

**IN THE INCOME TAX APPELLATE TRIBUNAL "K", BENCH
MUMBAI**

BEFORE SHRI R.C.SHARMA, AM & SHRI VIKAS AWASTHY, JM

**ITA No. 7371/Mum/2017
(Assessment Year: 2013-14)**

Essar Shipping Ltd., 11, K.K. Marg, Mahalaxmi, Mumbai-400034.	Vs.	A.C.I.T.-5(1)(2), Mumbai.
PAN/GIR No.AACCE 3707 D		
(Appellant)	..	(Respondent)

Assessee by	Shri Vijay Mehta (AR)
Revenue by	Ms. Nillu Jaggi (Jt.CIT)
Date of Hearing	12/12/2019
Date of Pronouncement	06/03/2020

आदेश / O R D E R

PER: R.C. SHARMA, A.M.

This is the appeal filed by the assessee against the direction of the Dispute Resolution Panel-1(WZ), Mumbai (in short, the DRP) U/s 144C(5) of the Income Tax Act, 1961 (in short, the Act) dated 29/09/2017 for the A.Y. 2013-14 by way of given effect by the order passed U/s 143(3) r.w.s. 144C(13) of the Act.

2. Rival contentions have been heard and record perused. Facts in brief are that the assessee M/s Essar Shipping Limited (ESL) is engaged in the business of shipping operations, crude oil transportation, drilling oil rigs, transportation management services and integrated dry bulk

transportation services. The A.O. passed draft assessment order comprising certain disallowances and additions to the total income declared by the assessee. The assessee has filed its objection against the draft assessment order before the DRP and vide order dated 25/01/2017, the DRP disposed off the objections raised by the assessee. Against the order passed by the AO U/s 144C(13) giving effect to the directions of the DRP, the assessee is in further appeal before the ITAT.

2.1 Ground No. 1 of the appeal was not pressed by the Id AR, therefore, the same is dismissed as not pressed.

3. The second grievance of the assessee relates to transfer pricing adjustment of Rs. 55,48,550/- in respect of interest on purchase price of two ships.

4. At the outset, the Id AR of the assessee placed on record the order of the Tribunal dated 26/06/2019 in assessee's own case for the A.Y. 2011-12 wherein issue with regard to disallowance of interest was decided by the Tribunal in favour of the assessee.

5. We have considered the rival contentions and carefully gone through the orders of the authorities below and found from the record that during the year under consideration, the assessee had purchased two ships under Bare Boat Charter cum Demise (BBCD) agreement from Essar Shipping and Logistics Limited, Cyprus. The purchase price was

agreed at USD 75 million and USD 73 million. However, the TPO had determined ALP of the said transactions at USD 73.75 million and USD 71.75 million respectively. The TPO has treated the excess payment as advance given to AE and adjustment has been made on account of interest receivable from AE on purchase price of said ships. Against which the assessee is in further appeal before the ITAT.

6. We have also gone through the orders of the Tribunal dated 26/06/2019 in assessee's own case for the A.Y. 2010-11. From the record, we found that the assessee is offering its income as per tonnage taxation scheme under Chapter XII-G of the Act. The Ships so purchased are qualifying ships as per tonnage tax provision, income from which has been offered and accepted accordingly. The manner of computing income under tonnage tax scheme has been prescribed u/s 115VE of the Act. According to which profits of tonnage taxation shall be computed separately from profits and gains of any other business. The formulae for calculating tonnage income has been prescribed and is dependent on presumptive rate of daily tonnage income and number of days of operation. Once the assessee opts for tonnage tax scheme, the income of the assessee has to be computed as per the provisions prescribed in the said chapter. Chapter XII-G is a complete code in itself and income has to be computed strictly as per the said provisions.

7. From the record we found that the similar additions were made by the TPO in assessee's own case in the A.Y. 2011-12 and were confirmed by the DRP, the assessee has been demerged from Essar Ports Limited w.e.f. 01/10/2010 i.e. A.Y. 2011-12. From the record we also found that since earlier the activities of assessee being carried on by Essar Ports Ltd., the assessment was made in case of Essar Ports Ltd. up to 30/09/2010. For the similar disallowance, the assessee came in appeal before the Tribunal and the Tribunal vide its order dated 26/06/2019 for the A.Y. 2011-12, deleted the similar addition so made by the A.O. after observing as under:

"10. We have considered the submission of Id. Authorized Representative (AR) of the assessee and Id. Departmental Representative (DR) for the revenue and perused the material available on record. The Id. AR of the assessee submits that the assessee has exercised the option of offering its income to tax on a presumptive basis under the Tonnage Tax Scheme covered under chapter XII-G of the Act. The option was exercised since AY 2005-06 till Ay 2014- 15. This fact is not disputed by Id. DR for the revenue as well as by the lower authorities. We have noted that on similar set of facts the coordinate bench of this Tribunal in Van Oord India Private Ltd. vs. ACIT (supra) held as under :

"6. We have carefully considered the rival submissions, perused the relevant material, including the orders of the lower authorities as well as the case laws referred at the time of hearing. Notably, the controversy before us primarily revolves around the applicability of transfer pricing provisions to the income that is covered by Chapter XII-G of the Act i.e. Tonnage Tax Scheme. The TTS was introduced in the Finance (No. 2) Act, 2004, with the intention of increasing foreign direct investment in the Indian shipping industry and making it globally competitive. The income of a tonnage tax company depends on the tonnage

capacity of the qualifying ships and the number of days for which it has been held. A reading of the provisions of TTS in Chapter XII-G suggest that the TTS is a charging section for the income generated by carrying out business of operating ships. Further, it also prescribes the mechanism for computation of income which is to be brought to tax. Thus, TTS is a presumptive basis of taxation, whereby the taxability of income from qualifying ships is restricted to the framework provided in the TTS. Further, the tonnage tax company is liable to pay taxes even in a case where the financial statements reveal a loss on actual operations. Further, all expenses, deduction, allowances or tax incentives are deemed to be allowed while computing the total income of a company as per TTS. The income thus computed shall be deemed to be the income chargeable to tax under the head 'Profit and gains of business or profession'. Hence, it is clear from the above that actual receipts/revenues earned and expenses incurred are not taken into consideration for the purpose of determining the tonnage income of the company. The entire computation of the tonnage income depends on the tonnage capacity of qualifying ships and number of days it has been held. At this stage, we may contrast the sphere in which the transfer pricing provisions of Chapter-X operate. The transfer pricing provisions envisage computation of income from specified international transactions of receipt or expenditure, ofcourse with reference to the stated price of such transactions. This is completely in contrast to Chapter-XII G, where the stated price of the transaction has no relevance to the computation of income of qualifying ships, which is based on the weight of the ship and the number of days it has been held. In other words, the determination 'of income/ expense having regard to arm's length price as envisaged in Chapter-X has no relevance, as it would not affect the computation of income liable for taxation in Chapter-XII G.

7. Section 115VA of the Act starts with "Notwithstanding any to the contrary contained in section 28 to section 43....". TTS thus, provides for computation of income to the exclusion of section 28 of the Act. In case of an assessee entering into international transactions with associated enterprise, the amount of allowable expenses is required to be determined as per the arm's length principle as per the machinery provisions of Chapter X (Section 92 to section 92F). The amount of allowable expenses determined as per the arm's length principle under section 92(1) of the Act would thus be relevant to compute business profits as

provided for in sections 28 to 43C of the Act. The Assessee has opted to be governed by TTS, thus the provisions of section 115VA would override section 28 to section 43C and hence income has to be calculated with reference to the registered tonnage of the ships and not on basis of net profits depicted in the financial statements or as per the profits adjusted in terms of Chapter-X. In fact, the related party transactions are not relevant for computing income chargeable to tax as per Chapter-XII G of the Act and therefore, the arm's length price determined under transfer pricing provisions would be of no relevance. In other words, determination of income/ expense having regard to arm's length price would not alter the computation of income and the taxability of tonnage income of an assessee covered by TTS.

8. Further, tonnage income is based on the weight of the vessel and not on "arm's length price". Section 92C prescribes methods for computation of arm's length price. None of the methods prescribed can have any application to computation of the tonnage income. In these circumstances, the computation provisions of Chapter X of the Act would fail and therefore, application of Chapter X of the Act in such circumstances has to fail. Tonnage tax provisions determine the entire chargeable income earned by the tonnage tax vessel including income from an international transaction with associated enterprise. In contrast, transfer pricing provisions apply only to international transactions entered with associated enterprises. It is not possible to segregate what portion of the final taxable tonnage income is relatable to international transactions with associated enterprises and then apply transfer pricing provisions to such transactions, because the statutorily prescribed formula to compute income under chapter XII-G is based on the weight of the qualifying ship and number of days it has been held, irrespective of whether the ship has been used for a related party or an unrelated party. Once again, therefore, the computation provisions of Chapter X of the Act fail and in such circumstances, the application of Chapter X of the Act fails.
9. In this context, the learned Counsel pointed out that a similar situation has been considered by the co-ordinate bench of this Tribunal in the case of Shreyas Shipping Logistics Ltd (supra) which has held as follows:

“5.....

Now we would like to discuss the TTS. Section 115VA of the Act is unique in the sense that it deals with the computation of income from the business of operating qualifying ships which opt for Tonnage Tax Scheme(TTS).The method of computation of income under the scheme, as provided by the section, stipulates that income has to be assessed in a particular manner. In other words, no expenditure can be allowed or disallowance can be made, while computing the income under TTS. The income of the assessee is computed at affixed rate and all other provisions of the Act are not to be applied, once an assessee opts for the scheme. In short, if the assessee cannot claim any expenditure after opting out of the scheme, then the AO is also barred by making any disallowance for incurring of expenditure. Legislature, in its wisdom, has allowed the assessee for opting for the said scheme and with a specific purpose. Therefore, while computing the income of the assessee u/s. 115VP, the AO has to put on blinkers and assess the income as suggested by the Parliament. There is no scope for tinkering with the provisions of section 115 VP of the Act. He has to follow the simple rule that no deduction is to be allowed or no disallowance is to be made under any of the normal provisions of the Act, once it is found that an assessee is to be assessed as per the provisions of chapter XIIG of the Act. Section 14A is not an exception to the TTS. Rather the scheme is an exception to the normal computation provisions, including the section 14A. Therefore, it cannot be said that when the income of the assessee from the business of operating ships was computed under the special provisions of Chapter XII-G, expenditure other than the expenditure incurred for the purpose of the business had been allowed. Considering the twin factors i.e. not claiming any expenditure against the nonshipping business income by the assessee and opting for TTS for shipping business, we are of the opinion that the order of the FAA does not suffer from any legal or factual infirmity. Therefore, confirming his order, we decide the effective ground of appeal against the AO.”

(underlined for emphasis by us)

10. On yet another occasion, our co-ordinate bench in the case of Tag Off shore(supra) was concerned with a situation where the

Revenue sought to make an addition by invoking the provisions of Section 14A of the Act in case of a tonnage tax company, whose income was computed under the special provisions of Chapter XII-G. The Tribunal set aside the addition observing thus 'No disallowance under section 14A is warranted in this case when the assessee has admittedly not claimed any expenditure, towards taxable income i.e. it has not claimed any deduction of expenditure debited in the Profit & Loss account while computing the total income.

11. Further, the co-ordinate bench of this Tribunal in the case of CGU Logistics Ltd (supra) while dealing on the issue under TTS has held as under:

“10.a.We find that section 115VP deals method and time of opting for TTS, Section 115VQ is about period for which tonnage tax option remains in force. Renewal of TTS is subject matter of section 115VR. Circumstances and conditions where in tonnage tax scheme cannot be opted are the subject matter of Section 115VS. As per the provisions of section 115VT every Asses see has to transfer profits to tonnage tax reserve account at a fix rate and has to utilise it for specific purpose, once he opts of TTS. Companies opting for TTS have to comply with minimum training requirement as required by Section 115VU. Limit for charter in of tonnage has been determined by section 115VV. Maintenance and audit of accounts of the TTS companies is governed by the provisions of section 115VW of the Act, whereas section 115VX determines tonnage. Amalgation is subject matter of section 115VY. Next section i.e. Section 115VZ takes care of the tonnage tax companies which are found to be a party to any transaction or arrangement that amounts to an abuse of the scheme. Last section, section 115VZC, deals with exclusion from TTS.

From the above it is clear that chapter XII-G is a complete code in itself and it provides for non applicability of section 28 to 43C of the Act i.e. chapter IV of the Act, when income is to be computed as per the provisions of the said section. Chapter-XII-G, was introduced by the Finance (No.2) Act, 2004, with effect from April 1, 2005, and it provides for TTS, which is optional. The Notes on Clauses appended to the Finance (No.2) Bill, 2004, referring to clause 28 as regards the introduction of section 115VA specifically

states that the provision relates to the computation of profits and gains of the shipping business. Tonnage tax was intended to make the industry internationally competitive and also to induce more ships to fly the Indian flag. As the whole of FEFG is covered by the provisions of chapter XII-G of the Act, there is no justification in computing it under a different chapter or section.”

(underlined for emphasis by us)

12. Before parting, we also think it apposite to refer to the judgment rendered by the Hon'ble Supreme Court in the case of Trans Asian Shipping Services Pvt Ltd (supra). In the said case, the Supreme Court observed that “.....It may be stated in brief that in view of the stiff competition faced by the Indian shipping companies vis-a-vis foreign shipping lines, and in order to ensure an easily accessible, fixed rate, low tax regime for shipping companies, the Rakesh Mohan Committee in its report (of January, 2002) recommended the introduction of the TTS in India, which was similar to, and adopted some of the best global practices prevalent. The whole purpose of introduction of the Scheme was to make the Indian shipping industry more competitive in the global space by rationalising its tax cost.....”

The Hon'ble Supreme Court further observed that, we would also like to refer to Circular No. 05/2005 dated 15.07.2005 explaining the need and essence of the introduction of these provisions which was issued contemporaneously by the Central Board of Direct Taxes (CBDT). The Circular clarifies that the Scheme is a "preferential regime of taxation". It also clarifies that "charging provision is under Section 115VA read with Section 115VF and Section 115VG....."

13. It has also been brought to our notice that an identical situation arose in assessee's own case for AY 2013-14 where the Dispute Resolution Panel('DRP') vide its order dated 18.09.2017 held that transfer pricing regulations do not apply to the assessee to the extent of operations carried out through operating qualifying ships where the income is taxed under TTS.
14. To sum up, Tonnage Tax Scheme, as per Chapter XII-G of the Act, is a separate code by itself in as much as it provides a self-contained charging provision as well as 'method of computation of income in the chapter, and, the method of computation of

income under TTS is not dependent on receipt or expenditure of the assessee. Under Tonnage Tax Scheme, the income has to be computed as per the method prescribed in section 115VG. The income as per Tonnage Tax Scheme is computed on the basis of the weight of the vessel and number of days it is held, irrespective of its revenue realisations and the expenditure incurred for the purpose of the business. Hence, neither the business receipts nor the business expenditure of the assessee has any bearing on the method prescribed for computation of income under TTS as per section 115VG. The tonnage tax scheme, in that sense, is a presumptive method of computation of taxable income which is not dependent on actual receipts and expenditure of the assessee.

15. In fact, the fallacy in the approach of the Assessing Officer can be gauged from a perusal of the computation of taxable income made in para 11 of the assessment order. The Assessing Officer has sought to add ` 5,40,887/- as a separate line item captioned as "Proposed adjustment/addition in view of the above discussion. Thus, as per the perception of Assessing Officer, chapter X of the Act creates an independent or a separate charge of income, an aspect which is contrary to the judgment of the Hon'ble Bombay High court in the case of Vodafone Services Pvt.ltd. vs. UOI (2015) 53 Taxman.com 286 (Bom), wherein after referring to an earlier judgment dated 10th October, 2014 in the case of same assessee reported in 50 taxmann.com 300 (Bom) interalia , held that chapter X does not contain any charging provision but is a machinery provision to arrive at an arm's length price of a transaction between associated enterprises.
16. In the final analysis, it is seen that in the instant case, the provisions of chapter X have been invoked to alter an expenditure, namely the mobilisation and demobilisation charges paid for a qualifying ship, an item which has no bearing on the income as computed under Chapter XIIG and accordingly the provisions of Chapter X have no application in computing the income of the assessee chargeable to tax as per Chapter XII-G of the Act.
17. In view of the aforesaid discussion, in our considered view, the transfer pricing regulations do not apply to the assessee to the extent of operations carried out through operating qualifying ships where the income is taxed under TTS."

11. Considering the decision of coordinate bench of the Tribunal as referred above, the provisions of transfer pricing regulations are not applicable to the assessee to the extent of operation carried by assessee through qualifying ships which is covered by Tonnage Tax Scheme. Thus, we hold that the grounds of appeal No. 2 to 6 & 9 are covered in favour of the assessee and against the revenue. In the result the ground No. 2 to 6 & 9 are allowed.
8. As the facts and circumstances during the year under consideration are same, respectfully following the order of the Tribunal in assessee's own case, we do not find any justification for the addition made by the A.O. in respect of interest on purchase price of two ships. Accordingly, we direct the A.O. to delete the same.
9. The next grievance of the assessee as contained in ground No. 3 relates to transfer pricing adjustment of Rs. 36,50,000/- on account of fees receivable for providing negative lien.
10. Rival contentions have been heard and record perused. Facts in brief are that during the relevant assessment year under consideration, the Essar Global Limited (EGL), the ultimate parent company of assessee had taken loan from ICICI bank, Hong Kong branch and Singapore branch. As per the letter given by assessee to ICICI bank, the assessee has undertaken not to transfer, assign and dispose of 49% of equity shares in Essar Logistics Ltd (ELL) without prior written approval of lenders during pendency of loan. ELL is wholly owned Indian subsidiary of assessee and as per agreement 49% of the shareholding will not be

transferred without prior approval of lender i.e. a lien was provided on transfer of shares.

11. The A.O. held that the assessee ought to have charged guarantee commission @ 0.5% and accordingly worked out adjustment of Rs. 36,50,000/-, which was confirmed by the DRP.

12. It was argued by the Id AR of the assessee that the assessee has provided a negative lien i.e. it has agreed not to sell 49% of its stake in Essar Logistics Ltd without prior consent from the bank. It is submitted that negative lien provided by assessee do not have a bearing on profit, income, losses, etc of assessee and hence it does not come within the purview of international transaction as defined u/s 92B of the Act, Reliance was placed on the orders of the Hon'ble Tribunal in case of;

- i) Micro Inks v. Addl. CIT [157 ITD 132 (Mum)]
- ii) Siro Clinpharm Pvt. Ltd. v. Dy. CIT (ITA No: 2618/Mum/2014) dated 31.03.2016
- iii) Marico Ltd v. ACIT (ITA No: 8858/Mum/2011) dated 18.05.2016
- iv) Bharti Airtel Ltd v. Addl. CIT [161 TTJ 483 (Mum)]

13. On the other hand, the Id DR has relied on the order of the DRP.

14. We have considered the rival contentions and carefully gone through the orders of the authorities below and found from the record that the TPO/AO has made adjustment for providing letter of negative lien by assessee to the bank. The TPO has equated the said

transaction with that of guarantee given to bank. In case of guarantee there is a possibility of a liability arising to the guarantor on account of providing guarantee. However, in the present case, even if EGL defaults in payment of loan, there will be no liability on assessee for paying any amount since assessee is not a guarantor. Hence, there would never be any liability on assessee even in case of default. However, keeping in view the nature of negative lien letter given by the assessee and the totality of facts and circumstances of the case and the terms of letter of negative lien given by the assessee, we direct the A.O. to make adjustment by applying 0.25% to the said transaction instead of 0.5% applied by the AO. We direct accordingly.

15. The next grievance of the assessee as contained in ground no.4 relates to transfer pricing adjustment in respect of interest on advance given for allotment of preference shares.

16. Rival contentions have been heard and record perused. Facts in brief are that during the previous year relevant to year under consideration, the assessee gave advance of Rs. 52.97 crores towards share application money to its wholly owned subsidiary i.e. Essar Oilfield Services Limited (EOSL) for issue of preference shares. Since ultimately no shares were allotted, EOSL has refunded full money to assessee. The TPO treated the above transaction as a loan and charged interest on the

said loan. By the impugned order, the DRP confirmed the action of the A.O., against which the assessee is in further appeal before the ITAT.

17. It was argued by the Id AR of the assessee that the money was advanced towards share application money. The assessee submitted ODI forms filed before RBI wherein the purpose for remittance has been stated to be for investment in preference shares. It was submitted that when the said advance was returned by EOSL, it was clearly mentioned in FIRC to be refund of advance given for investment in preference shares. It was further submitted that the TPO has no power to re-characterize the transaction in absence of any documentary evidence. The TPO did not agree with the contention of the assessee and held that it was an arrangement as per S. 92F(v) of the Act between EOSL and assessee. He relied on the decision of the Hon'ble Delhi High Court in case of CIT v. EKL Appliances (345 ITR 241) and CIT v. Abhinandan Investment (ITA No: 130 of 2001 dated 19.11.2015). He further held that the assessee has not received dividend @ 1% on investments which it should have received. The Id. AR has further submitted that the TPO cannot recharacterise the transaction without bringing any material on record. In order to support the said contention reliance is placed on the following decisions:

- a) Aegis Ltd v. Addl. CIT being ITA No: 1213/Mum/2014 dated 27.07.2015

- b) Bharti Airtel Limited v Addl. CIT being ITA No: 5816/Del/2012 dated 11.03.2014
- c) DIT v. Besix Kier Dabhol SA [210 taxman 151 (Born)] (Head note)
- d) M/s Pan India Network Infravest Pvt. Ltd v. Addl. CIT (ITA No: 7026/Mum/2013 dated 04.12.2015)

18. On the other hand, the Id. DR has relied on the order passed by the DRP.

19. We have considered the rival contentions and carefully gone through the orders of the authorities below. From the record, we found that the TPO has charged interest on advance for share application money to AE treating the same as a loan.

20. We have considered the judicial pronouncements referred by the Id AR and the Id. DR during the course before us as well as judicial pronouncements referred by the lower authorities in their respective orders. As per our considered view the A.O. has correctly charged interest by treating the advance for share application money as loans and advances, since the shares were not finally allotted and money was refunded back to the assessee, the A.O. has correctly made adjustment. However, the rate of interest to be applied on the said amount ought to be at LIBOR, since the transaction is in the foreign currency, our view is supported by the following decisions:

- i) CIT v. Aurionpro Solutions Ltd (ITA No: 1869 of 2014) (Bombay High Court)
- ii) Cotton Naturals (I) Pvt. Ltd. v DCIT [276 CTR 445 (Del)]
- iii) Hinduja Global Solutions Ltd v Addl.CIT [145 ITD 361 (Mum)]
- iv) Siva Industries & Holding Ltd. vs. CIT [145 TTJ 497 (Chen)]
- v) 3F Industries Ltd. Jt. Cit [63 SOT 314 (Visak)]
- vi) M/s. Everest Kanto Cylinder Ltd. v. ACIT being ITA No.7073/Mum/2012 for 2008-09 dated 25.09.2014

21. Respectfully following the proposition laid down in the above judicial pronouncements, we direct the TPO/AO to restrict the adjustment by taking LIBOR rate. We direct accordingly. This ground of appeal is allowed in part.

22. The next grievance of the assessee as contained in ground no.5 relates to adjustment of Rs. 9,12,541/- in respect of interest on outstanding receivables. In this respect, facts of the case are that the assessee has entered into a service agreement with its AE Essar Shipping and Logistics Limited (ESSL) dated 16/01/2012 to provide business support services. This agreement was entered with effect from 01.04.2011. As per the said agreement, ESSL shall pay the consideration within 30 days of receipt of invoice and delay in payment would attract interest @ 1% per month. During the year, there was delay in receiving

payment from ESSL, however, the assessee had not charged any interest on account of delay. Accordingly, the A.O. worked out interest on the outstanding dues beyond the stipulated period and made adjustment of Rs. 9,12,541/-.

23. It was argued by the Id AR of the assessee that the interest on outstanding receivables is not an independent international transaction since the international transaction entered into by assessee is accepted to be at arm's length wherein the assessee is charging its A.E. a profit margin of 29.71% as against 5.79% which is average margin of comparable cases providing similar services. It is submitted that when the assessee is charging such huge margins from its A.E., the assessee would have taken into account all the factors such as delay in receipt of payment and hence there is no justification for TPO to suggest adjustment in respect of interest on outstanding receivables. It is submitted that no separate adjustment can be made by treating the extension of credit period to AE as a separate international transaction.

24. On the other hand, the Id DR has relied on the order of the DRP and contended that since the payment was not made within the period of 30 days of receipt of invoice, the assessee should have charged

interest @ 1% per month which he failed to charge, accordingly, the TPO was justified in making the adjustment.

25. We have considered the rival contentions and carefully gone through the orders of the authorities below and found that the TPO has made adjustment by charging interest with regard to delay in receipt of payment for the services so rendered, accordingly, the TPO was justified in making the said adjustment. However, from the record, we found that the working of interest as determined by TPO is incorrect. The TPO has charged interest beyond the previous year relevant to assessment year under consideration. Accordingly, we restore the matter back to the file of TPO/AO to recalculate the chargeable interest and confine the same only up to the end of the year under consideration i.e. 31/3/2013 and not thereafter. We direct accordingly.

26. The next grievance of the assessee as contained in ground no.6 relates to taxing the interest income on loans / ICD given to subsidiaries and group concerns under the head "income from other sources" as against "income from business" as claimed by assessee. In ground No.7, assessee has challenged AO's action for declining claim of interest expenditure u/s.36(1)(iii) of I.T. Act. As an alternate in ground No.8, the assessee has requested to allow interest expenses u/s.57(iii). All these three grounds are interrelated, therefore, disposed by us as under.

27. Rival contentions have been heard and record perused. The facts in brief are that the assessee is in the business of operation of ships, logistics and drilling oil rigs. One of the main objects of the assessee as per Memorandum of Association of the Company is to enter into and conduct the business of owning and/or leasing and/or hiring and/or operating all types of onshore and offshore drilling rigs. The shipping and logistics business is being carried out by the assessee itself whereas the oilfield business is being carried out by the assessee through its subsidiary. For the purpose of carrying oil field business, the assessee had given ICD to its subsidiaries. Thus, the funds given to its subsidiary company engaged in oil drilling business represents the business activity of the company and forms part of the Oilfields Services Business of the assessee. It is evident from the record that the assessee has given the ICD to its subsidiary company to develop the oilfield services business of the company which is one of main objects of the company and thus forms part of the business of the assessee. During the year the assessee has borrowed money from LIC and bank which had been given as inter corporate deposits (ICDs) to its wholly owned subsidiary M/s Essar Oilfield Services India Ltd. (EOSIL) and other subsidiary who is carrying out the business of oil drilling operations. We also found that in the earlier years i.e. A.Y. 2011-12 and 2012-13, the assessee has given similar ICD to EOSIL. The income earned

on such ICD was offered by the assessee for taxation as business income. The A.O. has accepted the assessee's contention and assessed the interest income as "income from business". However, during the year under consideration i.e. A.Y. 2013-14, the interest income offered by the assessee as business income was not accepted by AO, the A.O. was of the view that the assessee had advanced money to subsidiaries for earning interest income, therefore, taxed the same as income from other sources. The AO had discussed this ground at page No.3 to 4 of his order. The A.O. also observed that the assessee has not proved that the borrowed money was used for giving ICDs, hence, the interest expenditure cannot be allowed as deduction even if the interest income is held taxable under the head income from other sources.

28. From the record, we found that the business activities of the assessee comprises of shipping business, logistics business and oilfield business. The shipping and logistics business is being carried out by the assessee itself whereas the oilfield business is being carried out by the assessee through its subsidiary. We had also gone through the Memorandum of Association of the assessee and found that the main object of the assessee is "to enter into and conduct the business of owning and/ or leasing and/ or hiring and/ or operating all types of onshore and offshore drilling rigs." Thus, it is clear that even as per the memorandum, it was main objection of the assessee. The assessee was

carrying out business of drilling oil rigs through its subsidiary for this purpose the assessee borrowed money and advanced the same as ICDs to its subsidiary to carry out the drilling business. Thus, the business so carried out by the subsidiary was as per the main objects of the assessee company. The assessee had not given ICD to its subsidiary for the purpose of earning interest income. Accordingly, the income on such ICD has to be treated as business income only, since it has been earned in the course of the business of the assessee and forms part of the business of the company.

29. From the record, we found that during the previous year relevant to assessment year under consideration, the assessee has earned interest income from ICDs of Rs. 60.16 crores and from banks of Rs. 1.81 crores. The break up of the interest income is as under:-

Sr. No.	Name	Amount of interest	Remarks
1.	Essar oilfield Services India Ltd.	53,97,05,043	This company is step down subsidiary of assessee
2.	Essar Steel India Ltd.	5,57,23,697	This company is group company of assessee.
3.	Essar Oilfield Services ltd Mauritius	53,45,802/-	This company is wholly owned subsidiary of assessee
4.	Energy Transportation International Ltd.	7,80,763/-	This company is wholly owned subsidiary of assessee
5.	Interest from banks	1,81,44,909	Interest on margin money given to bank

The money advanced to companies at Sr. No. 1 to 4 are group/subsidiary companies and the money has been given for business

purpose of assessee. The A.O. has not brought any material on record to suggest that the assessee had given intercorporate deposit to subsidiaries for earning interest income. It is also not the case of AO that the assessee had given its surplus funds to subsidiary for earning interest income. Thus, the income on ICD is to be assessed under the head 'business income.' Similar view has been taken by the Coordinate Bench of the ITAT, Mumbai in the case of Tolani Private Limited in ITA No. 5562/Mum/2013, order dated 04/01/2018 wherein the assessee was engaged in operation of ships had advanced loan/ICD to its subsidiary for acquiring ship, it was held that even on the basis of commercial expediency, the assessee was bound to assist its subsidiary, the interest income earned on such loans/ICD is liable to be assessed as income under the head "business income" and not under the head "income from other sources".

30. With regard to bank interest income amounting to Rs. 1,81,44,909/-, the same has been received on margin money which the assessee was required to keep with banks as per terms of sanction, hence the same is also for purpose of business. The money so kept with the bank as margin money was out of business compulsion and not as per the sweet will of the assessee, therefore, the interest earned on such margin money is also liable to be taxed as business income.

31. Assessee is also aggrieved for disallowance of interest expenditure. The A.O. has dealt with the issue at page Nos. 9 to 14. From the record we found that during the year, interest of Rs. 136,82,29,020/- was directly incurred for non tonnage activity and common interest of Rs. 37,75,64,523/- was allocated towards non-tonnage activity. Thus, the total interest expenditure of Rs. 174,57,93,543/- was claimed u/s 36(1)(iii) of the Act as business expenditure. It was contended before the Assessing Officer that the assessee is involved in business of oil drilling and the interest expenditure incurred was on account of loan taken from bank and LIC. The amount of money taken from bank and LIC was used for providing ICDs to its subsidiaries, as the business of oil drilling was carried out by assessee through its subsidiary. It was also contended that similar interest expenditure has been allowed u/s.36(1)(iii) in A.Y. 2011-12. The Assessing Officer held that oil drilling is not the business of assessee. He further held that interest income earned from ICDs has been taxed under the head income from other sources and hence interest expenditure cannot be allowed u/s 36(1)(iii) of the Act. The A.O. further held that out of total interest an amount of Rs. 1,56,83,680 has been paid for aircraft taken on lease and the assessee has not explained the nexus between expenses claimed with receipt of non tonnage

activities. Accordingly, he disallowed the said interest expenditure u/s 36(1)(iii) of the Act.

32. We had carefully gone through the entire details placed on record and found that the interest expenditure of Rs. 136,82,29,021 (174,57,93,544 - 37,75,64,523) is as under:

Sr.No.	Particulars	Amount (Rs)	Purpose of loan
1.	Interest paid to Yes Bank	19,91,29,094	Amount borrowed in A.Y. 2012-13 and used for investment in shares of Essar Oilfields Services Limited, Mauritius which is wholly owned subsidiary of assessee established for purpose of carrying out oilfield business.
2.	Interest paid on NCS from LIC	48,03,11,032	Amount received from LIC in A.Y. 2010-11 was utilized for giving ICD to subsidiary company for carrying out oilfield business. The income from ICD has been offered as business income under non tonnage activity.
3.	Interest on FCCB	67,31,05,2015	Amount borrowed in A.Y. 2011-12 and used for investment in preference shares in wholly owned subsidiary for carrying out oilfield business.
4.	Interest on aircraft taken on lease	1,56,83,680	Income earned from operation of aircraft has been offered as business income under non tonnage activity.

5.	Total	136,82,29,021/-	
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33. It is evident from the above chart that interest expenditure of Rs. 135,25,45,341/- has been incurred on amount borrowed for purpose of giving ICD to its subsidiary and interest of Rs. 1,56,83,680/- has been incurred on aircraft taken on lease.

34. As discussed hereinabove, the assessee derives business income from tonnage activity and non-tonnage activity. One of the activities, income from which is offered as business income under non tonnage, is oilfield business. As per object clause of the memorandum, one of the main object of the assessee was to carry out oil drilling business, which is also evident from the Director's report placed on record. Since the oil drilling business was carried out by the assessee through its subsidiary, loan was taken for giving as ICD to its subsidiary and assessee invested in subsidiary to acquire complete control over it since the assessee was to carry out its business of oil drilling through its subsidiaries. Therefore, the interest expenditure should be allowed as business expenditure U/s 36(1)(iii) of the Act. Since the investment was made in the group company for strategic purpose and not for earning dividend. Thus, the interest expenditure is allowable U/s 36(1)(iii) of the Act in so far as we have already held that the income on ICD earned from subsidiaries was liable to be taxed under the head income from business. From the record

we found that the said interest expenditure was effectively incurred for oil drilling business of assessee and hence the same is on account of business and allowable u/s 36(1)(iii) of the Act. In order to support our proposition, reliance is placed on following decisions;

- a) CIT v. Phil Corporation Ltd [244 CTR 226 (Bom)]
- b) CIT vs. Colgate Palmolive India Limited [(370 ITR 728) (Bom)]
- c) CIT v. Investa Industrial Corpn. Ltd. [(119 FUR 380) (Bom.)]
- d) CIT v. RPG Transmission Ltd. [359 ITR 673 (Mad)]
- e) Raptakos Brett & Co. Ltd vs. PCIT. (ITA No. 2251/Mu m/2015) (Mumbai Tribunal)

35. In all the above cases, it has been held that if the investment is made in subsidiary for the purpose of business, the loss or expenditure incurred by assessee would be allowable as business expenditure.

With respect to interest on aircraft taken on lease, we observe that assessee had offered income earned from operation of aircraft as business income, the interest paid for aircraft taken on lease is essentially allowable as business expense u/s.36(1)(iii) of the IT Act.

36. We also observe that even otherwise the interest expenditure incurred on the loans which are given to its subsidiaries as ICD on which interest was received by the assessee, such interest expenditure is

eligible to be allowed U/s 57(iii) of the Act while computing net interest income, our this observation is without prejudice to our above observation that interest on loan is eligible for deduction U/s 36(1)(iii) of the Act.

37. It was also argued by the Id AR that no interest disallowance on old/outstanding loan can be made in the current year, if the same was allowed in earlier year. It was submitted that the said interest expenditure pertaining to amount borrowed from LIC has been allowed in A.Y. 2010-11 in case of Essar Ports Limited and A.Y. 2011-12 in case of assessee by the Assessing Officer in the scrutiny assessment order passed u/s 143(3) of the Act. In order to support this proposition, reliance was placed on the following decisions;

- a) CIT v Sridev Enterprises [192 ITR 165 (Kar)]
- b) Escorts Ltd. v. ACIT [104 ITD 427 (Del)]
- c) Maiwa Cotton Spg. Mills v. ACIT [89 ITD 65 (TM)(Chd)]
- d) ITO v. J.M.P. Enterprises [101 ITD 324 (SMC)(Asr)]
- e) Virendra R. Gandhi v. ACIT (Tax Appeal No. 20 of 2004 with Tax Appeal No. 124 of 2005) dated 27.11.2014((Gujarat High Court)

38. Since we have already directed the A.O. to allow deduction of interest expenditure U/s 36(1)(iii) of the Act, even following the rule of consistency, the A.O. should have allowed the same as per the

treatment given by him in earlier years since there is no change in facts and circumstances of the case during the year under consideration. Thus, even on the doctrine of consistency, we find sufficient force in the argument of the Id AR that the interest expenditure which have already been allowed under business head of income in earlier year, the same should be allowed in the similar manner even during the year since there is no change in the facts and circumstances of the case.

39. We had also carefully perused the bank statement demonstrating the said nexus which is placed on record. It is evident from the said bank statement and ledger account that there is a direct nexus between the borrowed funds and the funds advanced to the subsidiary and hence the interest expenditure should otherwise be allowed as deduction U/s 57(iii) of the Act.

40. We are also of the view that even if the interest income is taxed as income from other sources, then the interest expenditure so incurred for earning the same should be allowed as deduction U/s 57(iii) of the Act. Since there was a direct nexus between the funds borrowed from the LIC and the money advanced to the subsidiary company and hence the interest expenditure of Rs. 48,03,11,032/- is otherwise liable to be allowed U/s 57(iii) of the Act. We direct accordingly.

41. From the record we found that AO had disallowed the interest paid on the funds borrowed which was given to subsidiaries / group companies. Since the ICDs were given to subsidiary in order to promote the business since an amount advanced to subsidiary would ultimately benefit the assessee, the interest paid is allowable as business expenditure. In order to support the said contention reliance is placed on the decision of the Hon'ble Supreme Court in the case of S.A, Builders v. CIT (288 ITR1). In the said decision the Hon'ble Supreme Court has held that if the assessee has borrowed funds and advanced the same to its subsidiary in order to promote the business of its subsidiary, then the interest paid by the assessee on borrowed funds is a business expenditure and no interest disallowance can be made u/s 36(l)(iii) of the Act. In the present case, the assessee has advanced ICD to its subsidiary in order to promote their business and charged interest thereon. Applying the ratio laid down by the Hon'ble Supreme Court in the case of S.A. Builders v. CIT (supra), wherein it has been held that interest expenditure incurred by the assessee is allowable as business expenditure, the interest income earned by the assessee on ICD given to subsidiary to promote their business would be taxable as business income. The said decision of the Hon'ble Supreme Court in the case of S.A. Builders v. CIT (supra) was followed by the Hon'ble Supreme Court in the case of Hero Cycles v. CIT (379 ITR 347). Further reliance is also

placed on the decisions of the Hon'ble Bombay High Court in the case of CIT v Piramal Glass Limited in Income Tax Appeal No 566 of 2017 dated 11.06.2019 (Bom), CIT v Sesa Resources Ltd. [404 ITR 707 (Bom)] and CIT v Reebok India Company (98 taxmann.com 413) in order to support our contention that interest expenditure is to be allowed u/s.36(1)(iii) while computing the income under head of "business and profession". Corresponding interest income is to be assessed under head of business income.

42. The interest expenditure of INR48.03 crores was incurred during the year on the loan taken from LIC for giving the same as ICD to EOSIL on which interest income of INR53.97 crores was earned. As per the bank statement, there is direct nexus between the loan received from LIC and the ICD given, therefore, without prejudice to our conclusion that the income from ICD forms part of the business income of the assessee, corresponding interest expense has to be allowed against interest income earned by the assessee irrespective of the head of the income under which it is assessed. Thus, we observe that interest expenditure is otherwise allowable u/s.57(iii) since there is direct nexus between the interest expenditure and interest income earned by assessee.

43. From the record we also found that the money was borrowed from LIC and advanced to its wholly owned subsidiary EOSIL as ICD in the earlier A.Y. 2010-11. The assessee was demerged from Essar Port Limited w.e.f. 01.10.2010 i.e. in A.Y. 2011-12. The money was advanced by Essar Ports Limited to EOSIL in A.Y. 2010-11 and Essar Ports Ltd received interest which was offered as business income. The same has been accepted by Assessing Officer in A.Y. 2010-11 as business income in the assessment order passed in case of Essar Ports Limited. Subsequently also in the assessment proceedings for A.Y. 2011-12, the same has been accepted by Assessing Officer as business income in case of Essar Ports Limited and in case of assessee also as business income in scrutiny assessment framed u/s 143(3) of the Act. The relevant assessment order so passed U/s 143(3) of the Act for the A.Y. 2010-11 and 2011-12 are placed on record. However, during the year under consideration, the assessee continued to receive similar interest income on the ICD from EOSIL which was given out of money borrowed from LIC. The assessee offered the same as business income but the he A.O. treated the same as income from other sources. There is no change in the facts and circumstances of the case during the year under consideration as compared to earlier years wherein the AO had assessed the very same income under the head of business income. Hence, even on the principles of consistency, the interest income received by the

assessee should be taxed as business income. In order to support the said contention reliance is placed on the decision of the Hon'ble Supreme Court in the case of CIT vs. Excel Industries (358 ITR 295). Accordingly, we do not find any justification in the order of AO for treating interest income as "income from other sources".

44. In view of the above discussion, we direct the AO to treat interest income as "income from business" and to allow interest expenditure u/s.36(1)(iii) of the I.T. Act. We direct accordingly.

45. The last grievance of the assessee relates to disallowance of common interest expenditure of Rs. 35,98,89,248/-. The A.O. has dealt with the issue at page No. 11 and 12. From the record we found that the assessee had claimed common interest expenditure of Rs. 48,82,67,263/- which has been apportioned to tonnage and non tonnage activity. The assessee allocated the said expenditure in the ratio of assets employed between tonnage and non tonnage activities. The Assessing Officer apportioned the said expenditure on the basis of turnover between tonnage and non tonnage activities. We do not find any merit in the order of the A.O. in so far as the interest expenditure is periodic cost of borrowing incurred for the purpose of financing business activities. Therefore it has to be apportioned on basis of cost of financing i.e. value of assets and not on basis of turnover, since the

turnover of the business has got no relation with the interest expenditure so incurred by the assessee. We, accordingly, restore this issue to the file of the A.O. to recompute the same by allocating interest expenditure in the ratio of assets employed between the tonnage and non tonnage activities. We direct accordingly.

46. The next grievance of the assessee as contained at ground No.9 relates to assessing the supervision management fees of Rs. 7,07,52,924/-, as belonging to tonnage business. This ground was not pressed by Id. AR, we therefore, dismiss this ground as not pressed. Accordingly, this ground of appeal is dismissed.

47. Ground No.10 is consequential to ground No.9, wherein it was contention of Id. AR that once the income is treated as income under tonnage tax income, the same should not again be taxed as part of normal income offered by the assessee. It was pointed out by Id. AR that AO has inadvertently added the same income in normal business income shown by the assessee which amount to double taxation of same income. From the record we found that AO was justified in treating the income of Rs.7,07,52,924/- as tonnage tax income, however, the same should not again form the part of normal business income. We found that AO has inadvertently again added the same income under the head normal business income, which amount to double taxation of same

income, accordingly, we direct the AO to reduce the same from normal business income after due verification. We direct accordingly.

48. In the result, ground No.10 is allowed for statistical purposes.

49. In the result, this appeal of the assessee is allowed in part, in terms indicated hereinabove.

Order pronounced in the open court on 06th March, 2020.

**Sd/-
(VIKAS AWASTHY)
JUDICIAL MEMBER**

**Sd/-
(R.C.SHARMA)
ACCOUNTANT MEMBER**

Mumbai; Dated 06/ 03/2020
*Ranjan

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.

सत्यापित प्रति //True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai