IN THE INCOME TAX APPELLATE TRIBUNAL

'B' BENCH, CHENNAI

BEFORE Dr. O.K.NARAYANAN, VICE-PRESIDENT
AND SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER

ITA No.1733(Mds)/2011
Assessment Year : 2003-04

M/s.Van Oord ACZ Marine Contractors BV Watermanweg 64, 3067GG Rotterdam PO Box 8574, 3009 AN Rotterdam, The Netherlands. PAN AABVC7075J.	Vs.	The Assistant Director of Income-tax, Intl. Taxation-I, Chennai.
(Appellant)		(Respondent)

Appellant by : S/Shri Ajay Vohra & Rupesh Jain and Mrs. Urmila Ajay Maheswari, Advocates
Respondent by : Dr. S.Moharana, IRS, CIT.

Date of Hearing : 3rd May, 2012
Date of Pronouncement : 11th May, 2012

O R D E R

PER Dr.O.K.NARAYANAN, VICE-PRESIDENT:

This appeal is filed by the assessee. The relevant assessment year is 2003-04. The appeal is directed against the assessment order passed under section 143(3), read with

sections 147 and 144C(13) of the Income-tax Act, 1961. The assessment order has been passed in the light of the directions issued by the Dispute Resolution Panel (DRP) at Chennai, through their proceedings dated 25-8-2011.

2. The first issue raised in this appeal filed by the assessee is that the assessment order is beyond jurisdiction, bad in law and void ab initio for the reason that assuming of jurisdiction by the Assessing Officer to issue notice under section 148 is illegal and bad in law. The relevant grounds raised in the grounds of appeal on this issue read as below:-

> *"1. That on the facts and circumstances of the case, the order passed by the assessing officer under section 144C(13)/143(3) read with section 147 of the Income-tax Act, 1961 ('the Act') is beyond jurisdiction, bad in law and void-ab-initio.*
>
> *1.1. That on the facts and circumstances of the case and in law the proceedings under section 147 of the Act having been initiated without there being 'reason to believe' that income of the appellant had escaped*

assessment, the impugned order is illegal and bad in law.

1.2. That the facts and circumstances of the case and in law, since no addition has been made on the grounds/reasons on the basis of which the reassessment proceedings were initiated, the impugned order is illegal and bad in law."

3. The second issue raised in the present appeal is that the Assessing Officer has erred in computing the income of the assessee at ₹ 11,53,52,883/- as against 'Nil' income returned by the assessee. The relevant grounds are extracted below:-

"2. That the assessing officer erred on facts and in law in computing the income of the appellant for the relevant assessment year at ₹ 11,53,52,883/- as against 'Nil' income returned by the appellant.

2.1. That the assessing officer erred on facts and in law in holding the appellant as liable to tax in India in respect of sum of ₹ 11,53,52,883/-, being expenses incurred by

the appellant which were reimbursed by Van Oord ACZ India Pvt. Ltd., considering the same to be income in the nature of "fees for technical services" under section 9(1)(vii) of the Act and the Article 12(5)(b) of the provisions of the India-Netherlands DTAA.

2.2. That the assessing officer erred on facts and in law in holding the aforesaid amount reimbursed by Van Oord ACZ India Pvt. Ltd., to be income in the nature of "fees for technical services", without appreciating that no technical knowledge, experience, skill, know-how or processes was made available by the appellant to Van Oord ACZ India Pvt. Ltd. in lieu of such reimbursement.

2.3. That the assessing officer erred on facts and in law in erroneously allowing that the aforesaid amounts reimbursed were towards allocation of costs for services rendered by the appellant to Van Oord ACZ India Pvt. Ltd., under the "Cost Allocation Agreement", not appreciating that the same were specific expenses directly incurred in connection with the project executed

by the latter entity in India and did not relate to services referred to under "Cost Allocation Agreement".

2.4. Without prejudice, the assessing officer erred on facts and in law in not appreciating that reimbursement of expenses can, in no circumstances, be regarded as income of the recipient."

4. The third issue raised by the assessee is on the question of permanent establishment attributed to the assessee. The relevant ground is reproduced below:-

"3. That the assessing officer erred on facts and in law in alleging that Van Oord ACZ India Pvt. Ltd., constituted dependent agent permanent establishment of the appellant in India under Article 5 of the Double Taxation Avoidance Agreement between India and the Netherlands without providing any basis for holding as aforesaid."

5. The residual ground is on the question of levy of interest. The following are the grounds:-

> *"4. That the assessing officer erred on facts and in law in levying interest under sections 234A, 234B and 234D of the Act.*
>
> *4.1. That the Dispute resolution Panel while confirming the levy of interest under the aforesaid sections, erred on facts and in law in observing that no specific objection has been raised by the appellant in this regard and in treating the Objection as not pressed."*

6. We heard Shri Ajay Vohra, the learned counsel appearing for the assessee, alongwith Shri Rupesh Jain and Mrs. Urmila Ajay Maheswari. Dr. S.Moharana, the learned Commissioner of Income-tax, appeared for the Revenue and argued the case.

7. The assessee is a foreign company. It is registered in The Netherlands. It is engaged in the business of dredging, reclamation and other marine and port related activities. The

assessee was awarded a dredging contract by M/s.Gujarat Adani Ltd. The dredging was to be carried out at Port Mundra. After the award of the contract, the assessee-company assigned the contract to its fully owned Indian subsidiary, namely, Van Oord ACZ India Pvt. Ltd. The parties executed an assignment agreement on 18-7-2001. In the light of the above stated assignment agreement, the assessee company undertook to provide coordinating and facilitating services to its Indian subsidiary in carrying out the dredging work. The assessee acted as an inter-face between its Indian subsidiary and other providers of facilities. The assessee brought the dredgers to the services of its subsidiary and such other logistic and coordinating support to its Indian subsidiary.

8. The assessee-company had received a total sum of ₹ 11,53,52,883/- from its Indian subsidiary as follows:-

Mobilisation and Demobilisation	:	₹ 8,42,62,240/-
Freight & Hire Charges	:	₹ 2,48,18,171/-
Meals and accommodation charges	:	₹ 17,62,726/-
Travelling	:	₹ 45,09,746/-
	Total :	₹ 11,53,52,883/-

9. According to the assessee-company, the above stated amounts were paid by its Indian subsidiary as reimbursement of expenditure incurred by the assessee company in providing the various facilities to its subsidiary. But, the Assessing Officer treated the above payments as fee for technical services rendered in India and proposed to levy tax in the light of the fact that the assessee had filed its return with 'Nil' income. The proposal was taken up before DRP at Chennai and the DRP confirmed the proposal made by the Assessing Officer and thereafter the assessment was completed accordingly.

10. In the above facts and circumstances of the case, we may consider the different grounds raised by the assessee one after the other.

11. First we will consider the question of legality of jurisdiction exercised by the Assessing Officer to issue notice under section 148 and usurp jurisdiction under section 147 of the Income-tax Act, 1961. The return in the present case was processed under section 143(1) of the Act on 11-5-2004. No assessment was subsequently made under section 143(3) of the Act. The case of the learned counsel appearing for the

assessee is that there was no new material in the hands of the Assessing Officer to hold on a reason to believe that income had escaped assessment. It is his argument that where no such material afresh is available in the hands of the Assessing Officer, there cannot be any ground to locate a reason that income has escaped assessment to proceed thereafter. The learned counsel has relied on the following decisions in support of the above argument:-

1. CIT vs. Batra Bhatta Company, 320 ITR 24(St.)
2. Shipra Shrivastava vs. ACIT, 319 ITR 221 (Del.)
3. CIT vs. SFIL Stock Broking Ltd., 325 ITR 285 (Del.)
4. CIT vs. Jet Airways India Ltd., 331 ITR 236 (Bom.)
5. Ranbaxy Laboratories Ltd. vs. CIT, 336 ITR 136(Del.)

He also relied on a number of decisions rendered by the different Benches of the Income-tax Appellate Tribunal.

12. The learned Commissioner of Income-tax appearing for the Revenue, on the other hand, relied on the decision of the Hon'ble Supreme Court in the case of ACIT vs. Rajesh Jhaveri Stock Brokers Pvt. Ltd., 291 ITR 500.

13. As already mentioned above, the return was initially processed under section 143(1) and no assessment was completed under section 143(3) of the Act. As pointed out by the DRP, what is required prior to the issue of notice under section 148 is 'reason to believe', but not the established fact of escapement of income. Whether material would conclusively prove escapement of income was not material at the stage of issue of notice. The reopening of the case further was not limited to the only issue which was prima facie noticed on record. The assessing authority seems to have rightfully relied on the judgment of the Hon'ble Gujarat High Court in the case of Praful Chunilal Patel vs. ACIT, 236 ITR 832.

14. The learned counsel has vehemently argued on the proposition that even in case of intimation under section 143(1), an assessment under section 147 could be made only if new materials have come to the knowledge of the Assessing Officer. We are afraid that this cannot be a universal proposition applicable to all cases. It depends upon facts of each case. In the present case, the contract was initially awarded to the assessee company and the assessee company had later on

assigned the contract to its Indian subsidiary and as per the assignment agreement, still the assessee had to play a role by coordinating technical services for the Indian subsidiary and in addition to the above, there is also an agreement for allocation of cost between the assessee and the subsidiary, etc. When the facts of the case are so complicated and cumbersome and when the return was only processed under section 143(1), the materials available on record alongwith the return filed by the assessee themselves constituted sufficient materials in the hands of the Assessing Officer to hold a reason that income had escaped assessment. The legal validity of section 143(1) intimation has to be considered in the light of the surrounding facts of a case. It is the argument of the assessee that the reassessment was done only on the basis of suspicion. It is not correct. Where the return was processed under section 143(1), there is no room even for an earlier conviction.

15. In the facts and circumstances of the case we are of the considered view that the decision of the Hon'ble Supreme Court in the case of Rajesh Jhaveri Stock Brokers P. Ltd., 291 ITR 500, is exactly applicable in the present case and, therefore,

the issue of notice and passing of assessment order under section 147 is to be upheld. Therefore, we reject the grounds raised by the assessee relating to jurisdiction assumed by the Assessing Officer in passing the impugned income escaping assessment order.

16. The second ground is regarding the fee for technical services. The Assessing Officer has treated the entire amount of ₹ 11,53,52,883/- as fee for technical services received by the assessee in India. It is the case of the assessee that the payments were made against mobilization and demobilization, freight and hire charges, meals and accommodation and travelling expenditure and the payments were only reimbursement on actual basis raised by third party invoices and they did not give rise to any income chargeable to tax in the hands of the assessee. It is the case of the assessee that no technical services have been rendered by it to its Indian subsidiary.

17. It is also the argument of the learned counsel appearing for the assessee that in view of Article 12 of the Double Taxation Avoidance Agreement (DTAA) between India

and Netherlands, the above stated reimbursement of expenditure would not be in the nature of fee for technical services. While explaining the relevance of Article 12 of India-Netherlands DTAA, the learned counsel has also placed much reliance on India-US DTAA and India-Portugal DTAA. He has argued that at any stretch of imagination, these reimbursements would not be in the nature of any technical service fees, as the assessee in fact had never rendered any technical services to its Indian subsidiary. What the assessee has arranged for its Indian subsidiary was only the sailing in and the sailing out of dredging vessels and the other connected coordinating activities, for which payments were made by the assessee, which were later reimbursed by its Indian subsidiary.

18. The learned Commissioner of Income-tax appearing for the Revenue, on the other hand, argued that the case is to be viewed with due regard to the cost allocation agreement entered into between the assessee and its Indian subsidiary. The cost allocation agreement lays down the role of the assessee described as “service group” in connection with the project. The learned Commissioner of Income-tax held that in view of the cost

allocation agreement, the assessee had in fact provided considerable knowhow and facilities within its command in the field of production, technology, marketing, finance, business administration, data processing and the like. The agreement between the assessee and its Indian subsidiary showed that the subsidiary did not have at its disposal adequate material and human resource expertise to execute the project on its own. The Commissioner of Income-tax, therefore, argued that the Assessing Officer has rightly treated the payments as fee for technical services and brought the same to tax in India.

19. The learned counsel appearing for the assessee has relied on the following decisions to support his arguments on the issue of fee for technical services:-

1. Diamond Services International P. Ltd. v. Union of India and Others, 304 ITR 201 (Bom.)
2. Raymond Ltd. vs. DCIT, 86 ITD 791 (Mum.)
3. Anapharm Inc., 305 ITR 394 (AAR).
4. Intertek Testing services India P. Ltd., 307 ITR 418 (AAR)
5. Ernst & Young P. Ltd., 323 ITR 184 (AAR)

6. Bharati AXA General Insurance Co. Ltd., 326 ITR 477 (ARR)

7. Joint Accreditation System of Australia and New Zealand, 326 ITR 487 (AAR)

8. Federation of Indian Chambers of Commerce and Industry vs. DIT, 320 ITR 124.

20. The learned counsel appearing for the assessee more specifically relied on the following decisions with reference to his arguments on the issue of reimbursement of expenses:-

1. Van Oord ACZ India P. Ltd. vs. CIT, 323 ITR 130 (Del)

2. Mahindra and Mahindra Ltd. vs DCIT, 313 ITR 263 (AT)(Mumbai)(SB)

3. CIT vs. Dunlop Rubber Co. Ltd., 142 ITR 493(Cal.)

4. CIT vs. Industrial Engg. Products P. Ltd., 202 ITR 1014(Del)

5. CIT vs. Fortis Healthcare Ltd., 181 Taxman 257(Del.).

21. We considered this crucial issue in the light of the detailed arguments advanced from both sides. If the sum of ₹ 11,53,52,883/- was paid by the Indian subsidiary to the assessee as reimbursement of expenditure, normally there would not be any profit element in such reimbursement and there

cannot be any income assessable in the hands of the assessee. Reimbursement of expenditure is not income as such. But the question is whether the payment made by the Indian subsidiary to the assessee company was in fact reimbursement of expenditure or not. The case of the assessing authority is that the payments were not reimbursement of expenses. They were payments made for technical services rendered by the assessee company in India in favour of its Indian subsidiary. It is the case of the Assessing Officer that even though the contract was assigned to its Indian subsidiary, the subsidiary has no technical expertise or any other wherewithal to carry out the contract. Therefore, the assessee company itself was providing all the necessary technical services and guidance to its subsidiary to execute the dredging contract. It is because of the above reason that the Assessing Officer has held that the assessee company had rendered technical services in India to its Indian subsidiary and, therefore, the payments made by the subsidiary company have to be treated as fees paid for technical services.

22. We find great force in the arguments of the Revenue and the conclusions arrived at by the Assessing Officer

as well as the DRP. The finding of the Assessing Officer has to be considered not only in the light of the contract assignment agreement, but also in the light of the cost allocation agreement entered into between the assessee company and its Indian subsidiary. The cost allocation agreement entered into between the assessee company and its Indian subsidiary has unequivocally declared that the Indian company does not have any sort of technical expertise or resources and ability to carry out the dredging contract assigned to it. It is in the light of the above declaration that the assessee company has undertaken to provide all sorts of services to its Indian subsidiary, wherever necessary, to execute the dredging contract. Such services include not only arranging the dredgers from abroad, but also application of technical mind to select and choose appropriate parties to execute the work entrusted to its Indian subsidiary. The argument of the assessee company that the payments were made by the Indian subsidiary only as reimbursement of expenses cannot be accepted at its face value. The facilities arranged and coordinated or obtained by the assessee to support the operations of its Indian subsidiary are not layman's

activities. Even to choose the best dredger, it is necessary to have adequate technical knowhow about the nature and place of work to be carried out by its Indian subsidiary. It is not possible to simply say that the assessee had only brought dredgers from outside India to the Indian port for dredging and kept back once the work is over. These are over-simplified statements.

23. Apart from arguing that the payments were in the nature of reimbursement of expenses, the assessee has not explained anything about the pricing of the services, for which the so-called reimbursements were made by the Indian subsidiary to the assessee company. It is the case of the assessee that expenses were reimbursed by the Indian subsidiary at par with the invoices issued by third parties. But there is nothing on record to show that the price negotiated between the assessee and the third parties and the amounts reflected in the invoices issued by the third parties are prices comparable to similar services provided by international parties. The assessee has not established that it had offered services to the subsidiary company on cost to cost basis at best reasonable and competent prices available at that point of time. Therefore, it

is not proper to rule out an element of profit in the invoices raised by third parties themselves, even though what was paid by the subsidiary company to the assessee is the same amount as reflected in the invoices. Therefore, the argument that what has been paid by the subsidiary to the assessee company was only the amount reflected in the invoices issued by the third parties alone, does not go to support the argument of the assessee company that the payments were only reimbursement of expenditure and there was no element of profit in those amounts. As the assessee has not explained the pricing factor with reference to the services reflected in the invoices issued by the third parties, it is not possible to say that the assessee had not rendered any service to its Indian subsidiary in India.

24. Further, it is to be seen that the original contract was awarded to the assessee company itself. The contract was thereafter assigned to its subsidiary on the basis of an assignment agreement. It is clear from the order of the Assessing Officer that the subsidiary company does not have the technical, organizational and managerial competence to carry out the contract work by itself. Therefore, in fact, the assessee

company itself had, to a great extent, execute the contract work for and on behalf of its subsidiary.

25. Therefore, in the facts and circumstances of the case, it is an inevitable conclusion on the part of the Assessing Officer that the assessee had rendered technical services to its subsidiary in India and the payments were in the nature of fee for technical services. Therefore, we hold that the Assessing Officer is justified in bringing the sum of ₹ 11,53,52,883/- to tax in the hands of the assessee company.

26. The issue of fee for technical services is also decided against the assessee.

27. The third issue raised by the assessee is regarding the finding of the Assessing Officer that the Indian subsidiary would constitute a dependent agent of the assessee company and thereby the assessee company has permanent establishment in India. This ground is almost academic in view of our finding that what the assessee received from its subsidiary was fee for technical services. On merits also the Assessing Officer is justified in holding that the assessee had a permanent establishment in India. This is because of the reason that we

have already stated that, de facto speaking, the assessee was carrying on contract work for and on behalf of the Indian subsidiary. Therefore, if we pierce the veil of assignment contract and go to the root of the case, we find that there is interlacing of activities and interlocking of funds between the assessee and its Indian subsidiary in executing the dredging contract. In such circumstances, the relationship of agency is there and the existence of permanent establishment is also there. This ground has necessarily to be decided against the assessee.

28. The last issue is regarding the levy of interest under sections 234A, 234B and 234D of the Act. Interest under section 234A is consequential. In respect of interest levied under section 234B, the Assessing Officer has not considered the duty of the payer to deduct tax at source. In the case of the assessee, TDS has been made. Therefore, the assessing authority is directed to redo the levy of interest under section 234B in the light of the relevant judicial pronouncements. As far as the interest under section 234D is concerned, it is only prospective in operation and, therefore, will not apply to the

impugned assessment year 2003-04. Therefore, the Assessing Officer is directed to recompute the interest liability afresh. The assessee shall be heard before passing order on this point.

29. In result, the substantial grounds of the assessee raised in this appeal on question of law and facts are dismissed and the grounds raised in respect of levy of interest under sections 234B and 234D are treated as allowed.

30. The appeal filed by the assessee is therefore treated as partly allowed for statistical purposes.

Order pronounced on Friday, the 11th of May, 2012 at Chennai.

Sd/-	Sd/-
(Challa Nagendra Prasad)	(Dr. O.K.Narayanan)
Judicial Member	Vice-President

Chennai,
Dated the 11th May, 2012.
V.A.P.

Copy to: (1) Appellant
(2) Respondent
(3) CIT
(4) CIT(A)
(5) D.R.
(6) G.F.