IN THE INCOME TAX APPELLATE TRIBUNAL
"I" Bench, Mumbai

Before Shri Pramod Kumar, Vice President
and Shri Ravish Sood, Judicial Member

ITA No. 5898/Mum/2019
ITA No. 218/Mum/2020
(Assessment Year: 2016-17)

Hapag Lloyd AG C/o Hapag Lloyd India Pvt. Ltd. 403 & 404, Satellite Gazebo, A Wing, 4th Floor, Guru Hargovindiji Marg, Andheri (East), Mumbai – 400 093	Vs.	Deputy Commissioner of Income-tax (Internatioal Taxation), Range-2(2)(2) Room No. 1606, 16th Floor, Air India Building, Nariman Point, Mumbai – 400 021
PAN – AAACH0979G		
(Appellant)		**(Respondent)**

Appellant by: Shri Nishant Thakkar &
Ms. Jasmin Amalsadvala, A.Rs
Respondent by: Shri Sanjay Singh, CIT,D.R

Date of Hearing: 20.01.2020
Date of Pronouncement: 31.01.2020

O R D E R

PER RAVISH SOOD, JM

The captioned appeals filed by the assessee are directed against the respective orders passed by the A.O under Sec.143(3) r.w.s 144C(13) of the Income Tax Act, 1961 (for short 'Act'), dated 08.08.2019 AND under Sec. 154 of the Act, dated 10.12.2019. As the issues involved in the aforementioned appeals are inextricably interwoven and interlinked, therefore, the same are being taken up and disposed off by way of a common order. We shall first take up the appeal of the assessee wherein it had assailed the assessment order passed under Sec. 143(3) r.w.s 144C(13) dated 08.08.2019 on the following grounds of appeal before us:

"Based on the facts and circumstances of the case, Hapag-Lloyd AG. (hereinafter referred to as the 'Appellant') respectfully craves leave to prefer an appeal against the order dated 8 August 2019 passed by Deputy Commissioner of Income-tax (International Taxation) - 2(2)(2) ('AO') in pursuance of the directions issued by Dispute Resolution Panel - I ('DRP'), Mumbai on the following grounds:

On the facts and in the circumstances of the case and in law. the AO, based on directions of DRP has:

GENERAL

1. erred in assessing total income of the Assessee at Rs 1,82,92,050/- as against returned income of Rs Nil:

Taxability of freight charges of INR 24,38,94,026/- from transportation of cargo through feeder vessels

2. erred in holding that freight income from transportation of cargo through feeder vessels is not eligible for benefit under Article 8 of India- Germany DTAA:
3. erred in holding that while income from feeder vessels would fall within the ambit of section 44B of the Act whereas the same shall not eligible for benefit under Article 8 of India-Germany DTAA:
4. erred in not taking cognizance of the decision of jurisdictional Bombay HC/ ITAT in the Assessee's own case for AY 2005-06 to AY 2011-12, AY 2013-14 and AY 201415, wherein the Hon'ble HC/ Hon'ble ITAT has held that freight income from transportation of cargo through feeder vessels is eligible for benefit under Article 8 of the India-Germany DTAA:

Hapag Lloyd India Private Limited ('HLIPL') held to be agency permanent establishment ('PE') of the Assessee in India

5. erred in holding that HLIPL constitutes an agency PE of the Assessee in India, without providing cogent reasons for the same:
6. without prejudice to the above, erred in not appreciating that HLIPL is not a dependent agent of the Assessee as per Article 5 of India-Germany DTAA,
7. without prejudice to the above, failed to appreciate that even if it is held that HLIPL constitutes an agency PE of the Assessee in India. no further profits could be attributed to such PE since the Assessee has remunerated HLIPL on an arms length basis:

Short grant of TDS credit of INR 60,06,811/-

8. erred in not granting TDS credit to the extent of INR 60,06,811 which was incorrectly deposited in the PAN No. of the Agent of Assessee whereas Agent has not taken credit for the same:

Levy of interest under section 234B of the Act

9. erred in levying interest of INR 29.82.996/- under section 234B of the Act to the Assessee

Initiation of penalty proceedings under section 271(1)(c) of the Act

10. erred in initiating penalty proceedings under section 271(1)(c) of the Act.

The above grounds of appeal are mutually exclusive and without prejudice to one another. The Assessee craves leave to add/ alter/ amend/ delete/ withdraw any or all of the grounds at or before the hearing of the appeal so as to enable the Income tax Appellate Tribunal to decide the appeal according to law."

2. Briefly stated, the assessee which is a limited liability company incorporated in and a tax resident of Germany is engaged in transportation of cargo to ports outside India and vice

versa. Also, the assessee company transports cargo on vessels owned/chartered/ pooled by it as well as on slot arrangement basis. Return of income for A.Y 2016-17 was e-filed by the assessee on 30.09.2016, declaring its total income at Rs.186,39,48,570/-. Subsequently, the assessee had revised its return of income on 05.05.2017, declaring its total income at Rs.186,01,46,020/-. As the revised return filed by the assessee was treated as defective by the CPC Bangalore, therefore, the assessee in response to the notice issued under Sec. 139(9) of the Act filed a return declaring total income of Rs. Nil on 30.03.2018. The case of the assessee was thereafter selected for scrutiny assessment under Sec. 143(2) of the Act.

3. As observed by us hereinabove, the assessee is engaged in transportation of cargo to ports outside India and vice versa. The assessee would transport cargo on vessels owned/chartered/pooled by it as well as on slot arrangement basis. In the normal course of its business the vessels of the assessee or its consortium partners would on certain occasions not call at the Indian ports on account of various reasons, viz. the size of the vessels would be too large to enter the Indian ports which had a shallow draft or the depth of the Indian ports would not be enough for the vessels to be anchored. The assessee under the aforesaid circumstances would transport the cargo on feeder vessels from the origin port to the hub port (i.e the intermediary port where vessels owned/chartered/pooled by the assessee could be anchored), and then the cargo would be transported from the hub port to the destination port on the vessels owned/chartered or pooled by the assessee. The assessee persuaded by commercial requirements would at times transport cargo on slot arrangement basis from the origin port to the destination port. The assessee would issue bill of lading to the exporters for transportation of cargo for the entire journey (i.e from the origin port to the destination port).

4. During the course of the assessment proceedings the A.O called upon the assessee to explain as to how the freight earned by it from the feeder vessels (i.e portion of freight income attributed to feeder vessels) which were neither owned, chartered or leased by the assessee was brought within the sweep of Article 8 of the 'Double Taxation Avoidance Agreement' (for short 'DTAA') between India and Germany. It was the claim of the assessee before the A.O that as per Article 8 – Clause 1 of the India-Germany DTAA the profits from the operation of ships or aircraft in international traffic was taxable only in the contracting state in which the place of effective management of the enterprise was situated. The assessee taking support of the

judgment of the Hon'ble High Court of Bombay in the case of DIT (IT) Vs. Balaji Shipping Ltd. (UK) [77 DTR 361](Bom) and the OECD guidelines submitted before the A.O that in the aforesaid case it was observed by the Hon'ble High Court that the income from transportation of cargo on slot arrangement basis was to be construed as income from operation of ships and was an integral part of the business of the shipping companies. It was further stated by the assessee before the A.O, that it had no 'Permanent Establishment' (for short 'PE') in India, viz. (i) neither had a fixed place PE in India under Article 5(1)(ii); (ii) nor an agency PE as per Article 5(5) and Article 5(6) of the tax treaty. It was thus the contention of the assessee before the A.O that slot hire arrangements were directly connected and interlinked with and an integral part of the enterprises business of operating ships. The assessee in order to drive home its aforesaid contention that now when the income from slot arrangement was ancillary to its main business activity of operation of ships internationally, therefore, the income generated from the same would be covered under Article 8 had relied on the order of the ITAT, Mumbai in the case of JDIT(IT) Vs. CMA CGM SA France (2009) 27 SOT 367 (Mum). Also the assessee took support of the OECD commentary on Article 8. Relying on the aforesaid judgment of the Hon'ble High Court it was submitted by the assessee that in its case also the income from slot arrangement did form part of the income from operation of ships in international traffic. The assessee further submitted that the Hon'ble High Court of Bombay in its own case for A.Y 2007-08 viz. Hapag-Llyod AG vs. Additional Director Of Income-tax (International Taxation) (2013) 84 CCH 0073 (Bom), vide its order dated. 01.02.2013, had after deliberating on the issue under consideration restored the matter back to the file of the Tribunal with a direction to decide the same in view of the decision of the High Court in the case of DIT(IT) vs. Balaji Shipping U.K Ltd. (supra) [77DTR 361](Bom). It was further submitted by the assessee that pursuant to the aforesaid directions of the Hon'ble High Court the Tribunal had vide its order dated. 14.08.2013 disposed off the appeal of the assessee for A.Y. 2007-08 and had concluded that the freight earned by the assessee from transportation of cargo through use of feeder vessels was entitled for relief provided in Article 8 of the India-Germany tax treaty and thus would not be taxable in India. Also, it was submitted by the assessee that the tribunal had taken a similar view while disposing off the appeals in the assesse's own case, vide its order dated 21.09.2016 for A.Y. 2005-06, vide order dated 22.07.2016 for AY(s). 2006-07, 2008-09 to A.Y. 2011-12, and vide its order dated 31.10.2017 for A.Y. 2013-14.

5. However, the A.O held a conviction that as the case of Balaji Shipping U.K. Ltd. (supra) pertained to India-UK treaty which specifically provided that income from the operation of ships included income derived from the rental on a bareboat basis of ships if such rental income was incidental to the income described in Paragraph 1 of the Article 9, therefore, the reliance placed by the assessee on the same was misconceived. The A.O observed that as there were no such alike provisions in Article 8 of India-Germany tax treaty, therefore, the ratio of the decision in the case of Balaji Shipping U.K. Ltd. (supra) would not be applicable to the case of the assessee. The A.O further observing that as the order of the Hon'ble Bombay High Court in the case of Balaji Shpping U.K Ltd (supra) was not accepted by the department and a 'Special Leave Petition' (for short 'SLP') had been filed before the Hon'ble Supreme Court, therefore, on the said count also the ratio of the aforesaid decision could not be accepted. The A.O further placed heavy reliance on the order passed by his predecessor on the issue under consideration in the assesse's own case for A.Y. 2007-08, wherein it was held that the income earned in respect of slot/feeder charges by the assessee would be taxable in India.

6. The A.O further deliberating on the facts of the case observed that the assessee had an agency PE in India in form of Hapag-Llyod India Ltd. The A.O in the backdrop of his aforesaid conviction concluded that the assessee was carrying out the business of operation of ships in India and was having a PE in India as per Article 5 of India-Germany DTAA. Thus, the A.O held that the income from booking of cargo by agent in India as well as transport of cargo from port in India to mother vessel in India was liable to be brought to tax in India.

7. Alternatively, the A.O observed that without prejudice to the fact that the assessee had a PE in India, even otherwise as there were special provisions in the Income-tax Act, 1961 in the form of Sec. 44BB and Article 8 of the DTAA between India and Germany, therefore, the income earned by the assessee on slot hire basis which did not qualify for exemption under Article 8 of the DTAA was inescapably liable to tax as per Sec. 44BB of the Act. Thus, out of the total freight income of Rs. 2480,19,46,913/- earned by the assessee, the A.O held that (i). the freight income earned by the assessee from feeder to feeder vessel of Rs. 21,39,12,837/-; and (ii). the freight earned from the entire journey on feeder vessel of Rs. 2,99,81,189/-, therein aggregating to Rs. 24,38,94,026/- [i.e Rs. 21,39,12,837/- (+) Rs. 2,99,81,189/-] was not eligible for relief under Article 8 of the India-Germany treaty. On the basis of his aforesaid deliberations,

the A.O inter alia held that the freight amounting to Rs. 24,38,94,026/- [i.e Rs. 21,39,12,837/- (+) Rs. 2,99,81,189/-] was not eligible for relief under Article 8 of the India-Germany DTAA.

8. The assessee assailed the draft assessment order passed by the A.O under Sec. 143(3) r.w.s 144C(13) of the 'Act' before the DRP. The DRP dealt with the contentions of the assessee, as under:

(A). The DRP observed that as per Article 8 of India-Germany tax treaty the profits from the "operation of ships or aircraft in international traffic" was taxable only in the Contracting state in which the place of effective management of the enterprise was situated. Also, as per the A.O the said provisions would apply to profits from the participation in a pool, a joint business or an international operating agency. As per the DRP, while for the provisions of Sec. 44B of the Act related to the non-residents engaged in the business of operation of ships, however, the same were not pari-materia with the wordings of India-Germany tax treaty. It was observed by the DRP that for the purposes of Sec. 44B the "business of operation of ships" was an inclusive definition but the term used in DTAA was "income from the operation of ships in international traffic" which impliedly restricted the scope of DTAA to the profits from operation of ships in international traffic only. Accordingly, on the basis of its aforesaid observations the DRP was of the view that though the India-Germany tax treaty covered running/operating own ships, pooled ships, joint shipping business or joint international operating agency but there was no mention of feeder vessels or coastal trade or slot chartering in ships which were not owned by the assessee and which had not been taken on a pool basis. Observing, that the Hon'ble High Court of Bombay in its decision in the case of Balaji Shipping (U.K) Ltd. (2012) 253 CTR (Bom) had held that the freight earned from feeder vessels would be covered by Article 8 of the India-Germany DTAA but a SLP of the department against the said order was pending before the Hon'ble Supreme Court in the case titled as DIT(Intl. Taxation), Mumbai Vs. Balaji Shipping UK Ltd. [C.A No. 009504/2013 registered on 12.03.2013; SLP(C) No. 011148/2013, registered on 21.10.2013, the DRP upheld the view taken by the A.O and dismissed the objections raised by the assessee.

(B). The DRP further upheld the observations of the A.O that Hapag Llyod India Ltd. was not an independent agent under Article 5 of the India-Germany DTAA. The DRP observed that the aforesaid agent was working solely for the assessee. Thus, on the basis of his aforesaid

observations the DRP held that Hapag Llyod India Ltd. constituted an agency PE of the assessee. The DRP was also not persuaded to accept the contention of the assessee that as the remuneration paid by assessee to Hapag Llyod India Ltd. was at arm's length, therefore, no further income could be subjected to tax in India. The DRP observed that what was being taxed in the case were the receipts of the assessee from the activities carried out in India or activities attributable to India which were not covered by Article 8 of the treaty between India and Germany. The DRP thus concluded that while for the receipts on account of transport of goods etc. by ship in international traffic was not taxable in India in view of Article 8 of the India-Germany treaty, any other receipt of the nature referred to in sub-section (2) in the case of the assessee being a non-resident engaged in the business of operations of ships was liable to be brought to tax in India as per the provisions of Sec. 44B.

9**.** The A.O on receipt of the directions of the DRP gave effect to the same and vide his order passed under Sec. 143(3) r.w.s 144C(13), dated. 08.08.2019 assessed the income of the assessee at Rs. 1,82,92,050/-.

10**.** The assessee being aggrieved with the order passed by the A.O under Sec. 143(3) r.w.s 144C(13) had carried the matter in appeal before us. The Ld. Authorised representative (for short 'A.R') for the assessee at the very outset of the hearing submitted that the issue involved in the present appeal was squarely covered by the order of the **Hon'ble High Court of Bombay** in the case of **Director Of Income-tax (International Taxation) Vs. Balaji Shipping U.K Ltd. (2012) 211 Taxman 0535 (Bom).** The ld. A.R further submitted that the **Hon'ble High Court of Bombay** while disposing of the appeal of the assessee for A.Y. 2007-08 in **Hapag-Llyod AG vs. Additional Director Of Income-tax (International Taxation)** (**2013) 84 CCH 0073 (Bom)** had restored the issue to the Tribunal for fresh adjudication after considering the judgment of the Hon'ble High Court in the case of Balaji Shipping Pvt. Ltd. The ld. A.R submitted that the Tribunal thereafter had vide its order dated. 14.08.2013 disposed off the appeal of the assessee for A.Y 2007-08. The ld. A.R submitted that the Tribunal in its order had held that the assessee would be eligible for exemption under the treaty provisions in respect of revenue earned from feeder vessels obtained by the assessee on slot hire arrangement basis. It was submitted by the ld. A.R that the issue involved in the present appeal was squarely covered by the aforesaid order of the Tribunal in the assesse's own case for A.Y. 2007-08. It

was further submitted by the ld. A.R, that the issue was also covered by the order passed by the Tribunal in the assesse's own case dated 21.09.2016 for A.Y. 2005-06, vide order dated 22.07.2016 for A.Y. 2006-07 to A.Y. 2011-12, vide order dated 31.10.2017 for A.Y. 2013-14, vide order dated 28.06.2019 for A.Y. 2014-15 and order dated 16.12.2019 for A.Y. 2015-16. (copies of orders placed on record).

11. Per Contra, the ld. D.R relied on the order of the A.O/DRP. However, the ld. D.R could not controvert the claim of the counsel for the assessee that the issue involved in the present appeal was covered by the aforesaid orders passed by the Tribunal in the assesse's own case.

12. We have heard the authorised representatives for both the parties, perused the orders of the lower authorities and the material available on record. We find that the core issue involved in the case of the present assessee which is a Foreign company engaged in the business of operation of ships internationally is as to whether the portion of freight income earned by the assessee in the course of its business of transportation of cargo to ports outside India and vice versa, to the extent the same is attributable to feeder vessels which were neither owned, chartered or leased by the assessee would fall within the sweep of Article 8 of the 'Double Taxation Avoidance Agreement' (for short 'DTAA') between India and Germany, or not. We find that the **Hon'ble High Court of Bombay** while disposing of the assesse's own appeal for A.Y. 2007-08 in **Hapag-Llyod AG vs. Additional Director of Income-tax (International Taxation)** (**2013) 84 CCH 0073 (Bom)** had restored the matter to the Tribunal for fresh adjudication on the same terms and observations which were recorded by the Hon'ble High Court on the issue under consideration in the case of **Director Of Income-tax (International Taxation) Vs. Balaji Shipping U.K Ltd. (2012) 211 Taxman 0535 (Bom).** We find that the Hon'ble High Court while disposing of the appeal of the assessee for A.Y. 2007-08 and restoring the matter to the Tribunal had observed as under:

> *"2. Counsel for the parties states that in view of the decision of this Court in the matter of Director of income Tax (International Taxation) V/s. Balaji shipping UK Ltd. reported in 77 DTR 361, the impugned order be set aside in respect of the issue raised in the present appeal. Accordingly, the impugned order is set aside and the matter is remanded to the Tribunal for fresh consideration in the light of the decision of this Court in the matter of Balaji (supra). All contentions before the Tribunal are kept open."*

13**.** We find that the Tribunal on the matter having been restored for fresh adjudication had thereafter vide its order passed in the case of the assessee for A.Y. 2007-08 in **Hapag–Llyod**

Container Line GMBH Vs. Addl. Director of Income-tax (International Taxation), Mumbai (ITA No. 8854/Mum/2010; dated. 14.08.2013) keeping in view the observations of the Hon'ble High Court in the case of **Director Of Income-tax (International Taxation) Vs. Balaji Shipping U.K Ltd. (2012) 211 Taxman 0535 (Bom)**, had held, that the assessee would be eligible for exemption under the treaty provisions in respect of revenue that was earned by it from feeder vessels obtained on slot hire arrangement basis. We find that subsequent to the aforesaid order of the Tribunal in the assesse's own case for A.Y. 2007-08, the same was thereafter followed by the Tribunal in the assesses own case for **A.Y. 2006-07 and A.Y. 2008-09 to 2011-12**, in **Dy. CIT (IT)-2(2)(2), Mumbai Vs. Hapag Llyod AG [ITA Nos. 1624 – 1628/Mum/2015; dated.22.07.2016]** and it had been held by the Tribunal that in the backdrop of the aforesaid order of the Tribunal for A.Y. 2007-08 and the judgment of the Hon'ble High Court of Bombay in the case of DIT (IT) Vs. Balaji Shipping U.K Ltd. (supra), the benefits of DTAA between India and Germany would also be available to the assessee in respect of the revenue earned from the feeder vessels obtained by the assessee from slot hire arrangements. We further find that again the Tribunal in the revenues appeal in the assesses own case for **A.Y. 2005-06**, had vide its order passed in **ITA No. 1776/Mum/2014, dated. 21.09.2016**, by referring to the earlier orders of the Tribunal in the case of the assessee for A**.Y. 2007-08, dated. 14.08.2013 in ITA No. 8854/Mum/2010** as well as the **consolidate order for A.Y. 2006-07 and 2008-09 to 2011-12, in ITA No. 1624-1628/Mum/2015; dated. 22.07.2016**, had taken the same view. Also, a similar view had been taken by the Tribunal while disposing off the appeals of the assessee for **A.Y. 2013-14 (ITA No.1441/Mum/2017), A.Y. 2014-15 (ITA No.7331/Mum/2017 and A.Y. 2015-16 (ITA No.4939/Mum/2018)**. We have perused the aforesaid orders and find ourselves to be in agreement with the view taken by the Tribunal in the aforesaid years in the case of the assessee. On the basis of our aforesaid observations, we are of the considered view that the benefits of Article 8 of the India-Germany DTAA would also be available to the assessee in respect of the revenue that was earned by the assessee from the feeder vessels obtained on slot hire arrangement basis. Accordingly, we set aside the order of the CIT(A) in terms of our aforesaid observations. The **Grounds of appeal No. 2 to 4** raised by the assessee before us are allowed.

14**.** We are further of the view that as we have held that the benefit of Article 8 of the India–Germany DTAA would also be available to the assessee in respect of the revenue earned by it

from the feeder vessels obtained on slot hire arrangements, therefore, the Grounds of appeal Nos. 5 to 7 as to whether the assessee had an agency PE in India having been rendered as academic are not being adverted to and adjudicated upon by us and are left open. The **Grounds of appeal No. 5 to 7** are dismissed in terms of our aforesaid observations.

15**.** That as regards the assailing of the interest of Rs. 29,82,996/- levied on the assessee under Sec. 234B of the Act, we find, that the said issue is covered in favour of the assessee by the decision of the **Hon'ble High Court of Bombay** in the case of **DDIT(IT) Vs. NGC Network Asia LLC (2009) 313 ITR 187 (Bom).** In the aforesaid case, the Hon'ble High Court had held that interest under Sec. 234B would not be applicable to a non-resident assessee, by observing as under:

> *"**5.** Under the provisions of the present Act, the issue had come for consideration in the case of CIT & Anr. vs. Sedco Forex International Drilling Co. Ltd. & Ors. (2004) 186 CTR (Uttaranchal) 144 : (2003) 264 ITR 320 (Uttaranchal). One of the questions was, as to whether interest could be levied on the assessee under s. 234B of the Act in respect of tax which was not liable to be deducted at source. A learned Bench of the Uttaranchal High Court, after considering the provisions, held as under :*
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> *"Secondly, although s. 191 of the Act is not overridden by ss. 192, 208 and 209(1)(a)/(d) of the Act, the scheme of ss. 208 and 209 of the Act indicates that in order to compute advance tax the assessee has to, inter alia, estimate his current income and calculate the tax on such income by applying the rates in force. That under s. 209(1)(d) the income-tax calculated is to be reduced by the amount of tax which would be deductible at source or collectible at source, which in this case has not been done by the employer company according to the law prevailing for which the assessee cannot be faulted."*
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> ***6.** Relying on the judgment in Sedco Forex International Drilling Co. Ltd. (supra), a learned Bench of this Court was pleased to pass an order dt. 16th July, 2008 in IT Appeal (L) No. 1796 of 2007 in the case of the Director of IT (International Taxation) vs. Morgan Guarantee International Finance Corporation, by applying the ratio of that judgment.*
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> ***7.** Our attention is also invited to the judgment of the Madras High Court in the case of CIT vs. Madras Fertilisers Ltd. (1984) 149 ITR 703 (Mad), where the Madras High Court took the view that the amount of tax deductible at source is to be taken into consideration to determine the liability to pay the interest under s. 215. In that case, the assessee had not paid advance tax on interest income. The payer of interest had not deducted the tax. The learned Bench of the Madras High Court was of the view that levy of interest under s. 215 on assessee was not justified.*
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> ***8.** We are in respectful agreement with the view taken in the case of CIT & Anr. vs. Sedco Forex International Drilling Co. Ltd. (supra), by the Uttaranchal High Court. We are clearly of the opinion that when a duty is cast on the payer to pay the tax at source, on failure, no interest can be imposed on the payee assessee.*
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> ***9.** Considering the submissions of both parties and the provisions of law, consequently the appeal is dismissed."*

We thus respectfully following the order of the Hon'ble High Court decide the issue in favour of the assessee. The **Ground of appeal No. 9** is allowed.

16. We find that the assessee had also assailed before us the failure on the part of the A.O to grant credit for TDS of Rs.60,06,811/-, for the reason, that the same was wrongly deposited in the PAN Number of the agent of the assessee. It was submitted by the ld. A.R that the A.O while concluding as hereinabove had overlooked the fact that the agent had not taken the credit for the said amount. We find that the aforesaid claim of the assessee would require verification of facts as had been stated by the assessee before us. Accordingly, we restore the matter to the file of the A.O for making necessary verifications. In case, the income of the correlating to the TDS of Rs.69,96,811/- had been assessed in the hands of the assessee and no credit for the same was raised by the agent, then the A.O after being satisfied shall allow the necessary credit for the same to the assessee. Needless to say, the A.O shall in the course of the 'set aside' proceedings afford a sufficient opportunity of being heard to the assessee for substantiating its aforesaid claim. The **Ground of appeal No. 8** is allowed for statistical purposes in terms of our aforesaid observations.

17. The **Ground of appeal No. 10** wherein the assessee had assailed the initiation of the penalty proceedings under Sec. 271(1)(c) being premature is dismissed.

18. The appeal of the assessee is allowed in terms of our aforesaid observations.

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19. We shall now advert to the appeal of the assessee against the order passed by the A.O under Sec. 154 of the Act, dated 10.12.2019. The assessee has assailed the impugned order on the following grounds of appeal before us:

> "Based on the facts and circumstances of the case, Hapag-Lloyd AG, (hereinafter referred to as the 'Appellant') respectfully craves leave to prefer an appeal under section 253 of the Income-tax Act, 1961 ('the Act') against the rectification order dated 10 December2019 passed by Deputy Commissioner of Income-tax (International Taxation)-2(2)(2) ('A.O') under section 154 of the Act on the following grounds:
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> On the facts and in the circumstances of the case and in law, the AO has:
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> **Short grant of TDS credit of INR 60,06,811/-:**

1. erred in rejecting the application of the Appellant under section 154 of the Act and not granting TDS credit to the extent of INR 60,06,811/- which was incorrectly deposited by the deductors in the PAN No. of the Agent of Appellant [i.e. Hapag-Lloyd India Private Limited ('HLIPL')] whereas the Agent has not taken credit for the same in the return of income;
2. erred in not appreciating the fact that the receipts of INR 29,05.19,061/- on which the aforesaid tax has been deducted has been considered for claim of exemption under section 90(2) read with Article 8 of the India - Germany DTAA and forms a part of the total income of INR 1,86,01,46,018/- (which is 7.5% of the total gross receipts of INR 24,80,19,46,907/- as computed under section 44B of the Act);
3. erred in denying the benefit of TDS on the ground that the said TDS credit is not reflected in Form 26AS of the Appellant and not appreciating the fact that the same is already been reflected in the Form 26AS of the Agent (i.e. HLIPL):

Opportunity of being heard: -

4. erred in passing the order without providing any opportunity to the Appellant of showing cause against such non-grant of TDS credit and accordingly, is in violation of principle of natural justice and bad in law;

Levy of interest under section 234B of the Act: -

5. erred in levying interest of INR 29,82,996/- under section 234B of the Act to the Appellant. The above grounds of appeal are mutually exclusive and without prejudice to one another.

The Appellant craves leave to add/ alter/ amend/ delete/ withdraw any or all of the grounds at or before the hearing of the appeal so as to enable the Income tax Appellate Tribunal to decide the appeal according to law."

20. The assessee has assailed the declining on the part of the A.O to allow TDS credit of INR 60,06,811/-. As we have deliberated on the said aspect and restored the said issue to the file of the A.O for fresh adjudication while disposing off the Ground of appeal No. 8 raised by the assessee in its appeal against the order passed by the A.O under Sec. 143(3) r.w.s 144C(13), dated 08.08.2019, therefore, the **Grounds of appeal Nos. 1 to 4** raised in the present appeal are disposed off in the same terms.

21. The assessee has assailed before us the charging of the interest of Rs. 29,82,996/- under Sec. 234B by the A.O. As we have after necessary deliberations adjudicated upon the said issue while disposing off the Ground of appeal No. 9 raised by the assessee in its appeal against the order passed by the A.O under Sec. 143(3) r.w.s 144C(13), dated 08.08.2019, therefore, the **Ground of appeal No. 5** raised by the assessee in the present appeal is disposed off in the same terms.

22. The appeal of the assessee is disposed off in terms of our aforesaid observations.

23. Resultantly, the appeals of the assessee for A.Y 2016-17 i.e ITA No. 5898/Mum/2019 arising from the order passed by the A.O under Sec. 143(3) r.w.s 144C(13), dated 08.08.2019

AND ITA No. 218/Mum/2020 arising from the order passed by the A.O under Sec. 154 of the Act, dated 10.12.2019 are allowed in terms of our aforesaid observations.

Order pronounced in the open court on 31/01/2020.

Sd/-	Sd/-
(Pramod Kumar)	(Ravish Sood)
VICE PRESIDENT	JUDICIAL MEMBER

मुंबई Mumbai; दिनांक 31.01.2020
P.S Rohit

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**