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

BEFORE SHRI PRAMOD KUMAR, VICE PRESIDENT&
Ms. MADHUMITA ROY, JUDICIAL MEMBER

I.T.A. No. 1473/Mum/2017
(Assessment Year: 2001-02)

Van Oord Dredging and Marine Contractors BV 201, 2nd Floor Central Plaza 166 CST RD, Kalina, Mumbai Pin- 400098	Vs.	Asst DIT (IT)2(2) Now Transferred To DCIT (IT) 4(3)(1)16th Floor, AIR INDIA BLDG, Nariman Point, Mumbai, Pin-400020

[PAN No. AAA CH3 500 M]

(**Appellant**) .. (**Respondent**)

Appellant by : Shri Porus Kaka, AR
Respondent by : Shri Jacinta Zimik Vashai, CIT D.R.

Date of Hearing 08.01.2020
Date of Pronouncement 27.05.2020

ORDER

PER Ms. MADHUMITA ROY - JM:

The appeal at the instance of the assessee is directed against the order dated 29.11.2016 passed by the Commissioner of Income Tax (Appeals) – 58, Mumbai arising out of the order dated 27.11.2006 passed by the ADIT(International Taxation)-2(2), Mumbai under section 271(1)(c) of the Income Tax Act, 1961 (hereinafter referred as to 'the Act') for Assessment Year 2001-02.

2. The assessee is a company incorporated in the Netherlands and is an International Dredging Contractor. It is a tax resident of the Netherland and executes contract in India and for this purpose it has established project/site offices in India with the approval of RBI. The assessee has filed its return of

income for the A.Y. 2001-02 on 30.10.2001 showing a loss of Rs. 128,033,980/-. While computing the returned loss of the said amount of Rs. 128,033,979/-, the income of Rs. 307,870,463/- received by the assessee in relation to the New Mangalore Port Trust (NMPT) project was reduced on the basis that the said project was completed in F.Y. 1995-96 and accordingly in the absence of any permanent establishment (PE) in relation to the NMPT project in A.Y. 2001-02, the said amount was not taxable as per the provisions of the India and Netherlands Tax Treaty.

3. The fact is this that in November, 1994 the appellant was awarded a capital dredging contract by New Mangalore Port Trust (NMPT) in relation to developing facilities at New Mangalore Port for handling crude and POL products. Pursuant to the same the appellant duly obtained approval from the RBI to open a site office at Mangalore up to 30th August, 1996. Upon completion of the said project at New Mangalore Port in the year 1995-96 the appellant closed its site office and demobilized equipment and personnel. Further that upon completion of the said contract the appellant made claims on the said NMPT aggregating to Rs. 892,579,385/- for additional work performed. Counter claim to the tune of Rs. 138,500,039/- for the loss of revenue due to delay in completion of the said contract by the assessee was also made by the NMPT. On May 19, 1998 the Arbitral Tribunal was pleased its award in favour of the appellant upon which the said NMPT filed an appeal before Additional District Court. Ultimately by an order dated March 30, 2000 the Additional District Court of Mangalore was pleased to upheld the claim in favour of the appellant. Thereafter, an appeal before the Karnataka High Court was moved by the NMPT and during the F.Y. 2000-01 the said NMPT withdrew the appeal filed with the Karnataka High Court and paid the claim of

the appellant to the tune of Rs. 307,870,463/- in the month of September, 2000. In fact, in the return of income filed by the appellant, this particular amount was reduced from its business profit for determining its taxable income.

4. The case of the appellant is this that the appeallant site office at New Mangalore Port being an independent PE; the same was not in existence on the date of accrual of the said income by way of arbitration award and in the absence such PE in relation to the NMPT project in the A.Y. 2001-02 the said amount of Rs. 307,870,463/- was not taxable as per provision of the India Netherlands Tax Treaty. The same was not, however, found tenable by the Ld. AO and the same was brought to tax. The penalty proceeding under section 271(1)(c) read with explanation 1 of the said section of the Income Tax Act has been initiated during the course of assessment proceeding against the appellant. Subsequently, the said penalty proceeding was kept in abeyance because of the particular fact that the appeal against the decision of the AO was pending before the Ld. CIT(A). Thereafter, by and under an order dated 15.12.2004 the said appeal was dismissed by the Ld. CIT(A) confirming the addition made by the Ld. AO whereupon, an appeal has been preferred before the Income Tax Appellate Tribunal but the same was dismissed vide order dated 29.03.2016. As a result, of the dismissal of the appeal filed by the assessee against the order passed by the Ld. CIT(A) dated 15.12.2004 the said order attained finality and the penalty proceeding which was kept in abeyance got revived and was finalized by an order dated 27.11.2006 by levying penalty to the tune of Rs. 14,77,77,822/- under section 271(1)(c) of the Act on the ground of furnishing inaccurate particulars of income by the assessee which was, in turn, confirmed by the Ld. CIT(A). Hence, the instant appeal before us.

At the time of hearing of the instant appeal the Ld. Senior Advocate appearing for the assessee submitted before us that while initiating the penalty proceeding, the Ld. AO has neither alleged concealment of income nor filing inaccurate particulars of income. Apart from that he took us to the note 7 which was annexed to the return of income filed by the assessee from which it appears the assessee has received gross amount of Rs. 307,870,463/- by the NMPT against the claim made by the assessee for additional work performed. However, at the time of accrual of that particular income, since, the appellant did not have any permanent establishment (PE) in India, relying upon Article 5 read with Article 7 of the India Netherlands Treaty, the said income is not taxable in India for the F.Y. 2000-01 for the said NMPT project. Thus the same was not offered to tax as submitted by the Ld. Senior Advocate appearing for the assessee.

There was a complete disclosure in respect of the NMPT arbitration award which is evident from the note 7 annexed to the computation on income wherein the appellant has disclosed the arbitration award and explained the legal opinion of the assessee for not offering the same as taxable income. Thus neither concealment of income nor furnishing of inaccurate particulars of income can be alleged against the assessee as the argued by the Ld. AR and penalty is not liable to be levied under section 271(1)(c) of the Act.

5. On the other hand, the Ld. Representative appearing for the Revenue submitted before us that the assessee's action of offering the tax in respect of income of Rs. 100 lakhs on account of bad debts from Kandala Port Trust Project but not offering the income of Rs. 30.79 crores received by way of 'arbitration award' shows the willful omission on the part of the assessee and the intention and/or desire to avoid payment of tax. According to him the

assessee has not discharged its onus and no satisfactory explanation has been pointed by the assessee. On this aspect, he relied upon the order passed by the authorities below.

6. We have heard the rival contentions of the parties and we have perused the relevant materials available on record.

It appears from the records that the Ld. AO while initiating the penalty proceeding relied upon the contention made by the Ld. AO in the quantum order subsequently supplemented by the CIT(A) that, in terms of Article 7 of the India Netherlands Tax Treaty, the business profits of a enterprise of Netherlands will be taxable in India if the enterprise carries the business in India through the PE situated in India; meaning thereby that it is not necessary that the PE should be in existence in the particular year in which the income is taxed. Thus, admittedly the case of the assessee made before the authorities below relating to the income of Rs. 30.79 crores received from NMPT as "arbitration award" not chargeable to tax in India has not been accepted by the authorities below. The authorities below was further harping upon the conduct of the assessee in respect of offering the income of Rs. 100 lakhs on account of bad debts recovery from Kandala Port Trust project and, therefore, the reason for not bringing this particular income in question to the tune of Rs. 30.79 crores as received as arbitration award not found to be justified. However, the stand of the assessee before the ITAT towards offering the income of Rs. 100 lakhs on account of the said bad debts recovery as a mistake was found to be taken into consideration not in its proper perspective because of the particular reason that the assessee, as we find from the records before us, categorically explained that the said amount was released by DCI against a bank guarantee and was subject matter of arbitration between DCI and KPT. On a

conservative basis Rs. 1,18,40,000/- was offered to tax in A.Y. 2000-01. In the previous year ended March 31, 2001, DCI has discharged the company from the above guarantee. Accordingly, the bad debt of Rs. 100 lakh has been credited to the profit and loss account. Apart from that we find from the records, as well as from the submission made by the assessee before the authorities below repeatedly that the appellant was under bona fide belief and on the interpretation of the Dutch Treaty claimed that the "arbitration award" of 30.79 crores is not taxable. The explanation has also been given by the assessee in note 7 annexed to the return of income filed by it. It is relevant to mention that Sec. 271(1)(c) of the Act provides that penalty may be levied, where in the course of any proceeding under the Act the AO is satisfied that any person has concealed the particulars of his income or furnished inaccurate particulars of such income. Though the expressions 'concealed the particulars of income' and 'furnish inaccurate particulars of income' have not been defined either in Sec. 271(1)(c) of the Act or elsewhere in the Act relying on different judicial pronouncement and as per the International Dictionary as we find, conceal implies 'to hide or withdraw from observation, to cover or keep from sight, or to prevent the discovery of or to withhold knowledge of'. The offence of concealment is thus a direct attempt to hide an item of income or a portion thereof from the knowledge of the income-tax authorities. Furthermore, there has to have a deliberate act on the part of the assessee for such concealment. According to the Shorter Oxford English Dictionary, 3rd edition, volume 1, concealment is the intentional suppression of truth or fact known to the injury or prejudice to another. Thus, the principle emanates from above on Sec. 271(1)(c) of the Act, can be summarized as under:

(i) The provision of being of a penal nature, some amount of culpable negligence or willful omission on the part of the assessee must be established

before penalty is imposed. Existence of mens rea is essential for imposition of penalty.

(ii) If the default flows from a bona fide belief and it is not the result of the deliberate act of defiance of the law, no penalty is leviable.

(iii) No penalty is leviable when the assessee's contention in the course of the assessment proceedings was based on various supporting decisions, which were rejected by the Assessing Officer during the assessment proceedings.

The expression 'furnishing of inaccurate particulars of income' has also not been defined in the Act. The expression 'inaccurate' refers to 'not in conformity with the fact of truth' and i.e. the meaning which in our humble opinion, is relevant to the context of 'furnishing of inaccurate particulars'. The expression 'particulars' refers to 'facts, detail, specifies, or information about someone or something'. Thus, the plain meaning of expression 'inaccurate particulars of income' implies furnishing of details or information about income which are not in conformity with the facts of truth. The details or information about income deal with the factual detail of income and this cannot be extended to areas which are subjective such as the status of taxability of an income, admissibility of a deduction and interpretation of law. The furnishing of inaccurate information thus relates to furnishing of factually correct details and information about income. In the present case, what has been treated as furnishing of inaccurate particulars is the income not being included to the tune of Rs. 30.79 crores received as "arbitration award" in its taxable income which was not admitted by the AO. What is correct claim and what is an incorrect claim is a matter of perspective. Raising a legal claim, even if it is ultimately found to be legally unacceptable, in our considered opinion the same cannot amount to furnishing of inaccurate particulars of

income just because the AO did not accept the interpretation, such an interpretation is not rendered incorrect. Thus, in that view of the matter the case of the assessee cannot be said to be neither a case of 'furnishing of inaccurate particulars of income'.

However, even assuming that the deeming fiction under Explanation 1 to Sec. 271(1)(c) can be triggered by a wrong legal claim, it cannot be the case that merely because there is wrong claim, even if that be so, penalty under section 271(1)(c) can be imposed. This deeming fiction under section 271(1)(c) only shifts the onus of proof on the assessee, as this Explanation itself provides that a penalty can only be imposed (a) when there is no explanation by the assessee, (b) when the explanation given by the assessee is found to be false, and (c) when the assessee provides an Explanation which he fails to substantiate and he fails to prove that the explanation was bona fide and that all the facts necessary for the same and material for computation of income have been duly disclosed by the assessee.

In the case before us in hand none of the conditions is fulfilled in favour of the Revenue for imposing penalty. As it appears on record that at the very onset of filing of return the assessee explained the reasons for not including the amount in question being 3.79 crores received as "arbitration award" in its taxable income by annexing Note 7 relying upon the content of the India-Netherlands Treaty. Such Explanation has not been found to be false by the authorities below neither there is any finding to that effect as on record. Even assuming the assessee fails to substantiate the explanation, he has been able to demonstrate that the explanation is bona fide. All the details and justification of claim have been set out in said Note 7 annexed to the return of income filed by the assessee giving rational and computation which is evident from the

statement showing gross total income as annexed to the Paper Book before us. Therefore, the question of bona fides cannot be decided against the assessee either. The conduct of the assessee is bona fide or not is essentially a question of fact and the related facts are always in the exclusive knowledge of the assessee. The assessee's contention based on Article 5 read with Article 7 of India Netherlands Treaty that he was of the bona fide belief that the "arbitration award" to the tune of Rs. 30.79 crores is not taxable in India since HOLLANDSCHE AANNEMING MAATSCHAPPIJ BV (HAM) does not have any permanent establishment in India in the F.Y. 2000-01 for the New Mangalore Port Trust project. The Revenue may or may not agree with this understanding of law of the assessee but the fact that there can be a bona fide view to that effect cannot be ruled out. The human probabilities favour acceptance of this explanation for bona fides. It cannot always be feasible to prove the claim of bona fides to the hilt, nor, in our considered opinion, the assessee cannot be expected to do so. Whether or not the person has acted bona fide reflects the state of his mind in respect of his conduct, and, therefore, the assessee has his inherent limitations in establishing this aspect of the manner. All that the assessee can do, is to explain the circumstances in which he has acted in a particular manner and set out the related facts. The explanation for bonafides, at the cost of repetition, needs to be considered in a fair and objective manner and in the light of human probabilities. As long as the explanation given by the assessee in the light of the human probabilities, there are no factual errors or inconsistencies, and it is supported by rational supporting evidences regarding factual evidences embedded therein, if any, the bonafides should be taken as proved. We observe that the assessee's explanation regarding bonafides of the claim does not suffer from any apparent inconsistencies or factual errors and it is quite in tune with the human

probabilities. We, therefore, find no reason to reject the reason as unacceptable. In that view the matter the case of the assessee is not even hit by the mischief of any of the three eventualities envisaged by the deeming fiction under Explanation 1 to Sec. 271(1)(c) of the Act. Neither we find any concealment of particulars of income or furnishing of inaccurate particulars of income by the assessee in not including Rs. 30.79 crores received as arbitration award in its taxable income and thus imposition of penalty is not justifiable at all in the present facts and circumstances of the case. Hence, we direct the AO to delete the impugned penalty of Rs. 147,777,822/-.

7. In the result, assessee's appeal is allowed.

8. Before parting we would like to make certain observation relating to the issue cropped up under present scenario of Covid-19 pandemic as to whether when the hearing of the matter was concluded on 08.01.2020 the order can be pronounced today i.e. on 19.05.2020. The issue has already been discussed by the Co-ordinate Bench in the case of DCIT vs. JSW Ltd. (ITA Nos. 6264 & 6103/Mum/2018) pronounced on 14.05.2020 in the light of which it is well within the time limit permitted under Rule 34(5) of the Appellate Tribunal Rules, 1963 in view of the following observations made therein:

"7. However, before we part with the matter, we must deal with one procedural issue as well. While hearing of these appeals was concluded on 8th January 2020, this order thereon is being pronounced today on the day of 14th May, 2020, much after the expiry of 90 days from the date of conclusion of hearing. We are also alive to the fact that rule 34(5) of the Income Tax

Appellate Tribunal Rules 1963, which deals with pronouncement of orders, provides as follows:

> *(5) The pronouncement may be in any of the following manners :—*
>
> *(a) The Bench may pronounce the order immediately upon the conclusion of the hearing.*
>
> *(b) In case where the order is not pronounced immediately on the conclusion of the hearing, the Bench shall give a date for pronouncement.*
>
> *(c) In a case where no date of pronouncement is given by the Bench, every endeavour shall be made by the Bench to pronounce the order within 60 days from the date on which the hearing of the case was concluded but, where it is not practicable so to do on the ground of exceptional and extraordinary circumstances of the case, the Bench shall fix a future day for pronouncement of the order, and* ***such date shall not ordinarily (emphasis supplied by us now) be a day beyond a further period of 30 days and due notice of the day so fixed shall be given on the notice board.***

8. Quite clearly, "ordinarily" the order on an appeal should be pronounced by the bench within no more than 90 days from the date of concluding the hearing. It is, however, important to note that the expression "ordinarily" has been used in the said rule itself. This rule was inserted as a result of directions of Hon'ble jurisdictional High Court in the case of **Shivsagar Veg Restaurant Vs ACIT [(2009) 317 ITR 433 (Bom)]** wherein Their Lordships had, inter alia, directed that **"We, therefore, direct the President of the Appellate Tribunal to frame and lay down the guidelines in the similar lines as are laid down by the Apex Court in the case of Anil Rai (supra) and to issue appropriate administrative directions to all the Benches of the Tribunal in that behalf. We hope and trust that suitable guidelines shall be framed and issued by the President of the Appellate Tribunal within shortest reasonable time and followed strictly by all the Benches of the Tribunal. In the meanwhile***(emphasis, by underlining, supplied by us now)***, all the revisional and appellate authorities under the Income-tax Act are directed**

to decide matters heard by them within a period of three months from the date case is closed for judgment". In the ruled so framed, as a result of these directions, the expression "ordinarily" has been inserted in the requirement to pronounce the order within a period of 90 days. The question then arises whether the passing of this order, beyond ninety days, was necessitated by any "extraordinary" circumstances.

9. Let us in this light revert to the prevailing situation in the country. On 24th March, 2020, Hon'ble Prime Minister of India took the bold step of imposing a nationwide lockdown, for 21 days, to prevent spread of Covid 19 epidemic, and this lockdown was extended from time to time. As a matter of fact, even before this formal nationwide lockdown, the functioning of the Income Tax Appellate Tribunal at Mumbai was severely restricted on account of lockdown by the Maharashtra Government, and on account of strict enforcement of health advisories with a view of checking spread of Covid 19. The epidemic situation in Mumbai being grave, there was not much of a relaxation in subsequent lockdowns also. In any case, there was unprecedented disruption of judicial wok all over the country. As a matter of fact, it has been such an unprecedented situation, causing disruption in the functioning of judicial machinery, that Hon'ble Supreme Court of India, in an unprecedented order in the history of India and vide order dated 6.5.2020 read with order dated 23.3.2020, extended the limitation to exclude not only this lockdown period but also a few more days prior to, and after, the lockdown by observing that **"In case the limitation has expired after 15.03.2020 then the period from 15.03.2020 till the date on which the lockdown is lifted in the jurisdictional area where the dispute lies or where the cause of action arises shall be extended for a period of 15days after the lifting of lockdown"**. Hon'ble Bombay High Court, in an order dated 15th April 2020,

has, besides extending the validity of all interim orders, has also observed that, "**It is also clarified that while calculating time for disposal of matters made time-bound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly**", and also observed that "**arrangement continued by an order dated 26th March 2020 till 30th April 2020 shall continue further till 15th June 2020**". It has been an unprecedented situation not only in India but all over the world. Government of India has, vide notification dated 19th February 2020, taken the stand that, the corona virus "should be considered a case of natural calamity and FMC (*i.e. force majeure clause)* may be invoked, wherever considered appropriate, following the due procedure…". The term '***force majeure***' has been defined in Black's Law Dictionary, as '**an event or effect that can be neither anticipated nor controlled**' When such is the position, and it is officially so notified by the Government of India and the Covid-19 epidemic has been notified as a disaster under the National Disaster Management Act, 2005, and also in the light of the discussions above, the period during which lockdown was in force can be anything but an "ordinary" period.

10. In the light of the above discussions, we are of the considered view that rather than taking a pedantic view of the rule requiring pronouncement of orders within 90 days, disregarding the important fact that the entire country was in lockdown, we should compute the period of 90 days by excluding at least the period during which the lockdown was in force. We must factor ground realities in mind while interpreting the time limit for the pronouncement of the order. Law is not brooding omnipotence in the sky. It is a pragmatic tool of the social order. The tenets of law being enacted on the

basis of pragmatism, and that is how the law is required to interpreted. The interpretation so assigned by us is not only in consonance with the letter and spirit of rule 34(5) but is also a pragmatic approach at a time when a disaster, notified under the Disaster Management Act 2005, is causing unprecedented disruption in the functioning of our justice delivery system. Undoubtedly, in the case of **Otters Club Vs DIT [(2017) 392 ITR 244 (Bom)]**, Hon'ble Bombay High Court did not approve an order being passed by the Tribunal beyond a period of 90 days, but then in the present situation Hon'ble Bombay High Court itself has, vide judgment dated 15th April 2020, held that directed "**while calculating the time for disposal of matters made time-bound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly**". The extraordinary steps taken *suo motu* by Hon'ble jurisdictional High Court and Hon'ble Supreme Court also indicate that this period of lockdown cannot be treated as an ordinary period during which the normal time limits are to remain in force. In our considered view, even without the words "ordinarily", in the light of the above analysis of the legal position, the period during which lockout was in force is to excluded for the purpose of time limits set out in rule 34(5) of the Appellate Tribunal Rules, 1963. Viewed thus, the exception, to 90-day time-limit for pronouncement of orders, inherent in rule 34(5)(c), with respect to the pronouncement of orders within ninety days, clearly comes into play in the present case. Of course, there is no, and there cannot be any, bar on the discretion of the benches to refix the matters for clarifications because of considerable time lag between the point of time when the hearing is concluded and the point of time when the order thereon is being finalized, but then, in our considered view, no such exercise was required to be carried out on the facts of this case."

9. On the basis of the observation made in the aforesaid judgment we exclude the period of lockdown while computing the limitation provided under Rule 34(5) of the Income Tax (Appellate Tribunal) Rule 1963. Order is, thus, pronounced under Rule 34(4) of the said Rule by placing the details on the Notice Board.

10. In the result, assessee's appeal is allowed.

This Order pronounced in Open Court on	**27/05/2020**

Sd/-
(PRAMOD KUMAR)
VICE PRESIDENT

Sd/-
(MADHUMITA ROY)
JUDICIAL MEMBER

Mumbai; Dated 27/05/2020
TANMAY, Sr. PS *TRUE COPY*

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent.
3. आयकरआयुक्त(अपील) / The CIT(A)-
4. आयकरआयुक्त/ CIT
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard file.

आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई **/ ITAT, Mumbai**