HØJESTERETS DOM

afsagt torsdag den 9. januar 2025

Sag BS-49398/2023-HJR og BS-47473/2023-HJR
(2. afdeling)

Accenture A/S
(advokat Nikolaj Bjørnholm)

mod

Skatteministeriet
(advokat Steffen Sværke)

I tidligere instans er afsagt dom af Østre Landsrets 18. afdeling den 29. august 2023 (B-0956-16 og BS-52532/2019-OLR).

I pådømmelsen har deltaget fem dommere: Poul Dahl Jensen, Michael Rekling, Jens Kruse Mikkelsen, Ole Hasselgaard og Julie Arnth Jørgensen.

Påstande
Appellanten, Accenture A/S, har gentaget sin påstand om frifindelse og om, at selskabets skattepligtige indkomst i indkomståret 2007 nedsættes med 7.027.853 kr.

Accenture A/S har subsidiært nedlagt påstand om, at ansættelsen af selskabets skattepligtige indkomst for indkomstårene 2005-2011 for så vidt angår medarbejderindlån og -udlån hjemvises til fornyet behandling ved Skattestyrelsen.

Accenture A/S har yderligere nedlagt påstand om, at indstævnte, Skatteministeriet, skal tilbagebetale 1.000.000 kr., som Accenture har betalt til opfyldelse af landsrettens omkostningsafgørelse, med procesrente fra den 5. september 2023.

Skatteministeriet har påstået stadfæstelse af landsrettens dom og har over for Accentures betalingspåstand påstået frifindelse.

Supplerende sagsfremstilling
Accenture har fremlagt transfer pricing-dokumentation vedrørende avancetillægget (mark-up) på 30 % nævnt i pkt. 6 i "The Accenture Organisations International Assignment Agreement" (IAA-aftalen) for de omhandlede indkomstår. Dokumentationen er bortset fra datagrundlaget i det væsentlige enslydende. Af Accentures transfer pricing-dokumentation for 2006 vedrørende IAA-aftalen fremgår bl.a.:

> "*III. ECONOMIC ANALYSIS*
>
> *A. Cross Border Personnel*
>
> Accenture clients require information technology and business solutions that are not limited by geographic boundaries. Therefore, the ability to deliver services to existing and prospective clients on a worldwide basis is critical to the business success of all Accenture entities. The proposals presented to prospective clients in any country typically stress Accenture's ability to assemble a project team in any country or any client location. A typical cross border engagement involves one or more functional and industry experts and often requires personnel from more than one Accenture entity. To facilitate this exchange of personnel, each Accenture entity has executed the International Assignment Agreement.
>
> Personnel who work on an engagement in another country are commonly referred to as "Cross Border Resources." Cross Border Resources are sent to work on an engagement in another country on a temporary, short term basis and return to their sending or "Home" country after their work is completed. Throughout this report, the term "Home Country" refers to the country that supplies the Cross Border Personnel. Similarly, the term "Host Country" refers to the country that borrows Cross Border Personnel. Use of Cross Border Resources enables the Accenture organization to balance swings in supply and demand in the different Accenture entities and has the following additional benefits:
>
> - The cross-border resource can augment local staff with required skills and/or experience on a client project;
> - A core team may work for a multinational client in more than one country; and
> - Occasionally, a person may move cross border to enhance his or her skills or receive on-the-job training.

Regardless of the specific needs of the Host Country, consulting personnel are rarely sent out of their Home Country if they are needed on a local project. Indeed, typically, personnel are sent out on cross border assignments only if there is no urgent need for their work in their Home Country.

The starting point for establishing an arm's length price for an intercompany transaction is the analysis of functions performed and risks incurred by each of the affiliated entities involved in a transaction. As will be discussed in more detail below, the Home Country that provides the Cross Border Resource to the Host Country acts as supplier of staff. The Host Country contracts with the client and generally assumes all the risks associated with the engagement. It is therefore appropriate that the Home Country, which is responsible only for providing competent staff, receives sufficient revenue to pay the employee's direct and indirect compensation and to recover a margin for the provision of staff to the Host Country. Any other engagement costs incurred by the borrowed employee are borne by the Host Country.

Functions of the Home and Host Countries

The Host Country typically carries out most of the job functions on a client engagement. The Host Country senior executive (or a senior executive group) identifies a prospective client, meets with and solicits work from the client, identifies the skills and resources required to deliver the work, enters into the contract with the client and delivers the work. The Home Country has no responsibilities specific to a particular engagement. In fact, an employee on a cross border engagement works under the supervision of the senior executive in charge of that engagement (i.e., a Host Country senior executive). The Home Country functions are limited to HR functions such as recruiting, training, setting long-term career paths, compensation and benefits.

In some cases, the Home Country may play a limited role in the selection of the cross border resource. However, the Host Country senior executive has the right to "veto" that selection if he or she feels that the resource selected by the Home Country does not meet the qualifications needed for the client engagement…

…

Risks Assumed

The distribution of risk between the Host Country and the Home Country is weighted heavily toward the Host Country. The Host Country is the contracting entity with the third-party clients and incurs the general

business risk, warranty risk and financial risks on client engagements. The risk assumed by the Home Country is primarily opportunity cost. For example, if there were an increase in the local market demand, the Home Country may not have enough resources if the resources are already committed abroad. This creates an opportunity cost for the Home Country. Of course, this cost is significantly reduced in that the Home Country, in turn, could borrow resources from other Accenture entities. In such cases, the Home Country would incur minimal opportunity costs if alternative resources were available and if the transfer prices for imported personnel were set globally and applied consistently for all Accenture entities. It should be noted, however, that the Home Country does not typically lend the resources that it needs for its own (local) engagements to an affiliated entity. Cross Border Personnel are always drawn from the pool of personnel that are "available," in the sense that they are not urgently needed for an engagement in their Home Country.

In addition to opportunity cost, the Home Country also risks losing resources to turnover when staffing them on cross-border engagements. For example, occasionally, due to demanding travel requirements or dissatisfaction with a specific cross-border job, resources will leave the company. Dissatisfaction can be caused by factors such as different management styles between the Home and the Host Country, cultural differences, a lengthy cross border assignment, and a perceived loss of career path. When the Home Country loses a resource, it loses the time and money spent developing that individual.

Following is a list of core risks that are assumed by the Host and Home countries.
…

B. Pricing Methods

The services performed by one Accenture entity for another Accenture entity pursuant to the International Assignment Agreement are intra-group services that must be compensated at arm's length. Without the ability to borrow resources from other Accenture entities, the Host Country entity would have to hire third party contractors to augment their local resources on certain engagements. Moreover, the entities that supply the personnel (Home Countries) are in the business of providing consulting services to third parties using the same personnel that may be loaned to other Accenture entities on cross border assignments. Therefore, the provision of personnel to the Host Country entity may not be charged at cost but must include a profit element. As noted

above, transfer pricing methods that are generally appropriate for intercompany services are the comparable uncontrolled price (CUP) method and the cost plus method.

Comparable Uncontrolled Price (CUP) Method
A CUP analysis would set the prices charged for services provided among Accenture entities based on the prices charged by Accenture entities to unrelated parties. The CUP method, however, requires substantial economic comparability, particularly with respect to functions and risks. To be comparable under the CUP method, the controlled and uncontrolled transactions must be either identical or fundamentally similar. Therefore, if Accenture provided consulting services to unrelated parties that were sufficiently comparable to the functions performed and risks assumed by the Home Country (in a cross border transfer setting), the prices charged in these transactions with unrelated parties would provide a CUP.

Of course, Accenture entities are in the business of providing consulting services to third parties. The service revenues received by the Accenture entities represent the amount that unrelated clients are willing to pay for their services. However, in order to use revenues earned on third-party projects as a basis for pricing between Accenture entities, the comparability of the services provided and the circumstances of the transactions between Accenture entities and third parties must be established. That is, the functions performed by an Accenture affiliate on a typical client engagement must be compared with the functions performed by the Home Country on a typical cross-border engagement. While the two transactions appear to be comparable from a narrow service (or "product") perspective, the transactions are not comparable from a functional and risk viewpoint. Thus, while the type of consulting services provided to third-party clients on domestic (Home Country) engagements are generally the same as those provided by the Host Country to its client on an engagement that requires the use of cross-border resources, the intracompany services provided to the Host Country by the Home Country are not the same. Specifically, as shown in the functional and risk analyses section presented above, the Home Country typically does not perform project management or client service functions. More specifically, the Home Country does not provide any consulting services to the Host Country. Rather, it provides consulting personnel who will then work under the direction of the Host Country executives (typically) as part of a larger team on a client engagement. Also, the Home Country does not bear any significant risk with respect to the engagement. Therefore, the revenues earned on a typical client project are too high in relation to the functions performed

and risks assumed by the Home Country. Hence, an alternative transfer pricing method, the cost plus method, needs to be considered.

Cost Plus Analysis
Since neither internal nor external comparable uncontrolled prices are available for cross-border services among Accenture entities, benchmark prices are best determined by identifying the costs of services and applying an arm's length markup to those costs. The arm's length markup is determined by examining the markups earned by independent companies performing functions comparable to those performed by the Home Country with respect to a cross-border engagement.

Search for Comparables
In order to identify the return to which an Accenture Affiliate is entitled for providing personnel to Accenture entities in other countries, an analysis of the markups and margins earned by independent companies performing functions similar to those of Accenture entities was performed. Searches were performed in three commercial databases containing financial and operating information on a large number of publicly and privately held companies around the world: S&P Compustat, Thomson BankerOne, and Bureau Van Dijk's Amadeus. The search process focused on companies that provided information technology services including companies classified in Standard Industrial Classification (SIC) group 737 (Computer and Data Processing Services), as well as companies in SIC codes 8742 (Management Consulting Services) and SIC code 8748 (Business Consulting Services, not elsewhere classified).

The initial search identified set of 1,170 potential comparable companies worldwide. A financial review of the companies in this initial set substantially reduced the number of potential comparables. The financial rejection criteria included, but were not limited to:

- a history of consecutive operating losses as evidenced by the company's last three years of financial data;
- less than three years of financial data;
- inventory to sales ratio greater than 10%.

The remaining potential comparable companies were again reduced after a review of the business description of each one of the companies. Since the analysis focused on the markup earned by IT service providers, companies were excluded if they derived significant revenue from software sales or licensing or were engaged in the re-sale of computer hardware or software as an important component of their business. In

addition, as Accenture personnel involved in cross border assignments provide a wide range of technical and professional services, companies that focused narrowly on specific areas of technology consulting (e.g., Web design) were excluded. Moreover, since the Host Country will have access to all intellectual property that it needs for its client engagements, companies were excluded if they had significant intellectual property (IP) as indicated in their SEC or other public fillings.

After a thorough review of the functions performed by the remaining companies, a set of 57 comparable companies was selected. These companies provide a good basis for comparison with the functions performed by the Home Country with respect to a cross-border assignment. While each of the comparable companies bears a normal level of business risks, these risks do not appear to be in excess of the business risks incurred by the Accenture entities in their role as a Home Country in a cross border transaction. As discussed in the functional and risk analysis, although the Home Country bears no risk of legal liability with respect to the cross-border engagement, some business risk is borne by the Home Country. For example, the Home Country would bear the costs of redeploying the personnel if a cross border job is terminated earlier than expected and the borrowed resources are sent back by Host Country.

A summary description of each of the comparable companies selected is presented in Exhibit 2. Selected financial data for the comparable companies are provided in Exhibit 3.

Accenture Data
Information regarding cross border transfers among Accenture entities was collected. Because Accenture's cross border transfer pricing policy is intended to be applied on a consistent worldwide basis, it would be impractical to analyze the financial information of each and every Accenture entity individually and apply a specific transfer price for each country. Instead financial data for operating entities in sixteen countries that account for the bulk (over 70%) of Cross Border transactions were obtained and analyzed. As it is not possible to isolate the costs and revenues associated solely with cross border services, entity-wide income statements were used.

Summary Income Statements for the sixteen selected Accenture Entities are presented in Exhibit 5. For comparative purposes, the following financial ratios were calculated from these GAAP financial statements:

- Gross profit as a percent of cost of services; and

- Operating expenses (including depreciation expenses) as a percent of net revenues.

Adjustments to Comparable Data

Before the profitability ratios of the comparable companies could be compared to those of the sixteen Accenture Entities, additional comparability adjustments were required to account for remaining differences between the functions performed by the Accenture Entities and the comparable companies. Each of the comparable companies under review incurs a different level of operating expenses (expressed as a percentage of revenues or sales). Because the level of operating expenses for any particular company generally provides a good indication of the magnitude of that company's marketing and administrative activities, differences in operating expense levels generally reflect differences in functions performed. Moreover, some of the comparable companies include some of the expenses that would normally be considered "selling, general, and administrative expenses" in the cost of services. Without appropriate adjustment, the cost plus margin of such companies is substantially understated and cannot be compared with companies, such as Accenture, that report direct costs (cost of goods/services) and overhead (selling, general, and administrative) expenses on a separate line. Therefore, adjustments were made to compensate for differences in levels of operating expenses between Accenture entities and the comparable companies.

The adjustments were made as follows: The operating expenses-to-revenues ratios of each of the selected Accenture entities were averaged over the last three fiscal years (FY2004 - FY2006). This three-year average ratio was then compared to the operating expenses-to-revenue average ratios of each of the comparable companies. For example, the three-year average operating expenses to revenues ratio of Accenture Australia was 16%, while the same ratio for Ciber, Inc. was 23%. The higher level of operating expenses implies that Ciber earns a higher gross margin than Accenture Australia because it performs more functions, or performs the same number of functions but with greater intensity than Accenture. In order to estimate the gross margin that would be earned by Ciber if its level of operating expenses were the same as Accenture Australia, the percentage difference in their operating expenses is subtracted from the reported gross margin of Ciber. That is, seven percentage points is subtracted from Ciber's gross margin to make it functionally more comparable with Accenture Australia. The adjusted gross margin is then used to calculate an adjusted cost plus markup, or markup over direct costs using the following formula:

Cost Plus Markup = (Adjusted Gross Margin/Cost of Services)

"Cost of Services" includes payroll costs and all employee benefits, social insurance costs, related taxes, and direct overhead. For example, based on the cost plus method of pricing, if a company's cost of services equal $100, and these costs are marked up by 25%, the company's revenue will be $125, and the gross margin will be $25.

The analysis comparing the comparable company results and the operating results of the sixteen selected Accenture Entities is attached as Exhibit 6. As an example, a summary of the analysis using Accenture Australia operating results to determine the adjusted cost plus markups for the comparable companies is shown in the following table.
…
As can be observed, the adjusted cost plus markups for the comparable companies ranged from -9% to 67% over the three year period equivalent to the Accenture Australia fiscal years 2004 through 2006. This range, however, is too broad to be used as the basis for transfer pricing. One method of narrowing the range is to focus on the interquartile range of the markups obtained from the comparables. The interquartile range is defined as the range of values from the 25th to the 75th percentile (i.e., the middle 50 percent of the range). The interquartile range of adjusted cost plus markups for the three years is 24% to 39%.

As shown in the following table (Adjusted Cost Plus Markup Interquartile Range), the adjustment and calculation process described above for Accenture Australia was also applied to all sixteen Accenture entities selected for this analysis…
…

The summary table above also includes the computation of the interquartile range for the ranges of data obtained for individual countries. The objective of this exercise is to obtain a range which eliminates extreme results but, at the same time, includes at least one data point from the applicable range of each of the sixteen entities. The applicable range is cost plus 24% to 44%, which spans from the lower end of 25th percentile range to the upper end of the 75th percentile range.

IV. CONCLUSION

Based on the functions performed and risks borne by the Home and Host Countries, the arm's length markup on cost of services charged by the Home Countries for employees lent to the Host Countries should be in the range of 24% to 44%. The 30% markup charged by the Accenture

Home Countries for Cross Border Resources was well within this arm's length range. The computation of the range is based on a three-year average ratio of adjusted gross profit to cost of services of comparable companies. Adjustments were made for the differences in the ratio of selling, general and administrative (SG&A) expenses to net sales ratios of comparable companies and Accenture."

I 2006 indgik Accenture Global Services GmbH (AGS) og Accenture A/S en licensaftale ("The Accenture Group – AGS Intellectual Property License Agreement"). Det fremgår af licensaftalen bl.a.:

"*WHEREAS:*

(A) The Licensee and Licensor are members of the Accenture Group;

(B) The Licensor is the legal and/or beneficial owner of the Licensed IPR (as defined below) and primarily responsible for the development, enhancement and protection of the Intellectual Property;

(C) Licensor has borne the cost of developing or acquiring Intellectual Property and has agreed, pursuant to the IP Services Agreements with the Entities, including the Licensee, to bear the future costs incurred by the Entities, including the Licensee, of development and/or improvement of the Intellectual Property;

…

THEREFORE THE PARTIES AGREE as follows

1. DEFINITIONS

...

1.1.5. *"AGS IPR"* means all Intellectual Property owned by the Licensor from time to time including, but not limited to, the Trademarks and Patents and all other Intellectual Property developed or acquired by the Licensor after the Effective Date;

…

1.1.13. *"Effective Date"* Means:

a) 1 January 2001 in respect of any rights and obligations relating to the Brand and any Intellectual Property attaching thereto; and
b) 1 June 2001 in respect of all other aspects of this Agreement;

...

1.1.18. *"Intellectual Property"* means all right, title and interest in and to patents (including supplementary protection certificates and divisionals), trademarks, service marks, registered designs, utility models, design rights, domain names and other Internet keywords, get-up or trade dress, logos, algorithms, frameworks, methods, models, solutions, processes, procedures, work-arounds, technology, tools, copyright (including copyright in computer software and databases), works of authorship, database rights, semi-conductor topography rights, inventions, trade secrets and other confidential information, know-how, methodologies, internal management information systems, business or trade names, any and all associated documentation (including training materials, books, booklets, pamphlets, subject files and reference matter), personality rights, rights under any unfair competition, privacy or publicity rights laws and all other intellectual and industrial property and rights of a similar or corresponding nature in any part of the world whether registered or not or capable of registration or not and including all applications for, and continuations, refillings, re-issues and extensions of any of the foregoing rights existing now or in the future;

…

2. *GRANT*

2.1. In consideration of the payment of the Royalty by the Licensee to the Licensor, the Licensor hereby grants the Licensee an exclusive (for Licensee's Business and Territory), revocable (in accordance with the terms hereof) right and license (or, as appropriate, sublicense) to Use the Licensed IPR.

…

6. *OWNERSHIP AND PROTECTION*

6.1. The Licensee acknowledges and agrees that the Licensor is the sole, exclusive, legal and/or beneficial owner of the AGS IPR and the subject matter thereof. All Use of the AGS IPR by the Licensee shall inure to the benefit of the Licensor.

6.2. The Licensee will, at the request and direction of the Licensor, take any action or do anything necessary or desirable to protect the Licensed IPR including, but not limited to:

…

10. *ROYALTY*

10.1. The Licensee shall pay the Royalty to the Licensor in accordance with the provisions of Schedule B.

…

10.7. The Royalty rate shall be reviewed periodically by the Parties and adjusted as necessary to ensure it is at arm's length as required by applicable transfer pricing laws and regulations."

Af "Schedule B: Royalty" til licensaftalen fremgår bl.a.:

"…

1. Subject to Paragraphs 2, 3 and 4, the Royalty shall be seven per cent (7%) of Client Billings (as defined below).

2. "Client Billings" shall mean billings to Clients on sales and services for unrelated parties exclusive of expense reimbursements:

2.1. excluding reversals of such billings to Clients on sales and services for unrelated parties exclusive of expense reimbursements; and

2.2. excluding billings transferred in from other Entities under the International Engagements Agreement or other related agreements; but

2.3. including billings transferred out to other Entities under the International Engagements Agreement or other related agreements.

3. In relation to revenue from Alliance Partners, the Royalty shall be agreed between the Parties on a case by case basis.

4. The Royalty payable hereunder will be reduced if and to the extent the Royalty payment results in Licensee earning Operating Profits, expressed as a percentage of Net Sales Revenue, of less than a minimum percentage as determined

from time to time by the Parties. Operating Profits and Net Sales Revenue shall, in each case, be determined in accordance with US GAAP, consistently applied."

I 2006 indgik Accenture Global Services GmbH og Accenture A/S endvidere en serviceaftale ("The Accenture Group – Intellectual Property Services Agreement"). Af serviceaftalen fremgår bl.a.:

"*WHEREAS:*

(A) The Parties are members of the Accenture Group;

(B) AGS has borne the cost of developing or acquiring the AGS IPR, (as defined below) and is the legal and/or beneficial owner of the AGS IPR;

(C) AGS is responsible, within the Accenture Group, for the development, enhancement and protection of Intellectual Property and in this respect, appoints the Contractor to provide certain services in relation to the same;

(D) The Parties recognise that the Contractor, by virtue of the nature of its Business and its location in the Territory, is in a position to perform such services and assist in the development, enhancement and protection of the AGS IPR;

(E) The Parties wish to more clearly articulate their rights and obligations under this Agreement;

THEREFORE THE PARTIES AGREE as follows:

1. DEFINITIONS

1.1. In this Agreement, unless the context otherwise requires:

…

1.1.12. "Effective Date" means:

(a) January 2001 in respect of the Services relating to the Brand and any related rights and obligations in this; and

…

2. PROVISION OF SERVICES

2.1. AGS may from time to time request Contractor to provide the Services to AGS.

2.2. The Contractor agrees to provide the Services with due care and skill and to the best of its knowledge and abilities and expeditiously where time is of the essence for the provision of those Services.

3. *OBLIGATIONS OF CONTRACTOR*

…

3.2. The Contractor shall, in providing the Services and using any AGS IPR in connection with the Services, comply fully with such requirements, instructions, standards, specifications, timescales and project plans as may be notified by AGS from time to time

…

5. *SERVICE CHARGE*

5.1. In consideration of the supply of the Services, AGS will pay to the Contractor the Service Charge. In assessing and agreeing the Service Charge, the Parties have taken into account all of the terms of this Agreement and all relevant additional circumstances, including but not limited to:

5.1.1. that AGS bears the costs and risks in relation to all Intellectual Property development under this Agreement;

5.1.2. the assignments set out in Clause 7;

5.1.3. the indemnities set out in this Agreement; and

5.1.4. that this Agreement may be terminated without compensation.

5.2. The Service Charge shall be reviewed periodically by the Parties and adjusted as necessary to ensure it is at arm's length as required by applicable transfer pricing laws and regulations.

…

7. *OWNERSHIP OF INTELLECTUAL PROPERTY RIGHTS*

7.1. The Contractor acknowledges and agrees that AGS is the sole and exclusive and legal and/or beneficial owner of the AGS IPR and the subject matter thereof.

7.2. All Intellectual Property developed by the Contractor, or on its behalf:

7.2.1. in the course of performing the Services;

7.2.2. the costs of which development are borne generally by AGS pursuant to this Agreement or otherwise; or

7.2.3. which is otherwise developed by the Contractor (or developed on its behalf), and is generally related to the provision of the Services, …"

Af Accentures transfer pricing-dokumentation om den fastsatte royaltysats på 7 % i licensaftalen fremgår bl.a.:

"*II. ACCENTURE INTELLECTUAL PROPERTY*

A. Accenture Global Services

As described in the Company Overview, the Accenture business model combines industry knowledge, business process and technology expertise, and intellectual assets to formulate and implement solutions for clients who seek to integrate the latest technology and process innovations into their business operations. Accenture's Intellectual Property contributes significantly to the Company's ability to charge premium rates for its services. The use of IP enables Accenture teams to bring value to clients faster and with results superior to those achieved by Accenture competitors or by the clients acting on their own.

AGS has the responsibility for Accenture's global IP Management program, including the ownership, development, improvement, enhancement and protection of the Accenture Intellectual Property. The relationship between AGS and the Accenture operating entities is governed by the AGS Intellectual Property License Agreement. Under this agreement, AGS grants to the Accenture operating entities a non-exclusive, revocable right and license to use and sublicense within their territory all Licensed Intellectual Property Rights developed or acquired by AGS. Licensed Intellectual Property Rights ("Licensed IPR") under the AGS IP License Agreement is defined in the agreement as AGS IPR (all IPR

owned by AGS including all IPR developed or acquired by AGS after the Effective Date) and Third Party/Entity IPR (all IPR licensed to AGS by the operating entities and/or parties outside the Accenture Organization). As described in more detail below, licensed IPR (referred to in this document as the Accenture Intellectual Property) includes:

- The Accenture name, brand and related IP,
- Trademarks, patents, copyrights, and
- Improvements and intellectual property in and relating to:
  - Market Offerings including content development and marketing support,
  - Tools and methods, and,
  - Other Intellectual property including inventions, solution construction aids, prototypes and other Accenture organization intellectual property not necessarily related to a specific Market Offering.

B. Accenture Financial Statements

The historical financial information used throughout this report has been taken from Accenture's filings with the US Securities and Exchange Commission ("SEC") for fiscal years ended August 31, 2005, 2006 and 2007.

C. Functional Analysis

Accenture provides business consulting and outsourcing services to clients, delivering its services through five Global Operating Groups, which are managed globally and have representation in the legal entities in each of the countries where Accenture operates. Business process and technology expertise is the primary responsibility of the Growth Platforms, which are also managed globally but have a local presence in each country. The Growth Platforms provide access to expertise in certain "horizontal" business disciplines and information technology solutions and are the centers of innovation through which the Company delivers a range of services and solutions that address business opportunities and challenges common across industries. The Growth Platforms have deep technical expertise in their respective areas, and employ subject matter experts who complement the industry-specific consulting, technology and outsourcing expertise of the Operating Group professionals. Client engagement teams typically consist of industry experts, service line specialists, and locally based consultants who team together to create tailored solutions for clients quickly and cost effectively.

Client work in Accenture's consulting practice is project driven with a defined outcome. The duration of engagements is typically anywhere from four months to three years. Consulting projects include the design and implementation of information technology applications and/or systems, design and implementation of new business strategies and processes, improvement of a client company's customer relationship management, development of new product strategies, improvement of organizational skills and processes, and similar projects geared to the enhancement of business performance.

Accenture's outsourcing business involves operating all or a portion of a client company's back office processes, such as its technology infrastructure or payables processing function, on a long-term contract basis. Accenture provides a range of services for managing technology infrastructure, applications and business processes. Accenture's outsourcing offerings also include a variety of shared-service solutions, including call centers, customer information management, billing systems, information technology services, supply chain management and human resources administration.

The consulting and outsourcing businesses in which Accenture engages involve two core types of activities: (1) assignment, supervision, training and recruitment of personnel; and (2) marketing, selling and delivering consulting and outsourcing services. These activities are common to all companies that are in the business of consulting and/or outsourcing and thus may be considered as "routine" activities for transfer pricing purposes. In addition, some leading companies such as Accenture spend significant resources developing intellectual property and marketing intangibles that enhance their competitive position in the marketplace.

Accenture differentiates itself from other consulting companies by the delivery of value oriented consulting and technology services, using AGS' unique intangibles – capabilities, service offerings and approaches that give the Company a competitive advantage. These intangibles, or Intellectual Property, are a key part of Accenture's operating strategy and business model. As noted previously, the AGS Intellectual Property includes the name and brand, the legally registered intangibles including trademarks and patents, and intellectual property relating to:

- *Market Offerings* including content development and marketing support. Examples of assets in this category include existing templates, business and technical architectures addressing business process design and

systems integration design, and proprietary software assets developed to support the integration and optimum use of systems and applications offered to the market by Accenture's affiliated companies and alliance partners. In certain cases, Accenture has developed its own software and technical infrastructure.

- *Tools and methods*. Examples of assets in this category include unique methods, processes, tools and templates to address client problems in different business disciplines – for instance: supply chain optimization, strategy and business organization best practices that improve corporate governance after a merger, systems integration methodologies to link older information technology systems with newer technologies, human performance gains achieved through electronic learning practices, training, or work process redesign, and better management of capital resources through an improved treasury function.
- *Other Intellectual Property* including inventions, solution construction aids, prototypes and other Intellectual Property not necessarily related to a specific Market Offering.

With respect to the transfer pricing of intangibles within Accenture, the division of functional responsibilities between Accenture operating entities and AGS may be described as follows: Accenture operating entities are responsible for supervision, maintenance, recruitment and training of qualified personnel; sales and marketing of consulting and outsourcing work to prospective clients; and delivery of services to existing clients. AGS is responsible for the IP Management program which includes the ownership, development, improvement, enhancement and protection of the Intellectual Property in support of Accenture client teams to sell and execute on engagements. In that capacity, AGS bears all costs and risks in connection with the management of the brand and non-brand IP assets…

…

III. SELECTION OF THE BEST METHOD

The OECD Transfer Pricing Guidelines (the "Guidelines") and the transfer pricing rules of most countries in which Accenture operates, specify two methods for evaluating the arm's length nature of a controlled transfer of intangible property. These methods are the comparable uncontrolled price ("CUP") method and the profit split method.

Given the available information, the residual profit split method ("RPSM"), a category of profit split method, is identified as the most reliable method. In addition, the conclusions of the residual profit split method were also corroborated by reference to the data obtained from a large set of external third-party licensing transactions.

It should be noted that in cases when one controlled entity owns the economic rights to all the intangibles, as is the case within Accenture, that party will receive the residual profit under the RPSM. The other controlled entities will receive a return for its routine activities as determined by the market benchmarks. In such situations, the application of RPSM is similar to the transactional net margin method of the Guidelines.

A. Application of the Residual Profit Split Method to Accenture

Financial Framework

Exhibit I.1 presents historical income statements for Accenture for fiscal years 2005 to 2007. The historical information is taken from consolidated financial statements in Accenture's Form 10K as filed with the US Securities and Exchange Commission ("SEC"). Exhibit I.2 presents the three-year average operating income statement for the period 2005 to 2007. The average operating margin achieved by Accenture over this period is 12% and represents the profitability attributable both to routine activities and to the Accenture Intellectual Property.

Selection of Time Period for Model

The OECD Guidelines call for the use of a multi-year average when applying the residual profit split method in order to account for the effect of business cycles, or unusual events that may influence profits of the tested party or the comparables. Typically, a three-year average is appropriate. We used an average of Accenture's financial data for the three most recent years (the fiscal years ended Aug 31, 2005 to Aug 31, 2007), in order to establish the routine return. Since the majority of the comparable companies did not have the same fiscal year ends as Accenture, data was matched as closely as possible to Accenture's three-year period. As a practical matter, the most recent three-year period available for most of the comparables included the 2004 to 2007 financial periods.

Description of Comparable Search and Selection Criteria for Routine Activities

To determine the profits allocable to routine activities of Accenture operating entities, a set of 35 comparable companies was identified

through search of several commercial databases of publicly held companies. The detailed search strategy and the summary business descriptions of the companies that were selected as comparable are contained in Exhibits II.1, II.2 and II.3. As described in Exhibit II.1, the objective of the search was to identify companies that provided information technology and/or management consulting services, preferably on a multinational basis and had business lines similar to those of Accenture. The range of returns earned by these companies is the applicable range for compensating Accenture operating entities for their routine consulting and outsourcing activities.

The companies identified above show an interquartile range of markups on cost from 5% to 11%, as shown in Exhibit I.3. The markup obtained from the comparables search is converted into a return on sales ("ROS") as detailed in Exhibit I.4, by computing the appropriate cost base for Accenture over the period 2005 to 2007 and multiplying it by the cost-plus markup. The historical cost base for Accenture was operating cost and expenses. For the purpose of calculating the routine markup, the Intangible Generating Expenses are excluded from the cost base. The resulting quotient is then divided by the average revenue base to yield an interquartile routine return on sales range of 4 to 10%. (See Exhibit I.4).

Selection of Profit Level Indicator for Comparables

The application of a comparable profits analysis for determining routine profits requires the selection of a profit level indicator ("PLI"). This serves as an objective measure of profitability from operations to be used in comparing the results achieved by a tested party on intercompany transactions to results achieved by comparable uncontrolled companies. The PLI measures the relationship between (i) profits and (ii) either costs incurred, revenues earned, or assets employed.

The PLIs may include: (i) return on operating assets ("ROA"), (i.e., operating profit divided by operating assets) or (ii) such financial ratios as the operating margin (operating profit divided by net sales or return on sales, ROS), or a percentage markup (operating profit divided by total cost), or a Berry ratio (gross profit divided by operating expenses).

The selection of the appropriate PLI depends primarily upon the extent to which the profit level indicator is likely to produce a reliable measure of income that the tested party would have earned had it dealt with uncontrolled taxpayers at arm's length. The choice of PLI thus depends on a comparative analysis of the functions and risks of the tested party,

and the availability and accuracy of the financial data for the tested party and comparable companies.

The analysis performed for this report uses the net markup on total operating cost. This PLI is generally used in evaluating the profitability of service providers, as it measures their profitability relative to their total costs (both direct and indirect costs) and mirrors the typical price setting mechanism of consulting service providers.

Determination of Base-Line Returns for Routine Functions
The starting point of the residual profit split analysis is the consolidated financial statements for Accenture related to sales of services incorporating the Accenture Intellectual Property for the fiscal years 2005 to 2007, described above. Accenture's three year average operating income statement is then segmented into two hypothetical entities: Entity A, performing non-routine activities and Entity B, performing routine activities. Entity B bears all the costs associated with Accenture's routine activities, i.e., consulting and outsourcing, sales and marketing, and general and administrative. Entity A bears the costs of developing and maintaining the Accenture Intellectual Property.

For purposes of segmenting the operating results, it is necessary to allocate the Intangible Generating Expenses since these expenses will be borne by the entity that holds the economic rights to the IP. This proportion of IGE's as a percentage of revenue is shown in Exhibit I.8.

Entity B must earn a return on the costs incurred by it as benchmarked to the returns exhibited by the set of comparable companies engaging in similar activities. Under the RPSM, any residual profit after the determination of routine return is then allocated to Entity A in the form of an intercompany royalty. As shown in Exhibit I.3, an interquartile range of operating returns on cost was determined for the set of comparable companies described above. This interquartile range was then applied to the total cost of Accenture, excluding IGE's (i.e., excluding the cost of IP development and brand marketing and advertising), to obtain the arm's length profit range for routine activities. The interquartile operating profit margin range for routine activities was then derived as a ratio of arm's length routine profit to total revenue base. As shown in Exhibit I.4, the applicable profit margin range is 4% to 10%.

Determination of Arm's Length Royalty Range
Once the routine profit is determined, the royalty from Entity B to Entity A for the use of the intangibles is computed as the amount of resid-

> ual profit remaining plus Entity A's operating costs and expenses. Exhibits I.5 - I.7 show the calculation of the arm's length interquartile royalty range payable to the entity that performs non-routine activities. As seen, the interquartile range is between 5% and 11%. At 7%, the worldwide intercompany royalty rate for Accenture IP is within the interquartile the range.
>
> *Summary of Residual Profit Split Method Results*
> Based on updated financial information for Accenture and the comparable companies, the 7% worldwide royalty rate is within the arm's length range."

Af Accentures transfer pricing-dokumentation vedrørende serviceaftalen fremgår bl.a.:

> "*Markup on Costs of Providing Intragroup IP Services*
>
> AGS contracts with the Accenture operating entities to procure IP and Brand development services ("IP Services"). This arrangement is governed by the Accenture Group Intellectual Property Services Agreement (the "IP Services Agreement"). A separate comparables-based analysis is used to determine an arm's length markup on total costs to be used in pricing the IP Services provided by the Accenture operating entities to AGS pursuant to the IP Services Agreement. The analysis indicates an arm's length markup range of 4% to 16%. The intercompany markup used to compensate Accenture operating entities for IP Services they perform for AGS is 8%."

Højesterets begrundelse og resultat

1. Sagens baggrund og problemstillinger
Accenture-koncernen er en international konsulent- og it-virksomhed, hvis moderselskab er Accenture plc (Irland), der er børsnoteret på New York Stock Exchange. Accenture-koncernen servicerer sine kunder gennem lokale driftsselskaber, der har egne medarbejdere.

Koncernens driftsselskaber, herunder Accenture A/S i Danmark, indgik i 2001 "The Accenture Organisations International Assignment Agreement" (IAA-aftalen) med Accenture SCA (Luxembourg) om ind- og udleje af medarbejdere mellem koncernens driftsselskaber. Ifølge IAA-aftalen betaler det indlejende selskab det udlejende selskabs direkte og indirekte lønomkostninger med et avancetillæg (mark-up). I henhold til Accenture-koncernens transfer pricing-analyse er avancetillægget (bruttoavancen) fastsat til 30 %. I indkomstårene

2005-2011 har Accenture A/S haft nettoomkostninger til indleje af medarbejdere i henhold til IAA-aftalen.

Accenture A/S har i 2006 endvidere indgået en licensaftale med det schweiziske koncernselskab Accenture Global Services GmbH (AGS). Ifølge licensaftalen ejer AGS en række immaterielle aktiver, og Accenture A/S betaler en royalty på 7 % af sin omsætning med eksterne kunder for udnyttelsen heraf.

Sagen vedrører ansættelsen af Accenture A/S' skattepligtige indkomst for indkomstårene 2005-2011 for så vidt angår selskabets omkostninger til indleje af medarbejdere i henhold til IAA-aftalen og for indkomståret 2007 tillige royaltybetaling i henhold til licensaftalen.

Ved afgørelse af 31. august 2011 nedsatte SKAT (nu Skattestyrelsen) skønsmæssigt avancetillægget til 4,1 % på omkostninger til indleje af medarbejdere for indkomstårene 2005 og 2006 og forhøjede herved Accenture A/S' skattepligtige indkomst med 14.919.780 kr. (2005) og 16.996.616 kr. (2006). Ved afgørelse af 12. marts 2014 nedsatte SKAT skønsmæssigt avancetillægget til 7,27 % for indkomstårene 2007-2011 og forhøjede herved selskabets skattepligtige indkomst med 7.957.753 kr. (2007), 14.027.403 kr. (2008), 14.122.679 kr. (2009), 18.000.146 kr. (2010) og 15.127.184 kr. (2011). Endvidere nedsatte SKAT skønsmæssigt fradraget for royalty betalt af Accenture A/S i 2007 og forhøjede derved selskabets skattepligtige indkomst med 25.951.421 kr.

Landsskatteretten fandt ved afgørelse af 16. december 2015 (indkomstårene 2005-2006) og afgørelse af 24. maj 2019 (indkomstårene 2007-2011), at der ikke var grundlag for at ændre avancetillægget på 30 % og nedsatte herefter SKATs forhøjelser af Accenture A/S' skattepligtige indkomst til 0 kr. i de pågældende indkomstår. Ved afgørelsen af 24. maj 2019 fandt Landsskatteretten herudover, at der ikke var grundlag for at ændre royaltysatsen på 7 %, men at der ved opgørelsen af royalty skulle anvendes danske regnskabsstandarder. Forhøjelsen af den skattepligtige indkomst vedrørende royalty for indkomståret 2007 blev herefter fastsat til 7.027.853 kr.

Skatteministeriet anlagde sag mod Accenture A/S med påstand om, at selskabets skattepligtige indkomst forhøjes for indkomståret 2005 med 14.919.780 kr., for indkomståret 2006 med 16.996.616 kr., for indkomståret 2007 med 26.881.321 kr., for indkomståret 2008 med 14.027.403 kr., for indkomståret 2009 med 14.122.679 kr., for indkomståret 2010 med 18.000.146 kr. og for indkomståret 2011 med 15.127.184 kr.

Landsretten gav Skatteministeriet medhold i den nedlagte påstand.

Med den for Højesteret nedlagte påstand ønsker Accenture A/S at blive stillet som efter Landsskatterettens afgørelser med den ændring, at selskabets skattepligtige indkomst for indkomståret 2007 vedrørende royalty nedsættes med 7.027.853 kr.

Højesteret skal tage stilling til, om avancetillægget på 30 % af Accenture A/S' omkostninger til indleje af medarbejdere i indkomstårene 2005-2011 og den betalte royalty til AGS i 2007 på 7 % af omsætningen med eksterne kunder er i overensstemmelse med ligningslovens § 2, stk. 1 (armslængdeprincippet).

Der er i den forbindelse spørgsmål om, hvorvidt Accenture A/S' transfer pricing-dokumentation er mangelfuld i så væsentligt omfang, at SKAT har været berettiget til skønsmæssigt at ansætte avancetillægget og royalty, jf. skattekontrollovens dagældende § 3 B, stk. 8, jf. § 5, stk. 3. Der er endvidere spørgsmål om, hvorvidt Skatteministeriet har godtgjort, at avancetillægget og royaltybetalingen ikke er i overensstemmelse med ligningslovens § 2, stk. 1.

2. IAA-aftalen

2.1. Transfer pricing-dokumentationen

Det fremgår af de dagældende bestemmelser i skattekontrollovens § 3 B, stk. 8, jf. § 5, stk. 3, at hvis den skattepligtige ikke har udarbejdet den lovpligtige dokumentation for prisfastsættelse af transaktioner mellem interesseforbundne parter (transfer pricing-dokumentation), kan skatteansættelsen foretages skønsmæssigt. Højesteret har i dom af 31. januar 2019 (UfR 2019.1446) fastslået, at en transfer pricing-dokumentation, der i så væsentligt omfang er mangelfuld, at den ikke giver skattemyndighederne et tilstrækkeligt grundlag for at vurdere, om armslængdeprincippet er overholdt, må sidestilles med manglende dokumentation.

Højesteret har i dom af 25. juni 2020 (UfR 2020.3156) endvidere fastslået, at det forhold, at skattemyndighederne er uenig i eller rejser berettiget tvivl om sammenlignelighedsanalysen, ikke i sig selv indebærer, at dokumentationen i væsentligt omfang er mangelfuld.

Det er skattemyndighederne, der skal godtgøre, at en transfer pricing-dokumentation er så mangelfuld, at det må sidestilles med manglende dokumentation.

I den konkrete sag har Skatteministeriet anført, at Accentures transfer pricing-dokumentation er mangelfuld og har herved henvist til navnlig, at et avancetillæg på armslængdevilkår skulle have været fastsat som en nettoavance og ikke som en bruttoavance, samt at denne nettoavance skulle have været fastsat baseret på vikarbureauers nettoavancer.

Højesteret finder, at Skatteministeriet ikke har godtgjort, at Accentures globale transfer pricing-dokumentation for indkomstårene 2005-2011 vedrørende avancetillægget på 30 % var mangelfuld i så væsentligt omfang, at det kunne sidestilles med manglende dokumentation. Det bemærkes herved, at transfer pricing-dokumentationen er baseret på OECD's retningslinjer for transfer pricing, og at den bl.a. indeholder et begrundet valg af metode (Cost Plus-metoden), en funktions- og risikoanalyse og en sammenlignelighedsanalyse foretaget på et oplyst datagrundlag. Det forhold, at Skatteministeriet er uenig i prisfastsættelsesmetoden eller i sammenlignelighedsanalysen, gør ikke i sig selv dokumentationen mangelfuld.

Højesteret finder derfor, at Accenture A/S' indkomst vedrørende omkostningerne til indleje af medarbejdere i henhold til IAA-aftalen for indkomstårene 2005-2011 ikke kunne ansættes skønsmæssigt i medfør af dagældende skattekontrollovs § 3 B, stk. 8, jf. § 5, stk. 3.

Spørgsmålet er herefter, om Skatteministeriet har godtgjort, at avancetillægget på 30 % ikke er i overensstemmelse med, hvad der kunne være opnået, hvis transaktionerne var afsluttet mellem uafhængige parter (armslængdeprincippet), jf. ligningslovens § 2, stk. 1.

2.2 Vurdering af armslængdepris

Det følger af IAA-aftalens pkt. 6, at det indlejende selskab til det udlejende selskab skal betale det udlejende selskabs direkte og indirekte lønomkostninger (produktionsomkostninger) til de indlejede medarbejdere med et avancetillæg (mark-up) med henblik på, at den samlede betaling udgør en armslængdepris for at stille en specialiseret medarbejder til rådighed.

Der er enighed om, at ind- og udleje af medarbejdere mellem Accenture-koncernens driftsselskaber ikke kan sidestilles med levering af en konsulentydelse, og at prisen ikke kan fastsættes ved at sammenligne med prisen på en konsulentydelse til en uafhængig part efter Comparable Uncontrolled Price-metoden (CUP).

Med henblik på at vise, at prisen for ind- og udleje af medarbejdere er på armslængdevilkår, har Accenture i transfer pricing-dokumentationen anvendt Cost Plus-metoden. Denne metode tager udgangspunkt i de direkte og indirekte produktionsomkostninger, som er afholdt ved de kontrollerede transaktioner. Disse omkostninger tillægges en avance (bruttoavance). Avancetillægget (mark-up-procenten) fastsættes med udgangspunkt i den avance og de omkostninger, som uafhængige parter har ved sammenlignelige transaktioner, jf. OECD's retningslinjer for transfer pricing (TPG), 2017, pkt. 2.45, og nu Skatteforvaltningens Juridiske Vejledning 2024-2, afsnit C.D.11.4.1.3.

Ved fastsættelse af avancetillægget til produktionsomkostningerne efter IAA-aftalens pkt. 6 har Accenture i transfer pricing-dokumentationen lagt til grund, at en uafhængig part ville kræve, at et avancetillæg skulle dække kapacitetsomkostninger (generalomkostninger, administrative omkostninger og markedsføringsomkostninger) samt en profit (bruttoavance).

Accenture har sammenlignet med bruttoavancer i it- og konsulentfirmaer og har herved lagt vægt på navnlig, at alternativet til indleje af medarbejdere ville være at lade et andet it- eller konsulentfirma udføre en del af det projekt for driftsselskabets eksterne kunde, som driftsselskabet ikke selv har tilstrækkelige eller kvalificerede medarbejdere til at udføre.

Accenture har udvalgt ca. 50 it- og konsulentvirksomheder, og disse virksomheders bruttoresultater over en 3-årig periode er justeret, så forholdet mellem deres produktions- og kapacitetsomkostninger svarer til Accentures. Til brug for justeringerne er der sammenlignet med 16 af Accentures driftsselskaber, som stod for 70-80 % af udlejningen af medarbejdere under IAA-aftalen. De herefter beregnede bruttoavancer i % er opdelt i kvartilsæt. Et avancetillæg på 30 % er inden for det interkvartile spænd i alle de omhandlede indkomstår.

Som nævnt påhviler det Skatteministeriet at godtgøre, at avancetillægget på 30 % ikke er i overensstemmelse med, hvad der kunne være opnået, hvis transaktionerne var afsluttet mellem uafhængige parter.

Højesteret finder, at Skatteministeriet ikke har godtgjort, at det er i strid med armslængdeprincippet at fastsætte avancetillægget efter Cost Plus-metoden som en bruttoavance, der skal dække de anførte kapacitetsomkostninger samt en profit. Det er i den forbindelse ikke godtgjort, at en uafhængig part ikke kunne opnå en sådan betaling.

Højesteret finder endvidere, at Skatteministeriet ikke har godtgjort, at avancetillægget ikke kan fastsættes ved en sammenligning med bruttoavancer i andre it- og konsulentfirmaer. Det er herved ikke godtgjort, at den ydelse, der er forbundet med at udleje en specialiseret medarbejder fra et Accenture-driftsselskab, bør sammenlignes med et vikarbureaus udlejning af en vikar.

Herefter – og da det, som Skatteministeriet i øvrigt har anført, ikke kan føre til anden vurdering – finder Højesteret, at Skatteministeriet ikke har godtgjort, at et avancetillæg på 30 % ikke ligger inden for rammerne af, hvad der kunne være opnået, hvis transaktionerne var afsluttet mellem uafhængige parter, jf. ligningslovens § 2, stk. 1.

3. Royalty

3.1. AGS' ejerskab

Som anført ejer AGS ifølge licensaftalen med Accenture A/S en række immaterielle aktiver. Disse immaterielle aktiver omfatter Accenture-koncernens navn og brand samt en række andre immaterielle aktiver, herunder patenter og ophavsrettigheder samt ikke-registrerede rettigheder i form af f.eks. procesværktøjer.

Skatteministeriet har bestridt dette ejerskab og har henvist til, at "ejerskabet" beror på en overdragelse af immaterielle aktiver til AGS i 2001, der var "en fiktiv konstruktion uden realitet".

Efter bevisførelsen må det lægges til grund, at AGS siden 2001 har haft ansvaret for og truffet beslutninger om udviklingen af Accenture-koncernens immaterielle aktiver, har varetaget beskyttelsen af disse immaterielle aktiver og har afholdt udgifterne hertil. AGS har endvidere varetaget og afholdt udgifterne til koncernens overordnede markedsføring. AGS har i perioden 2007-2011 haft ca. 11 fastansatte medarbejdere og har herudover afholdt betydelige udgifter til indleje af medarbejdere fra andre koncernselskaber.

Højesteret finder ikke grundlag for at fastslå, at AGS ikke er ejer af de immaterielle aktiver, som licensaftalen mellem AGS og Accenture A/S fra 2006 angår.

3.2. Transfer pricing-dokumentationen

Skatteministeriet har anført, at Accentures transfer pricing-dokumentation er mangelfuld og har henvist til navnlig, at der ikke er taget tilstrækkeligt hensyn til, at Accenture A/S bidrager til den værdi, der knytter sig til de immaterielle aktiver.

Højesteret finder, at Skatteministeriet ikke har godtgjort, at Accentures globale transfer pricing-dokumentation for indkomståret 2007 vedrørende royaltysatsen på 7 % var mangelfuld i så væsentligt omfang, at det kunne sidestilles med manglende dokumentation. Det bemærkes herved, at transfer pricing-dokumentationen er baseret på OECD's retningslinjer for transfer pricing, og at den bl.a. indeholder et begrundet valg af metode (Residual Profit Split), en funktions- og risikoanalyse og en sammenlignelighedsanalyse foretaget på et oplyst datagrundlag. Det forhold, at Skatteministeriet mener, at der ikke i tilstrækkelig grad er taget hensyn til, at Accenture A/S bidrager til den værdi, der knytter sig til de immaterielle aktiver, gør ikke i sig selv dokumentationen mangelfuld.

Højesteret finder derfor, at Accenture A/S' indkomst for indkomståret 2007 vedrørende royaltybetaling ikke kunne ansættes skønsmæssigt i medfør af dagældende skattekontrollovs § 3 B, stk. 8, jf. § 5, stk. 3.

Spørgsmålet er herefter, om Skatteministeriet har godtgjort, at Accenture A/S' royaltybetaling til AGS i 2007 ikke er i overensstemmelse med, hvad der kunne

være opnået, hvis transaktionerne var afsluttet mellem uafhængige parter (armslængdeprincippet), jf. ligningslovens § 2, stk. 1.

3.3. Vurdering af armslængdepris

Som nævnt følger det af licensaftalen mellem Accenture A/S og AGS, at Accenture A/S skal betale en royalty på 7 % af sin omsætning med eksterne kunder for udnyttelsen af de immaterielle aktiver, der ejes af AGS. Ifølge aftalen reduceres royalty, hvis resultatet af driften kommer under en minimumssats. Opgørelsen sker efter amerikanske regnskabsstandarder.

Med henblik på at vise, at royaltysatsen på 7 % er på armslængdevilkår, har Accenture i transfer pricing-dokumentationen anvendt avancefordelingsmetoden (Residual Profit Split). Når denne metode anvendes, er målet at fordele profitten (eller tabet) fra en kontrolleret transaktion mellem de forbundne parter, sådan som parterne under sammenlignelige omstændigheder ville have delt profitten fra transaktionen, hvis transaktionen ikke havde været kontrolleret, jf. OECD's retningslinjer for transfer pricing (TPG), 2017, pkt. 2.121, og nu Skatteforvaltningens Juridiske Vejledning 2024-2, afsnit C.D.11.4.1.5.

Accenture har taget udgangspunkt i, at Accenture-koncernens samlede indtjening kommer fra koncernens driftsselskaber (konsulenthus-driften) og fra udnyttelse af koncernens immaterielle aktiver, der ejes af AGS.

Den andel af Accenture-koncernens indtjening, der beregningsmæssigt kan anses for at knytte sig til konsulenthus-driften, er opgjort ved at sammenholde Accenture-koncernens indtjening i en 3-årig periode med sammenlignelige konsulentfirmaers gennemsnitlige indtjening i den tilsvarende periode. Den andel af indtjeningen, der ikke knytter sig til konsulenthus-driften, er anset for at knytte sig til udnyttelsen af AGS' immaterielle aktiver. Jo højere en andel af indtjeningen, der knytter sig til konsulenthus-driften, desto lavere er royaltysatsen. Ifølge beregningerne modsvarer en royaltysats på 7 % en indtjening fra konsulenthus-driften på 7,68 %, hvilket er over medianen for de sammenlignelige konsulentfirmaers indtjening.

Højesteret finder det ikke godtgjort, at Accenture ved anvendelse af avancefordelingsmetoden og den foretagne sammenlignelighedsanalyse for indtjeningen på konsulenthus-driften ikke har taget tilstrækkeligt hensyn til, at Accenture A/S bidrager til den værdi, der knytter sig til de immaterielle aktiver. Skatteministeriet har i den forbindelse heller ikke godtgjort, at mere end 7,68 % af indtjeningen bør henføres til konsulenthus-driften, for at royaltysatsen bliver på armslængdevilkår.

Højesteret finder herefter, at Skatteministeriet ikke har godtgjort, at en royaltysats på 7 % ikke ligger inden for rammerne af, hvad der kunne være opnået, hvis transaktionerne var afsluttet mellem uafhængige parter, jf. ligningslovens § 2, stk. 1. Det er heller ikke godtgjort, at der skatteretligt er grundlag for at tilsidesætte parternes civilretlige aftale om, at royalty beregnes på grundlag af omsætningen med eksterne kunder opgjort efter amerikanske regnskabsstandarder.

4. Konklusion

På denne baggrund tager Højesteret Accenture A/S' principale påstand til følge, således at Accenture A/S frifindes for Skatteministeriets påstand om forhøjelse af selskabets skattepligtige indkomst i indkomstårene 2005-2011, og Accenture A/S' skattepligtige indkomst for indkomståret 2007 nedsættes med 7.027.853 kr.

Skatteministeriet skal tilbagebetale sagsomkostningsbeløbet for landsretten på 1.000.000 kr. med procesrente fra den 5. september 2023.

5. Sagsomkostninger

Sagsomkostningerne er fastsat til dækning af advokatudgift for landsret og Højesteret med 1.800.000 kr. og retsafgift for Højesteret med 17.000 kr., i alt 1.817.000 kr.

THI KENDES FOR RET:

Accenture A/S frifindes.

Accenture A/S' skattepligtige indkomst for indkomståret 2007 nedsættes med 7.027.853 kr.

Skatteministeriet skal til Accenture A/S betale 1.000.000 kr. med procesrente fra den 5. september 2023.

I sagsomkostninger for landsret og Højesteret skal Skatteministeriet betale 1.817.000 kr. til Accenture A/S.

De idømte beløb skal betales inden 14 dage efter denne højesteretsdoms afsigelse.

Sagsomkostningsbeløbet forrentes efter rentelovens § 8 a.