

आयकर अपीलीय अधिकरण "सी" न्यायपीठ पुणेमें।
IN THE INCOME TAX APPELLATE TRIBUNAL "C"
BENCH, PUNE

BEFORE SHRI S.S.GODARA, JUDICIAL MEMBER AND
SHRI G.D.PADMAHSHALI, ACCOUNTANT MEMBER

आयकर अपील सं. / ITA No.150 /PUN/2022

निर्धारण वर्ष / Assessment Year : 2013-14

Nalco Water India Private Limited, (Formerly known as Naclo Water India Limited) S.No.238/239, 3 rd Floor, Quadra 1, Panchshil, Magarpatta Road, Sade Satra Nali, Pune – 411028. PAN: AAACO 4994 N	Vs .	The Assistant Commissioner of Income Tax, Circle-2, Pune.
Appellant / Assessee		Respondent /Revenue

आयकर अपील सं. / ITA No. 151/PUN/2022

निर्धारण वर्ष / Assessment Year : 2013-14

The Assistant Commissioner of Income Tax, Circle-2, Pune.	Vs .	Nalco Water India Private Limited, S.No.238/239, 3 rd Floor, Quadra 1, Hadapsar, Magarpatta Road, Sade Satra Nali, Pune – 411028. PAN: AAACO 4994 N
Appellant / Revenue		Respondent / Assessee

Assessee by	Shri Ketan Ved – AR
Revenue by	Shri Prashant Gadekar & Shri Piyush Kumar Singh Yadav – DR
Date of hearing	26/08/2022
Date of pronouncement	07/10/2022

आदेश/ ORDER

Per S.S.Godara, JM:

These assessee's and Revenue's cross appeals ITA No.150 &
151/PUN/2022 for A.Y. 2013-14, arise against the CIT(A)-13,

Pune's order dated passed in case no.PN/CIT(A)-13/ACIT Circle-2, Pune/11130/2016-17/223 in proceedings under section 143(3) r.w.s 144C(3) of the Income Tax Act, 1961(in short "the Act").

Heard both the parties. Case files perused.

2. Delay of two days in filing of the assessee's appeal ITA No.150/PUN/2022 stands condoned since falling in Covid-19 pandemic outbreak period.

3. We next note that the assessee instant appeal raises five substantive grounds. Its first and foremost substantive grievance is that the learned lower authorities have erred in law and on facts in holding subvention money receipts of Rs.27,07,00,000/- as revenue in nature eligible to tax. The Revenue's 4th substantive ground also raises the very issue in its cross appeal ITA No.151/PUN/2022 that the CIT(A) has erred in law and on facts in treating the impugned sum as operating income. We note in this factual backdrop that the instant issue of subvention money receipts involving the assessee and its group entities is no more res-integra as this tribunals' co-ordinate bench in AY 2012-13 involving tax payers appeal ITA No.742/PUN/2017 decided on 06.09.2019 has rejected the Revenue's identical contentions as follows:

"15. We have heard the rival contentions and perused the record. The issue arising by way of ground of appeal No.2 is against treatment of

subvention / subsidy received by assessee from its parent company Nalco, USA. The second issue which is raised on without prejudice basis vide ground of appeal No.11 is whether the said subvention amount is operating in nature and the same has to be includable as receipt in the hands of assessee while computing PLI for the year under consideration. The assessee was a subsidiary of Nalco, USA and since it was incurring losses, the parent company allowed promotional allowance to prevent the assessee from becoming sick company. This is evident from the Memo placed at page 139 of Paper Book and also from consequential Memo for approval of subvention and relevant e-mails and relevant documents thereto. The assessee received sum of Rs.65,19,47,000/- towards subvention. The assessee had offered the said amount as taxable in its hands initially but before the DRP, it was pleaded that the same was not taxable in its hands. The issue vis-a-vis its taxability i.e. receipt of subvention from parent company now stands settled by recent decision of Hon'ble Supreme Court in Siemens Public Communication Network (P.) Ltd. Vs. CIT (supra). The Hon'ble Supreme Court had held that voluntary payments made by parent company to its loss making Indian company can also be understood to be payments made in order to protect the capital investment of assessee company. It was further held that if that is so, then the payment in question could not be held to be revenue receipts, hence they were capital receipts in the hands of assessee. Similar proposition has been laid down by the Hon'ble High Court of Kolkata and Hon'ble Delhi High Court in different decisions.

16. Applying the said proposition to the facts of present case, where the assessee had received the alleged subvention amount or the subsidy as referred to by the Assessing Officer / TPO / DRP, the amount received by assessee from its parent company Nalco, USA was a capital receipt in the hands of assessee and hence, was not taxable in its hands.”

4. There is hardly any dispute that the assessee's subvention receipt arrangement has remained the same all along including the

relevant previous year. Learned CIT-DR at this stage invited our attention to the CIT(A)'s detailed discussion that the instant issue nowhere emanated from the assessment order. He could hardly rebut the fact that the assessee had raised its corresponding substantive grounds before the CIT(A) for the first time only. Honourable jurisdictional high court's landmark decision in CIT vs. Pruthvi Brokers and Shareholders Pvt. Ltd., [2012] 349 ITR 336 has settled the law that such issue could very well be agitated before the CIT(A)'s for the first time. We thus accept the assessee's arguments in principle and restore its instant first and foremost substantive ground to the Assessing Officer for his necessary computation / verification. The Revenue's corresponding 4th substantive ground(supra) fails accordingly.

5. The assessee's substantive ground no.2 as well as the Revenue's 2nd to 3rd grounds in the instant cross appeals raise identical issue involving transfer pricing adjustment pertaining to manufacturing segment of chemicals. We note with the able assistance of both the parties that the instant issue as well as that this tribunal's co-ordinate bench's order hereinabove for AY 2012-13 has restored it back to the AO/TPO for his fresh computation and verification as follows:

"47. The learned Authorized Representative for the assessee pointed out that the issue raised vide ground of appeal No.9 is in relation to

transfer pricing adjustment in the manufacturing segment, wherein the assessee had applied TNMM method and compared its margins with margins of finally selected companies as comparables. He here pointed out that while deciding this issue two aspects have to be kept in mind; first aspect is whether subvention payment is to be reduced from income and or to be included in the operating margins. Here, he again stressed that the said receipt was not taxable following the ratio laid down by the Hon'ble Apex Court in Siemens Public Communication Network (P.) Ltd. Vs. CIT (supra) but the question was where the assessee had kept its margins at low, to be market effective and in such scenario, where Nalco US had given subvention amount, then the additional amount received from holding company was part of operating margins. He pointed out that the assessee initially had taken the said receipt as taxable and operating in nature. The DRP however, decided the chargeability to tax but reduced it from TP adjustment applying the ratio laid down in the case of UPS Jetair Express Pvt. Ltd. (supra). Hence, he did not decide the taxability of said amount being infructuous. He then, referred to the second aspect of the case and pointed out that the margins of assessee declared by it were 1.54% and the mean margins of comparables were 3.44%, as per transfer pricing report. However, as per the order of TPO, wherein he had finally selected different set of comparables, the mean margins worked out to 14.01%. The assessee's margins were also re-computed at (-) 1.37%. However, before the DRP, the assessee filed list of additional comparable companies and after the directions of DRP, finally selected comparables totaled 18 and the mean margins of comparables works out to 8.92%. The margins of assessee were re-computed at (-) 3.52% excluding intra-group service charges. In this regard, he pointed out that (a) margins of assessee would depend on whether subvention amount is operating or not; (b) whether intra-group services are to be allowed out of operating margins, if at arm's length; (c) whether royalty to be reduced in case no adjustment and all this would have bearing on operating margins.

48. *Coming to second step, the learned Authorized Representative for the assessee filed tabulated details before us and pointed out that in respect of 9 comparables, there was no dispute and the same may be*

selected for final benchmarking. However, in respect of balance concerns, the learned Authorized Representative for the assessee pointed out that because of extraordinary events and certain concerns holding intangibles or engaged in activities other than the one carried on by the assessee or dealing in different products, then their inclusion is in question and the same are to be excluded. He further filed a list of other concerns which as per him, need to be included. In respect of some of the concerns, he pointed out that they were accepted as comparables last year and since there was no change in their functions, then the same again be accepted as comparable to the assessee.

49. *The learned Departmental Representative for the Revenue on the other hand, placed strong reliance on the order of Assessing Officer / TPO / DRP.*

50. *We have heard the rival contentions and perused the record. Before going into merits and demerits of exclusion / inclusion of comparables, the first aspect needs to be decided i.e. the determination of PLI in the case of assessee. We have in the paras above already held that the subvention amount is operating in nature and have also held that intra-group services availed by assessee for which payment has been made to associated enterprises are at arm's length price and also decided the issue of payment of royalty to be at arm's length price and no adjustment to be made either on account of payment for intra-group services or payment for royalty. In such scenario, first of all, PLI of assessee would have to be re-determined. Once the same is re-determined, then the margins of assessee would be re-worked and in such scenario, the comparison has to be made or re-work margins of assessee with the mean margins of comparables finally selected. Though the learned Authorized Representative for the assessee has taken us through the list of comparables, which have been finally selected and also comparables which have not been selected, which as per the assessee needs to be selected, we are of the view that at this juncture, the said exercise would be a futile exercise. It is only after the PLI / margins of assessee are re-worked in line with our decision in respect of various issues raised which affect the operating margins of assessee, the need*

would come to look at the margins of comparables. Our decision on the inclusion / exclusion of comparables at this stage would be an academic exercise. In such facts and circumstances of the case, we first direct the Assessing Officer to re-work the operating margins of assessee and thereafter to look into the objections raised by assessee vis-a-vis the comparables finally selected and also the comparables which have not been finally selected. The assessee shall furnish complete details in this regard and the Assessing Officer shall decide the issue of final select! comparables after taking into consideration the settled position on the i: after appreciating the facts relating to each of the comparables a accordance with law. Hence, the ground of appeal No.9 raised by assess allowed for statistical purposes.”

We thus adopt the very course of action herein as well and accept the assessee's and Revenue's corresponding substantive grounds in their respective appeals for statistical purposes. Ordered accordingly.

6. The assessee's 3rd substantive grounds raises the issue of use of multiple year data in which it has already lost the corresponding arguments in earlier assessment years as stated by the learned counsel. Rejected accordingly.

7. The assessee's 4th substantive grounds reads as follows:

“4 : 0 Excluding payment of headquarter common expenses and the allocation of regional management assistance as well as royalty while determining operating margin for the manufacturing segment:

4 : 1 The Appellant submits that having tested the arm's length price of the international transactions pertaining to payment of headquarter common expenses and the allocation of regional management assistance

separately and not having disturbed the arm's length price of royalty as well, the same ought not to be included while determining the operating margin of the assessee for the manufacturing segment. On the facts and in the circumstances of the case, the Transfer Pricing Officer ['TPO'] / AO / CIT(A), has erred in not doing so."

8. Coming to the instant issue of royalty involving allocation of regional management assistance as well as royalty, we find that this tribunals' findings in AY 2012-13 read as follows:

"54. We have heard the rival contentions and perused the record. The issue of transfer pricing adjustment vis-a-vis in proportion with the value of international transactions now stands settled by the Hon'ble Supreme Court in CIT Vs. Hindustan Unilever Ltd. (supra) and the Hon'ble Bombay High Court in CIT Vs. Firestone International P. Ltd. (supra). The benchmarking on account of transfer pricing adjustment, if any, has to be done for associated enterprises transactions only and not the entire turnover. Accordingly, we direct the Assessing Officer to carry out the said exercise after verifying the computation of proportionate adjustment filed by assessee before us and also after calculating the margins of assessee in line with our directions in the paras above. This takes care of ground of appeal No.10 and corrected additional ground of appeal No.2. The Assessing Officer / TPO shall give effect to our directions with regard to subvention amount, also our decision on the payment of intra-group services and royalty to be at arm's length price and no adjustment to be made on that account and also proportionate adjustment to associated enterprises transactions. The learned Authorized Representative for the assessee also pointed out that while making proportionate adjustment, royalty and intra-group fees having been held to be at arm's length, could not form part of operating cost, also requires proportionate adjustment. Similar adjustment is to be made in respect of R&D segment, though at present no R&D adjustment has been made. This takes care of additional ground of appeal No.1 raised by assessee."

9. We adopt the very course of action in the impugned assessment order as well and direct the AO/TPO to frame his consequential computation keeping in mind above extracted directions of AY 2012-13. Ordered accordingly.

10. This assessee's appeal ITA No.150/PUN/2022 is partly allowed in above terms

11. We are now left with the Revenue's cross appeal filed by the Assessing Officer involving the assessee's regional management assistances services and headquarter common expenses of Rs.11,54,95,930/- thereof holding value thereto as Rs."nil" as reversed in the CIT(A)'s order.

12. The assessee has invited our attention to all the developments qua the instant issue allowed from AY 2003-04 to AY 2014-15 wherein the tribunals' various learned co-ordinate bench(es) in the said first year as well as from AY 2009-10 to 2012-13 and 2014-15 have rejected the Revenue's stand involving "benefits test". Learned co-ordinate bench's order in assessee's appeal ITA No.1892/PUN/2018 AY 2014-15 decided on 02.03.2022 rejects the Revenue's contentions as follows:

"6. At the time of hearing, the learned counsel for the assessee submitted that this issue stands covered in favour of the assessee by the order of Pune Bench of the Tribunal in assessee's own case for A.Y. 2012-13 in I.T.A. No. 742/PUN/2017, dated 06-09-2019 wherein it was

observed that the issue of depreciation on assets installed at customer's premises, was decided in favour of the assessee by the Kolkata Bench of Tribunal in assessee's own case for A.Y. 2008-09 in ITA No.2111/Kol/2013 vide para 9 of order dated 05-04-2017. The relevant observations of Pune Bench of the Tribunal are as follows:

"19. Now, coming to ground of appeal No. 3, the issue which is raised is the depreciation on assets installed at the customer's premises.

20. The issue stands covered in favour of assessee by the decision of Kolkata Bench of Tribunal in assessee's own case for A.Y 2008-09 in ITA No. 2111/Kol/2013, vide para 9 of order dated 5-4-2017. Following the same parity of reasons, we allow this claim of assessee. However, for the sake of brevity, the said para 9 is not being reproduced. The ground of appeal No. 3 raised by assessee is thus, allowed."

7. That also in the concerned order in assessee's own case, the Kolkata Bench of the Tribunal in ITA No. 2111/Kol/2013 for A.Y. 2008-09 dated 5-4- 2017, had held as follows:

"9. We have given a very careful consideration to the rival submissions. The details of the addition to fixed assets which were installed in the customer's premises are given at pages 20 to 26 of the assessee's paper book. The assessee has also brought to our notice by filing sample copies of some of the agreements whereby the assessee had agreed that monitoring equipments and pumps would be installed at the client's premises. Thus it becomes clear that the installation of equipments in the client's premises of assessee's equipments was necessary and part and parcel of nature of business carried on by the assessee. It cannot therefore be said that the equipments in question had not been used for the purpose of the business of the assessee. The fact that the equipments were used in the business premises of the clients cannot be the basis to disallow the claim of the assessee for deduction on account of depreciation. The decision of the Hon'ble Supreme Court in the case of ICDS Ltd. vs CIT clearly supports the claim of the assessee in this regard. It is clear from the perusal of the order of AO that the AO's objection was that since the equipments in question had not been installed at the assessee's factory premises, it

cannot be said that the equipments were used for the purpose of assessee's business. This reason given by the AO for disallowing the claim of the assessee for depreciation cannot be sustained in view of the factual and legal position discussed as above. We therefore are of the view that CIT (A) was fully justified in deleting the addition made by the AO in this regard. Order of CIT (A) does not call for any interference."

13. We thus adopt the learned co-ordinate bench's foregoing reasoning mutatis-mutandis to reject the Revenue's instant first substantive ground. Its second to third substantive grounds already stand accepted for statistical purpose and fourth ground has been rejected in preceding paragraphs(supra). This cross appeal ITA No.150/PUN/2022 is partly allowed for statistical purposes in very terms therefore.

No other ground has been raised or pressed before us.

14. To sum up, the assessee's appeal ITA No.150/PUN/2022 is partly allowed and Revenue's cross appeal ITA No.151/PUN/2022 is partly allowed for statistical purpose in above terms. A copy of this common order be placed in the respective case files.

Order pronounced in the open Court on 7th October, 2022.

Sd/-
(G.D.PADMAHSHALI)
ACCOUNTANT MEMBER

Sd/-
(S.S.GODARA)
JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 7th Oct, 2022/ SGR*

आदेशकीप्रतिलिपिअग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A), concerned.
4. The Pr. CIT, concerned.
5. विभागीयप्रतिनिधि, आयकर अपीलीय अधिकरण, "सी" बेंच,
पुणे / DR, ITAT, "C" Bench, Pune.
6. गार्डफ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// TRUE COPY //

Senior Private Secretary
आयकर अपीलीय अधिकरण, पुणे/ITAT, Pune.

ITA No.150 & 151/PUN/2022 for A.Y. 2013-14 (A)
Nalco Water India Private Limited (02 Appeals)

S.No	Details	Date	Initials	Designation
1	Draft dictated on	08.09.2022		Sr. PS/PS
2	Final Draft placed before author	20.10.2022		Sr. PS/PS
3	Draft proposed & placed before the Second Member			JM/AM
4	Draft discussed/approved by Second Member			AM/AM
5	Approved Draft comes to the Sr. PS/PS			Sr. PS/PS
6	Kept for pronouncement on			Sr. PS/PS
7	Date of uploading of Order			Sr. PS/PS
8	File sent to Bench Clerk			Sr. PS/PS
9	Date on which the file goes to the Head Clerk			
10	Date on which file goes to the A.R.			
11	Date of Dispatch of order			