



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

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER

ITA no.2029/Mum./2016
(Assessment Year :2011-12)

Van Oord Dredging and
Marine Contractor BV
201, 2nd Floor, Central Plaza
166, CST Road, Kalina
Mumbai 400 098
PAN – AAACH3500M

..... Appellant

v/s

Dy. Commissioner of Income Tax (I.T)
Circle-4(3)1), Mumbai

..... Respondent

Assessee by : Shri Nishant Thakker and
Shri Hiten Chande
Revenue by : Shri S.K. Jha

Date of Hearing – 12.03.2019

Date of Order – 31.05.2019

ORDER

PER SAKTIJIT DEY, J.M.

Aforesaid appeal has been filed by the assessee challenging the final assessment order dated 27th January 2016 passed under section 144C(13) r/w section 143(3) of the Income Tax Act, 1961 (for short "*the Act*") pertaining to the assessment year 2011-12, in pursuance to the directions of the Dispute Resolution Panel-2 (DRP), Mumbai.

2. At the outset, Shri Nishant Thakkar, learned Authorised Representative submitted, grounds no.1, 2 and 3, being general in nature do not require adjudication. Accordingly, these grounds are dismissed.

3. In grounds no.5 and 6, the assessee has challenged the decision of the Departmental Authorities in rejecting the benchmarking done by the assessee with regard to the payment made to the Associated Enterprises (AE) towards charter hire of dredgers by applying Comparable Uncontrolled Price (CUP) method as the most appropriate method and selecting Transactional Net Margin Method (TNMM) as the most appropriate method.

4. Brief facts are, the assessee is a foreign company incorporated in Netherland. It has set-up a Project Office in India to execute dredging contracts in India. It is stated, the assessee is carrying on dredging activity in India for more than 20 years. In previous year relevant to the assessment year under dispute, the assessee undertook various international transactions with its overseas Associated Enterprise (AE) including charter hire of dredgers. In the year under consideration, the assessee paid charter hire / lease rental of ₹ 302,78,03,783. Out of the ten dredgers used for executing dredging contracts in India in the year under consideration, six dredgers were under hire by the assessee

from the assessment year 2010–11. The assessee benchmarked the charter hire / lease rentals paid to the AE for hiring the dredgers on the basis of a valuation certificate obtained from Van Woerkom, Nobels & Ten Veen and claimed the charter hire / lease rentals paid to the AE to be at arm's length. In the course of proceedings before him, the Transfer Pricing Officer called upon the assessee to furnish documentary evidences to justify the benchmarking of charter hire / lease rentals of the dredgers hired by it. After perusing the documents furnished by the assessee, including the bareboat charter agreement for lease of dredgers, the Transfer Pricing Officer was of the view that CUP method cannot be the appropriate method for benchmarking charter hire charges since the CUP method applied by the assessee is not on the basis of actual transaction but on the basis of a valuation report. Further, he observed, the price quoted in the valuation report is on the basis of indicative rate of charter hire and was qualified with a rider that the actual rates of hire would depend on the actual market conditions and on the basis of negotiation. Further, he observed, there is wide variation in the rates given for dredger Sagar Manthan in the valuation reports of the same valuer in assessment years 2010–11 and 2011–12. He also pointed out various other defects in the valuation report considered as a CUP by the assessee. Accordingly, he issued a show cause notice to the assessee to explain why the benchmarking

done by applying CUP method should not be rejected and the arm's length price should not be determined by applying Transactional Net Margin Method (TNMM) at entity level. Further, in this regard, he directed the assessee to show cause why the comparables selected for benchmarking the sub-contract activities should not be treated as comparables for transaction relating to charter hire of dredgers as well. In response to the show cause notice, the assessee filed a detailed reply justifying the benchmarking done by it by applying CUP method on the basis of valuation done by the independent valuer. It was explained by the assessee, there has been a nominal incremental increase of 3.4% in the lease rentals compared to assessment year 2010-11 on the basis of valuation report. It was submitted, the valuer has valued the charter hire charges based on Construction Industry Research and Information Association (CIRIA) norms, which is consistently followed not only by the assessee but by many other companies involved in dredging activities on charter hire of vessels / dredgers. Thus, it was submitted, CUP method is the most appropriate method to benchmark the transaction. The Transfer Pricing Officer, however, did not find merit in the submissions of the assessee. He observed, benchmarking of charter hire / lease rental is simply based on the valuation report which has no scientific basis but is merely on assumption and conclusion drawn by a third party without any

supporting evidence. Further, he observed, for benchmarking the transaction for the impugned assessment year, CIRIA norms of 2009, cannot be applied. Further, he observed, the assessee failed to substantiate that the valuation report is a valid CUP for determining the arm's length price. As regards assessee's contention that in the preceding assessment years similar valuation report from the independent valuer was accepted as a valid CUP, the Transfer Pricing Officer observed, principle of res judicata does not apply to tax proceedings. In the aforesaid premises, the Transfer Pricing Officer rejected the benchmarking done by the assessee under CUP method and proceeded to determine the arm's length price of the international transaction by applying TNMM at entity level which resulted in upward adjustment of ₹ 161,70,50,636, to the arm's length price. On the basis of adjustment proposed by the Transfer Pricing Officer, the Assessing Officer passed the draft assessment order. Against the draft assessment order, the assessee raised objections before learned DRP.

5. Learned DRP, however, rejected the objections of the assessee by upholding the decision of the Transfer Pricing Officer.

6. The learned Authorised Representative submitted, the assessee is in the dredging business in India since the year 1994. He submitted, for executing the dredging contracts in India, assessee charter hires

dredgers from its AEs by executing bareboat charter agreement. The assessee charter hires the dredgers on payment of charter hire / rental charges and the charter hire / rental charges is benchmarked following industry practice and norms by getting them valued by an independent valuer. He submitted, the valuation certificate issued is by a reputed valuer having expertise over the subject. He submitted, the independent valuer has made the valuation in accordance with CIRIA guidelines which was earlier known as NIVAG and then VG Bouw guidelines. He submitted, from the very inception of its dredging business in India, the assessee had been benchmarking the arm's length price of payment made towards charter hire of dredgers following the aforesaid method and the Department has also accepted the valuation done by the independent valuer as per VG Bouw / CIRIA norms as a valid CUP. He submitted, in fact, in some of the assessment years the Transfer Pricing Officer himself had directed the assessee to get the valuation done under VG Bouw / CIRIA norms as a CUP for determining the arm's length price of charter hire charges. In this context, he drew our attention to the orders passed by the Transfer Pricing Officer/Assessing Officer for the A.Y. 2002-03, 2003-04, 2004-05, 2005-06, 2008-09, 2009-10 and 2010-11.

7. The learned Authorised Representative submitted, the assessee generally uses two types of dredgers i.e., Trailer Suction dredgers and

cutter suction dredgers. He submitted, out of the ten dredgers for which the assessee had paid charter hire / lease rental in the impugned assessment year, six dredgers were hired from assessment year 2010–11. He submitted, in assessment year 2010–11, the assessee had benchmarked the charter hire charges on the basis of valuation certificate from the independent valuation. However, the Transfer Pricing Officer noticing that the basis for valuation in the valuation certificate is CIRIA Norms 2005, called upon the assessee to do valuation as per CIRIA Norms 2009. The learned Authorised Representative drawing our attention to the valuation certificate of the independent valuer placed in the paper book submitted, the valuer has made the valuation as per CIRIA norms and made adjustments for inflation using appropriate indexation as of 1st January 2010 provided under CIRIA norms. He submitted, the valuer has applied the same formula on the basis of which the Transfer Pricing Officer in the earlier assessment years had directed the assessee to make the valuation. The learned Authorised Representative submitted, in case of assessee's wholly owned subsidiary Van Oord India Pvt. Ltd., which also regularly hires dredgers from the AEs, the arm's length price of the charter hire charges is always benchmarked by using CIRIA norms and the Department has accepted it over the years. He submitted, even, in the impugned assessment year also in case of Van Oord India

Pvt. Ltd, the valuation done by the independent valuer as per CIRIA norms has been accepted as a valid CUP by the Transfer Pricing Officer. Thus, he submitted, once the Department has accepted the determination of arm's length price by accepting the valuation of the independent value as a valid CUP in the preceding assessment years, the same cannot be rejected in the impugned assessment year in absence of any material difference in facts. The learned Authorised Representative submitted, though, principle of res judicata do not strictly apply to the income tax proceedings, however, rule of consistency cannot also be ignored. He submitted, since the Department has accepted the determination of arm's length price on the basis of valuation certificate issued by the independent valuer under CUP method, it cannot take a different stand in the impugned assessment year on identical facts. In support of his contention, he relied upon the following decisions:—

- i) Bharat Sanchar Nigam Ltd. v/s Union of India, [2006] 382 ITR 273;*
- ii) Radhasoami Satsang v/s CIT, [1992] 193 ITR 321 (SC); and*
- iii) PCIT v/s Vishay Components India Pvt. Ltd., ITA no.1643/2016, judgment dated 18.02.2019.*

8. Further, in support of his contention that determination of charter hire charges as per VG Bouw / CIRIA norms is a scientific

method and is a valid CUP, learned Authorised Representative relied upon the following decisions:-

- i) *Boskalis International and Dredging International C.V. v/s DDIT, ITA no.4862/Mum./2008, dated 18.07.2014; and*
- ii) *ADIT v/s Ballast Nedam Dredging, [2013] 32 taxmann.com 317.*

9. The learned Authorised Representative submitted, adoption of valuation certificate by independent valuation as a valid CUP is not contrary to the statutory provisions, as, rule 10D(3) contemplates reports by agencies. Thus, he submitted, benchmarking done by the assessee on the basis of valuation certificate of the independent valuer should be accepted.

10. The learned Departmental Representative submitted, in the preceding assessment years, the Transfer Pricing Officer might have accepted the valuation certificate by independent valuer as a CUP for determining the arm's length price of charter hire charges. However, that will not apply as res judicata since in the impugned assessment year the Transfer Pricing Officer has pointed out the factual differences on the basis of which the valuation certificate of the independent valuer cannot be accepted as CUP. Further elaborating, he submitted, the valuation report does not represent the actual rate as the valuer himself has stated that the rates are indicative. Further, drawing our

attention to the order of the Transfer Pricing Officer, learned Departmental Representative submitted, the assessee did not furnish details which prevented the Transfer Pricing Officer from verifying whether the valuation done by the independent valuer is as per the actual rate. Therefore, he submitted, if the bench is of the opinion that the arm's length price of the hire charges / lease rentals are to be determined on the basis of CIRIA norms, let the issue be restored back to the Assessing Officer / Transfer Pricing Officer for re-adjudication with a direction to the assessee to furnish all the details.

11. We have considered rival submissions and perused the material on record. As could be seen from the facts on record, in the year under consideration, the assessee has paid an amount of ₹ 302,78,03,783, to its AEs towards hire charges / lease rentals for charter hire of 10 dredgers. The assessee has benchmarked the aforesaid transactions with the AEs by selecting CUP method, wherein, the valuation certificate dated. 16th February 2010 obtained from an independent valuer viz. Van Woerkom, Nobels & Ten Veen, Netherland was applied as a CUP. On a perusal of the aforesaid valuation certificate, a copy of which is at Page-161 of the paper book, it is noticed that the valuer has valued the charter hire charges of the dredgers as per the norms prescribed by CIRIA with cost inflation indexation of 1st January 2010.

The valuer has ultimately determined the value of charter hire charges as per CIRIA cost standard.

12. It is relevant to observe, the assessee has been executing dredging contracts in India since long and it has determined the arm's length price of the hire charges / lease rentals of the dredgers hired from the AEs by applying the aforesaid methodology. As could be seen from the materials placed before us, in the assessment year 2002-03, the Assessing Officer while completing the assessment under section 143(3) of the Act had accepted the charter hire charges for dredger Sagar Manthan, which is also under hire in the impugned assessment year, by accepting the valuation as per VG Bouw norms to be a fair value. In the assessment year 2005-06, the Transfer Pricing Officer while accepting the valuation certificate obtained from the valuer on the basis of VG Bouw norms as a CUP had observed that the assessee had to furnish separate valuation certificates for dredging operation and mobilization and demobilization charges. Thus, the Transfer Pricing Officer had proceeded to make an adjustment of 15% on account of demobilization and mobilization period. Similarly, for the assessment year 2006-07, while completing the assessment under section 143(3) of the Act, the Assessing Officer, though, accepted the valuation as per VG Bouw norms, however, he made an adjustment on account of mobilization and de-mobilization period.

13. Interestingly, in the assessment year 2010–11, the assessee benchmarked the hire charges / lease rentals for charter hire of dredgers by applying the valuation certificate of the valuer as a CUP. However, in the course of proceedings before him, the Transfer Pricing Officer noticed that independent valuer has valued the hire charges by applying CIRIA norms of 2005. Therefore, the Transfer Pricing Officer vide letter dated 11th December 2013 called upon the assessee to value the charter hire charges of dredgers by applying the formula as per CIRIA Norms 2005. Ultimately, the Transfer Pricing Officer having found that charter hire charges paid by the assessee to the AEs is at arm's length as per CIRIA Norms 2009, made no further adjustment. It is relevant to observe, in case assessee's Indian subsidiary, viz, Van Oord India Pvt. Ltd., the Transfer Pricing Officer has consistently accepted the benchmarking of charter hire charges as per valuation done on the basis of VG Bouw / CIRIA Norms, which is evident from the orders passed by the Transfer Pricing Officer for the assessment year 2011–12, a copy of which is placed in the paper book.

14. Interestingly enough, out of 10 dredgers hired by the assessee for the impugned assessment year, two dredgers were partly hired by the aforesaid Indian subsidiary and in the course of proceedings under section 92CA(3) of the Act, the Transfer Pricing Officer has accepted the valuation report of the independent value as a valid CUP and

treated the international transaction relating to payment of charter hire charges to be at arm's length price. It is also relevant to observe, the Transfer Pricing Officer in both the cases is the same. Thus, from the aforesaid facts, it is evident that the valuation done by the independent valuer on the basis of VG Bouw / CIRIA Norms is accepted as valid CUP not only by the dredging industry but by the Department also.

15. It is further relevant to observe, in case of Boskalis International and Dredging International C.V. (supra), the Tribunal has accepted the computation of arm's length price of hire charges of dredgers by using VG Bouw valuation as a valid CUP. In the case of Ballast Nedam Dredging (supra), the Co-ordinate Bench has expressed similar view by holding that the valuation done by the valuer on the basis of VG Bouw norms can be accepted as a valid CUP. On a perusal of the valuation certificate issued by the independent valuer, it is noticed that the independent valuer has determined the value of charter hire charges by applying the standard formula prescribed under the CIRIA norms which was earlier known as VG Bouw norms. That being the case, the benchmarking done by the assessee applying the valuation certificate issued by the independent valuer as a CUP is valid. More so, when in the preceding assessment years, the Assessing Officer/Transfer Pricing Officer has accepted the valuation of charter

hire charges as per VG Bouw / CIRIA norms. Though, the principle of res judicata does not apply to income tax proceedings, each assessment year being an independent unit, however, rule of consistency cannot also be given a complete go by. The Hon'ble Supreme Court in Bharat Sanchar Nigam Ltd. (supra), has held in the following manner:–

"The decisions cited have uniformly held that res judicata does not apply in matters pertaining to tax for different assessment years because res judicata applies to debar Courts from entertaining issues on the same cause of action whereas the cause of action for each assessment year is distinct. The Courts will generally adopt an earlier pronouncement of the law or a conclusion of fact unless there is a new ground urged or a material change in the factual position. The reason why Courts have held parties to the opinion expressed in a decision in one assessment year to the same opinion in a subsequent year is not because of any principle of res judicata but because of the theory of precedent or the precedential value of the earlier pronouncement. Where facts and law in a subsequent assessment year are the same, no authority whether quasi judicial or judicial can generally be permitted to take a different view. This mandate is subject only to the usual gateways of distinguishing the earlier decision or where the earlier decision is per incuriam. However, these are fetters only on a coordinate bench which, failing the possibility of availing of either of these gateways, may yet differ with the view expressed and refer the matter to a bench of superior strength or in some cases to a bench of superior jurisdiction."

16. The same view has been expressed in other decisions as well. In case of the present assessee also, the material facts permeating through different assessment years are more or less identical as the terms and conditions on which the dredgers are hired have not changed. That being the case, applying the rule of consistency, a

different view cannot be taken in the impugned assessment year with regard to the benchmarking of lease rentals paid for charter hire of dredgers by applying CUP method. For the aforesaid reasons, we allow the grounds raised by the assessee with a direction to the Assessing Officer / Transfer Pricing Officer to accept the benchmarking done by the assessee under CUP method after verifying the fact that the independent valuer has made the valuation as per CIRIA norms. Grounds are allowed.

17. Grounds no.6 to 13 are on the issue of transfer pricing adjustment in relation to the sub-contract charges paid to Van Oord India Pvt. Ltd.

18. In view of our decision in grounds no.4 and 5, the issue raised in these grounds has become academic, hence, do not require adjudication.

19. In grounds no.14 to 19, the assessee has challenged the addition made on account of transfer pricing adjustment to the arm's length price of management services paid to the AE.

20. Brief facts are, the assessee provides various services to group companies including the assessee, such as, general management, survey and engineering related functions, marketing and public

relation, information technology, quality assurance, technical, financial and administrative, human resources and organization, etc. For providing such services to the Indian subsidiary assessee received a sum of ₹ 9,72,01,066. While framing the draft assessment order, the Assessing Officer treated the aforesaid amount received by the assessee as royalty as per Article-12 of India-Netherland Double Taxation Avoidance Agreement (DTAA) and accordingly, brought it to tax. The assessee challenged the aforesaid addition before learned DRP.

21. Learned DRP relying upon its own decision in assessment year 2009-10, held that the amount is taxable as royalty / fee for technical services.

22. The learned Authorised Representative submitted, while deciding identical issue in assessee's own case in assessment year 2009-10, the Tribunal has held that the management fee received by the assessee is neither in the nature of royalty nor fee for technical services as per Article-12 of India-Netherland Tax Treaty. Thus, he submitted, the issue is covered by the decision of the Tribunal.

23. The learned Departmental Representative, though, agreed that the issue has been decided in favour of the assessee, however, he relied upon the observations of learned DRP and the Assessing Officer.

24. We have considered rival submissions and perused the material on record. It is evident from the order of learned DRP that they have decided the issue relying upon their decision in assessee's own case for the assessment year 2009-10. Notably, while deciding assessee's appeal for the assessment year 2009-10 in ITA no.7589/ Mum./2012, dated 7th October 2016, the Tribunal has held that the amount received is neither in the nature of royalty nor fees for technical services under Article-12 of India-Netherland Tax Treaty. That being the case, respectfully following the decision of the Co-ordinate Bench referred to above, we delete the addition made by the Assessing Officer.

25. In grounds no.20, 21 and 23, the assessee has challenged the addition made on account of reimbursement of salary by treating it as fees for technical services.

26. The Assessing Officer in the course of assessment proceedings, held that the reimbursement of salary is in the nature of fees for technical services.

27. Learned DRP also concurred with the aforesaid view relying upon its own order for the assessment year 2009-10.

28. Having considered rival submissions, it is noticed that the Tribunal while deciding the issue in assessment year 2009–10 held that reimbursement of salary is not in the nature of fees for technical services as per Article–12(5) of India–Netherland Tax Treaty. Therefore, respectfully following the aforesaid decision of the Co-ordinate Bench, we delete the addition made by the Assessing Officer. These grounds are allowed.

29. Ground no.25, the assessee has challenged levy of interest under section 234B of the Act.

30. The learned Authorised Representative appearing for the parties have agreed that this issue is covered by the decision of the Hon'ble Supreme Court in assessee's own case.

31. Having considered rival submissions, we find that in Balash Hamp Dredging B.V., as assessee was known earlier, the Hon'ble Supreme Court following the decision in NGC network LLC, has upheld the decision of the Hon'ble High Court and the Tribunal holding that interest under section 234B of the Act cannot be charged as the assessee is not liable to pay advance tax and the liability is on the payer to deduct tax at source. Following the aforesaid decision of the Hon'ble Supreme Court, we allow the ground raised by the assessee.

32. The additional grounds raised were not pressed at the time of hearing, hence dismissed.

33. In the result, appeal is partly allowed.

Order pronounced in the open Court on 31.05.2019

**Sd/-
RAJESH KUMAR
ACCOUNTANT MEMBER**

**Sd/-
SAKTIJIT DEY
JUDICIAL MEMBER**

MUMBAI, DATED: 31.05.2019

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The CIT(A);*
- (4) *The CIT, Mumbai City concerned;*
- (5) *The DR, ITAT, Mumbai;*
- (6) *Guard file.*

*Pradeep J. Chowdhury
Sr. Private Secretary*

True Copy
By Order

(Sr. Private Secretary)
ITAT, Mumbai