

IN THE INCOME TAX APPELLATE TRIBUNAL  
"K" Bench, Mumbai

**Before Shri Prashant Maharishi (AM) & Shri Pavan Kumar Gadale(JM)**  
I.T.A. No.2105/Mum/2017 (Assessment Year 2012-13)

Kongsberg Maritime India Private Limited EL-145, TTC Industrial Area MIDC, Mahape Navi Mumbai-400 710 PAN : AAKCS8953M (Appellant)	Vs.	ACIT-15(2)(1) Room No.357 3 <sup>rd</sup> Floor Aaykar Bhawan M.K.Road-400 710 (Respondent)
---	-----	--

Assessee by	Shri. M P Lohia
Department by	Shri. Satya Pinisetty
Date of Hearing	29.11.2021
Date of Pronouncement	10.11.2021

**ORDER**

**Per Prashant Maharishi (AM) :**

This appeal filed by the Assessee namely Kongsberg Maritime India Private Limited in ITA No.2015/Mum/2017 for AY 2012-13 against the order passed by the ACIT-15(2)(1), Mumbai . The Ld. Assessing Officer passed order u/s. 143(3) r.w.s. 144C(13) of the I.T Act, 1961, dated 27/01/2017. By this order the Ld. AO has determined the total income of the Assessee at Rs. 4,60,84,440/- against the returned income of Rs. 2,43,39,498/-.

2. The brief facts of the case are that the Assessee is a company engaged in the business of Erection, Commissioning and installation services, maintenance and repair services, trading of spares, providing project engineering services, software development and sales commission on equipments and spare parts.

3. The Assessee filed its return of income on 29/11/2012, declaring total of Rs. 2,43,39,298/-. The return of the income was picked up for scrutiny by issuing notice u/s. 143(2) dated 16/08/2013. It was found that the Assessee has entered into certain international transactions with its Associated Enterprises(AE) and therefore, a reference was made to the Ld. DCIT,TP-2(3)(1), Mumbai (Ld. TPO) for determining Arms Length Price (ALP) of these international transactions.

4. The Assessee is providing services to its group companies, as well as to other independent third parties. It also imports spares and component for sale. The Assessee company renders the repairs and maintenance, installation, commissioning, project engineering, business services, software development as well as corporate fees with respect to its AE. The Assessee for the purpose for benchmarking, the international transactions adopted Comparable Uncontrolled Price (CUP) as the most appropriate method for all its transactions of installation and commissioning, repairs and maintenance, project engineering, agency commission, software development services, purchases and sale of spares. With respect to the corporate fees, it adopted the 'other method' as allocation of cost and for reimbursement of expenses 'other method' as the most appropriate method and actual cost. In its transfer pricing study report, it stated that Assessee has rendered services to its AE, as well as to unrelated parties. Since, the commissioning, installation, maintenance, repairs and support services rendered to its AE or functionally the same and for similar as services rendered to third parties, the same could be used for the comparability analysis under CUP method. Thus, the CUP method was stated to be the most appropriate method, the Assessee was also remunerated from its parent company.

5. The Assessee was also remunerated by its associated enterprises and by other parties on the basis of man-hour rates. The man-hour rates charged to the

parent company was 80 dollars per hour whereas in case of third party with respect to various services it was ranging from 70 dollar per hour to 130 dollars per hour whereas in case of third party with respect to various services, it was ranging from 70 dollar per hour to 130 dollars per hour. The total billing on the hourly basis for commissioning, installation and repair services was of Rs.4,63,67,70/- equivalent to USD 9,98,270 and thereby resultant hours was 12,715 and average rate per hour was Rs.79/-. In the transfer pricing study report, the assessee contended that the risk undertaken by it in respect of services to overseas entity is substantially lower than the risk associated with services to the third party; hence, the rates charged to the third parties cannot be used as benchmark for arm's length price. Therefore, assessee made an adhoc adjustment of 20% on the prices charged by the taxpayer to the third parties.

6. On examination of the transfer pricing analysis of the assessee, the learned assessing officer questioned the adjustment of adhoc adjustment of 20%; according to him, it was very high. The assessee submitted that the actual hours billed to associated enterprises was 2.75 times and therefore, 10% discount is required. This contention was rejected by the transfer pricing officer for the reason that the agreement with the associated enterprises was entered into at USD per man-hour without any consideration in billing of hours to independent parties. Assessee also submitted that for commissioning work, the associated enterprises is responsible and they can depute engineers from neighbouring countries whereas in case of repairs and maintenance services assessee is responsible for stand-by services of engineers. Assessee also stated that the payments are received on time whereas in case of independent parties, there are chances of bad debts. The learned Assessing Officer rejected all these contentions stating that these are all general replies. These replies are also not supported by

any substantial material evidences. He further held that the argument of the assessee for absence of credit risk is also not true.

7. The assessee submitted, without prejudice, calculation as per transactional net margin method has been rejected by the transfer pricing officer as it was neither added and further, no justification was provided for shifting support staff expenses to a separate segment. He also found that the difference in net margin between associated enterprises and non associated enterprises is more than 3%. He also rejected the contention of the assessee that transactional net margin method of comparable companies needs to be considered with assessee's net margin for the reason that all the companies selected by the assessee are in the business of project engineering and, therefore, nature of business activities is not at all comparable to installation and commissioning of repair and maintenance segment of the assessee's business. Therefore, he rejected the transactional net margin method for benchmarking the international transaction of installation and commissioning and repairs and maintenance segment of business. At the end, the learned transfer pricing officer held that the assessee itself has used the CUP method as the most appropriate method, taking comparables of prices charged to non associated enterprises and further, assessee has requested for the discount of USD 20 to USD 50 applying the transactional net margin method as the most appropriate method. He held that the transactional net margin method cannot be applied when the data is available as per CUP method. He also rejected the discount of USD 20 to USD 50. Accordingly, he worked out the arm's length price of the international transaction on the basis of rates charged by associated enterprises and rates charged by non associated enterprises and made an adjustment of USD 3,33,463 amounting to Rs.1,69,65,364/-.

8. The another transaction was with the Norway associated entity, which renders various entry group services to its associated enterprise. The assessee also paid share of its corporate fees on a pre-determined cost allocation basis. As per transfer pricing study report, the assessee used other method as allocation of cost and as per transfer pricing study report, it was charged on cost to cost basis. The assessee paid corporate fees of Rs.47,79,782/-. Before the learned transfer pricing officer assessee submitted summary of expenses and copy of agreement dated 01-01-2010. The learned transfer pricing officer on examination of summary of expenses held that the costs run on cost to cost basis as these are pre-determined cost. Accordingly, he held that these are adhoc allocation without any basis. With respect to the arm's length price, he further held that the payments for entry group services was only be treated at arm's length fee, there is an actual rendition of services and such services have benefited the assessee. He, thereafter considered several judicial precedents and OECD guidelines regarding entry group services. Therefore, he asked the assessee to show the receipt of such services as well as the benefit accruing to the assessee. Before transfer pricing officer, the assessee did not submit any evidence and, therefore, he determined the arm's length price of the corporate fees of Rs.47,79,782/- at Rs. Nil. Accordingly, the total adjustment of Rs.2,17,45,146/- was proposed for order dated 28/01/2016 passed u/s 92CA of the I.T. Act, 1961. Consequent to that the draft order was also passed by the learned Assessing Officer on 23/3/2016 determining total income of the assessee at Rs.4,63,10,550/-.

9. The assessee preferred objections before the learned Dispute Resolution Panel-1, Mumbai, who passed direction under section 144C(5) of the Act on 23-12-2016. Before the learned Dispute Resolution Panel-1, with respect to the arm's length price adjustment of commissioning and installation and management

services, the learned Dispute Resolution Panel-1, rejected the contention of the assessee with respect to the discount on volume of the work holding that no volume discount is warranted. With respect to the distinction between the nature of work with associated enterprises and non associated enterprises, it held that the nature of work is similar. It also rejected the credit risk adjustment. However, at the end, it accepted 5% discount on the non associated enterprises as given by the transfer pricing officer. Accordingly, the determination of arm's length price with respect to installation and commissioning of service was upheld.

10. With respect to the corporate fee services, the learned Dispute Resolution Panel-1, upheld the action of the transfer pricing officer as the assessee could not bring on record the details of the services rendered by the associated enterprises. The quotations were produced by the assessee as an additional evidence which were rejected. Accordingly, the action of the learned transfer pricing officer was upheld.

11. Accordingly, a final order was passed by the learned assessing officer on 27/01/2017 under section 143(3) r.w.s.144C(13) of the Income-tax Act, 1961. The total income of the assessee was determined at Rs.4,60,84,440/-. The assessee, being aggrieved by that order, has preferred this appeal.

12. The only dispute is the adjustment of Rs.2,17,45,146/- to the total income of the assessee comprising of adjustment of Rs.1,69,65,364/- on account of arm's length price of provision of installation and commission and repairs and maintenance services and further adjustment of Rs.47,79,782/- with respect to the corporate fees expenditure.

13. At the time of hearing, the assessee made an application for admission of additional evidence on 12/06/2019. The assessee has submitted the segmental profit & loss account for the period 01/04/2011 to 31/03/2012. These accounts

are initialled and stamped by the auditor of the company. The submission of the assessee is that without prejudice to the other arguments, assessee adopted transactional net margin method for benchmarking of the international transaction of installation and commissioning and repairs and maintenance work which was rejected by the learned transfer pricing officer as the segmental accounts were not audited by the statutory auditors and, therefore, the learned assessing officer adopted CUP method for benchmarking the international transaction. It was stated that the segmental profit & loss account was furnished before the transfer pricing officer. However, the same were not audited and now, they are audited. Therefore, same may be admitted. The assessee submitted the auditor's report dated 07/06/2019 certifying the segmental profit and loss account for the year ended on 31/03/2012.

14. The learned authorized representative vehemently submitted that the above additional supporting evidences should be admitted.

15. The learned departmental representative also agreed to the fact that the transactional net margin method was rejected by the learned transfer pricing officer stating one of the reasons that the assessee has not submitted the audited segmental-wise report.

16. We have carefully considered the rival contentions and perused the orders of the lower authorities. We find that the assessee, without prejudice, has submitted calculation as per the transactional net margin method before the learned transfer pricing officer submitting the segmental profit statement. The learned transfer pricing officer rejected the same for two reasons: (i) Such segmental financial reports were not audited by the statutory auditors; and (ii) no justification is provided for shifting separate staff expenses to support segment, altogether. The report submitted by the auditor on 07<sup>th</sup> June, 2019 states that

they have audited segmental profit and loss account and reported the profit & loss account giving certain findings. They have also put seven different rationales for determining the segmental net profit of the assessee. Therefore, we admit the additional evidences and remit the whole issue of determination of the arm's length price with respect to the installation and commissioning as well as repairs and maintenance activities to the file of the learned transfer pricing officer. The assessee is directed to substantiate before the learned transfer pricing officer with respect to the selection of the most appropriate method and in case of transactional net margin method, then to demonstrate before the Assessing Officer about the correctness and its rationales of segmental profit & loss analysis before the Transfer Pricing Officer. The learned transfer pricing officer is directed to examine the whole issue afresh and then decide the arm's length price of the provision of installation and commissioning and repairs and maintenance services. Accordingly ground 6 of the assessee's appeal is allowed.

17. In view of our decision on ground 6, grounds 3 to 5 and grounds 7 to 10 are not required to be adjudicated and hence, become infructuous and dismissed.

18. With respect to the adjustment of corporate fees paid to the associated enterprises, the learned authorized representative submitted that assessee has submitted an application for filing additional evidence before the learned Dispute Resolution Panel on 29/07/2016. He referred to such application placed at page 286 to 368 of the paper book. He submitted that the learned Dispute Resolution Panel despite noting at para 5.3, the additional evidence submitted by the assessee did admit the same; however, same were not considered at all. He referred to paras 5.17 to 5.22 of the directions of the learned Dispute Resolution Panel. He also referred to the application for additional evidences and submitted that at page 288 onwards supporting documents for cost reimbursements as well

as invoices from third parties submitted before the learned Dispute Resolution Panel. He submitted that these are the evidences for actual rendering of services. Had these points considered by the learned Dispute Resolution Panel, according to the learned authorized representative, the question of rendition of the services would not have arisen.

19. The learned departmental representative submitted that the evidences submitted by the assessee are not in English, and therefore, they could not be read and does not lead to any evidence that the services have been rendered to the assessee by the foreign associated enterprise. Unless these documents are translated by the assessee and if they are found as the evidence of rendition of services, then only the same could have been entertained.

20. We have carefully considered the rival contentions and find that the assessee has shown a payment of Rs.47,79,782/- for the use of services to its associated enterprise. Such services are in the area of international tax consultant, cost incurred for use of I.T. Infrastructure, usage of video conference facilities and other facilities. The claim of the assessee is that it did not have these resources and, therefore such services are availed from associated enterprises. The assessee explained that these services are required from the associated enterprises only against different third party consultant for the reason of timely services and easy access. Further, external consultants also did not require any briefing and spending time with group companies. The learned transfer pricing officer held that there is no evidence placed before him with respect to actual rendition of services by the foreign associated enterprises to the assessee. The assessee has submitted additional evidences before the learned Dispute Resolution Panel vide letter dated 29/07/2016, copy of which is also placed in the paper book placed before us at pages 286 to 367. However, the additional

evidences with respect to the corporate fees are not in English language, but in the language of the host country, who provided the services. Those nature of services as well as the proof of rendition of the services cannot be deciphered from those documents. The assessee has also placed before the lower authorities English translation of such documents. In view of all these, we set aside the whole issue of determining arm's length price of corporate fees expenses back to the file of the learned transfer pricing officer with direction to the assessee to show before him that services are actually rendered and received by the assessee. All these documents placed before us are also required to be explained to the learned transfer pricing officer. The learned transfer pricing officer, after examination of these details is directed to decide the issue of arm's length price of this intra group services, if at all they have been received by the assessee. In view of this, we set aside grounds 11 to 15 of the appeal back to the file of the learned transfer pricing officer and they are statistically allowed.

21. Grounds 1 to 2 and 16 are general in nature and hence, these are dismissed.

22. Accordingly, appeal filed by the assessee in IT(TP) A No.2105/Mum/2017 for assessment year 2012-13 is partly allowed for statistical purpose.

Order pronounced in the open court on 10. 12.2021.

Sd/-  
**(PAVAN KUMAR GADALE)**  
JUDICIAL MEMBER

sd/-  
**(PRASHANT MAHARISHI)**  
ACCOUNTANT MEMBER

Mumbai; Dated : 10 /12/2021  
*Pavanan, Sr.PS(on contract)*

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Assistant Registrar)  
ITAT, Mumbai