

**IN THE INCOME TAX APPELLATE TRIBUNAL (VIRTUAL COURT
DB-II), MUMBAI**

BEFORE SHRI M.BALAGANESH, AM

&

SHRI RAM LAL NEGI, JM

**ITA No6203/Mum/2010
(Assessment Year :2003-04)**

M/s. Wilhelmsen Ship Management India Pvt. Ltd., 31/32, 3 rd Floor, "Apple Heritage", Sir, M.V. Road Andheri (East), Mumbai – 400 093	Vs.	The Deputy CIT 8(3) 2 nd Floor, Aayakar Bhavan Mumbai – 400 020
PAN/GIR No.AAACI1614H		
(Appellant)	..	(Respondent)

Revenue by	Shri Nishant Thakkar
Assessee by	Shri Uodol Raj Singh
Date of Hearing	14/07/2020
Date of Pronouncement	17/07/2020

आदेश / O R D E R

PER M. BALAGANESH (A.M):

This appeal in ITA No.6203/Mum/2010 for A.Y.2003-04 arises out of the order by the Id. Commissioner of Income Tax (Appeals)-15, Mumbai in appeal No. CIT(A)-15/IT-101/Addl.CIT-Rg.8(1)/06-07 dated 03/09/2010 (Id. CIT(A) in short) against the order of assessment passed u/s.147 r.w.s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 26/12/2006 by the Id. Addl. Commissioner of Income Tax, Range 8(1), Mumbai (hereinafter referred to as Id. AO).

2. The ground Nos. 1,2,5 & 6 raised by the assessee were stated to be not pressed by the Id. AR at the time of hearing before us. The same is returned as a statement made from the Bar and accordingly, the ground Nos. 1,2,5 & 6 are dismissed as not pressed.

3. The ground No.3 raised by the assessee is with regard to disallowance of repairs and maintenance.

3.1. We have heard rival submissions and perused the materials available on record. We find the assessee has let out an area of 100 sq.ft for a period of five months. During the previous year relevant to A.Y.2003-04 out of their total office area of 10,000 sq.ft and derived rental income of Rs.57,500/-. This rental income was offered to tax by the assessee under the head 'income from business'. The Id. AO sought to treat the said rental income under the head 'income from house property' and granted flat 30% deduction towards repairs thereof. We find that the assessee though, had raised a ground disputing the shifting of head of income from 'income from business' to 'income from house property' with regard to rental income, the Id. AR before us stated that he is not pressing the said ground as stated supra.

3.2. We find that since, the rental income was taxed by the Id. AO under the head 'income from house property' and 30% deduction towards repairs were given under the head 'income from house property', the regular repairs and maintenance of Rs.12,23,559/- debited by the assessee and claimed as deduction under the head 'income from business' was disallowed by the Id. AO in the assessment. Further, the Id. AO also disallowed a sum of Rs.1,40,53,158/- on account of depreciation claimed on the business premises. We find that the Id. CIT(A) had

granted 100% relief with regard to claim of depreciation by giving a categorical finding that the 100 sq.ft of premises was utilized by the assessee for its own business for a period of seven months. Against that finding, we find that the revenue has not preferred any appeal before us. The Id. CIT(A) however, sustained the disallowance made on account of repairs and maintenance by holding that assessee had already given flat deduction @30% of rental income towards repairs under head 'income from house property' and no further deduction is eligible to the assessee. We find that the rental income offered by the assessee in the sum of Rs.57,500/- was only in respect of 100 sq.ft of premises let out for five months. Hence, the corresponding flat deduction @30% towards repairs under the head 'income from house property' was also given only for a period of five months. No deduction for the remaining 7 months has been given, in terms of the provisions of Section 38(2) of the Act. We find that assessee is entitled for proportionate deduction for the remaining period of seven months of these repairs and maintenance in respect of 100 Sq.ft of property. Accordingly, the ground No.3 raised by the assessee is partly allowed.

4. The issue to be decided in this appeal is with regard to action of the Id. CIT(A) in confirming the addition made on account of manning services fee of Rs.6,82,62,238/- being the arm's length price adjustment made by the Id. TPO.

4.1. We have heard the rival submissions and perused the materials available on record. Both the parties before us fairly stated that this issue is covered in assessee's own case for the A.Yrs.2002-03, 2004-05 and 2005-06 by the order of this Tribunal. We find that the lower authorities had followed the observations made by their respective purchasers for the A.Y.2002-03 while making this addition. We find that this Tribunal for the

A.Y.2004-05 in ITA No.6204/Mum/2010 dated 30/06/2020 had disposed off the same issue in favour of the assessee by observing as under:-

“4. In ground no.1, the assessee has challenged the addition of Rs. 5,79,09,935, on account of adjustment made to the arm's length price of manning charges.

5. Brief facts are, the assessee, a resident company, carrying on business of sourcing, screening and selecting Indian seafarers and also providing assistance in completing their pre-joining formalities so as to enable them to join the vessels managed by the assessee's overseas Associated Enterprises (AE) viz. Barber Ship Management Ltd., Hong Kong. During the previous year relevant to the assessment year under dispute, the assessee had provided manning services to its AE in Hong Kong and as per the scope of work, the assessee recruits seafarers of the vessels owned or managed by the AE. In the year under consideration, the assessee credited an amount of Rs. 3,75,14,882, in its Profit & Loss account towards fees received from the AE on account of manning services. The Transfer Pricing Officer while examining the arm's length nature of the aforesaid transaction was not satisfied with the price charged to the AE. Accordingly, he issued notice under section 133(6) of the Act to another party i.e., Confidence Shipping Ltd. seeking information regarding rate charged by them. On the basis of information received from the said party, the Transfer Pricing Officer found that the concerned party was charging fees at 120 US \$ per person per month from July 2002 onwards. Whereas, prior to July 2002, it was 150 US \$ per person per month from April 2002 to June 2002. Further, the Assessing Officer found that in assessee's own case in assessment year 2002-03, relying upon similar information received from Confidence Shipping Ltd., the Transfer Pricing Officer has made adjustment to the fees received towards manning services. Following the view taken by the Transfer Pricing Officer in assessee's own case for the assessment year 2002-03, the Transfer Pricing Officer proceeded to determine the arm's length price of fee for manning services@ US \$ 120 per person per month for the impugned assessment year which worked out to Rs. 9,54,19,817. Considering the fact, the assessee has charged fee of Rs. 3,75,14,882, to the AE towards manning services, he made an adjustment of Rs. 5,79,04,935, which was added to the income of the assessee by the Assessing Officer while framing the assessment. Though, the assessee challenged the aforesaid addition before learned Commissioner (Appeals), however, was unsuccessful.

6. The learned Counsel for the assessee, at the very outset, submitted that while deciding identical dispute in assessee's own case for the assessment year 2002-03, the Tribunal in ITA no.6160/Mum./2010, dated 7th February 2018, has accepted the price charged by the assessee to be at arm's length

and deleted the addition. Further, he submitted, the same view was expressed by the Tribunal while deciding identical issue in assessee's own case in assessment year 2005-06, in ITA no.2404/ Mum./2012, dated 27th April 2018. He submitted, the facts involved in the impugned assessment year relating to the disputed issue is identical to the facts involved in the assessment year 2002-03 and 2005-06. Therefore, he submitted, following the earlier decisions of the Tribunal, the addition made on account of adjustment to the price charged for manning services has to be deleted.

7. The learned Departmental Representative, though, agreed that the issue in dispute is covered by the decisions of the Tribunal in assessee's own case for the assessment years 2002-03 and 2005-06, however, he strongly relied upon the observations of the Transfer Pricing Officer and learned Commissioner (Appeals).

8. We have considered rival submissions and perused the material on record. A bare reading of the order passed by the Transfer Pricing Officer would make it clear that completely relying upon the decision taken by him in assessee's own case for the assessment year 2002-03, he has proceeded to determine the arm's length price of the manning service by obtaining information from a third party Confidence Shipping Co. Pvt. Ltd.. It is a fact on record that on the basis of information obtained from the very same party, the Transfer Pricing Officer has determined the arm's length price of manning services in assessment year 2002-03 as well. Further, from the reply filed before the Transfer Pricing Officer which were brought to our notice by the learned Counsel for the assessee during the course of hearing, we find that the method of computation of arm's length price by the assessee as well as by the Transfer Pricing Officer, is more or less identical to such computation in assessment year 2002-03 and 2005-06. Thus, it leaves no room for doubt that facts involved in the impugned assessment year relating to the disputed issue are identical to the facts involved in the assessment years 2002-03 and 2005-06. It is relevant to observe, while deciding the issue in assessment year 2002-03 in the order referred to above, the Tribunal after considering all factual as well as legal aspects of the issue, had accepted the price charged by the assessee towards manning services to the AE to be at arm's length. Following the aforesaid decision, the Tribunal expressed similar view while deciding identical issue in assessee's own case in assessment year 2005-06 (supra). The relevant observations of the Tribunal in this regard is reproduced hereunder for better appreciation and clarity.

“7. We have considered rival submissions and perused materials on record. From the impugned order of the Transfer Pricing Officer it is evident that on the basis of information obtained under section 133(6) of the Act, in course of transfer pricing proceedings of the assessee for assessment year 2002-03, the Transfer Pricing Officer has applied the rate charged by M/s. Confidence Shipping Co. towards provision of manning services. In fact, the TPO while

adopting the rate charged by M/s. Confidence Shipping Co. has categorically stated that there is no material difference in fact involved between assessment year 2002–03 and the impugned assessment year. On a perusal of the order dated 7th February 2018, passed in assessee's own case by the Tribunal, for assessment year 2002–03 in ITA no.6160/Mum./2010, it is noticed that while deciding identical issue relating to transfer pricing adjustment made on fees charged for manning services the Tribunal has deleted the addition holding as under:–

“5. Before the CIT(A) as well as before us, assessee has raised multiple submissions in order to assail the tradition. Such submissions, inter-alia, include the in-appropriateness of considering the data provided by Confidence Shipping Company on account of it being irrelevant, such data being unsubstantiated etc., so however, another pertinent point which has been consistently been pursued by the Appellant is that even if the data provided by Confidence Shipping company of US\$ 150 is taken as a valid CUP data, even then the actual charges recovered by the assessee from its associate enterprise works out to be at an arm's length price. This has been argued by the assessee, based on the fact, that it has been reimbursed by its associate enterprise of expenses amounting to Rs.6,38,78,901, which has not been factored in the benchmarking analysis by the TPO. In other words, as per the assessee, if the reimbursement of expenses of Rs.6,38,78,901 is considered while determining the arm's length price of the international transaction, then the rate charged by the assessee for the manning services comes to US\$ 152, which is in excess of the arm's length rate of US\$ 150 adopted by the TPO. In this context, our attention has been drawn to para 10(xiv) of the Statement of Facts, filed before the CIT(A) which we find appropriate to reproduce as under:-

“xiv) The TPO/ITO have also ignored the fact that had the amounts of expenses billed on their principals and the amounts received from their principals by your appellants been considered by the said TPO/ITO properly, they would have observed the bare truth that the amount received/realised by your appellants from their principals was US\$ 152.94 as against the US\$ 150/- considered by the TPO/ITO, as set out hereunder:-

TABLE

	<i>Particulars</i>	<i>Rupees</i>	<i>Rupees</i>
	<i>On Billed basis : Manning fee included in P&L A/c</i>	21,697,822	
	<i>Add : Exp. Incurred under current a/c</i>	63,878,901	85,576,723
	<i>Add : Project exp. Incurred/billed</i>		3,988,466
	<i>Total</i>		89,565,189
	<i>No. of man months as per TPO</i>		12,213
	<i>Therefore, charge per man month</i>		7,334
	<i>Exchange rate as per TPO</i>		48.80
	<i>Therefore, charge per man month in US\$ as per BSMI</i>	150.28	
	<i>Charge per man month as per TPO in US\$</i>	150.00	
	<i>Excess received by BSMI in US\$</i>	0.28	

	<i>As per TPO/ITO: Manning fee as per TPO @ US\$ 150/- per man month for 12,213 man months</i>		89,325,960
	<i>On Received basis : Manning fee included in P&L A/c</i>	21,697,822	
	<i>Add : Expenses Received</i>	69,451,805	
	<i>Total</i>	91,149,627	91,149,627
	<i>No. of man months as per TPO</i>		12,213
	<i>Therefore, charge per man month</i>		7,469
	<i>Exchange rate as per TPO</i>		48.80
	<i>Therefore, charge per man month in US\$ as per BSMI</i>	152.94	
	<i>Charge per man month as per TPO in US\$</i>	150.00	
	<i>Excess received by BSMI in US\$</i>	2.94	

Thus, the TPO/ITO overlooked the fact that the sum charged/realised by your appellants are more by US\$ 0.28 per man month under the billed method and more by US\$ 2.94 per man-month under the receipt method (which was in fact the method considered by the ITO in making the addition of INR 1,583,688/-)."

On this basis, it is sought to be canvassed even if one has to go by the manner in which benchmarking has been carried out by the TPO, even then the transactions of the assessee are at an arm's length price taking into consideration the amount of expenses reimbursed by the associated enterprise over and above the fixed rate of payment.

6. On the aforesaid alternate plea of the appellant, the stand of the Revenue is manifested in paras 7 to 7.2 of the order of the CIT(A). The Learned CIT-DR appearing for the Revenue, referred to the order of the TPO in this regard and pointed out that it has been brought out that such expenses have not been debited in the Profit & Loss Account and therefore such amount could not be considered for the determination of the arm's length price. In fact, the CIT(A) in para 7.1 of his order also takes a somewhat similar line that assessee should have included such expenses in its Profit & Loss Account so as to enable computation of appropriate mark-up on it. Pertinently, the said observation of the CIT(A) is factually untenable, having regard to the fact that the compensation earned by the assessee for providing Manning services is not based on a cost plus mark-up model but is instead based on a negotiated rate of Rs.2000 per crew per month, as is evident by page 8 of the Paper Book wherein is placed the relevant annexure to the Technical Management and Consultancy Agreement with the associate enterprise.

Be that that it may, we have considered the said alternate plea of the assessee and find that the same is potent. The relevant details which we have extracted above, clearly suggest that assessee incurred expenses for providing manning services to the extent of Rs.6,38,78,901 which were reimbursed by its associate enterprise. At the time of the hearing, our attention has also been drawn to the payments terms and conditions annexed to the Technical Management and Consultancy Agreement, which inter-alia, included clause 5 which reads as under:-

"5. First Party shall provide free of cost following facilities to the personnel deputed by Second Party and for that purpose reimburse expenses incurred by the Second Party on behalf of First Party.

*Salaries and perquisites of personnel.
Appropriate lodging and boarding facilities.
Local transportation for due performance of duties and personal use.
To and fro air passage.
Medical facilities.”*

It has been clarified before us, that the reimbursement of the expenses of Rs.6,38,78,901 is governed by above clause 5 of the arrangement with the associated enterprise. Notably, the TPO in page 10 of his order has reproduced the details of expenses reimbursed by the associate enterprise which are on various heads, viz., fish vessel expenses, travelling expenses, port expenses, licence and certification expenses, uniform expenses, training expenses, repair team expenses etc. In fact, in Para (ii) at page 12 of his order, the TPO further records that the amount of Rs.6,38,78,901 “..... are the expenses incurred by the company for rendering the services and should have been shown in the profit & loss account”. The aforesaid finding of the Assessing Officer clearly supports the assertion of the assessee to the effect that the said expenses have been incurred by it in the course of providing the manning service to the associate enterprise, and the same have been recovered from the associate enterprise as reimbursements. We are only trying to highlight the fact that the said expenses are in relation to the ‘tested transaction’ and therefore there is no justification in not considering them while computing the arm’s length price.

The plea of the Revenue before us, based on the observation of the CIT(A) that the expenses have not been shown in the Profit & Loss Account, and therefore, it cannot be taken into consideration, is to say the least, avoiding the obvious. Ostensibly, if such expenses were to be debited to the Profit & Loss Account, it would require simultaneous equivalent credit to the Profit & Loss Account on account of reimbursements. Ostensibly, if one is to determine the rate charged by the assessee from its associate enterprise per crew per month, it would entail taking into consideration the recoveries by way of reimbursements also; and, as the Tabulation reproduced by us earlier shows that once such recoveries are also factored into the rate charged from the associated enterprise, the rate comes to US\$ 150.28 per crew per month and upon comparison with the rate of US\$ 150 adopted by the TPO, the amount recovered by the assessee from the associate enterprise compares favourably, and, thus it would obviate the need for any further adjustment to the stated values in order to arrive at the arm’s length price. Therefore, on this short point, the adjustment sustained by the CIT(A) is found to untenable. We hold so.”

8. There being no material difference in facts relating to the disputed issue in the impugned assessment year, the aforesaid reasoning of the Co-ordinate Bench will apply in full force to the issue raised in the present appeal as well. Therefore, respectfully following the decision of the Co-ordinate Bench in assessee's own case as referred to above, we delete the addition made on account of transfer pricing adjustment of manning services as made by the Assessing Officer and sustained by the learned Commissioner (Appeals). The grounds raised are allowed to the extent indicated above.

2. Facts relating to the disputed issue being identical in the impugned assessment year, in our considered opinion, the decisions taken by the Tribunal in assessee's own case for the assessment years 2002-03 and 2005-06 on identical issue, as referred to above, would squarely apply to the issue raised in the present appeal also. That being the case, respectfully following the aforesaid decisions of the Tribunal in assessee's own case, we delete the addition made of Rs.5,79,09,935, on account of transfer pricing adjustment to manning services. This ground is allowed."

4.2. The facts relating to the disputed issue being identical in A.Y.2003-04, in our considered opinion, the decision taken by this Tribunal in assessee's own case for the A.Yrs. 2002-03, 2004-05 and 2005-06 would squarely apply to this assessment year also and accordingly, we dealt the addition made of Rs.7,14,96,558/- towards manning services fee on account of transfer pricing adjustment. We find that the Id. CIT(A) had already granted relief to the extent of Rs.2,14,48,677/- in this regard and had confirmed only the remaining sum of Rs.5,00,47,881/-. At the time of hearing, both the parties informed that no appeal was preferred by the revenue against such relief granted by the Id. CIT(A). Accordingly, the ground No.4 raised by the assessee is allowed.

5. Ground No.7 raised by the assessee is with regard to initiation of penalty proceedings u/s.271(1)(c) of the Act which would be premature for adjudication at this stage.

6. Ground No.8 raised by the assessee is general in nature and does not require any specific adjudication.

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

Order pronounced on 17/07/2020 by way of proper mentioning in the notice board.

Sd/-
(RAM LAL NEGI)
JUDICIAL MEMBER

Sd/-
(M.BALAGANESH)
ACCOUNTANT MEMBER

Mumbai; Dated 17/07/2020

KARUNA, *sr.ps*

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai