

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "K", MUMBAI
BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER AND
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER**

ITA No.717/Mum/2022 (AY: 2017-18)

Aegis Ltd.

Essar House, 11, K. K. Marg,

Mahalaxmi,

Mumbai –400034

PAN – AAACE8354Q

..... Appellant

VS.

Dy. Commissioner of Income Tax

Circle–6(1)(1), Mumbai

..... Respondent

Assessee by: Shri Rajan R. Vora

Revenue by: Dr. Yogesh Kamath

Date of Hearing: 10/10/2022

Date of Pronouncement: 06/01/2023

ORDER

PER GAGAN GOYAL, A.M.

1. This appeal by the Appellant is against the assessment order dated 25th February 2022 passed by the National Faceless Assessment Centre for the assessment year 2017-18.

2. The assessee has raised the following grounds of appeal:

"GENERAL

1. *erred in determining the total taxable income of the appellant for AY 2017-18 at INR 40,44,64,087 as against returned income of INR 12,36,48,010 as reported in the return of income filed by the appellant.*

PART I - TRANSFER PRICING ADJUSTMENTS

Rejection of economic analysis:

2. erred in not accepting the economic analysis/position adopted by the appellant in accordance with provisions of the Act read with the Income-tax Rules, 1962 ("the Rules") and proceeding to re-determine the arm's length price ("ALP") thereof.

Adjustment in respect of re-characterisation of preference shares of INR 27,96,34,539:

3. erred in making an adjustment under section 92CA(3) of the Act of INR 27,96,34,539 by re-characterising the investments made in preference shares of the AE as an interest-free loan given by the appellant to its AE and imputing interest thereon;

Without prejudice to the above, while doing so, the learned TPO/AO erred in:

4. erred violating the principles of judicial discipline by not following the order of the Hon'ble Income Tax Appellate Tribunal ("ITAT") in appellant's own case for earlier years (viz. AY 2009-10 through AY 2014-15) and Hon'ble Bombay High Court ("HC") for AY 2009-10 in the appellant's own case, wherein such re-characterization of preference shares as loan has been struck down by the Hon'ble ITAT/Hon'ble HC;

5. erred in not accepting that such investment by the appellant in preference shares of its AE (wholly owned subsidiary), was in the capacity of the parent company, under commercial expediency and in business interest of the appellant itself and hence, is a shareholder activity; and

PART II - CORPORATE TAX DISALLOWANCES:**Disallowance under section 36(1)(va) of the Act of INR 11,81,538:**

6. erred in disallowing deduction of employees contribution made towards Provident fund amounting to INR 11,81,538/- beyond the due date prescribed under section 36(1)(va) of the Act, but before the due date of filing return of income as per the provisions of the Act;

Interest under section 244A of the Act of INR 1,60,35,516:

7. erred in recovering interest granted under section 244A of the Act.

Interest under section 234D of the Act of INR 97,76,613:

8. erred in levying interest under Section 234D of the Act amounting to INR 97,76,613/-

Initiating penalty under section 271AA(1) and 270A of the Act:

9. *erred in both on facts and circumstances of the case and in law, in proposing to initiate penalty proceedings under section 271AA(1) and 270A of the Act.*

3. Briefly stated, the assessee is engaged in providing IT-enabled Business Process Outsourcing Services to its Associated Enterprises ('AEs') outside India.

4. Ground no.1 to 2, are general in nature, hence, does not require adjudication.

5. In grounds no. 3 to 5, the Appellant has challenged the action of transfer pricing officer of imputing interest of Rs.27,96,34,539/- by re-characterising the investments made in redeemable preference shares of Essar Services (Mauritius) to be in nature of interest free loans.

6. Brief facts are, the Appellant, an Indian Company, during the year under consideration, had an outstanding balance of investment in redeemable preference shares of its AE, Essar Services Mauritius ("ESM") amounting to Rs. 584,03,20,362 /-. However, the appellant did not additionally subscribe to or redeem preference shares in its AE during the said year and thus, there was no international transaction reported or benchmarked in TP study for the said year. TPO re-characterized the said transaction as interest free loan and applied interest @ 11.91%, using the bond rates and proposed a transfer pricing adjustment of Rs. 69.55 Crores. DRP in principle, upheld the assessment made by the TPO, however, the interest rate was reduced to London Inter-Bank Offered Rate [LIBOR]+300 basis points, following the earlier order, resulting into the reduction in transfer pricing adjustments to Rs.27.96 Crores.

7. Shri Rajan Vora, learned Counsel for the Appellant submitted, the issue involved in Ground Nos. 3 to 5 has been decided in favour of the assessee by

the Tribunal in the assessment year 2009–10 by holding that re-characterization of preferential shares to loan is invalid. He submitted, the aforesaid decision of the Tribunal was upheld by the Hon'ble Jurisdictional High Court while dismissing Revenue's appeal in assessment year 2009–10, vide judgment dated 28th January 2019, in ITA no.1248/2016. In this context, he drew our attention to the decisions of the Tribunal and the Hon'ble Jurisdictional High Court. He submitted, the same view was reiterated by the Tribunal while deciding assessee's appeal for the assessment years 2010–11, 2011–12, 2012–13, 2013–14 and 2014-15. Thus, he submitted, the issue stands covered by the assessee by virtue of the aforesaid decisions of the Tribunal and the Hon'ble Jurisdictional High Court.

8. Shri Yogesh Kamat, learned Departmental Representative (DR) fairly submitted, in the preceding assessment years this issue has been decided in favour of the assessee by the Tribunal and the Hon'ble Jurisdictional High Court.

9. We have considered rival submissions and perused material on record. As could be seen from the facts on record, the Transfer Pricing Officer while making the disputed adjustment has re-characterized the investment made in preferential shares held by the assessee with its overseas AE as interest free loan and has accordingly determined the arm's length price of interest chargeable on such loan at 11.91%. Notably, while doing so, the Transfer Pricing Officer, though, has taken note of the fact that the Tribunal while deciding assessee's appeal in the assessment year 2009–10 has disapproved such re-characterization of preferential shares to loan which has also been upheld by Hon'ble High Court, however, he did not follow the decision on the reasoning that the SLP filed by the Revenue against the said order of the High Court is pending before the Hon'ble Supreme Court. However, as brought to

our notice by the learned Authorised Representative, the said issue has been decided by the Hon'ble Jurisdictional High Court for the assessment year 2009-10, vide judgment dated 28th January 2019, in ITA no.1248/2016, upholding the decision of the Tribunal. The findings of the Hon'ble High Court are as under:

"2. Whether on the facts and circumstances of the case and in law, the Income Tax Appellate Tribunal erred in not considering the fact that the rate of corporate guarantee fee was calculated by the TPO by adopting a scientific approach to differential in the corresponding credit rating of assessee and the AE ?"

2. The respondent-assessee is a Company registered under the Companies Act. For the Assessment Year 2009- 10, the assessee was subjected to transfer pricing regime. Question no.1 arises out of the action of the Revenue to tax notional interest in the hands of the assessee through transfer pricing. The facts are that, during the period relevant to the assessment year in question, the assessee had subscribed to redeemable preferential shares of its Associated Enterprises ("AE" for short) and redeemed some of its shares at par. The Transfer Pricing Officer ("TPO" for short) held that the preference shares were equivalent to interest free loans advanced by the assessee and accordingly charged the interest on notional basis. The Tribunal by the impugned judgment, deleted the addition Rane 4/9 ITXA-1248-2016 (sr.20) Monday, 28.1.2019 observing that the TPO had re-characterised the transaction of subscription of shares into advancing of unsecured loans. The Tribunal did not accept such conclusion, inter-alia on the grounds that the TPO cannot disregard the apparent transaction and substitute the same without any material of exceptional circumstances pointing out that the assessee had tried to conceal the real transaction or that the transaction in question was sham. The Tribunal observed that the TPO cannot question the commercial expediency of the assessee entered into such transaction.

3. We are broadly in agreement with the view of the Tribunal. The facts on record would suggest that the assessee had entered into a transaction of purchase and sale of shares of an AE. Nothing is brought on record by the Revenue to suggest that the transaction was sham. In absence of any material on record, the TPO could not have treated such transaction as a loan and charged interest thereon on notional basis. No question of law arises.

10. Similarly identical issue has been decided by co-ordinate bench of ITAT in the assessment years 2010–11 to 2014-15, in favour of the assessee in the orders referred to herein below:–

- i) ITA no.7694/Mum./2014, dated 08.02.2017, for A.Y. 2010–11;
- ii) ITA no.962 & 1556/Mum./2016, dated 12.05.2017, for A.Y. 2011–12 and 2012–13;
- iii) ITA no.7348/Mum./2017, dated 06.02.2019, for A.Y. 2013–14; and
- iv) ITA no 125/Mum/2019, dated 30.04.2019, for AY 2014-15

11. Since the facts being identical, following the consistent view of the Tribunal and the Hon'ble Jurisdictional High Court, we hold that re-characterization of preferential shares as interest free loan is invalid. Accordingly, we delete the addition made on account of the said adjustment

12. In ground no. 6, the Appellant has challenged the disallowance made by learned AO under section 36(1)(va) of the Act of Rs.11,81,538/- on account of delay in deposit of employees contribution towards provident fund.

13. Brief facts are, the Appellant, during the year has made certain delays in depositing Employee's contribution to Provident Fund to the credit of government account. However, the same were duly deposited by the assessee before 30 November 2017. The same are tabulated below:

Nature of fund	Due date for payment	Date of actual deposit	The actual amount paid (in Rs.)
Provident Fund	15.07.2016	13.10.2016	184283
-do-	15.08.2016	13.10.2016	148150
-do-	15.09.2016	13.10.2016	154382
-do-	15.10.2016	20.10.2016	160937
-do-	15.11.2016	17.11.2016	175773
-do-	15.12.2016	18.12.2016	170050
-do-	15.03.2017	16.03.2017	161006
Any other Welfare Fund	15.01.2017	16.01.2017	3160
Any other Welfare Fund	15.01.2017	25.01.2017	15280
Any other Welfare Fund	31.01.2017	07.02.2017	1413
Any other Welfare Fund	15.01.2017	17.01.2017	7104
		Total	11,81,538/-

14. The learned Assessing Officer, after considering the submissions of the Appellant, sustained the disallowance was upheld by the Hon'ble DRP.

15. Shri Rajan Vora for the Appellant submitted, the Appellant submitted that since, the Employee's contribution to provident fund etc has been deposited by the Appellant before the due-date of filing the return, in this case being 30.11.2017, therefore no disallowance is warranted in view of provisions of Section 36(1)(va) r.w.s. 43B of the Act. In this connection, he placed reliance on the following decisions of Hon'ble Supreme Court, Hon'ble High Court and co-ordinate bench of Tribunal:

- i) CIT vs Ghatge Patil Transports Ltd (53 taxmann.com 141) (Bombay HC)
- ii) TML Business Services Limited earlier known as Concorde Motors (India) Limited (ITA No 931/M/2021) dated 29 December 2021.
- iii) Ramesh Narayan Shetty (ITA 2008/M/2021 and ITA 79 & 80/M/2022) dated 12 May 2022

- iv) *Alom Extrusions Ltd [2009] 319 ITR 306 (SC)*
- v) *CIT vs Vinay Cement Ltd [213 CTR 268 (SC),*

16. The learned Departmental Representative relied upon the observations of the Assessing Officer and DRP.

17. We have considered rival submissions and perused material on record. However, recently, the Hon'ble Supreme Court in the case of **Checkmate Services Pvt Ltd vs CIT in Civil Appeal No.2833 of 2016 dated 12.10.2022** has decided identical issue, wherein, the Hon'ble Supreme Court has categorically held that if the employees contribution to PF and ESI has been paid beyond the time prescribed under the relevant PF Act, then same is not allowable under section 43B even after the payment has been made before the due date of filing of return under the Income tax Act. It was the submission that the amount of employees contribution to PF and ESI, which has not been paid within the due date as prescribed under the relevant Act, has been held by Hon'ble Supreme Court to be not allowable u/s.36(1)(va) of the Act. It was the submission that the Hon'ble Supreme Court in paras 52 & 53 has also categorically held that the provisions of section 43B would not apply to the employees' contribution to PF and ESI.

18. In light of the above, following the decision of Hon'ble Supreme Court in case of Checkmate Services (Supra), the appeal of the Appellant on the said ground is dismissed and AO order in this regard is upheld.

19. Ground No. 7 to 8 of appeal being consequential, hence does not require adjudication hence is dismissed.

20. In ground No. 9 of appeal, the assessee has challenged initiation of penalty under section 271AA and 270A of the Act. We are of the considered

view that as the aforesaid ground of appeal is premature, therefore, the same merits to be dismissed. The Ground of appeal No. 9 is dismissed as being premature in nature.

21. In the result, appeal filed by assessee is partly allowed.

Order pronounced in the open court on 6th day of January 2023.

Sd/-

(KULDIP SINGH)
JUDICIAL MEMBER

Mumbai – Dated 06/01/2023

SK, PS

Copy of the Order forwarded to:

1. अपीलार्थी/ The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त (अ) /The CIT(A)/DRP, Mumbai.
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय. अपी. अधि., मुंबई/DR, ITAT, Mumbai
6. गार्ड फाइल/ Guard file.

Sd/-

(GAGAN GOYAL)
ACCOUNTANT MEMBER

//True Copy//

BY ORDER,

(Dy. /Asstt. Registrar)
ITAT, Mumbai