IN THE INCOME TAX APPELLATE TRIBUNAL "J", BENCH MUMBAI

BEFORE SHRI LALEIT KUMAR, JM
&
SHRI M.BALAGANESH, AM

ITA No.2070/Mum/2016
(**Assessment Year : 2011-12**)

M/s. Soveresign Safeship Management Pvt. Ltd., Shop No.37, M.M.R.D. Market, Vansant Pride Thakur Complex Kandivali (East) Mumbai – 400 101	Vs.	Income Tax Officer Ward-13(2)-2, Mumbai
PAN/GIR No. AAMCS6425N		
(Appellant)	..	**(Respondent**)

Assessee by	Shri Rishabh Shah
Revenue by	Shri Vodal Raj Singh
Date of Hearing	**02/03/2020**
Date of Pronouncement	**05/03/2020**

आदेश / O R D E R

***PER M. BALAGANESH (A.M)*:**

This appeal in ITA No.2070/Mum/2016 for A.Y.2011-12 preferred by the order against the final assessment order passed by the Assessing Officer dated 05/02/2016 u/s.143(3) r.w.s.144C(13) of the Income Tax Act, hereinafter referred to as Act, pursuant to the directions of the ld. Dispute Resolution Panel-2, Mumbai (DRP in short) u/s.144C(5) of the Act dated 14/12/2015 for the A.Y.2011-12.

2. The Ground Nos. 1,2,3,6,9 and 10 were stated to be not pressed by the ld AR before us at the time of hearing for which necessary endorsement was duly made by the ld AR in our file. Accordingly, the said grounds are dismissed as not pressed.

3. The other surviving grounds of assessee are as under:-

> "4.*The Ld. AO/ Hon'ble DRP has grossly erred in facts as well as law by not considering the fact that the Entities mentioned as AEs do not fall within the definition of AEs as per Section 92A of the Income Tax Act, 1961.*
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> *5.The Hon'ble DRP has erred in holding the parties to be AE's u/s 92A(2)(c) of the Income Tax Act by taking the 'combined loan' granted by both the parties to the assessee and has also erred in calculation of book value of total assets.*
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> *7.The Ld. AO/ Hon'ble DRP erred in rejecting Cost plus method as the Most Appropriate Method and using TNMM instead without assigning any proper and valid reasons for the same.*
>
> *8.The Ld. AO/ Hon'ble DRP has erred in accepting the comparables while applying the TNMM without considering the facts and circumstances of the case and the submissions of the assessee on the same."*

4. We have heard the rival submissions and perused the materials available on record. We find that the assessee manages tankers, bulk carriers, speedboats and supply vessels. It mainly assists the owner / employers in procurement of stores, spares, lubricants, chemical, paints, charts and publications, stationery and arrangement of technical superintendents and specialized technicians for the various ships managed by the assessee. We find that basically the assessee is engaged in providing ship management and consultancy services. We find that the assessee had submitted the details of shareholding pattern and details of its directors and directors of Associated Enterprises (AEs) concerns before the ld TPO and claimed that the entities involved in the

transaction are not AEs within the meaning of section 92A of the Act. The ld TPO observed that the assessee itself had included those concerns as the AEs in its Form 3CEB filed along with the return of income and hence the objection of the assessee was rejected. Before the proceedings before the ld TPO, Shri Rajeev Kumar Singh, Director of the assessee company appeared in person and submitted the following primary facts which are undisputed and indisputable :-

> *"a) That he was earlier working as Superintendent in Hong Kong with M/s. Fleet Management Ltd. Hong Kong (owned by Noble Group) (MD was Shri Kishore Rajwanshi).*
> *b) There he was given job of handling ships of M/s. Pureborid Ltd, UK. (Owner- Shri Ramesh Kansagra and Shri Bhupendra Kansagra)*
>
> *c) Then he was requested by Kansagras to handle their ships on behalf of M/s. Fleet Management Ltd by opening an office in Ixmdoti, UK. This happened in August 2005 when he joined in London as an employee in a newly flouted company of Shri Kishore Rajwanshi named M/s. Fleet Management Europe Ltd, UK.*
>
> *d) Then, in beginning of year 2007, he was given an offer by Kansagras to join their business on partnership basis. After, thorough discussions, he agreed to their offer and became 13% shareholder in a newly floated company named M/s. Sovereign Ship Management Ltd, UK, in June 2007. The balance 87% shares were held by M/s. Union Maritime Ltd. UK.*
>
> *e) M/s. Union Maritime Ltd, UK was formed in 2006 and it was 50-50 partnership between M/s. South Central Property Ltd (UK) (owned by Cadji Family) and M/s. Solai Holding Ltd (UK) (owned by Kansaga family)*
>
> *(f) Then in April 2010, a new company was formed viz M/s, Premier Ship Management Ltd, UK wherein he was made 20% shareholder and M/s. Union Maritime Lid, UK held the balance 80% shareholding. At the same nine, his shareholding in M/s. Sovereign Ship Management Ltd, UK was increased from 13% to 20% with the remaining 80% held by M/s. Union Maritime Ltd, UK.*
>
> *g) In the mean time, a new company was floated in his name viz. M/s. Sovereign Safeship Management Pvt. Ltd (India) (the assessee) in December 2008 wherein he held 90% shares and his wife held the balance 10%.*

h) This company used to provide services only to M/s. Suverign Ship Management Ltd, M/s. Premier Ship Management Ltd and M/s. Union Maritime Ltd for which he used to receive 5% service fees from them"

4.1. The ld TPO concluded that the overall management and control of the assessee company still lies with the management of M/s Sovereign Ship Management Ltd, UK ; M/s Premier Ship Management Ltd and M/s Union Maritime Ltd and that Shri Rajeev Kumar Singh's role is limited to managing ships like an employee who does not have any say in the decision making process of the company. Accordingly, he held that those concerns become AEs within the meaning of section 92A(1)(a) of the Act. The ld TPO also observed that the assessee company did work only for these AEs during the year and concluded that the assessee company in India was formed to serve the mutual interest and thus held that M/s Sovereign Ship Management Ltd, UK ; M/s Premier Ship Management Ltd and M/s Union Maritime Ltd are AEs of the assessee company during the year, as per the provisions of section 92A(2)(m) of the Act. We find that the assessee had contended that the directors of Union Maritime Ltd had not relationship with the operations of Sovereign Safeship Management Pvt Ltd. We find that the assessee before the ld DRP had disputed the conclusion of the ld TPO that the assessee was formed to serve a mutual interest and hence as per the provisions of section 92A(2)(m) of the Act "if there exists between the two enterprises, any relationship of mutual interest, as may be prescribed" , the companies are Associated Enterprises. The assessee submitted that as per the provisions of section 92A(2)(m) of the Act, two enterprises can be termed as AEs "if there exists between the two enterprises, any relationship of mutual interest, as may be prescribed", however, no such relationship of mutual interest had yet been prescribed by the CBDT.

5. As per Form 3CEB, the assessee had reported the following international transactions in Form 3CEB :-

Ship Management and Consultancy Services

M/s Sovereign Ship Management Ltd, UK	- Rs	14,70,888/-
M/s Premier Ship Management Ltd, UK	- Rs	21,71,108/-

Advances received

M/s Sovereign Ship Management Ltd, UK	- Rs	2,42,03,651/-
M/s Premier Ship Management Ltd, UK	- Rs	3,08,79,986/-

5.1. Further as per Schedule 5 of the financial statements of the assessee company, a sum of Rs 5,56,71,932/- was reflected as 'Other Creditors', the break up of the same are as under:-

P Kothari	-	1,86,760/-
Premier Ship Management Ltd		3,08,79,986/-
Sovereign Ship Management Ltd		2,42,03,651/-
Union Maritime Ltd		3,95,078/-
Cannon India Pvt Ltd		6,457/-
		5,56,71,932/-

6. The ld DRP observed that the above sums are not advances, as the advance from Sovereign Ship Management Ltd had been reported separately under the head Sundry Creditor. Therefore, the aforesaid amounts cannot be considered mere business advances as stated in the Transfer Pricing Study report. The concerns Premier Ship Management Ltd and Sovereign Ship Management Ltd do not provide any service to the assessee and thus these amounts cannot be considered credits availed during the course of business. Thus these credits can only be considered as the loans advanced by the AEs to the assessee. The ld DRP observed that the book value of total assets of the assessee company was Rs

8,00,13,738/- and total amount of above loan was Rs 5,50,83,637/- which constitutes 68.84% of book value of total assets of the assessee. Therefore the assessee's case squarely falls under the provisions of section 92A(2)(c) of the Act which would make these two entites as AEs of the assessee company.

6.1. The ld DRP further observed that the total borrowings made by the assessee company from the aforesaid parties including Union Maritime Ltd are as under:-

Sovereign Ship Management Ltd – Advance	2,34,34,694/-
<u>Other Creditors</u>	
Premier Ship Management Ltd	3,08,79,986/-
Sovereign Ship Management Ltd	2,42,03,651/-
Union Maritime Ltd	3,95,078/-
	8,02,70,661/-

6.2. Accordingly, the ld DRP observed finally that Sovereign Ship Management Ltd and Premier Ship Management Ltd are participating directly, Union Maritime Ltd is participating indirectly, in the capital of the assessee company and hence these two concerns become AEs of the assessee company in terms of section 92A(2)(c) of the Act. Accordingly, the ld DRP upheld the action of the ld AO / ld TPO in-

a) Treating these two entities as AEs

b) Gross amount received by the assessee company includes reimbursement of expenses on cost to cost basis and hence the same should not be considered as fees for the ship management and consultancy services provided to the AEs.

c) Transactional Net Margin Method (TNMM) would be the Most Appropriate Method (MAM) as against the Cost Plus Method (CPM) adopted by the assessee in its TP Study Report

d) EDCIL (India) Limited was directed to be excluded as a comparable company.

e) ICRA Management Consulting Services Ltd was rightly included as a comparable company.

f) IDC (India) Ltd was directed to be excluded as a comparable company.

g) Inclusion of ICC International Agencies Ltd, Indus Technical & Financial Consultants Ltd , Inhouse Productions Ltd, Inmacs Management Services Ltd, Priya International Ltd, Best Mulyankan Consultants Ltd, were remanded back to the file of ld TPO to provide the annual report / TP Study report to the assessee and provide adequate opportunity to the assessee to determine whether the said companies are functionally comparable with that of the assessee company.

h) India Cements Capital Ltd was directed to be excluded as a comparable company.

i) Rites Ltd was directed to be excluded as a comparable company.

j) Tamil Nadu Ex-Servicemen's Corporation Ltd was directed to be excluded as a comparable company.

k) The argument that comparables which were chosen to be excluded by the assessee on the basis of turnover and data not available in public domain was rejected.

7. Hence it could be seen that the ld DRP had finally observed that Sovereign Ship Management Ltd and Premier Ship Management Ltd jointly had given loans more than 51% of the book value of total assets of the assessee company and hence they would become AEs of the assessee company in terms of section 92A(2)(c) of the Act by deeming fiction.

For the sake of convience, the relevant provisions of section 92A(2)(c) of the Act are reproduced hereunder:-

> ***Section 92A – Meaning of associated enterprise***
> *(2) For the purposes of sub-section (1), two enterprises shall be deemed to be associated enterprises, if, at any time during the previous year,-*
>
> *(c) a loan advanced by one enterprise to the other enterprise constitutes not less than fifty –one percent of the book value of the total assets of the other enterprise; or*

7.1. Hence it could be seen that provisions of section 92A(2)(c) of the Act mandates that each of the enterprise should have advanced loan to assessee company constituting more than 51% of book value of total assets of the assessee company. In the instant case, we find that the ld DRP had combined the loans given by both Sovereign Ship Management Ltd , UK and Premier Ship Management Ltd, UK to arrive at the said percentage, which is not the mandate provided in the section. In our considered opinion, the language of section 92A(2)(c) of the Act is unambiguous and clear that in order to fall within the ambit of deeming fiction of of becoming AEs, either Sovereign Ship Management Ltd, UK or Premier Ship Management Ltd, UK should have independently advanced loan to the assessee company which more than 51% of book value of total assets of the assessee company. In the instant case, only if the loans advanced by both Sovereign Ship Management Ltd, UK and Premier Ship Management Ltd, UK are combined, the said provision is satisfied. Moreover, the advances received by the assessee company from Sovereign Ship Management Ltd, UK in the sum of Rs 2,34,34,694/- are in the nature of business advances for rendering ship management and consultancy services by the assessee company to the said party and hence the same cannot be construed as loan advanced to the assessee company. Once the same is excluded and the loans given by the

aforesaid two entities are considered independently, we find that none of the aforesaid parties had advanced loans more than 51% of book value of total assets of the assessee company. Hence it could be safely concluded that the aforesaid two entities cannot be construed as AEs of the assessee company within the meaning of section 92A(2)(c) of the Act which is the case of the ld DRP. In this regard, the ld DR vehemently argued that the assessee itself had reported these two parties to be AEs in its Form 3CEB. We are unable to persuade ourselves to accept to this argument of the ld DR for more than one reason that the facts of the assessee company are staring on us from its financial statements; moreover the plain language of the statute is unambiguous and it is very well settled that there is no estoppel against the statute.

7.2. We also find that the ld AR strongly placed reliance on the decision of the co-ordinate bench of Ahmedabad Tribunal in the case of ACIT vs Veer Gems reported in 183 TTJ 588 by referring to para 8 of the said judgement thereon. He also drew our attention to the fact that this tribunal decision was subsequently approved by the Hon'ble Gujarat High Court in the case of PCIT vs Veer Gems reported in 407 ITR 639 (Guj) and Special Leave Petition preferred by the Revenue before the Hon'ble Supreme Court was dismissed in 256 Taxman 298 (SC).

7.3. We also find that the co-ordinate bench of this tribunal had an occasion to consider the very same issue recently in the case of Kaybee Pvt Ltd vs ITO in ITA No. 2165/Mum/15 for Asst Year 2007-08 dated 28.2.2020 wherein they had followed the decision of Ahmedabad Tribunal referred to supra. The relevant operative portion of the judgement of Ahmedabad Tribunal is as under:-

> ***"……****As long as an enterprise participates in any of the three aspects of the other*
> *enterprise, i.e. (a) management; (b) capital; or (c) control, these enterprises are required to be treated as associated enterprise, as also is the position when common persons participate in management, control or capital of both the enterprises.* ***However, the expression 'participation in management or capital or control' is not a defined expression. To find the meaning of this expression, one has take recourse to Section 92(2) which gives practical illustrations, which are exhaustive and not simply illustrative- as clarified in the Memorandum Explaining the provisions of the Finance Bill 2002 which, while inserting the words "For the purpose of sub section (1) of section 92A" in Section 92A(2), observed that "It is proposed to amend subsection (2) of the said section to clarify that the mere fact of participation by one enterprise in the management or control or capital of the other enterprise, or the participation of one or more persons in the management or control or capital of both the enterprises shall not make them associated enterprises, unless the criteria specified in sub-section (2) are fulfilled".*** *In this sense, Section 92A(2) governs the operation of Section 92A(1) by controlling the definition of participation in management or capital or control by one of the enterprise in the other enterprise.* ***If a form of participation in management, capital or control is not recognized by Section 92A(2), even if it ends up in de facto or even de jure participation in management, capital or control by one of the enterprise in the other enterprise, it does not result in the related enterprises being treated as 'associated enterprises'. Section 92A(1) and (2), in that sense, are required to be read together, even though Section 92A(2) does provide several deeming fictions which prima facie stretch the basic rule in Section 92A(1) quite considerably on the basis of, what appears to be, manner of participation in "control" of the other enterprise.*** *What is thus clear that as long as the provisions of one of the clauses in Section 92A(2) are not satisfied, even if an enterprise has a de facto participation capital, management or control over the other enterprises, the two enterprises cannot be said to be associated enterprises. That is a what coordinate bench decisions in the cases of* ***Orchid Pharma Ltd Vs DCIT [(2016) 76 taxmann.com 63 (Chennai - Trib.)]*** *and* ***Page Industries Ltd Vs DCIT {(2016) 159 ITD 680 (Bang)] also hold.***
>
> *[Emphasis, by underlining, supplied by us now]"*

It was further held in the decision of Mumbai Tribunal referred to supra as under:-

> *"18. Learned representatives fairly agree that the case of the Assessing Officer hinges only on application of Section 92A(1) and it does not meet any of the specific conditions set out in Section 92A(2). Once we hold that*

Section 92A(1) cannot be applied on standalone basis, and has to be essentially considered in conjunction of Section 92A(2) – only when it satisfies at least one of the conditions set out therein, it is clear that the relationship between the assessee company and its KE'S cannot be said to be that of the associated enterprises. The case of the revenue must, therefore, fail on this test.

19. In view of the above discussions, as also bearing in mind entirety of the case, we have to hold that the relationship between the assessee and the KE-S was not of the AEs, and, accordingly, no arm's length price adjustments could be made on the transactions between these two entities. Ground no. 3 is thus allowed, and, as a corollary thereto, the impugned ALP adjustment must, therefore, be deleted for this short reason alone. Ordered, accordingly."

7.4. Respectfully following the aforesaid decisions, we hold that Sovereign Ship Management Ltd, UK and Premier Ship Management Ltd, UK cannot be deemed to be AEs of the assessee company within the meaning of section 92A(2)(c) of the Act and hence no adjustment to ALP in respect of transactions carried out , need to be done. In view of this, the adjudication of other grounds on merits of the case becomes academic in nature.

8. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on this 05/03/2020

Sd/-	**Sd/-**
(LALIET KUMAR)	**(M.BALAGANESH)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai; Dated 05/03/2020
KARUNA, *sr.ps*

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.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai