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

BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER &
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER

ITA No.1382/Mum/2017
(A.Y. 2012-13)

Van Oord Dredging and Marine Contractors BV 201, 2nd Floor, Central Plaza, 166 CST Road, Kalina, Mumbai - 400098	Vs.	Deputy Commissioner of Income-tax (International Taxation)-4(3)(1) 16th Floor, Air India Building, Nariman Point, Mumbai - 400020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AAACH3500M		
Appellant	..	Respondent

Appellant by :	Nishant Thakkar & Hiten Chande
Respondent by :	K.C. Kanojiya

Date of Hearing	19.05.2022
Date of Pronouncement	15.07.2022

आदेश / O R D E R

Per Amarjit Singh (AM):

The present appeal filed by the assessee is directed against the order passed by the Dispute Resolution Panel (DRP)-2, Mumbai, which in turn arises from the order passed by the A.O u/s 144C(13) r.w.s 143(3) of the Act for A.Y.2012-13. The assessee has raised the following grounds before us:

"General Ground

1. *On the facts and in the circumstances of the case and in law, the learned AO, based on directions of DRP erred in making addition of Rs 6.38.24.922 (i.e Transfer Pricing adjustment amounting to Rs.1,28,51,051, Management service fees of Rs.3,85,97,891 and reimbursement of salary amounting to Rs.1,23,75,980) to the total income of the Appellant.*

Transfer pricing adjustment of Rs 1,28,51,051:

Rejection of economic analysis undertaken by the Appellant

On the facts and in the circumstances of the case and in law, the learned TPO/DRP:

2. *erred in not appreciating that in respect of the international transactions under consideration, none of the conditions set out in Section 92C(3) of the Act are satisfied and therefore, it is incorrect to disregard the transfer pricing analysis carried out by the Appellant and re-determine the arm's-length price;*

3. *erred in aggregating the international transactions (i.e charter hire of dredgers and payment for subcontracted activity) of the Appellant for the purpose of Transactional Net Margin Method, disregarding the independent scientific transfer pricing analysis done by the Appellant for each transaction in accordance with Rule 10B of the Rules.*

Charter hire of dredgers

On the facts and in the circumstances of the case and in law, the learned TPO / DRP:

4. *erred in rejecting 'other method which has been considered as the most appropriate method in VODMC's transfer pricing study report and selecting transactional net margin method without providing cogent reasons for the same and simply relying on last year's DRP directions.*

5. *erred in disregarding valuation carried out by independent valuers viz Van Woerkem, Nobels & Ten Veen for the purpose of valuation and determination of lease rentals of dredgers, which is globally accepted industry norm;*

Payment to AE for sub-contract of specified dredging activities

On the facts and in the circumstances of the case and in law, the learned TPO/DRP;

6. *erred in making an adjustment on the international transaction of payment to AE for sub contract of specified dredging activities without providing any cogent reason for disregarding the methodology adopted by the Applicant for benchmarking the transaction.*

7. erred in benchmarking transaction of payment to AE for subcontract of specified dredging activities using the aggregation approach under TNMM disregarding the fact that the said transaction has been separately justified to be at arm's length;

Allocation of Head Office expenses

On the facts and in the circumstances of the case and in law, the learned TPO/DRP :

8. erred in making an adjustment to the transaction of payment of allocation of head office expenses, having failed to appreciate that the head office costs recovered by HO from the Applicant represent a mere allocation of costs without any mark-up;
9. erred in not appreciating the documentary evidence fled by the Appellant during the course of assessment proceedings to justify the setup of services as well as allocation of cost of head office expenses;

10. erred in not appreciating the benefit test substantiated by the Appellant during the course of assessment proceedings to justify the allocation of head office expenses;
11. erred in determining the value of services received from AE as NIL without undertaking any comparability analysis for the same under any of the methods prescribed under Section 92C of the Act;

Without prejudice grounds

Without prejudice to the above, on the facts and in the circumstances of the case and in law the learned TPO/DRP:

12. erred in not considering the economic analysis carried out by the Applicant to arrive at a set of comparable companies;

13. erred in considering the write-back of provision of foreseeable losses of INR 10,31,11,161 as a non-operating item and thereby computing the operating margins of the Appellant by adding back the reversal of provision and consider the correct operating margin of 46.64% of the Appellant by including write back of provision of foreseeable losses as an operating item;
14. erred in considering the payment towards allocation of head office (HO) expenses while computing the operating margins of the Appellant even though the same was disallowed by the Appellant in its computation of income to the extent of section 44C of the Income-tax Act, 1961 (the Act).
15. erred in considering the payment towards allocation of head office (HO) expenses while computing the operating margins of the Appellant even though the same has been in entirety disallowed by AO/TPO;
16. erred in computing the ALP without giving the benefit of 5 percent under the proviso to Section 92C(2) of the Act;
17. erred in selecting government company viz. Dredging Corporation of India as a comparable to the operations of the Appellant.

18. failed to consider the following comparables for the purpose of TNMM

a) Afcons Infrastructure Limited
b) International seaport dredging
c) KND Engineering Technologies Ltd.
d) Krishna Bhagya Jala Nigam Ltd
e) L&T S apura Offshore Pvt Ltd
f) Seamec Ltd
g) Stewarts & L loyds of India Limite

Taxability of Management service fees of Rs 3,85,97,891

On the facts and in the circumstances of the case and in law, the learned AO/DRP;

19. erred in treating the management service fees received by the Appellant as "Royalty" under Article 12(4) of the Double Taxation Avoidance Agreement (DTAA) between India and the Netherlands as well as fee for technical services under Article 12(5) of India - Netherlands DTAA, thereby making an addition of Rs 3,85,97,891 to the income of the Appellant.
20. erred in not appreciating that for the services rendered by the Appellant to qualify as royalty, the same should provide know-how to the recipient.
21. erred in not appreciating that the services provided by the Appellant are in the nature of business support and administration services and are not in the nature of sharing information concerning industrial, commercial and scientific experience.
22. erred in not appreciating that that services rendered by the Appellant are in the nature of business support and administration services and not in the nature of technical or consultancy services;
23. erred in not appreciating that the services rendered by the Appellant do not "make available" any technical knowledge, experience, skill, know-how or processes and hence, is not taxable even as fees for technical services in view of Article 12(5) of the India-Netherlands DTAA.
24. erred in not appreciating that the management service fees received by the Appellant are without any markup and constitute pure allocation of cost which is neither taxable as Royalty nor taxable as Fees for Technical Services under the Act as well as under the India - Netherlands DTAA.

Taxability of the reimbursements of salary received of Rs.1,23,75,980

On the facts and in the circumstances of the case and in law, the learned AO/DRP:

25. erred in treating the reimbursement of salary amounting to Rs 1.23.75.000 received by the Appellant as fees for technical services under Article 12(5)(a) of the India Netherlands DTAA (ie technical services rendered in connection with the enjoyment of the right property or information)
26. erred in not appreciating the fact that the crew members provided on dredgers by the Appellant is neither sharing of any experience and information concerning industrial, commercial and scientific knowledge

and experience gathered over the years by the Appellant nor in furtherance of sharing such experience and information.

27. *erred in not appreciating the fact that the reimbursement of salary received by the Appellant does not have any nexus with the management services rendered by it to VOIPL.*

28. *erred in not appreciating the fact the reimbursement of salary received by the Appellant was without any markup and constitute pure reimbursements which are not taxable as fees for technical services under the Act.*

Levy of surcharge and education cess

On the facts and in the circumstances of the case and in law, the learned AO:

29. *erred in levying surcharge and education cess on the income chargeable to tax under India- Netherlands DTAA;*

Levy of interest under section 234B of the Act

On the facts and in the circumstances of the case and in law, the learned AO:

30. *erred in levying interest under section 234B of the Act to the Appellant, being a non resident company, without appreciating the fact that the Hon'ble Supreme Court in the Appellant's own case has dismissed the Special Leave Petition filed by the Department for levy of interest under section 2348 of the Act.*

Incorrect computation of interest under section 234D of the Act

On the facts and in the circumstances of the case and in law, the learned AO:

31. *erred in computing the interest on excess refund granted from the date of intimation instead of the date of the cheque as contemplated under the provisions of section 234D of the Act.*

The above grounds of objections are distinct and separate and without prejudice to each other

The appellant craves leave to add, alter, vary, omit, substitute or amend the above grounds of appeal, at any time before or at, the time of appeal, so as to enable the Hon'ble Tribunal to decide the appeal in accordance with the law."

2. The fact in brief is that the return of income declaring income of Rs. Nil was filed on 30.11.2012. The case was subject to scrutiny assessment and notice u/s 143(2) of the Act was issued on 08.08.2013. The assessee is a company incorporated in Netherland and it has executed a number of Dredging Contract in India, M/s VAN Oord Dredging & Marine Contractors Pvt. Ltd. V. India Project office was set up as the Indian

project office of VAN Oord Dredging & Marine Contractors BV (VODMCBV) (a company incorporated in the Netherland) with the approval of the Reserve Bank of India to execute dredging Contracts with various ports and government authorities in India. The Transfer Pricing Officer passed order u/s 92CA(3) and recommended various adjustment.

3. During the year the assessee has taken on lease dredgers from its associated enterprises. The assessee benchmarked the charter hire/lease rent paid to associate enterprises for hiring the dredgers on the basis of a valuation certificate obtained from VAN Woerkam Nobels & Ten-Veen and claimed charter hire/lease rentals paid to the associate enterprise to be at arm's length. The TPO rejected the independent valuer certificate used by the assessee for benchmarking the transaction of charter hire of dredgers using cup as most appropriate method and proceeded to benchmark charter hire dredgers and payment to associate enterprises for sub-contract of specified dredging activities using TNMM and aggregating these transaction. The TPO compared the operating margins of the assessee i.e- 9.98% with the margin of dredging corporation of India ltd i.e 0.95% and accordingly made an adjustment to the total income of the assessee.

4. The DRP vide direction dated 29.11.2016 stated that TPO found that price paid for international transaction has not been determined in accordance with sub-section (1) and sub-section (2) of Section 92C of the Act and held that the action of the TPO using TNMM and comparing margin of the assessee (-) 9.98% with margin of dredging Corporation of India Ltd. i.e 0.95% and making of an adjustment was in accordance with law. The TPO selected Dredging Corporation of India a Government

Company as a comparable to the assessee whose margin was 0.95% and made adjustment after considering assessee's margin at (-)9.98%.

5. During the course of appellate proceedings before us at the outset the ld. Counsel submitted that identical issue on similar facts has been adjudicated by the coordinate bench of the ITAT, Mumbai, vide ITA No. 2029/Mum/2016 for A.Y. 2011-12 dated 31.03.2019.

On the other hand the ld. Departmental Representative placed reliance on the decision of lower authorities. With the assistance of the ld. Representatives we have perused the decision of ITAT, Mumbai, as referred supra, the relevant part of the decision is reproduced as under:

> *"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 bye. 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."

5. Similarly, the taxability of management service fees is also covered in favour of the assessee as per the aforesaid decision of the ITAT, Mumbai in the case of the assessee itself. The relevant part of the decision is reproduced as under:

"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."

It is also submitted that issue of taxability of salary received was also covered in favour of the assessee by the decision of the ITAT, Mumbai, in the case of the assessee itself as referred supra in this order. The relevant part of the operating para is reproduced as under:

"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."

6. Following the decision of the coordinate bench as discussed above the ground of appeal no. 4 & 5, 19-24 & 25 to 28 are allowed.

7. Ground Nos. 1 – 3 filed by the assessee are general ground of appeal, therefore, the same not required any adjudication.

8. Ground Nos. 8-18, 29-31 are not pressed, therefore, the same stand dismissed.

9. Ground Nos. 6 & 7 were not adjudicated by the DRP, therefore, the same are restore to the file of the DRP for deciding on merit. Therefore, ground nos. 6 & 7 are allowed for statistical purposes.

10. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on 15.07.2022

Sd/-	Sd/-
(Amit Shukla) JUDICIAL MEMBER	(AMARJIT SINGH) ACCOUNTANT MEMBER

Mumbai, Dated 15.07.2022
PS: Rohit

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / The CIT(A)
4. आयकर आयुक्त(अपील) / Concerned CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,
सत्यापित प्रति //True Copy//

(Asst. Registrar)
ITAT, Mumbai