आयकर अपीलीय अधिकरण, कोलकाता पीठ ''सी'', कोलकाता

IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH: KOLKATA

श्री राजेश कुमार, लेखा सदस्य एवं श्री संजय शर्मा न्यायिक सदस्य के समक्ष

[Before Shri Rajesh Kumar, Accountant Member & Shri Sonjoy Sarma, Judicial Member]

I.T.A. No. 101/Kol/2022
Assessment Year: 2017-18

M/s Sarat Chatterjee & Co. VSP Pvt. Ltd. (PAN: AADCS 6139 A)	Vs.	ACIT, CC-1(1), Kolkata
Appellant / (अपीलार्थी)		Respondent / (प्रत्यर्थी)

Date of Hearing / सुनवाई की तिथि	20.02.2023
Date of Pronouncement/ आदेश उद्घोषणा की तिथि	29.03.2023
For the Appellant/ निर्धारिती की ओर से	Arati Agarwal, A.R Rosy Banjerjee, A.R
For the Respondent/ राजस्व की ओर से	Shri G.Hukugha Sema, CIT

ORDER / आदेश

Per Rajesh Kumar, AM:

This is the appeal preferred by the assessee against the order of the Ld. Assistant Commissioner of Income Tax, Central Circle-1(1), Kolkata (hereinafter referred to as the Ld. AO"] dated 25.01.2022 for the AY 2017-18.

2. Issue raised in ground nos. 1 to 5 is against the confirmation of addition of Rs. 84,76,769/- by DRP as made by the AO/TPO on account of TP adjustment with respect to the international transactions without appreciating the fact that TP provisions are not applicable as the assessee's income is chargeable to tax as per Tonnage Tax Scheme.

3. Facts in brief are that the assessee filed return of income on 30.11.2017 declaring total income of Rs. 17,07,17,340/- which was selected for scrutiny under CASS and statutory notices were duly issued and served on the assessee. One of the reasons for selection of the case for scrutiny was examination of TP parameters and huge amount of international transactions of Rs. 8.80Crores and specified domestic transactions (SDT) to the tune of Rs. 33.08 crores. Accordingly a reference was made to the AO/TPO. The TPO passed the order u/s 92CA(3) proposing the upper adjustment on account of transfer pricing adjustment of Rs. 84,76,769/- and accordingly the same was added to the income of the assesse in the assessment framed u/s 143(3) read with Section 144C(13) of the Act dated 25.01.2022 inter alia making other additions.

4. In the appellate proceedings also, the DRP dismissed the appeal of the assessee observing and holding as under:

> *3.1 In DRP proceedings, the assessee stated that TP provisions are inapplicable to the transaction under reference i.e. receipt of hire income from its AE which stood covered under Tonnage Tax Scheme as provided under Chapter Xll-G of the Act. The assessee submitted that Finance Act (No.2), 2004 introduced Tonnage Tax Scheme for taxation of income derived from shipping activities by an Indian Company vide Chapter Xll-G to provide for special provisions relating to taxation of shipping companies with effect from the AY 2005-06. The assessee stated that income from the business of operating qualifying ships, may, at the option of the shipping company, be computed in accordance with the provisions of Chapter Xll-G, wherein notional income arising from the operation of ships is determined on the basis of tonnage of ships.*
>
> *3.2 During AY 2017-18, the assessee opted for Tonnage Tax Scheme and determined the taxable income as per the computation mechanism provided in Chapter XII-G of the Act. Accordingly, as the vessel owned by it fell under "qualifying ship", the assessee determined tonnage income of INR 1,668,278 as taxable income derived from the business of chartering of vessel named MV Jal Vaibhav and paid income tax thereon The assessee stated that under the Scheme, the income tax payable by the taxpayer has to be computed on the basis of tonnage capacity of the qualifying ship and the number of days for which it was held, irrespective of the revenue realization and the expenditure incurred for the purpose of the business. The assessee stated that as the Scheme provides for a presumptive basis of taxation, the determination of income / expense having regard to arm's length price under Chapter-X has no relevance for computing income chargeable to tax as per Chapter XII-G of the Act. Reliance was placed upon the decisions in Van Oord India Private Limited [TS-440-ITAT-2019(Mum)-TP] - 22 May 2019; Essar Ports Ltd [TS-666-ITAT-2019(Mum)-TP] - 26 June 2019, wherein it was held that TP-provisions [Chapter X] do not apply to income taxed under TTS as detailed under Chapter XII-G of the Act:*

3.3 The submissions have been perused along with the materials available on record. On the above issue, in the TP order, the TPO stated that his role in this context was limited to determine the arm's length price ('ALP') of an international transaction. At the outset, it is seen that the assessee has itself reported the said international transaction of receipt of hire income from its AE in the auditor certified Form 3CEB, which the assessee stated was done out of abundant caution. There is no dispute regarding the fact that the transaction of receipt of charter hire income amounting to INR 7,01,49,539 is an international transaction within the meaning of section 92B of the Act. Under the scheme of the Act, any income arising from an international transaction shall be computed having regard to the arm's length price under section 92 of the Act. Transfer pricing provisions contained in sections 92 to 92F fall within the ambit of Chapter X of the Act which contains special provisions relating to avoidance of tax. The Memorandum explaining the provisions of the Finance Bill, 2001 explains the intention underlying the provision is to prevent avoidance of tax by shifting taxable income to a jurisdiction outside India through abuse of transfer pricing. Thus, Chapter X of the Act governs the determination of arm's length price of every / any international transaction with a view to prevent profit shifting to a foreign jurisdiction 3.4 Chapter Xll-G of the Act provides relates to special provisions relating- to income of shipping companies in terms of computation of profits and gains from the business of operating qualifying ships. However, as the income from such business constitutesbusiness income, section 115VA provides for a non-obstante clause whereby notwithstanding anything contrary contained in business provision sections 28 to 43C of the Act, the computation of such income shall be computed as under that Chapter at the option of the assessee. However, Chapter XII-G does not in any manner preclude the operation of Chapter X which is a specific anti-abuse provision in respect of any international transaction. This is similar to the case of an assessee whose income is computed in accordance with section 28 to 43C with the computation of such business income not precluding the operation of Chapter X. The assessee's contention that TP provisions do not apply once it opts for the tonnage tax regime is not borne out of any specific provision in the Act. The Chapter does not provide for any such prohibition. In fact, sub-section (8) of section 115VI expressly provides for inclusion of income arising from related party transactions as under-

> *(8) Where it appears to the Assessing Officer that, owing to the close connection 'between the tonnage tax company and any other person, or for any other reason, the course of business between them is so arranged that the business transacted between them produces to the tonnage tax company more than the ordinary profits which might be expected to arise in the tonnage tax business, the Assessing Officer shall, in computing the relevant shipping income of the tonnage tax company for the purposes of this Chapter, take the amount of income as may reasonably be deemed to have been derived therefrom.*

3.5 The above provision is pari materia to the transfer pricing provisions contained in Chapter -X of the Act. Accordingly, the TPO/AO is not precluded from taking the amount of transfer pricing adjustment into consideration while computing the relevant shipping income of the tonnage tax company, which is the assessee in this case. As regards the decisions upon by the assessee, it has not been confirmed whether the said decisions have seen accepted by Revenue and have attained finality. The assessee has not furnished any such ruling from the jurisdictional Court / Tribunal or by the Hon'ble Supreme Court. Under such circumstances, as DRP is an extension of assessment proceedings and is not an appellate forum and in the light of the above discussion, the Panel upholds the action of the TPO in making an adjustment under the TP provisions and that of the AO in taking the same into account in the computation of the final assessed income. The objection is dismissed."

5. The ld. Counsel for the assessee at the outset submitted that the assessee has been granted approval by the Addl. CIT, Range-1, Kolkata to offer its income on tonnage tax scheme vide letter dated 29.03.2017 on an application moved by the assessee exercising its option for the tonnage tax scheme under sub-section (1) of Section 115VP in form no. 65 for a period of 10 years effective from the date of application subject to the certain conditions. The Ld. Counsel also submitted that once the assessee has been returning his income from operating ships under Tonnage Tax Scheme, the transfer pricing provisions in respect of transactions entered into between domestic and foreign AE are not applicable as the tax is being paid on the notional/presumptive basis which cannot be subjected to any further adjustment/ variation. In defense of his arguments the Ld. Counsel for the assessee relied on the decision of Co-ordinate Bench of Mumbai in the case of Van Oord India Pvt. Ltd. vs. DCIT, Range-5(3), Mumbai in IT(TP) A No. 720/Mum/2015 dated 11.11.2019 wherein it was held that the TP provisions are not applicable where the assessee has opted for tonnage tax scheme and income is offered to tax under tonnage tax scheme. The ld. Counsel for the assessee also brought to the notice of the Bench that the assessee vide letter dated 01.02.2023 informed the Bench that AY 2018-19 the assessee offered the income under Tonnage Tax Scheme of Rs. 43,80,730/- which has been accepted in the assessment framed u/s 143(3) of the Act dated 29.11.2021 and in respect of assessment years from from 2019-20 to 2021-22, the cases of the assessee have been processed u/s 143(1) of the Act and intimations u/s 143(1) were received.

6. The Ld. D.R. on the other hand relied on the order of authorities below by submitting that even though the assessee has opted for tonnage tax scheme which has been approved by the competent authority, even then the provisions of transfer pricing would be applicable. Therefore the appeal of the assessee may kindly be dismissed on this legal issue.

7. After perusing the material on record and hearing the rival contentions, we observe that the assessee has opted for tonnage tax scheme in respect of its income from operating the ships in terms of approval granted to it by the Addl. CIT, range-1,

Kolkata vide letter dated 29.03.2017 for a period of 10 years. We have also perused the presumptive scheme as envisaged by the provisions of Section 115BB of the Act and also the decision cited by the assessee in the case of Van Oord India Pvt. Ltd. (supra). Considering the facts in the light of above decisions of the coordinate bench we are of the considred view that where the assessee has opted for tonnage tax scheme and has offered the income on presumptive basis, no TP adjustments are required to be made. The operative part of the decision is reproduced as under:

> *"25. Our findings on this issue are summed up a savoir:*
>
> *(a) Section 115VA of the Income Tax Act, forming part of the TTS (for which, the assessee has made option) contained in Chapter XII-G of the Act, excludes the operation of sections 28 to 43C of the Act pertaining to the computation of total income under Chapter IV of the Act.*
>
> *(b) For computing taxable income under Chapter XII-G of the Act, related party transactions have no relevance, weight and length of user of qualifying ships, rather than the nature of party for which the user is, or ALP, or income, or expenses, being the formula prescribed for computation of income under Chapter XII-G.*
>
> *(c) Consideration of the TP provisions, enclosing within them, the arm's length principle, under Chapter X (sections 92 to 92F) of the Act are, a fortiori, not applicable to the TTS and ALP does not affect the computation and taxability of the tonnage income of the assessee.*
>
> *(d) Computation of income under the TTS is, thus, not impinged upon by the adjustment made by the TPO.*
>
> *(e) Income computed under the TTS is, by virtue of section 115VF, deemed to be the profits taxable as profits & gains of business or profession.*
>
> *(f) The amount of Rs. 17,24,50,468/-, which represents reimbursement of Head Office Expenses by the assessee to its holding company and AE, has wrongly been added, by altering the expenditure, under Chapter X, despite the inapplicability of the Chapter and inspite of the fact that Chapter X contains only machinery provisions and no charging provisions, sans which, it is trite, no tax can be levied.*
>
> *(g) Non-applicability of Chapter X does not get altered by the factum of the assessee having either filed audit report in Form 3CEB, or undertaken the benchmarking process and concluding its international transactions to be at arm's length.*
>
> *(h) The issue stands decided by the tribunal in favour of the assessee vide its orders in the assessee's case for assessment years 2007-08 and 2011-12.*
>
> *(i) The DRP has itself acceded to this legal claim of the assessee."*

Accordingly ground nos. 1 to 5 are allowed.

8. Issue raised in ground no. 7 and 8 is against the confirmation of addition by CIT(A) of Rs. 10,39,487/- as made by the AO on account of late payment of employees contributions beyond the time as prescribed under the Provident Fund. We After considering the rivals contentions , we are of the views that the issue is covered against the assessee by the decision of Hon'ble Supreme Court in the case of Chekmate Services Pvt. Ltd. vs. CIT (2022) 143 taxmann.com 178 (SC) dated 12.10.2022. Accordingly ground nos. 7 & 8 are dismissed.

9. Issue raised in ground no. 9 is against the order of DRP not allowing the deduction in respect of education cess and secondary and higher secondary education cess for the purpose of computing profits and gains from business or profession.

10. We have heard the ld. authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record, and have also considered the judicial pronouncements that have been relied upon by them in context of the issue in hand and also explanation 3 as inserted by Finance Act ,2022 to section 40(ii) of the Act. In terms of the said explanation , it has been provided tax shall include and shall be deemed to have always included any surcharge or cess by whatever name called on such tax. Considering the above position we are of the considered view that education cess and Secondary and higher Secondary Education cess are also part of the tax and not deduction is available to the assesse. Accordingly the ground raised by the assesse is dismissed.

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

Order is pronounced in the open court on 29th March, 2023

Sd/-	Sd/-
(Sonjoy Sarma /संजय शर्मा)	(Rajesh Kumar/राजेश कुमार)
Judicial Member/न्यायिक सदस्य	Accountant Member/लेखा सदस्य

Dated: 29th March, 2023

SB, Sr. PS

Copy of the order forwarded to:

1. Appellant- M/s Sarat Chatterjee & Co. VSP Pvt. Ltd., Sagar Estate, 2nd Floor, Room No. 10, 2, Clive Ghat Street, Kolkata-700001.
2. Respondent – ACIT, CC-1(1), Kolkata
3. Pr. CIT- , Kolkata
4. DR, Kolkata Benches, Kolkata (sent through e-mail)

True Copy

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata