

आयकर अपीलिय अधिकरण] पुणे न्यायपीठ “बी” पुणे में
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH “B”, PUNE

BEFORE MS. SUSHMA CHOWLA, JM AND
SHRI ANIL CHATURVEDI, AM

आयकर अपील स / ITA No.590/MUM/2015

निर्धारण वर्ष / Assessment year : 2010-11

B.G. Shirke Construction Technology
Pvt. Ltd., (Being the amalgamated
Company in which the erstwhile
Five Stars Bulkcarries Pvt. Ltd., has
Merged into w.e.f. 01.04.2015)
Unit No.3, Brady Gladys Plaza,
Senapati Bapat Road, Lower Parel,
Mumbai – 400 013.

..... अपीलार्थी /
Appellant.

बनाम v/s

The Dy.Commissioner of Income Tax,
Circle – 5(1), Mumbai.

..... प्रत्यर्थी /
Respondent

Assessee by : Shri Nikhil Pathak.

Revenue by : Shri Vodan Raj Singh.

सुनवाई की तारीख / Date of Hearing : 01.08.2019	घोषणा की तारीख / Date of Pronouncement: 16.10.2019
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आदेश / ORDER

PER ANIL CHATURVEDI, AM :

1. This appeal filed by the assessee is emanating out of the order of Commissioner of Income Tax (A) – 15, Mumbai dated 03.11.2014 for the assessment year 2010-11.

2. The relevant facts as culled out from the material on record are as under :-

Assessee is a company stated to be engaged in the business of Charter and Hire of Ships. Assessee electronically filed its return of income for A.Y. 2007-08 on 12.10.2010 declaring total income at

Rs.52,64,808/-. The case was selected for scrutiny and thereafter assessment was framed u/s 143(3) of the Act vide order dt.01.03.2013 and the total income was determined at Rs.1,92,66,830/-. Aggrieved by the order of AO, assessee carried the matter before Ld.CIT(A), who vide order dated 31.11.2014 (in appeal No.CIT(A)-15/Curr.172/14-15) granted partial relief to the assessee. Aggrieved by the order of Ld.CIT(A), assessee is now in appeal before us and has raised the following grounds :

“1.1 The learned CIT(A) erred in confirming the Transfer Pricing adjustment of Rs. 1,20,23,900/- made by the learned Assessing Officer in respect of corporate guarantee given by the appellant company to the banks for the purpose of loans given by them to the Appellant Company's AE.

1.2 The learned CIT(A) erred in not appreciating that giving of corporate guarantee as a collateral security does not fall within the definition of International Transaction as defined in section 92B(1) of the Income Tax Act, 1961 as the said transaction has no bearing on profits, income, losses or assets of the appellant company.

1.3. The learned CIT(A) erred in not appreciating that -

- The corporate guarantee was a collateral security*
- The banks had specifically provided that no guarantee commission shall be payable by the AE to the Appellant Company and hence, there was no question of charging any commission by the assessee company from its AE.*
- the corporate guarantee which is a collateral security does not fall within the definition of an "international transaction"*

1.4 Without prejudice to above, the learned CIT(A) erred in not appreciating that giving and taking of a corporate guarantee are part of closely linked transactions and the ALP of said "international transaction" will have to be computed at Rs. Nil as the company is prohibited from charging any guarantee commission to its AE as per the sanction letter of the banks and the documents filed under the FEMA regulations.

1.5. The learned CIT(A) erred in not appreciating that the Bank of Baroda, London had confirmed that the rate of interest charged to the AE was as per the commercial understanding irrespective of availability of corporate guarantee provided by the appellant company and hence the addition of Rs. 1,20,23,900/- on account of corporate guarantee was not warranted on the facts of the case. "

1.6 Without prejudice to above, the learned CIT(A) erred in not appreciating that the ALP of the above "international transaction" worked out by the learned Assessing Officer is very high and needs to be reduced substantially as the said guarantee is only a collateral security and

secondly, as the primary security provided by the AE adequately covered the credit facility provided by the banks.

2.1 The learned CIT(A) erred in not appreciating that the interest on Escrow Accounts of Rs. 6,12,860/- was not chargeable to tax as non-tonnage income because the interest on Escrow Accounts was inextricably linked to the loans taken from banks for shipping activity and hence was part of shipping income of a tonnage tax company.

2.2 Without prejudice to above, the above interest income had to be netted out against interest paid on shipping loans.”

3. Grounds 1 to 1.6 are inter-connected and are with respect to the Corporate Guarantee Commission.

3.1. During the course of assessment proceedings, AO noticed that assessee company had opted for Tonnage Tax Scheme u/s 115VP of the Act being the special provision relating to income of shipping companies. AO further noticed that assessee had given corporate guarantee in respect of loans provided to its Associated Enterprise (A.E.) M/s. Ganesh Shipping Inc. Panama, a foreign company, subsidiary of the assessee. The assessee was asked to show cause as to why in computing Arms Length Price (ALP) of the international transactions in respect of corporate guarantee commission necessary Transfer Pricing Adjustments not be made. In response to the query of the AO, assessee made the submissions which were not found acceptable to the AO. AO noted that M/s. Ganesh Shipping Inc. Panama was 100% subsidiary of assessee and the assessee company jointly with B.G. Shirke Construction Technology Pvt. Ltd., had given guarantee on behalf of M/s. Ganesh Shipping Inc. Panama towards facilitation of loans for acquisition of vessels. AO noted that assessee has not recovered any amount towards guarantee fee from it. AO noted that the Corporate Guarantee Agreement was jointly signed by the assessee and M/s. B.G. Shirke Construction Technology Pvt. Ltd., in favour of Bank of Baroda.

As per the agreement, the nature of guarantee furnished was irrevocable and unconditional. AO was of the view that irrevocable and unconditional guarantee furnished to the Bank carries a high level of risk and the transaction relating to the provision of corporate guarantee for the benefit of A.E. falls within the meaning of international transaction as per Sec.92B(1) and 92B(2) of the Act. He was further of the view that for the guarantee in the form of separate agreement as given to ship owners provides a benevolent advantage to the A.E. in obtaining credit facilities from the banks. He was of the view that but for the guarantee of the assessee, no one would have lent money to M/s. Ganesh Shipping Inc. Panama or would have lent the amount at a much higher rate. He was further of the view that providing a guarantee represents a transfer of benefit to the guarantee company from the guarantor of the company and therefore, an arm's length consideration should be recovered by the guarantor for providing such a benefit. AO therefore decided to compute the Arms Length Price (ALP) at 1.5% on outstanding (as on 31.03.2010) net value of corporate guarantee given and availed by the assessee and calculated the corporate guarantee commission at Rs.1,20,23,900/- and accordingly, the addition was made in the hands of the assessee. Aggrieved by the order of AO, assessee carried the matter before Ld.CIT(A), who upheld the order of AO.

Aggrieved by the order of Ld.CIT(A), assessee is now in appeal before us.

4. Before us, Ld.A.R. reiterated the submissions made before AO and Ld.CIT(A) and further submitted that assessee had given corporate guarantee to Bank of Baroda, London for acquisition of M/s. Five Stars

Bulkcarriers Pvt. Ltd. costing 11.5 mln USD approximately. He submitted that as per the terms and conditions stipulated by the Bank of Baroda, an irrevocable and unconditional corporate guarantee was to be given by Five Star Bulkcarriers Pvt. Ltd (assessee) and B.G. Shrike Construction Technology Pvt. Ltd., in accordance with the law applicable and as per the Reserve Bank of India (RBI) guidelines. He submitted that the sanction letter also stipulated that no guarantee commission shall be payable by the company to the guarantors. He pointed to the copy of the sanctioned letter which is placed at Page 30 to 38 of the Paper Book. He submitted that when the sanctioning bank had stipulated the condition of no guarantee commission being payable to the guarantors in accordance with the applicable R.B.I guidelines, the payment of commission if made to the assessee would have been in violation of the applicable rules and regulations and in such a situation, the AO was not justified in making addition of the guarantee commission. He further submitted that B.G. Shrike Construction Technology Pvt. Ltd., had also given the guarantee jointly to M/s. Ganesh Shipping Inc. Panama but no addition on account of corporate guarantee commission was made in the hands of assessee though the transaction arose from the same guarantee given. Without prejudice to the contention of the assessee that no addition be made, Ld.A.R. submitted that the rate of guarantee commission of 1.5% considered by the AO is too high. He submitted that Hon'ble Bombay High Court in the case of CIT Vs. Everest Kanto Cylinder Ltd., Vs. DCIT reported in 378 ITR 57 has held the addition on account of guarantee commission be made at 0.5%. He further submitted that in the case of Everest Kanto Cylinder Ltd., (supra), there was no stipulation or condition by the Bank for not charging commission. He therefore submitted that no

addition is called for in the present case. Ld. D.R. on the other hand supported the order of AO and Ld.CIT(A).

5. We have heard the rival submissions and perused the material on record. The issue in the present ground is with respect to addition made on account of ALP transaction on corporate guarantee. It is an undisputed fact that for purchase of vessels by Ganesh Shipping Inc. Panama, an irrevocable and unconditional corporate guarantee was given by the assessee and M/s. B.G. Shirke Construction Technology Pvt. Ltd., pursuant to the conditions stipulated by the Bank of Baroda, London. The sanction letter issued by the Bank of Baroda, London which is also placed on record by the assessee also reveals that the corporate guarantee was to be given in accordance with the applicable R.B.I. guidelines and it further stipulated that no guarantee commission was payable by Ganesh Shipping Inc. Panama to the guarantors. It is thus seen that the guarantee has been given in terms of sanction letter issued by Bank of Baroda and the non-charging of guarantee commission is also as per the conditions stipulated by the Bank. It is also a fact that the corporate guarantee has been given by the assessee as well as B.G. Shirke Construction Technology Pvt. Ltd., and no addition on account of guarantee commission has been made in the hands of B.G. Shirke Construction Technology Pvt. Ltd. It is only in the hands of the assessee that the addition has been made by the AO. We are of the view that when the guarantee has been given by two concerns and on similar terms and conditions arising out of the same transaction, two different and contradictory stands cannot be taken by the Revenue i.e., no addition is made on account of guarantee commission in the case of B.G. Shirke Construction Technology Pvt. Ltd., and addition is

made only in the hands of the assessee. Further since the non-charging of guarantee commission is pursuant to the conditions stipulated by the sanctioning Bank, we are of the view that no addition on account of non-receipt of guarantee commission is called for in the present case. We therefore direct the deletion of the addition made by the AO in the hands of assessee. **Thus, the grounds of the assessee are allowed.**

6. Ground Nos.2.1 and 2.2. are inter-connected and are considered together.

6.1. During the course of assessment proceedings, AO noticed that assessee had received interest income of Rs.6,12,860/-. The assessee was show caused as to why the same should not be considered as non-tonnage income and not brought to tax. Assessee inter-alia submitted that assessee had availed loans for purchase of vessels and had paid interest of Rs.6.42 crore during the year. As per the sanction condition of loan, assessee was required to maintain the minimum balance of 0.186 mln USD throughout the tenure of loan in DSRA account and it could not be utilized for re-payment of outstanding balances. It was submitted that assessee had earned Rs.6,12,860/- on DSRA account and assessee as per the prevailing accounting standards has shown interest income separately and had not netted off interest payment against the interest expenditure. It was further submitted that no addition of similar interest earned by the assessee was made in A.Y. 2008-09 and 2009-10. The submissions of the assessee were not found acceptable to the AO. AO also noted that assessee also earned interest on income tax refund of Rs.4,64,641/- AO considered the aggregate amount of Rs.10,77,501/- as normal income. Aggrieved by the order

of AO, assessee carried the matter before Ld.CIT(A), who upheld the order of AO by observing as under :

“The submissions of-the appellant are summarized as under.-

- i. *Appellant submitted that, the interest is earned on ESCROW accounts kept with banks who had lent money to the company for acquisition for vessels. Thus interest earned has a direct nexus to the interest paid by our company and if the same are I netted out then the net income is Rs. Nil.*
- ii. *It was further submitted that appellant has received interest of Rs. 6,12,860/- on ESCROW A/c kept with the Bank of India who had lent loan funds to the appellant company for acquisition of Vessel “Maha Padmaja”. As per the sanctioned loan terms a minimum balance of USD 0.186 mln in Indian Rupees is to be maintained throughout the tenure of the loan with Bank of India, Chakala Branch in Debt Service Reserve Account (DSRA). The DSRA account has to be compulsorily maintained and cannot be utilized for repayment of outstanding loan balance. Thus the above interest received is in the nature of Business Income and needs to be netted off against the interest paid to Bank: of India for the said loan. As the interest paid is higher than the interest earned there is no net income earned by our company and hence the interest received of Rs.6,12,860/- cannot be taxed in isolation i. e. without allowing deduction of the interest paid. In view of above, the Assessing Officer clearly erred in making the addition of Rs. 10,77,501/-. It may be noted that, company is subject to' tax under Tonnage Tax Scheme and the addition of Rs.1 0,77,501/- is not justified-in light of the above facts.*
- iii. *In view of above, it was requested to delete the addition of Rs.10,77,501/-.*

5.4. I have considered the facts of the case, observations of the AO in the order U/S 143(3) of the 1.T. Act. The contentions 1 submissions of the appellant as above are being discussed and decided as under :

- i. *Appellant submitted that the interest of Rs. 6,12,860 received by it was on escrow account which was compulsorily required to be maintained and hence it was business income and required to be netted off against interest paid. However I do not agree with this contention of the appellant since in the case of South India Shipping Corporation vs CIT 240 ITR 024, it was held by Hon'ble Madras High Court that interest income earned from deposits in banks is to be taxed under the head "income from other sources". Similar observations were made by Hon'ble Supreme Court in the case of Tuticorin Alkali Chemical and Fertilizer 227 ITR 172 and Pandian Chemicals 183 CTR 99. Further no netting of interest can be allowed since the interest income is to be taxed under the head "income from other sources" while interest paid is*

admittedly a business expenditure. Accordingly this contention of the appellant is not acceptable.

- ii. No submissions have been made with reference to the interest on income tax refund of Rs.4,64,641. Accordingly the same is held to be business income and has rightly been taxed by the assessing officer as such.*
- iii. This ground of appeal is therefore dismissed.”*

7. Before us, Ld.A.R. reiterated the submissions made before lower authorities and with respect to the interest earned from Bank, submitted that the interest received was not in the nature of business income and should be netted off against the income paid for the loan and since the interest paid is higher than the interest earned then there is no income earned by the assessee and therefore the amount cannot be taxed. He further submitted that assessee has opted for special provision relating to income of shipping companies under Chapter XIIG of the Income Tax Act. He submitted that as per the provisions of Sec.115VP, the tonnage income of taxing company has to be computed as per the provisions stipulated therein. He submitted that the provisions of Sec.115 VP are akin to the deeming provision of Sec.44AD of the Act and since the business of the assessee is only operating of the ships, the entire income earned by assessee is to be computed under the Chapter XIIG. He submitted that interest earned by the assessee was on the amount of ESCROW deposits kept by the assessee and which the assessee was required to maintain as per the conditions stipulated by the Bank. In such a situation, the interest received by the assessee is to be considered to be normal business income from shipping business and cannot be considered to be income from other sources. He further submitted that if the interest received is netted against the interest payment, the assessee has not earned net interest and in such a situation also the amount is to be considered as normal

business income from shipping business and not be taxed at normal rates. With respect to interest earned on income tax refund he fairly agreed with the action of AO.

8. We have heard the rival submissions and perused the material on record. The issue in the present ground is with respect to considering the amount earned on interest as income from other sources and therefore held by the AO to be as income earned from non-tonnage activity and accordingly taxable at normal income. Before us, at the outset, Ld.A.R. submitted that as far as interest from income tax refund of Rs.4,64,641/- is concerned, he does not dispute the action of AO and Ld.CIT(A). The only dispute is with respect to the interest received of Rs.6,12,860/- from the bank. It is assessee's contention that assessee had availed loan from Bank of India for purchase of vessel "Maha Padmaja" and as per the terms and conditions, the assessee was required to maintain a minimum balance of 0.186 mln USD throughout the tenure of the loan. On such balance maintained by the assessee it had earned interest of Rs.6,12,860/-. It is also a fact that assessee had paid interest of Rs.6,42,99,091/- on loan for purchase of vessels and which has been claimed as expenditure in the Profit and Loss account. It is a fact that if the interest paid and earned are considered in totality, the assessee has paid net interest. Further considering the fact that the assessee was required to maintain the deposits as per the sanction terms of the bank and in view of the facts cited hereinabove, we are of the view that AO was not justified in considering the interest of Rs.6,12,860/- to be non tonnage activity. We therefore set aside the order of AO and direct the AO to consider it as income from shipping business and **thus, the grounds of assessee are partly allowed.**

9. **In the result, the appeal of the assessee is partly allowed.**

Order pronounced on 16th day of October, 2019.

Sd/-
(SUSHMA CHOWLA)
न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-
(ANIL CHATURVEDI)
लेखा सदस्य / ACCOUNTANT MEMBER

पुणे Pune; दिनांक Dated : 16th October, 2019.

Yamini

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. CIT(A)-15, Mumbai.
4. Pr. CIT-5, Mumbai.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "बी" / DR,
ITAT, "B" Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER

// True Copy //

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune.