

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'J' BENCH
MUMBAI**

**BEFORE: SHRI M.BALAGANESH, ACCOUNTANT MEMBER
&
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER**

**ITA No.1755/Mum/2014
(Assessment Year :2009-10)**

&

**ITA No.1243/Mum/2015
(Assessment Year :2009-10)**

M/s. Tolani Shipping Co. Ltd 10-A, Bakhtawar Nariman Point Mumbai – 400 021	Vs.	DCIT, CIR-5(3) Mumbai 10-A, Bakhtawar, Nariman Point Mumbai – 400 021
PAN/GIR No.AACI4127C		
(Appellant)	..	(Respondent)

Assessee by	Shri Satyaprakash Singh
Revenue by	Dr. Samuel Pitta
Date of Hearing	20/03/2023
Date of Pronouncement	31/03/2023

आदेश / ORDER

PER M. BALAGANESH (A.M):

These appeals in ITA Nos. 1755/Mum/2014 & 1243/Mum/2015 for A.Yrs.2009-10 & 2010-11 preferred by the order against the final assessment order passed by the Assessing Officer dated 09/01/2014 & 21/02/2014 respectively u/s.143(3) r.w.s. 144C(13) & 143(3) r.w.s.144C(1) of the Income Tax Act, hereinafter referred to as Act,

pursuant to the directions of the Id. Dispute Resolution Panel (DRP in short) u/s.144C(5) of the Act dated 25/11/2013 & 10/11/2014 respectively for the A.Yrs. & 2009-10 & 2010-11.

2. The grounds 1 to 3 raised by the assessee are with regard to challenging the transfer pricing adjustment made in the sum of Rs.11,77,31,845/-.

3. We have heard the rival submissions and perused the materials available on record. We find that assessee is an Indian Shipping Company plying its own ships and occasionally ships hired from its Associated Enterprises (AEs). The return of income for the assessment year 2009-10 was filed by the assessee company on 30/09/2009 declaring total income of Rs.13,82,19,884/-. Considering the international transactions carried out by the assessee with its AEs amounting to more than Rs.15 crores, the Ld. Assessing Officer made a reference under section 92CA(1) of the Act to the Ld.Transfer Pricing Officer after obtaining the prior approval of the Ld.Commissioner of Income-tax-5, Mumbai.

3.1. The international transactions carried out by the assessee are as under:-

<u>S.No.</u>	<u>Nature of transaction</u>	<u>Value in Rs.</u>	<u>Most</u>	<u>Appropriate</u>
				<u>Method</u>
1.	Receipts for technical management services provided	Rs.1,19,68,923/-		Cost Plus Method
2.	Payments for in-chartering of vessels	Rs.46,32,92,667/-		Comparable uncontrolled price (CUP)

3.2. The Ld.Transfer Pricing Officer observed that during the year under consideration, the assessee had taken ships on voyage charter from Tolani Shipping (Singapore) Pte Ltd, an Associated Enterprise (AE). The Voyage rates which assessee had paid to the AE was comparatively favourable with the then prevailing market fixtures that have been concluded by TRANSCHART, New Delhi, which is the chartering wing of the Ministry of Surface Transport, Govt. of India. TRANSCHART is the sole chartering agency for chartering ships for Government undertakings. During the year, the assessee had paid freight charges for the three voyages and in this regard, the submissions made by the assessee are as under:-

*“(a) (PDYK22)) M.V. Prabhu Daya (10.4.2008 to 30.5.2008)
(Freight paid amounting to Rs.18,31,74,850/-)*

The Assessee entered into a Charter Party agreement with Steel Authority of India Ltd., a Government Undertaking, vide Agreement dated 20th March, 2008 for transporting cargo of 50,000 Metric Tonnes of Coking Coal from Queensland, Australia to Vishakhapatnam and Haldia ports, India at a freight rate, of Rs.2,369/- (Rupees Two Thousand Three Hundred and Sixty Nine only) PMT.

The Assessee was required to make its ship available in the month of April' 2008 at port of Queensland. However, since Assessee's own Vessels were engaged in carriage of other cargoes, its own Vessels were not available; hence we had to make arrangement to in-charter a vessel of similar capacity. With that in mind the Assessee approached Associate Enterprise.

The Assessee was committed to make a ship available for performing the CPA with Steel Authority of India Ltd., as its own Vessels were not available; it had to in-charter Vessel. Moreover, the in-chartering had to be done to avoid loss on account of non-performance of contract and not to lose out on business opportunities from reputed Government Companies.

The Assessee has taken on voyage charter, vessel, M. V. Prabhu Daya belonging to the Associate Enterprise, Tolani Shipping (Singapore) Pte. Ltd., vide agreement dated 28th March, 2008 at USD 60.00 Per Metric Ton for transport of cargo from port at Queensland, Australia for discharge at Vishakhapatnam and Haldia ports, India. We are reproducing below the relevant market transactions which indicate the freight rates prevailing at the time the Assessee in-chartered the Vessel.

The details of the relevant market transactions obtained from broker, M/s. Interocean, Delhi, during the relevant period are given below.

M.V. CHEMTEX ORIENT -56000 MT / 5% PCT coal
 Load / Discharge Port : Port Lyttleton / East Coast of
 India
 Lay Can : 23rd March, 2008 / 2nd April, 2008
 Freight Rate : USD 64.50 PMT

(b)(PG 22(33))M.V. Prabhu Copal (7.10.2008 to 12.10.2008) (Freight paid amounting to Rs.13,19,81,397/-):

The Assessee entered into a Charter Party agreement with Steel Authority of India Ltd., a Government Undertaking, vide Agreement dated 16th August, 2008 for transporting cargo of 51,000 Metric Tonnes of Coking Coal from Queensland, Australia to Vishakhapatnam and Haldia ports, India at a freight rate of Rs.1,997.50 (Rupees One Thousand Nine Hundred Ninety Seven and Paise Fifty only) PMT.

The Assessee was required to make its ship available in the month of September, 2008 at port of Queensland. However, since Assessee's own Vessels were engaged in carriage of other cargoes, its own Vessels were not available; hence we had to make arrangement to in-charter a vessel of similar capacity. With that in mind the Assessee approached Associate Enterprise.

The Assessee was committed to make a ship available for performing the CPA with Steel Authority of India Ltd., as its own Vessels were not available; it had to in-charter Vessel. Moreover, the in-chartering had to be done to avoid loss on account of non-performance of contract and not to lose out on business opportunities from reputed Government Companies.

The Assessee has taken on voyage charter, vessel, M. V. Prabhu Gopal belonging to the Associate Enterprise, Tolani Shipping (Singapore) Pte. Ltd., vide agreement dated 21st August, 2008 at USD 47.00 Per Metric Ton for transport of cargo from port at Queensland, Australia for discharge at Vishakhapatnam and Haldia ports, India (Copy enclosed at Annexure 13).

We are reproducing below the relevant market transactions which indicate the freight rates prevailing at the time the Assessee in-chartered the Vessel.

The details of the relevant market transactions obtained from broker, M/s. Interocean, Delhi, (Copy enclosed) during the relevant period are given below:

M.V. HAPPY CLIPPER – 50,000MT / 5%
 PCTcoal
 Load / Discharge Port : Port Kembla / East
 Coast of India

Lay Can: 20 th August, 2008 / 30 th August, 2008 Freight Rate : USD 57.75 PMT
M.V. XANADU – 50,000 MT / 5% PCT coal Load / Discharge Port : Port Norfolk / East Coast of India
Lay Can: 10 th September, 2008 / 20 th September, 2008 Freight Rate : USD 76.00 PMT

(c) (PPR 16(35)) M.V. Prabhu Parvati (21.8.2008 to 18.9.2008) (Freight paid amounting to Rs.14,20,81,938/-):

The Assessee entered into a Charter Party agreement with MMTC Ltd., a Government Undertaking, vide Agreement dated 27th July, 2008 for transporting cargo of 50,000 Metric Tonnes of Coking Coal from Queensland, Australia to Paradip port, India at a freight rate of Rs.2,364/- (Rupees Two Thousand Three Hundred Sixty Four only) PMT.

The Assessee was required to make its ship available in the month of 21st August, 2008 at port of Queensland. However, since Assessee's own Vessels were engaged in carriage of other cargoes, its own Vessels were not available; hence we had to make arrangement to in-charter a vessel of similar capacity. With that in mind the Assessee approached Associate Enterprise.

The Assessee was committed to make a ship available for performing the CPA with MMTC Ltd., as its own Vessels were not available; it had to in-charter Vessel. Moreover, the in-chartering had to be done to avoid loss on account of non-performance of contract and not to loose out on business opportunities from reputed Government Companies.

The Assessee has taken on voyage charter, vessel, M. V. Prabhu Parvati belonging to the Associate Enterprise, Tolani Shipping (Singapore) Pte. Ltd., vide agreement dated 5th August, 2008 at USD 55.00 Per Metric Ton for transport of cargo from port at Queensland, Australia for discharge at Paradip port, India. Copy enclosed at Annexure 14 (Refer Page Nos. 103 to 114). We are reproducing below the relevant market transactions which indicate the freight rates prevailing at the time the Assessee in-chartered the Vessel.

The details of the relevant market transactions obtained from broker, M/s. Interocean, Delhi, (Copy enclosed (Refer Page No. 33)) during the relevant period are given below:

M.V. NAVIOUS MERIDIAN – 50,000 MT / 5% PCT coal

Load / Discharge Port : Port Queensland / East Cost of India Lay Can : 1 st August, 2008 / 15 th August, 2008 Freight Rate : USD 57.75 PMT
M.V.JIN XIN SHAN – 50,000 MT / 5% PCT coal Load / Discharge Port : Port Queensland / East Cost of India Lay Can : 1 st August, 2008 / 10 th August, 2008 Freight Rate : USD 56.00 PMT

3.3. The assessee also furnished the copies of confirmation received from the relevant broker for the relevant market transaction which indicated coal freight rate prevailing at the time of entering into an agreement with the AE. The assessee had benchmarked this international transaction and treating the payment made by the assessee to be at Arm's Length Price (ALP) since the freight rate of USD 60 per MT paid by the assessee is comparable with the prevailing market rate as indicated above for the first voyage between 10/04/2008 to 30/05/2008; freight rate of USD 47 per MT paid by the assessee is comparable with the prevailing market rate as indicated above for voyage between 07/10/2008 to 12/10/2008 and freight rate of USD 55 per MT paid by the assessee is comparable with the prevailing market rate as indicated above for voyage between 21/08/2008 to 18/09/2008.

3.4. The Ld.TPO observed that assessee had entered into chartered party agreement with Steel Authority of India Ltd (SAIL) on 28/03/2008 for transporting 50,000 MT of coal from Queensland, Australia to Visakhapatnam and Haldia Port, India. The assessee had entered into an agreement with its AE on 28/03/2008 to transport the above said cargo from Australia to India at USD 60 per MT which is equivalent to Rs.2390.40 per MT. The Ld.Transfer Pricing Officer observed that assessee had incurred a loss of Rs.21.40 per MT on handling of

cargo from Australia to India. Moreover, the Ld.TPO adopted the metric tonnes mentioned in the agreement and the exchange rate of USD to Indian rupees prevailing on the date of agreement to determine the freight charges payable by the assessee. In other words, according to the Ld.TPO, the Arm's Length Price would be as under:-

MT specified in the agreement for each voyage (x) USD 60 per MT
(x) Exchange Rate prevailing on the date of agreement

3.5. On the contrary, the Ld.Counsel for the assessee submitted that actual quantity despatched in the voyage should be taken as against the agreed quantity as per the agreement. Similarly, the assessee has also submitted that the exchange rate prevailing on the date of shipments should be taken as against the exchange rate prevailing on the date of agreement with the party. So according to the assessee, the freight rate should be as under:-

Actual quantity shipped (x) USD 60 PMT (x) Exchange Rate
prevailing on the date of shipment

3.6. The Ld.Transfer Pricing Officer, however, did not agree with the contentions of the assessee and proceeded to make a transfer pricing adjustment of Rs.11,77,31,845/- towards ALP adjustment on account of payment for freight without considering demurrage and brokerage charges thereon. Aggrieved by this, the assessee is in appeal before us.

4. The entire essence of the adjustment made by the Ld.TPO can be captured in the table reproduced herein below:-

As per Assessee's Books

Voyage No.	Actual Quantity Shipped (MT)	Freight rate per MT as per Agreement (USD)	Total Freight Amount (USD)	Exch. Rate applied (INR)	Freight Rate per MT (INR)	Freight Amount (INR)	Net Amount of Demurrage after Despatch & Brokerage (INR)	Freight Amount including Demurrage after Despatch & Brokerage (INR)
(1)	(2)	(3)	(4)=(2)+(3)	(5)	(6)=(3)*5	(7)	(8)	(9)=(7)+(8)
PDY 1(22)	49,896.70	60.00	2,993,802.00	49.6344148	2,978.06	148,595,610	34,579,239	183,174,850
PG 22(33)	51,724.40	47.00	2,431,046.80	49.2602853	2,315.23	119,754,059	12,227,339	131,981,398
PPR 16(35)	51,450.00	55.00	2,829,750.00	49.2602853	2,709.32	139,394,292	2,687,645	142,081,938
						407,743,961	49,494,224	457,238,185
Previous year voyage					-		6,054,482	6,054,482
						407,743,961	55,548,706	463,292,667

As per TPO Order

Assumed Quantity based on Agreement (MT)	Freight rate per MT as per Agreement (in USD)	Exch. Rate applied based on the date of agreement with AE (INR)	Freight Rate per MT (INR)	Freight Amount arrived (INR)
(10)	(11)	(12)	(13)=(11)*(12)	(14)=(10) * (13)
50,000.00	60.00	39.84	2,390.40	119,520,000
51,000.00	47.00	43.47	2,043.09	104,197,590
50,000.00	55.00	42.11	2,315.78	115,788,750
				339,506,340
				-
				339,506,340

VARIANCES DUE TO COMPARISON OF TPO'S WORKING AND ASSESSMENT'S FIGURES

Difference in Freight Amount calculation by Assessee and TPO (INR)	Previous year Balances (INR)	Reason No.1- Demurrage Despatch Brokerage (INR)	Difference in Quantity	Freight amount due to difference in Quantity (INR)	Difference in Freight Rate (INR)	Freight amount due to difference in Exchange Rate (INR)	Total Variance due to Demurrage, Despatch, Prev. Year bal. Quantity and Exchange Rate (INR)
(15)=(9)-(14)	(16)	(17)	(18)=(2)-(10)	(19)=(13)*(18)	(20)=(6)-(13)	(21)=(2)*(20)	(22)=(16)+(17)+(19)+(21)
63,654,850	-	34,579,239	(103.3)	(246,928)	587.66	29,322,539	63,654,850
27,783,808	-	12,237,339	724.4	1,480,014.00	272.14	14,076,454	27,783,808
26,293,188	-	2,687,645	1,450.0	3,357,874.00	393.54	20,247,668	26,293,188
117,731,845	-	49,494,224	-	4,590,960		63,646,662	117,731,845
6,054,482	6,054,482						6,054,482
123,786,327	123,786,327	49,494,224	-	4,590,960		63,646,662	123,786,327

5. We find for the purpose of benchmarking the international transactions, actual quantity i.e. the subject matter of shipment should be considered together with the exchange rate prevailing on the date of shipment. The purpose of transfer pricing regulation in Chapter X of the Act is only to ensure that on the date of relevant international transaction, whether the said transaction had been carried out by the assessee with the AE at arm's length. The quantity to be shipped as mentioned in the agreement and exchange rate prevailing on the date of agreement is only a promise or a contract entered into between assessee and other parties. That promise gets fructified / materialized only when actual shipment is made. Hence, the benchmarking of the said international transaction should be done on the date of actual shipment of the goods by applying the exchange rate of conversion of USD into Indian rupees prevailing on the date of the said transaction and not on the date of agreement. In our considered opinion, the interpretation of provisions of Chapter X of the

Act in this manner alone would be just and fair and serve the intended purpose of the said Chapter. When this is done, there will be no scope of any ALP adjustment in respect of freight charges paid by the assessee as is evident from the aforesaid table. Hence, we direct the Ld. AO / TPO to delete the ALP adjustment made in the sum of Rs.11,77,31,845/-. Accordingly, the grounds No 1 to 3 raised by the assessee are allowed.

6. No arguments were advanced by the Ld.AR before us with regard to the grounds 4 & 5. Hence, they are dismissed as not pressed.

7. The ground 6 raised by the assessee is general in nature and does not require any specific adjudication.

8. The assessee has also raised an additional ground before us stating that it is paying tax under the Tonnage Tax Scheme and that in view of non obstante clause thereon, no other additions with regard to transfer pricing could be made. We find no arguments were advanced by the Ld.AR before us on this additional ground. Rather, heavy arguments were advanced vehemently only for deletion of transfer pricing adjustment on merits. Hence, the additional ground raised by the assessee is dismissed as not pressed.

9. In the result, the appeal of the assessee for A.Y. 2009-10 in ITA No.1755/Mum/2014 is partly allowed.

ITA No. 1243/Mum/2015 – A.Y. 2010-11 (Appeal by Assessee)

10. This is a recalled matter. Pursuant to miscellaneous application order dated 16/07/2020 passed by this Tribunal for A.Y. 2010-11, we find

that this appeal is recalled only for the limited purpose of adjudication of ground 6 raised by the assessee. The ground No.6 reads as under:-

“6. The Learned A.O. as well as Hon'ble DRP have erred in computing Long-term Capital Gains of Rs.3,41,33,536/- without considering the INDEX COST of assets purchased u/s.48 and if INDEX COST is considered the Appellant has incurred Long-term Capital Loss of Rs.32,05,603/- as against profit of Rs.3,41,33,536/- taken as Taxable Income.”

10.1. We have heard the rival submissions and perused the materials available on record. It is not in dispute that assessee had reported long term capital gains on sale of shares. While offering the long term capital gain, the assessee had not claimed the benefit of indexation while filing return of income. However, the offer of long term capital gains made by the assessee was accepted by the Ld.AO while framing the assessment. The assessee before the Ld.DRP for the first time made the claim of benefit of indexation while computing long term capital gains. This was rejected by the Ld.DRP by placing reliance on the decision of Hon'ble Supreme Court in the case of Goetze (India) Ltd. v. CIT reported in 284 ITR 323 (SC). But we find from the last paragraph of the said decision of Goetze (India) Ltd. v. CIT (supra) it has been categorically mentioned by the Hon'ble Supreme Court that any valid claim of the assessee could be entertained by the appellate authorities. In any case, we also find that Hon'ble Jurisdictional High Court in the case of CIT vs. Pruthvi Brokers & Shareholders Pvt. Ltd reported in 349 ITR 336 (Bom) had categorically held that any valid claim of assessee could be made for the first time either by way of filing a revised computation or before the appellate authorities. We find that the benefit of indexation while computing long term capital gains had been statutorily provided to the assessee. Hence, in view of the above judicial precedents, we direct the Ld.AO to grant the benefit of indexation to the assessee while computing long term capital gains after verifying the veracity of the workings thereon. Accordingly, the ground No.6 raised by the assessee is allowed for statistical purposes.

11. The other grounds raised by the assessee had already been disposed by this Tribunal vide consolidated order dated 28/02/2019.

12. In the result, appeal of the assessee for A.Y. 2010-11 is partly allowed.

13. To sum up, both the appeals of the assessee are partly allowed.

Order pronounced on 31/03/2023 by way of proper mentioning in the notice board.

Sd/-
(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Sd/-
(M.BALAGANESH)
ACCOUNTANT MEMBER

Mumbai; Dated 31/03/2023
KARUNA, *sr.ps*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai