



ITA No.4719/Mum/2018  
Essar Shipping Ltd.  
Assessment Year :2011-12

**आयकर अपीलीय अधिकरण “के” न्यायपीठ मुंबई में।**  
**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**“K” BENCH, MUMBAI**

**माननीय श्री अमरजीत सिंह, न्यायिक सदस्य एवं**  
**माननीय श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।**  
**BEFORE HON’BLE SHRI AMARJIT SINGH, JM AND**  
**HON’BLE SHRI MANOJ KUMAR AGGARWAL, AM**

आयकर अपील सं./ I.T.A. No.4719/Mum/2018  
(निर्धारण वर्ष / Assessment Year: 2011-12)

<b>Essar Shipping Ltd.</b> Essar House, 11 K.K. Marg Mahalaxmi, Mumbai-400 034.	<b>बनाम/ Vs.</b>	<b>DCIT-5(1)(2)</b> Mumbai.
स्थायी लेखासं./जीआइआरसं./PAN/GIR No. <b>AACCE-3707-D</b>		
(पीलार्थी/ <b>Appellant</b> )	:	(प्रत्यर्थी / <b>Respondent</b> )

<b>Assessee by</b>	:	Shri Anuj Kisnadwala- Ld. AR
<b>Revenue by</b>	:	Shri Akhtar Husain Ansari - Ld.DR

सुनवाई की तारीख/ <b>Date of Hearing</b>	:	12/02/2020
घोषणा की तारीख / <b>Date of Pronouncement</b>	:	16/03/2020

**आदेश / O R D E R**

**Manoj Kumar Aggarwal (Accountant Member)**

1. Aforesaid appeal by assessee for Assessment Year [in short referred to as ‘AY’] 2011-12 contest the order of Ld. Commissioner of Income-Tax (Appeals)-56, Mumbai, [in short referred to as ‘CIT(A)’], Appeal No. CIT(A)-56/DCIT-5(1)(2)/2017-18/404 dated 16/05/2018 on following grounds: -



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1. The learned CIT (A) has erred in law and on facts in upholding the order passed by the Assessing Officer u/s. 144C r.w.s. 143(3) of the Income-tax Act, 1961.
2. The learned CIT(A) ought to have held that no transfer pricing adjustment can be made since the appellant was engaged in shipping operations and its income was offered under tonnage tax scheme.
3. The learned CIT (A) has erred in law and on facts in upholding the transfer pricing adjustment of Rs. 28,09,305/- on account of interest payable for purchase price of two ships.
4. The learned CIT (A) has erred in law and on facts in upholding the transfer pricing adjustment of Rs. 50,00,000/- on account of purchase price of ship.
5. The learned CIT (A) has erred in law and on facts in upholding the transfer pricing adjustment of Rs 8,82,000/- on account of fees receivable for providing negative lien on shares held by assessee.
6. The learned CIT (A) has erred in law and on facts in upholding the transfer pricing adjustment of Rs 70,66,153/- towards hire charges payable for ships.”

As evident, the assessee is aggrieved by certain Transfer Pricing (TP) Adjustment. Although, an additional ground of appeal was filed vide petition dated 04/11/2019, however, the same has not been pressed by Ld. Authorized Representative for the assessee (AR).

2. The Ld. AR submitted that substantial additions would stand deleted in view of the fact that the assessee was engaged in shipping operations and its income was offered under tonnage taxation scheme and therefore, the Transfer Pricing provisions would not apply to the assessee. Our attention has been drawn to the decision of co-ordinate bench in the case of assessee's group concern case for AY 2011-12, **Essar Ports Ltd. V/s ACIT, ITA No.4444/Mum/2017 dated 26/06/2019**. A copy of the same has been placed on record. Similar view is stated to have been taken in case of that assessee for AY 2010-11, ITA No.1831/Mum/2015 order dated 06/01/2020. Both the decisions have followed the decision of co-ordinate bench rendered in **Van Oord India Ltd. V/s ACIT (ITA No.7228/Mum/2012 dated 22/05/2019)**. The consistent view of the Tribunal is that the adjustments as envisaged by



Chapter-X would have no bearing on the computation of income liable for taxation in Chapter-XII-G of the Act since under Tonnage Taxation Scheme, actual receipts / revenues earned and expenses incurred are not taken into consideration for the purpose of determining the tonnage income of the eligible company and therefore, the applicability of Transfer Pricing Provisions as per Chapter-X would stand excluded. The Ld. AR has placed a chart on record to submit that facts as well as grounds are pari-materia the same in the case of present assessee vis-à-vis assessee's group concern namely **Essar Ports Ltd.** In fact, the shipping business of that entity got demerged into the assessee w.e.f. 01/10/2010 as per the Scheme approved by Hon'ble Gujarat High Court.

3. In the above background, we find that the assessee was assessed u/s 143(3) r.w.s. 144C(1) on 10/04/2015 wherein it was saddled with Transfer Pricing Adjustment of Rs.157.57 Lacs, as proposed by Ld. Transfer Pricing Officer vide its order u/s 92CA(3) dated 22/01/2015.

4. The TP adjustment, which are the subject matter of dispute before us, arises out of following transactions: -

No.	Nature of Transaction	Proposed TP Adjustment (Rs.)
1.	Adjustment on Account of Interest	Rs.28.09 Lacs
2.	Adjustment on Account of purchase of ships	Rs.50.00 Lacs
3.	Adjustment on Account of lien of property	Rs.8.82 Lacs
4.	Adjustment on Account of Hire Charges	Rs.70.66 Lacs
	<b>Total</b>	<b>157.57 Lacs</b>

The Ld. AR submitted that there are two streams of income for the assessee viz. shipping business and non-shipping business. The Shipping business income has been offered under tonnage taxation Scheme as per Sec.115VA of the Act.



5. We find that the TP adjustment listed at Serial Nos. 1, 2 & 4 are in respect of Shipping business, the income wherefrom has been offered under Tonnage Taxation Scheme. The same has also been submitted by Ld. AR in its written submissions. The Ld. DR also could not controvert the said submissions. Keeping in view the admitted position and respectfully following the consistent stand of Tribunal in the cited decisions, the TP adjustments listed at Serial Nos. 1, 2 & 4 would stand deleted. Grounds thus raised, stand allowed.

6.1 The only surviving TP adjustment of Rs.8.82 Lacs arises out of Negative Lien. It transpired that the assessee has issued *No Lien undertakings* to the lenders of its AE namely *Essar Global Limited (EGL)* which is ultimate holding company of the assessee. M/s EGL has obtained loan from foreign branches of ICICI Bank. As per the terms, the assessee was not to transfer, assign and dispose-off 49% of equity of another entity namely *M/s Essar Logistics Ltd. (ELL)* without prior approval of lender during the pendency of loan. M/s ELL was wholly owned subsidiary of assessee company and as per the terms of agreement 7,30,000 shares has been kept by the assessee as lien to the bank. The cost of investment was Rs.73 Crores and 49% of such shares kept as negative lien came to Rs.35.77 Crores. The assessee did not charge any fees for the same *inter-alia* on the ground that the transaction was not an international transaction within the meaning of Sec.92B. A plea was also raised that it was not akin to corporate guarantee since no liability was assumed by the assessee in the event of failure on the part of its AE to repay the same.



6.2 The Ld. TPO agreed that although the arrangement was not in the form of financial guarantee but by giving negative lien, the assessee provided comfort to the lender bank and therefore, the same was to be benchmarked. Finally, the benchmarking rate was adopted as 0.5% per annum. Applying the same to the tenure of the lien, the TP adjustment thus worked out to be Rs.8.82 Lacs. The said adjustment, upon confirmation by Ld. CIT(A), is under challenge before us.

6.3 Upon careful consideration, it is admitted fact by Ld. TPO that the negative lien did not entail financial commitments on the part of the assessee rather a restriction was imposed which obliged the assessee not to deal in certain specified securities during the tenure of loan. The assessee was required to obtain prior permission of the lender to deal in those shares. However, certain comfort was indeed provided by the assessee to its AE which was to be benchmarked on Arm's Length Principle. The ALP rate of 0.5% as adopted by Ld. TPO, in our opinion, would be on the higher side. We reduce the same to 0.25%. This rate is nothing but the rate sustained by co-ordinate bench in assessee's own case for AY 2013-14, ITA No.7371/Mum/2017 order dated 06/03/2020. The Ld. AO is directed to recompute the same, in terms of our above order. The ground stand partly allowed.

7. Resultantly, the appeal stands partly allowed in terms of our above order.

*Order pronounced in the open court on 16<sup>th</sup> March, 2020.*

**Sd/-**

**(Amarjit Singh)**

न्यायिक सदस्य / **Judicial Member**

**Sd/-**

**(Manoj Kumar Aggarwal)**

लेखा सदस्य / **Accountant Member**



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मुंबई Mumbai; दिनांक Dated : 16/03/2020  
Sr.PS, Jaisy Varghese

**आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)  
आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai.