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

Before Sh. N. K. Saini, AM and Sh. K. N. Chary, JM

ITA No. 2025/Del/2014 : Asstt. Year : 2009-10

Genpact Infrastructure (Bhopal) Pvt. Ltd., (now merged with Genpact India), Delhi Information Technology Park, Shastri Park, Delhi-110053	Vs	DCIT, Circle-12(1), New Delhi
(APPELLANT)		**(RESPONDENT)**
PAN/GIR No. AACCG6569R		

Assessee by : Sh. Vishal Kalra, Adv. &,
Ms. Reena Malik, CA
Sh. Khyati Dadhwal, Adv.
Revenue by : Mrs. Namita Panday, Sr. DR

Date of Hearing : 25.01.2018		**Date of Pronouncement : 09.02.2018**

ORDER

Per N. K. Saini, AM:

This is an appeal by the assessee against the order dated 16.01.2013 passed by the AO u/s 143(3) r.w.s. 144C(5) of the Income Tax Act, 1961 (hereinafter referred to as the Act).

2. The assessee also requested for admission of the additional ground under Rule 11 of the Income Tax (Appellate Tribunal) Rules, 1963 stating there as under:

> *"The Appellant requests to allow raising of the following ground of appeal in addition to those filed for adjudication before the Hon'ble Income Tax Appellate Tribunal ("Hon'ble Bench"):*
>
> *1. That on the facts and circumstances of the case and in law, the orders passed by the Assessing Officer*

("AO") / Dispute Resolution Panel ("DRP") / Transfer Pricing Officer ("TPO") are bad in law and void ab initio as the same have been passed on a non-existent entity, namely Genpact Infrastructure (Bhopal) Pvt. Ltd.

The brief facts giving rise to the aforesaid ground of appeal are stated hereunder:

The Appellant is engaged in the business of providing Information Technology enabled Services ("ITeS") / Business Process Outsourcing ("BPO") services, including finance and accounting, collections, insurance, customer fulfilment services etc to its associated enterprise.

It is submitted that the erstwhile Genpact Infrastructure (Bhopal) Pvt. Ltd amalgamated with Genpact India with effect from April 1, 2010 vide order of the Hon'ble Delhi High Court dated November 19, 2010 ***(Copy of the order attached as Annexure 1).***

Further, the AO was informed about the scheme of amalgamation vide letter dated January 24, 2011 ***(Copy attached as Annexure*** *2). However, the lower authorities namely the AO / DRP / TPO, have framed / passed orders on the erstwhile entity i.e. Genpact Infrastructure (Bhopal) Pvt. Ltd. The orders, thus, passed by the lower authorities are bad in law and void ab initio as the same have been passed on a non-existent entity.*

In this regard, it is respectfully submitted that the issue involved in the said additional ground of appeal stands covered in favor of the Appellant by the jurisdictions! High Court's decision in the case of ***Spice Entertainment Limited vs Commissioner of Service Tax (ITA 475, 476 of*** *2011***) (Delhi)** *which has now been* ***affirmed by the Hon'ble Supreme Court vide order dated November 2, 2017 in CA No. 285 of 2014.***

Reliance is also placed upon the following judicial precedents:

- *CIT(C)-II Vs. Micra India Pvt. Ltd. [ITA 441, 444, 445, 446, 452, 461 of 2013] - Hon'ble Delhi High Court*
- *DCIT Vs. Transcend MT Services Pvt. Ltd. [ITA No. 2697'/Del/2014] - Hon'ble Delhi ITAT*
- *Shell India Markets Private Limited Vs. ACIT [ITA NO. 1055/BANG/2011] - Hon'ble Mumbai ITAT*

In light of the above settled legal position, the assessment completed on the erstwhile entity which had ceased to exist pursuant to the scheme of amalgamation, is a jurisdictional defect which is beyond cure under the Income-tax Act 1961, thus making the orders of the lower authorities, void ab initio.

It is further submitted that the aforesaid additional ground of appeal is purely legal in nature and does not involve any fresh investigation into facts of the case. The Appellant by way of this application, craves leave of the Hon'ble Bench to raise the aforesaid additional ground.

In view of the decision of the Hon'ble Supreme Court in the ***case*** *of* ***National Thermal Power Co. Ltd. vs CIT: 229 ITR 383*** *as also the decision in the case of Jute* ***Corporation of India vs. CIT: 187 ITR*** *688 and the discretion vested with your Honours under Rule 11 of the Income-tax (Appellate Tribunal) Rules, 1963, it is prayed that the aforesaid additional ground of appeal may kindly be admitted and adjudicated on merits.*

The Appellant trusts that its request shall be acceded to."

3. The ld. Counsel for the assessee reiterated the contents of the aforesaid application and requested to admit the additional ground.

In his rival submissions, the ld. Sr. DR opposed the admission of the additional ground.

4. We have considered the submissions of both the parties and perused the material available on the record. In the present case, it is noticed that the additional ground raised by the assessee is purely a legal ground and no fresh investigation is required. On a similar issue regarding to the admission of the additional ground, the Hon'ble Supreme Court in the case of National Thermal Power Co. Ltd. Vs CIT reported at 229 ITR 383, has held as under:

> *"Undoubtedly, the Tribunal has the discretion to allow or not to allow a new ground to be ra sed. But where the Tribunal is only required to consider the question of law arising from facts which are on record in the assessment proceedings, there is no reason why such a question should not be allowed to be raised when it is necessary to consider that question in order to correctly assess the tax liability of an assessee"*

5. In view of the above, ratio laid down by the Hon'ble Supreme Court in the aforesaid referred to case, the additional ground raised by the assessee is admitted.

6. The ld. Counsel for the assessee submitted that the assessment order has been passed on erstwhile entity i.e. M/s Genpact Infrastructure (Bhopal) Pvt. Ltd. which amalgamated with M/s Genpact India w.e.f. 01.04.2010 vide order of the Hon'ble Delhi High Court dated 19.11.2010 (copy of which is furnished as Annexure 1). It was submitted that the order thus passed by the AO was bad in law, *void ab initio* as the same had been passed on a

non-existent entity. The reliance was placed on the following case laws:

- *M/s Maruti Suzuki Pvt. Ltd. Vs DCIT (2016) 72 Taxmann.com 164 (ITAT Del.)*
- *Pr. CIT, New Delhi Vs M/s Maruti Suzuki Pvt. Ltd. (2017) 85 Taxmann.com 330 (Del.)*

7. In her rival submissions, the ld. Sr. DR supported the order of the AO and further submitted that the assessee participated in the assessment proceedings and never raised objection before the AO. Therefore, the assessment framed by the AO was a valid assessment. The reliance was placed on the judgment of the Honôble Calcutta High Court in the case of CIT, Central-1 Vs M/s Shaw Wallace Distilleries Ltd. in ITA No. 32/2008, order dated 06.06.2016 (copy of the said order was furnished which is placed on record).

8. We have considered the submissions of both the parties and perused the material available on the record. In the present case, it is an admitted fact that the assessee M/s Genpact Infrastructure (Bhopal) Pvt Ltd. amalgamated with M/s Genpact India in pursuant to the order dated 19.11.2010 w.e.f. 01.04.2010 of the Honôble Delhi High Court and this fact was brought to the notice of the AO (ACIT, Circle-1, Jaipur) vide letter dated 24.01.2011 which was received in the office of Additional Commissioner of Income Tax, Range-12, New Delhi on 03.02.2011. In the said letter it has been mentioned as under:

> *"Genpact Infrastructure (Bhopal) Private Limited was an Indian company engaged in providing Information Technology ("IT") / IT Enabled Services (ITES), which*

had changed its registered office Co Delhi Information Technology Park, Shastri Park, New Delhi. It has been assessed to income-tax with your office vide PAN AACCG6569R.

Genpact India is another Indian company, engaged in rendering ITES. It maintains its registered office at Delhi Information Technology Park, Shastri Park, New Delhi. Genpact India is presently assessed to income-tax with Circle I2(1), New Delhi vide PAN AAACG9163H.

Pursuant to a scheme of amalgamation under section 391/394 of the Companies Act, 1956, as sanctioned by the Hon'ble Delhi High Court vide order dated November 19, 2010. Genpact Bhopal has been amalgamated with Genpact India. Consequently, Genpact Bhopal has ceased to exist as separate legal entity and all its assets and liabilities along with all rights, obligations, licenses, registrations etc. stands transferred to Genpact India w.e.f. April 1, 2010 being, the appointed date under the Scheme of Amalgamation.

A copy of the order passed by the Hon'ble Delhi High Court and the acknowledgment of fifing, the same with the office of Registrar of Companies on December 31, 2010 is collectively enclosed as Annexure A for your records.

We request your office to take the above record."

It has further been mentioned as under:

"Further, in view of the aforesaid, we hereby surrender the PAN AACCG6569R issued to Genpact Bhopal and request your office to transfer all the files/records pertaining to Genpact Bhopal maintained by your office, to Circle 12(1), New Delhi and consequently, enable the office of Circle 12(1), New Delhi to issue all pending refunds due to Genpact Bhopal to Genpact India, it being the amalgamated company.

We believe that our above request will be acceded to."

9. From the aforesaid letter, it is crystal clear that information was received by the AO on 03.02.2011 relating to the amalgamation of the assessee with M/s Genpact India and a reference was made by the AO u/s 92CA(1) of the Act to the TPO who vide letter dated 17.02.2012 asked the assessee to submit the document maintained in terms of Section 92D of the Act. The TPO passed the order u/s 92CA(3) of the Act on 29.01.2013. Thereafter, the AO passed the draft assessment order dated 12.03.2013 and the assessee raised the objections before the ld. DRP who issued the direction to the TPO/AO vide order dated 26.12.2013 and the TPO on the directions of the ld. DRP passed the order giving effect of the direction of the DRP-1 u/s 24(5) of the Act on 21.01.2014. All the aforesaid orders were passed in the name of erstwhile entity i.e. M/s Genpact Infrastructure (Bhopal) Pvt Ltd. without any mentioning of the transferee name i.e. M/s Genpact India. Therefore, it is crystal clear from the aforesaid narrated facts that the entity M/s Genpact Infrastructure (Bhopal) Pvt. Ltd. which amalgamated with M/s Genpact India was not in existence when the TPO/AO/DRP passed their respective orders.

10. On a similar issue, the ITAT Delhi Bench I-1, New Delhi having the same combination passed a detailed order authored by the AM in the case of M/s Maruti Suzuki India Ltd. vs. Dy. CIT reported in (2016) 72 taxmann.com. 164. and the relevant findings have been given as under:

"10. We have considered the submissions of both the parties and carefully gone through the material le on the record. In the present case, it is an admitted fact that the amalgamating company M/s Powertrain India Ltd. amalgamated with M/s Maruti Suzuki India Ltd. w.e.f. 01.04.2012, as a of scheme of amalgamation duly approved by the Hon'ble Delhi High Court vide order dated 2013 and the assessment in this has been framed by the AO vide order dated 03.03.2015. Therefore, dear that when the assessment order was passed on 03.03.2015, M/s Suzuki Powertrain India Ltd. lot inexistence. It is also noticed that the aforesaid fact was in the knowledge of the department as the informed vide various letters mentioned in para 5 of the former part of this order which were to the various Tax Authorities. However, the AO in spite of knowing this fact that M/s Suzuki in India Ltd. amalgamated with M/s Maruti Suzuki India Ltd., made the reference to the TPO and - sued the notice dated 07.11.2014 to the non-existent entity i.e. M/s Suzuki Powertrain India Ltd.

11. A similar issue the Hon'ble Jurisdictional High Court in the case of Micra India (P.) Ltd. (supra) under:

> *"In the instant case, no doubt there was participation during the course of assessment; however, the Assessing Officer, despite being told that the original company was no longer in existence, did not Le remedial measures and did not transpose the transferee as the company which had to be assessed, instead, he resorted to a peculiar procedure of describing the original assessee as the one in existence; order also mentioned the transferee's name below that of assessee's company. Now, that did not to the assessment being completed in the name of the transferee-company. According to the sing Officer, the assesseecompany was still in existence. Clearly, this was a case where the assesssment was contrary to law, as having being completed against a non-existent*

company. The Tribunal's decision is, in the circumstances, justified and warranted."

12. Similarly, the Hon'ble Jurisdictional High Court in the case of Spice Infotainment Ltd. v. CIT [IT Nos. 475 & 476 of 2011, dated 3-8-2011] held as under:

"No doubt, M/s Spice was an assessee and as an incorporated company and was in existence when it the returns in respect of two assessment years in question. However, before the case could be ted for scrutiny and assessment proceedings could be initiated, M/s Spice got amalgamated wi h M Corp Pvt. Ltd. It was the result of the scheme of the amalgamation filed before the Company Judge of this Court which was dully sanctioned vide orders dated 11th February, 2004. With this amalgamation made effective from 1st July, 2003, M s Spice ceased to exist. That is the plain and le effect in law. The scheme of amalgamation itself provided for this consequence, inasmuch as simultaneous with the sanctioning of the scheme, M/s Spice was also stood dissolved by specific of this Court. With the dissolution of this company, its name was struck off from the rolls Companies maintained by the Registrar of Companies. A company incorporated under the Indian Companies Act is a juristic person It takes its birth and gets life with the incorporation. It dies with the dissolution as per the provisions of the Companies Act. It is trite law that on amalgamation, the amalgamating company ceases to exist in the eyes of law. In view of the aforesaid clinching position in law, it is difficult to digest the circuitious route adopted by the Tribunal holding that the assessment was in fact in the name of amalgamated company and there was only a procedural defect. After the sanction of the scheme on 11th April, 2004, the Spice ceased to exit w.e.f 1st July, 2003. Even if Spice had filed the returns, it became incumbent upon the Income tax authorities to substitute the successor in place of the said "dead person". When notice under Section 143 (2) was sent, the appellant/amalgamated

company appeared and brought this fact to the knowledge of the AO. He, however, did not substitute the name of the appellant on record Instead, the AO made the assessment in the name of M/s Spice which was nonexisting entity on that day. In such proceedings and assessment order passed in the name of M/s Spice would clearly be void such a defect cannot be treated as procedural defect. Mere participation by the appellant would be of no effect as there is no estoppel against law."

It has been further held as under:

"Once it is found that assessment is framed in the name of non-existing entity, it does not remain a procedural irregularity of the nature which could be cured by invoking the provisions of Section 292B. The framing of assessment against a non-existing entity person goes to the root of the matter which is not a procedural irregularity but a jurisdictional defect as there cannot be any assessment against a 'dead per son'."

13. In the present case also as the assessment was framed in the name of non-existing entity i.e. M/s Suzuki Powertrain India Ltd which amalgamated with M/s Maruti Suzuki India Ltd. and this irregularity was not curable. Therefore, the assessment order passed by the AO in the name of non- existing entity was void ab initio and deserves to be quashed, we order accordingly.

14. On the present case, the contention of the Id. CIT DR was that the assessment was rightly framed by the AO on the assessee who filed the return of income and when the income was earned, it was inexistence. This controversy has been settled by the Hon'ble Jurisdictional High Court in the case of CIT v. Dimension Apparels (P.) Ltd. [2015] 370 ITR 288/[2014] 52 taxmann.com 356 (Delhi) wherein it has been held as under:

"Section 170(2) of the Income-tax Act, 1961, makes it clear that in the case of amalgamation, the assessment must be made on the successor (i.e., the amalgamated

company). Section 176 which contains provisions pertaining to a discontinuation of business, does not apply to a case of amalgamation. The language of section 159 evidently only applies to natural persons and cannot be extended through a legal fiction, to the dissolution of companies. Once it is found that assessment is framed in the name of non-existing entity it does not remain a procedural irregularity of the nature which could be cured by invoking the provisions of section 292B. Participation by the amalgamated company in assessment proceedings would not cure the defect because "there can be no estoppels against law."

15. In the present case also when the assessment was framed by the AO vide order dated 29.12.2015 in the name of M/s Suzuki Powertrain India Ltd., the said company had already amalgamated with M/s Maruti Suzuki India Ltd. and therefore, it was not inexistence. Moreover, it is clear from the provisions of Section 170(2) of the Act that in the case of amalgamation, the assessment must be made on the successor i.e. the ama gamated company and not on the predecessor i.e. amalgamating company. Therefore, in the present case, the assessment framed by the AO vide order dated 29.12.2015 on the amalgamating company i.e. M/s Suzuki Powertrain India Ltd. which was not inexistence on the date of passing the assessment order was not valid and as such the same is quashed. Since we have allowed ground No. 1 of the assessee and assessment order is quashed, therefore, no finding is given on the other issues raised by the assessee."

11. It is also relevant to point that the aforesaid order of the ITAT in the case of Maruti Suzuki Pvt. Ltd. vs. DCIT, Circle 16(1), New Delhi (Supra) has been upheld by the Honôble Jurisdictional High Court vide order dated 4th September, 2017 in the case of Principal Commissioner of Income Tax, New Delhi vs. Maruti Suzuki Private Ltd., reported at (2017) 85 Taxmann.com 330 (supra) wherein it has been held as under:

"The revenue has repeatedly brought the issue before the Court in a large number of cases where, in more or less identical circumstances, the Assessing Officer had passed the assessment order in the name of the entity that had ceased to exist as on the date of the assessment order. In many of these cases, as in the present case, the Assessing Officer, after mentioning the name of the Amalgamating Company as the assessee, mentioned below it the name of the Amalgamated Company. The submission of revenue that under section 292B, the successor-interest is precluded from raising an objection if it has participated in the assessment proceedings was negatived in Spice Infotainment Ltd. v. CIT [2012] 247 CTR (Del.) 500 wherein it was held that once it was found that the assessment was framed in the name of a non-existent entity, it did not remain a procedural irregularity of the nature which could be cured by invoking the provisions of section 292-B. The legal position having been made abundantly clear, there is no hesitation in holding that impugned order passed by Tribunal does not require any interference The appeal is accordingly dismissed."

12. Recently the Hon'ble Apex Court dismissed the SLP moved by the Department in the case of M/s Spice Enfotainment Ltd. which has been followed in the aforesaid referred case of M/s Maruti Suzuki Pvt. Ltd. vs. DCIT, vide order dated 2nd November, 2017.

13. In the present case also, as we have already pointed out that the assessment was framed by the AO on the non-existent amalgamated company, not on the amalgamating company, therefore, the assessment framed was *void ab initio* and the same was rightly quashed by the ld. CIT(A). Since, we have quashed the assessment framed by the AO therefore no separate finding is being given on the other issues raised in the Departmental appeal.

14. Before parting, it is relevant to point out that in the order relied by the ld. Sr. DR i.e. in the case of CIT, Central-1 Vs M/s Shaw Wallace Distilleries Ltd. (supra), the facts were totally different because in the said case, the assessee had not brought to the notice of the department in particular the Assessing Officer, the fact about the amalgamation sanctioned by the Honôble High and it had also filed its return of income for the subsequent assessment year. Therefore, the assessee itself had not acted upon the amalgamation but in the present case, the facts are totally different as the assessee brought to the notice of the AO about the amalgamation of the erstwhile Genpact Infrastructure (Bhopal) Pvt. Ltd. which amalgamated with M/s Genpact India w.e.f. 01.04.2010 vide order of the Honôble Delhi High Court dated 19.11.2010. Therefore, the case relied by the ld. Sr. DR is of no help to the department.

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

(Order Pronounced in the Court on 09/02/2018)

Sd/-
(K. N. Chary)
JUDICIAL MEMBER

Sd/-
(N. K. Saini)
ACCOUNTANT MEMBER

Dated: 09/02/2018
Subodh
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR