

**IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD “D” BENCH, AHMEDABAD**

**[Coram: Pramod Kumar (Vice President)
and Mahavir Prasad (Judicial Member)]**

ITA No.: 1368/Ahd/2013
Assessment year: 2008-09

Synefra Engineering & Construction LtdAppellant
(now known as Aspen Infrastructures Limited)
Suzlon, 5 Shrimali Society, Navrangpura,
Ahmedabad 380 009 [PAN: AACCS6871Q]

Vs

Assistant Commissioner of Income Tax
Circle 8, AhmedabadRespondent

ITA No.: 1611Ahd/2013
Assessment year: 2008-09

Deputy Commissioner of Income Tax
Circle 8, AhmedabadRespondent

Vs

Synefra Engineering & Construction LtdAppellant
(now known as Aspen Infrastructures Limited)
Suzlon, 5 Shrimali Society, Navrangpura,
Ahmedabad 380 009 [PAN: AACCS6871Q]

Appearances by

Tushar Hemani for the assessee

Lalit P Jain for the revenue

Date of concluding the hearing : January 30, 2019

Date of pronouncement : April 30, 2019

O R D E R

Per Pramod Kumar, VP:

1. These cross appeals are directed against the order dated 22nd March 2013 passed by the Commissioner of Income Tax (Appeals), in the matter of assessment under section 143(3) of the Income Tax Act, 1961, for the assessment year 2008-09.

2. Although the assessee has raised as many as five grounds of appeal, short grievance of the assessee, in substance, is that the learned CIT(A) erred in sustaining the arm's length

price adjustment of Rs 1,56,75,033 in respect of memorandum entries for reimbursement of charter hire, bunker charges to an AE. In a connected grievance, raised by ground no. 3 in revenue's appeal, the Assessing Officer is aggrieved that the CIT(A) has erred in estimating the arm's length margin @ 7.5% on presumptive basis, drawing support from section 172 of the Income Tax Act, 1961, and thus ignoring the gross margin of 22.04% earned by the assessee himself. We will take up these grievances together.

3. The issue in appeal lies in a narrow compass of material facts. The assessee before us is a part of the Suzlon Group of companies and is engaged in the business of developing, maintaining and operating SEZs at various locations across the country, and also in the business of providing project management consultancy services to various units being set up in these SEZs. In the course of its assessment proceedings, the Assessing Officer referred the international transaction reported by the assessee, as "reimbursement of charter hire, bunker charges", for ascertainment of arm's length price by the TPO. In the proceedings before the TPO, the assessee submitted that the reimbursement was on actual basis, involved no mark up, and thus no profit element is introduced. The TPO examined the matter further and noticed that the assessee, as also its AE i.e. S E Shipping Lines Pte Ltd, are engaged in the business of shipping. The AE is a one hundred percent subsidiary of Suzlon Infrastructure Limited and its principal activity has been of the vessel operator. It was also noted that the AE is showing the profitability margin of 16.42% as PBT, whereas segmental accounts shown by the assessee reflect PBT at margin of 4.43%. This variation of profitability of the assessee and the AE, according to the assessee, was explained on account of strategic location at Singapore, which is a shipping hub, and high margins obtained by the AE from independent transactions. The TPO, however, noted that most of the transactions of the AE are with Suzlon Energy Ltd, a related party for the assessee as also the AE, that both the assessee and the AE are engaged in the same business and yet there is such a difference in the profitability. It was noted that "the AE in low tax jurisdiction is earning roughly four times the margin than the AE in India" and that "the assessee has not been able to demonstrate, transaction wise, that the high profits have arisen in independent transactions entered into by the Singapore AE and hence the transfer price of the related parties should not be altered". The TPO was of the view that the assessee has used performed crucial functions as the time charter contract with Beluga Shipping Lines has been utilized, that since the assessee has negotiated the contract, "the functions related to execution of work are attributed to the assessee", and that as the office of shipping line is in India and all the negotiations and orders have been handled locally. It was also noted that no functions have been performed by the AE as only the sale has been booked in its name. The TPO was further of the view that so far as assets employed are concerned, this transaction involves use of day charter shipping contracts of the assessee, and that no assets of the AE have been used at all. As for the risks assumed, the TPO was of the view that as the billing by the vessel owner is done in the name of the assessee, all the risks are assumed by the assessee. The AE, in the opinion of the TPO, does not carry any risk and only the payment has been made by the AE. The TPO observed that "in spite of the dominant role in the above transaction has been of the assessee company, some portion of its functions, dominantly the payment of cargo and documentation in this regard, has been carried out by the AE" and added that "for this activity, at the most 20% of the profit can be stated to be attributed to the AE while remaining profit will be attributed to the FAR of the assessee company". He thus attributed 80% of the actual profit earned by the AE, in respect of these transactions, to the assessee, and proceeded to compute the ALP of the transactions with the AE on the basis of the value at which the AE entered into transactions with Suzlon Energy Ltd. Aggrieved, assessee carried the matter in appeal before the CIT(A). Learned CIT(A) noted that there were no financial transactions with the AEs and

the bills received by the assessee were forwarded to the AE which made payments of the same, and that the entries passed by the assessee, in that sense, were only memorandum entries. There was no, according to the CIT(A), element of income in these transactions. Yet, he further observed that “looking to the wider scope of international transactions, I am of the view that memorandum entries passed by the assessee for AE also constitute international transaction”. The CIT(A) proceeded to adopt 7.5%, on the basis of the presumptive taxation scheme under section 172 for income of the foreign ships, as reasonable mark up that the assessee should have charged in respect of these memorandum entries. The ALP adjustment was thus reduced to Rs 1,56,75,033, as against the ALP adjustment of Rs 4,60,63,820 made during the assessment proceedings. None of the parties is satisfied. While the assessee is aggrieved that the CIT(A) ought to have deleted the entire ALP adjustment, the Assessing Officer is aggrieved of the relief granted by the CIT(A). Both the parties are in appeal before us.

4. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

5. We have noted that basic contention of the learned counsel is that there is no ‘international transaction’ inasmuch as no payment has been made by the assessee to the AE or *vice versa*, the entries are only memorandum entries and the bills raised by the ship owners have been simply forwarded to the AE for payment. This plea, in our humble understanding, does not meet approval. Section 92B(1) specifically provides that “for the purposes of this section and sections 92, 92C, 92D and 92E, “international transaction” means a transaction between two or more associated enterprises, either or both of whom are non-residents, in the nature of purchase, sale or lease of tangible or intangible property, or provision of services, or lending or borrowing money, or any other transaction having a bearing on the profits, income, losses or assets of such enterprises....” When an assessee enters into a time charter contract, and instead of using the vessel on his own, allows an AE to use the vessel on the same terms (including the price) on which the assessee has contracted, though the bills are raised on the assessee under the time charter contract, generally such an arrangement has an impact on profit and losses of the assessee. If one proceeds on the basis that the assessee was in a position to sell the cargo space- a presumption which looks more realistic in the light of the fact that the cargo space was ultimately used by the group entities, though with the billing by the AE in a low tax jurisdiction, the assessee actually forgoes the profit. In the event, however, one proceeds on the basis that the assessee was not in a position to sell the cargo space, such an assignment of contractual rights and obligations, would reduce the losses of the assessee. Whichever way one looks at, clearly the transaction in question is very well covered by Section 92(1). It is only elementary that actual earning of profits or incurring of losses in a transaction is not a sine qua non for transaction being treated as ‘international transaction’, it is “having the bearing” profit and losses which is sufficient for the transaction being treated as international transaction. We are, therefore, of the considered view that the transaction in question is an international transaction which should have been benchmarked by the assessee. There is, in our considered view, no escape from benchmarking of the transaction. Having held so, however, it is also important to notice that the assessee has entered the transaction with an independent transaction at the same price at which the assessee has entered into with the present transaction with the AE. That would generally be the best comparable for the uncontrolled comparable price. Essentially, therefore, as long as

the transaction is simply a back to back transaction, without any functions being performed, assets being employed and risks being assumed, with an independent enterprise on one end, and an associated enterprise on the other end, no arm's length price adjustment is warranted. That is what a coordinate bench has held in the case of **DCIT Vs Calance Software Pvt Ltd [(2017) 82 taxmann.com 390 (Delhi-Trib)]**. Considering the fact that it is a back to back transaction, only such adjustments can be made to the price as are warranted on account of functions performed, assets employed and risks assumed by the assessee. There are clearly no assets employed and risks assumed in the present case inasmuch as there is no other asset, barring the contract itself which is subject matter of ALP, has been employed, and no risks at all, since the AE is a group entity. The short point of adjustments could at best be for the functions performed and that function is confined to negotiating the contract with the ship owner. So far as the ALP in the present case is concerned, an adjustment for such function performed, i.e. negotiation of contract with the ship owner, can at best be made in the transaction value with the independent transaction of time charter hire. As we hold so, we are alive to the fact that in the course of ascertainment of arm's length price, it cannot be open to the revenue authorities to shift taxability of profits of foreign AE to India, beyond what is the consequence of assignment of arm's length price of the international transaction under scrutiny. Viewed thus, the adjustment must remain confined to the function of negotiating the time charter contract. The earning of profits from operation of vessels is a complex transaction and negotiating the contract with the ship owners, howsoever important, is only a very small part of this business. The impact of this function has to be quantified on estimated basis. While we are not inclined to go into this question at this stage, or to do the quantification on our own, we may add that while entire estimate profit of operation of ships by the foreign companies is 7.5% under the presumptive taxation scheme under section 172, it would be wholly unreasonable to assign an even higher value to the function of negotiating the time charter alone. Such an adjustment must remain restricted to a small part of this overall reasonable estimated income. With this observation, we remit the matter to the file of the TPO for deciding the adjustment to be made, in the back to back time charter vessel hire contract payments, for negotiating the time charter contracts. We make it clear that while so deciding the matter afresh, the TPO will give a fresh opportunity of hearing to the assessee and decide the matter by way of a speaking order. The ALP adjustment will accordingly be modified by the Assessing Officer.

6. In the result, the appeal of the assessee is allowed for statistical purposes. Ground no. 3 of the revenue's appeal is thus rendered infructuous as the matter stands remitted to the assessment stage so far as the ALP adjustment is concerned.

7. As regards ground no. 1 in revenue's appeal, i.e. with respect to deletion of disallowance of Rs 1,09,78,592 (incorrectly mentioned as Rs 1,17,18,630 in the ground of appeal) on account of site development expenses, learned representatives fairly agree that the issue is covered, in favour of the assessee, by a coordinate bench decision in assessee's own case for the assessment year 2007-08. Learned Departmental Representative, however, relied upon the stand of the Assessing Officer, even as he did not point out any distinguishing features in the present assessment year. We see no reasons to take any other view of the matter than the view so taken by our coordinate bench, and the said decision is deemed to have been attached to and forming part of this order as well. Respectfully following the

coordinate bench decision, we uphold the relief granted by the CIT(A) and decline to interfere in the matter.

8. Ground no. 1 is thus dismissed.

9. In ground no. 2, the Assessing Officer is aggrieved of the learned CIT(A) deleting the addition of Rs 26,33,323 in respect of bad debts. Grievance of the Assessing Officer, by way of a question that he has posed for our adjudication, is “whether the CIT(A) was right in law and on facts in deleting the disallowance of claim as bad debts as advances of Rs 26,33,323 pertaining to an amount which was never included in income of the assessee for any of the earlier assessment years”. This grievance, however, proceeds on the fallacious assumptions- as clearly evident from a plain reading of the CIT(A)’s order. The disallowance of Rs 26,33,323 consists of two components- first, Rs 21,39,050 on account of writing off irrevocable advances to nodal agencies, and – second, Rs 4,94,273 written off for excess service tax provisions etc. So far as the first component is concerned, the CIT(A) has deleted the disallowance under section 37(1) as a business loss, and so far as the second component is concerned, the CIT(A) has given uncontroverted findings about the years in which related income has been accounted. When we pointed out these facts to the learned DR, he did not have much to say except for placing reliance on the stand of the Assessing Officer. We, therefore, no infirmity in the relief granted by the CIT(A) on this score either. We approve the action of the CIT(A) and decline to interfere in the matter.

10. Ground no. 2 is thus dismissed.

11. In the result, the appeal of the Assessing Officer is dismissed, and the appeal of the assessee is partly allowed for statistical purposes. Pronounced in the open court today on the 30th day of April, 2019.

Sd/-

Mahavir Prasad
(Judicial Member)

Sd/-

Pramod Kumar
(Vice President)

Ahmedabad, dated the 30th day of April, 2019

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| <i>Copies to:</i> | (1) <i>The Applicant</i> | (2) <i>The respondent</i> |
| | (3) <i>CIT</i> | (4) <i>CIT(A)</i> |
| | (5) <i>DR</i> | (6) <i>Guard File</i> |

True Copy

By order

Assistant Registrar
Income Tax Appellate Tribunal
Ahmedabad benches, Ahmedabad