आयकर अपीलीय अधिकरण, विशाखापटणम पीठ, विशाखापटणम

IN THE INCOME TAX APPELLATE TRIBUNAL,
VISAKHAPATNAM BENCH, VISAKHAPATNAM

श्री वी. दुर्गा राव,न्यायिक सदस्य एवं
श्री डि.एस. सुन्दर सिंह, लेखा सदस्य के समक्ष

BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER&
SHRI D.S. SUNDER SINGH, ACCOUNTANT MEMBER

I.T.A.No.93/Viz/2017
(निर्धारण वर्ष**/Assessment Year:2012-13)**

Lewek Altair Shipping Private Ltd. #3-16-193/1 Srividya Colony, Suryaraopet Kakinada - 533003	The ACIT, Circle-1 Kakinada
[**PAN : AABCL9766C]**	
(अपीलार्थी/ Appellant)	**(प्रत्यर्थी/ Respondent)**

I.T.A.No.559/Viz/2017
(निर्धारण वर्ष**/Assessment Year:2013-14)**

Lewek Altair Shipping Private Ltd. #3-16-193/1 Srividya Colony, Suryaraopet Kakinada - 533003	The DCIT, Circle-1 Kakinada
[**PAN : AABCL9766C]**	

अपीलार्थी की ओर से/ Appellant by	:	Shri Jitendra Singh, AR
प्रत्यार्थी की ओर से / Respondent by	:	Shri Debakumar Sonowala, DR
सुनवाई की तारीख / Date of Hearing	:	27.09.2018
घोषणा की तारीख/Date of Pronouncement	:	10.10.2018

आदेश /O R D E R

PER D.S. SUNDER SINGH, Accountant Member:

These appeals are filed by the assessee against the orders of the AO/TPO/Dispute Resolution Panel-1, Bengaluru(DRP in short) u/s 143(3) r.w.s 144C of the income tax act for the assessment years 2012-13 and 2013-14 respectively. Since the facts are identical, both the appeals are clubbed, heard together and disposed off in a common order for the sake of convenience and the facts are extracted from I.T.A.No.93/Viz/2017 for the A.Y.2012-13.

2. For the A.Y. 2013-13, the assessee filed return of income declaring loss of Rs.12,10,43,947/-. During the assessment proceedings, the Assessing Officer (AO) found the international transactions in respect of payment of Bareboat Charter Rentals and Ship Management Services to its AEs Lewek Shipping Pte.Ltd., and Emas Offshore services Ltd., for an amounts of Rs.43.33 crores and 23.18 crores respectively apart from issue of shares of Rs.82.75 lacs byTunis Oil Pte.Ltd., therefore, the AO referred the international transaction to Transfer Pricing Officer (TPO) u/s 92CA of the Income Tax Act, 1961 (hereinafter called as 'Act') to determine the Arms Length Price(ALP in short). The

assessee paid the Bareboat Charter Rentals to its Associate Enterprise (AE) for an amount of Rs.43,35,50,310/- and ship management services of Rs.23,18,30,814 and worked out the PLI of the tax payer (OP/OC) at 28.36% against the margin of comparables at 19.22% and held the transaction are at arms length. The details of payments made to AEs, PLI indicator, Most Appropriate Method (MAM) adopted by the assessee as per the transfer pricing document are furnished as under :

Nature of International Transaction	Amount (Rs.)	MAM	PLI	Margin of Taxpayer	Margin of comparables
Bareboat Charter Rentals	43,35,50,310	TNMM	OP/OC	28.36	19.22
Ship Management Services	23,18,30,814	TNMM	OP/OC	28.36	19.22
Issue of shares	82,75,970	Other Method	NA	NA	NA

2.1. The taxpayer has carried out economic analysis in search for comparables and has used "one source – Global Business Browser", data base in search for comparable companies. For the "Oil and Gas Field Services" after applying certain filters, the tax payer has short listed 7 comparables, arithmetic mean of PLI was computed at 19.22% as against the PLI of the taxpayer at 28.36%. Accordingly, the taxpayer held that the transactions are at arm's length. The tax payer has arrived at the margin of 28.36% by taking the average anticipated profits for future years. The actual financials of the taxpayer as per the audited statement are as under :

Description	**Amount (in Rs.)**
Operating Revenue	48,58,04,962
Operating Cost	68,63,58,779
Operating Profit	20,05,53,817
OP/OR (%)	-29.22%
OP/OC(%)	-41.28%

2.2. Since the TPO has observed in the TP document, that the assessee has taken the projected margins for the future years i.e. upto F.Y.2016-17 and computed its margins at 28.36% against the margin of comparables at 19.22%, the TPO has rejected the anticipated profits for future years and has selected 6 comparables taking OP/OR as PLI of the comparables and arrived at margin of 12.35% and proposed the adjustment of Rs.26,05,50,730/- u/s 92CA and show caused the assessee to furnish the objections if any, for the proposed adjustment. The assessee filed objections for adoption of *cost plus method* which was rejected by the TPO stating that the internal comparable data supplied by the assessee was controlled transactions between the related parties (RPT) and the price of the transaction is controlled transaction.

2.3. The assessee has also requested for consideration of daily bareboat charges and ship management service charges which was also rejected by the TPO as the vessels are owned by the AEs and the consideration of daily rate chart for hiring / chartering of vessels would tantamount to controlled transaction. The objection of the tax payers of incurring losses due to governmental policies was rejected by the TPO stating that it is not a criteria for consideration.

2.4. The assessee has not commented on the search process conducted by the TPO nor has provided an alternative remedy for determination of ALP. Therefore, the TPO has rejected the comparables selected by the assessee taken the following comparables as final comparables after analyzing the databases, the annual reports. After considering the objections raised by the taxpayer, the AO arrived at the average margin of 12.35% as under :

Sl.No.	Name of the Company	OR	OC	OP	OP/OR
1.	Chowgule Steamships Ltd.	245266000	261541000	-1,62,75,000	-6.63
2.	Global Offshore Ltd.	1542596000	983986000	558610000	36.21
3.	Great Eastern Shipping Co.Ltd.	17107000000	10294400000	6812600000	39.82
4.	Seamec Ltd.	1877570000	2038910000	-161340000	-8.59
5.	Shahi Shipping Ltd.	228315634	174760088	53555546	23.46
6.	Shipping Corporation Ltd.	43019900000	47397500000	4377600000	-10.18
				Total	74.09
				Average	12.35

2.5. Accordingly, the TPO applied the margin of 12.35% over the operating cost and arrived at the arm's length price at Rs.42,58,08,049/- against the operating cost of Rs.68,63,58,779/- and suggested for adjustment u/s 92CA of the Act at Rs.26,05,50,730/- towards Bareboat charges and ship management charges as under :

Description	Amount
Arm's Length Margin	12.5%
Operating Revenue	48,58,04,962
Operating Cost	68,63,58,779
Arm's Length Price = (100-AALM)*OR	42,58,08,049

2.6. The TPO has also suggested for adjustment of interest on receivables of Rs.23,17,69,020/- at 14.75% which worked out to Rs.3,41,85,930/-. The AO issued draft assessment order proposing the adjustments suggested by the TPO and the assessee filed objections before the DRP requesting for exclusion of the six comparable companies adopted by the TPO and argued that the said comparable companies adopted by the TPO are functionally divergent and incomparable in deployment of assets and risks also. The assessee submitted before the DRP with regard to the comparables selected by the TPO as under:

Chowgule Steamships Ltd.

2.7. The assesse submitted before the DRP that as per the Directors Report Chowgule Steamships Ltd. was into Dry Bulk Market with fleet profile having DWT of 47,574 MT, which is completely divergent to the functions and assets of the assessee.

Global Offshore Services Liimited.

2.8. The assessee objected before the DRP stating that the company's vessels support Oil and Gas exploration efforts involving transport of personnel to rigs / platforms from onshore bases and vice-versa, delivery of cargo / material to rigs / platforms, anchor handling operations, towing of rigs from one location to another, support to offshore, underwater construction projects. The platform supply vessels owned and operated by the company and its subsidiaries are deployed in India, the North Sea, Brazil and West Africa. The assessee submitted that the activities of the comparable company selected by the TPO are completely divergent to the functions of the assessee.

Great Eastern Shipping Limited.

2.9. As per the website based information, the company is providing sea logistics support in its initial years and venturing in tramp shipping to diversify into offshore oil field services much against the industry norms. The assessee submitted the details of the assets owned by the company are as under :

Sl.No.	Type of Fleet	Vessles (Nos.)
1.	Crude Oil Carriers	9
2.	Product Carriers	14
3.	Gas Carriers	1
4.	Dry Bulk Carriers	10
Total		34

The assessee also submitted that the company's fleet are classified as crude oil carriers, product carriers, gas carriers and dry bulk carriers which are completely divergent to the functions of the assessee.

Seamec Limited.

3. The assessee submitted that the company is the region's leading provider of diving support vessel based diving services utilizing in-house owned and operated specialist DSVs, SEAMEC has unrivalled experience in the ongoing subsea inspection, repair, maintenance and light construction required for the efficient and productive support. The assessee further submitted that the company's performance as per Directors' Report in page No.6 of its Annual Report is as under :

"The company owns and operates four multi support vessels. The company operates an additional vessel under bareboat charter from Seamec International FZE. Your company's wholly owned subsidiary

effective from January 2012. The company succeeded in overcoming the volatility of decline in business of last year. Overall deployment has increased significantly to 65% against 49 of last year. The company's vessels during the Year in general operated in India and South East Asia. One of the vessels had undergone modification / upgradation for deployment on a long term contract of 3 years with ONGC. The charger commenced from end of January 2012 after release of vessel by customs. With this two of your company's vessels are placed on Long Term Charter. Out of the balance, one had assured significant employment whilst the other had to struggle for Employment. The Vessel owned by Seamec International FZE, was taken under Bareboat Charter, deployed in West Africa for a Project with TECHNIP Effective from January, 2012."

The assessee submitted that the company was mainly into diving support vessels, which is completely divergent to the functions of the assessee.

Shahi Shipping Ltd.

3.1. According to the assessee, Shahi Shipping Ltd., owns the following vessels and the company's fleet are classified as bulk cargo carriers, liquid cargo carriers, multipurpose vessels which are completely divergent to the functions of the assessee.

Sl.No.	Type of Fleet	Vessels (Nos.)
1.	Bulk Cargo Carriers	10
2.	Liquid Cargo Carriers	10
3.	Multipurpose Vessels (Bulk Cargo / Container)	3
4.	Others	3
		26

Shipping Corporation of India Limited

3.2. The assessee submitted that the Shipping Corporation of India Ltd owns the following fleet of vessels and the assets and engaged in crude oil tanker, product tankers, chemical tankers, gas carriers, bulk carriers, passenger cum cargo vessels which are completely divergent to the functions and assets of the assessee.

Sl.No.	Type of Fleet	Vessels(Nos.)
1.	Crude Oil Tanker	24
2.	Product Tankers	16
3.	Chemical Tankers	3
4.	Gas Carriers	2
5.	Bulk Carriers	17
6.	Liner Ships	5
7.	Offshore Supply Vessels	10
8.	Passenger-cum Cargo Vessels	2
		79

3.3. The assessee further submitted before the DRP that the impact of the Government Regulation should be made neutral, before proceeding with the Comparisons for ALP and as such the Operating Profit to Operative Revenue was reworked out to 20.09%, if due consideration is given to the factor of RBI Permission to avail External Commercial Borrowing loan. Had the company was allowed to import vessels meant for oil exploration on an automatic route without prior approval from Government or RBI, the company would not have run into losses, therefore, requested for necessary adjustments towards the Government Regulations. The DRP considered the objections raised by the assessee for exclusion of the comparables and held that the company is not engaged in oil exploration but in shipping and the same is comparable. Further, the DRP observed that if there are any differences in the functions, the same is taken care of in arithmetic mean of the comparables. The DRP further observed that the onus is on the assessee to establish the ALP and if the assessee contends that the comparables selected by the TPO are not appropriate, the onus is on the assessee to establish the transaction are at arm's length. Since the assessee failed to do so and analysis of the Profit & Loss of the assessee company shows that the company had incurred losses to the extent of 34.42 crores during the year only due to the transactions with the AE and no independent enterprise would have entered into such transaction, the DRP rejected the objections raised by the assessee. With regard to the assessee's objection on external commercial borrowings, the DRP observed that instead of seeking transfer price adjustment, the DRP opined that the assessee should not have entered into such international transaction which would result into loss. Accordingly, the objections raised by the assessee were rejected.

The alternate plea raised by the assessee to adopt any *other method* and *cost plus method* was also rejected by the DRP and confirmed the adjustment proposed by the TPO. The AO passed order u/s 143(3) r.w.s. 144-C and made the transfer pricing adjustment of Rs.26,05,50,730/- on bareboat charges and shipping management services.

3.4. For the assessment year 2013-14 also, same issue of determining the arm's length price for bareboat charges and ship management services is involved. The TPO adopted the margin of 9.77% of the comparables and suggested for downward adjustment of Rs.53,96,81,884/- u/s 92CA of the act and arms length price was determined at Rs.25,27,14,726/-.The DRP has directed the AO to exclude the comparables selected by the AO in respect of Global Offshore Ltd, Seamec Ltd. on the ground of RPT filter is more than 25% and with regard to Shahi Shipping Ltd., the DRP held that functionally, the company is comparable. The assessing officer passed the assessment order under 143(3) r.w.s.144C for the assessment years making the adjustments as directed by the DRP. Hence the assessee is in appeal before us.

4. During the appeal hearing, the Ld.AR submitted that the Ld.TPO has taken six comparables for the assessment year 2012-13 and the margin on OP/OR arrived by the AO is incorrect. In the case of Global Offshore Company Ltd., the TPO has taken the OP/OR of 36.21% against the correct OP/OR of 35.91%, in the case of Great Eastern Shipping Co. Ltd, the TPO has taken the OP/OR of 39.82% as against the actuals of 7.20% and in shahi Shipping Ltd the OP/PR was 20.57% as against the adoption of 23.46% by the TPO. The Ld.AR during the appeal hearing confined his arguments only to the issues of comparables companies adopted by the TPO for arriving the ALP on Ship Management Services and bareboat charges and the payment of service tax. The Ld.AR brought to our notice that the companies taken by the TPO for transfer pricing study are functionally divergent and uncomparable on deployment of assets and risks wise. The assessee is engaged in the receipt of bareboat charges and making the payments of ship management services. Though the assessee's functions are described as charter services, in fact the company has taken 2 vessels

from the AE on lease basis and given both the vessels to third party for sub lease and receiving the rentals. The Ld.AR submitted that the assessee is engaged in the leasing and sub leasing of the vessels but not charter services as stated in the TP document. According to the Ld.A.R the comparable companies taken by the TPO are completely uncomparable deployment of asset wise, turnover wise, functionally and also on risk factors. The Ld.AR submitted that in case of *Chowgule Steamships Ltd.,* the company is engaged in the *dry bulk market*, and the freight earnings and charter hire receipts amounted to Rs.,2,270.83 lakhs. The company is owning fleet profile having DWT of 47574 MT and it is completely divergent to the functions of the assessee.

4.1. With regard to the *Global Offshore Services Ltd.*, the Ld.AR submitted that the company's vessels support oil and gas exploration, involving transport of personnel to rigs / platforms from onshore bases and vice versa, delivery of cargo / material to rigs / platforms, anchor handling operations, towing of rigs from one location to another. It also supports off shore under water construction projects. The platform supply vessels owned and operated by the company and its subsidiaries in India. Therefore, the activities of the Global Offshore Services Ltd. are completely divergent to the functions of the assessee.

4.2. With regard to *Great Eastern Shipping Company Ltd.,* as stated earlier in this order, the company owns 34 vessels and engaged in providing sea-logistics and venturing into tramp shipping to diversifying into offshore oil field services. The company's fleet is classified as crude oil carriers, product carriers, gas carriers and dry bulk carriers which are completely divergent to the functions of the assessee.

Seamec Limited

4.3. The company is engaged in providing diving support vessles based diving services, utilizing in house and operated specialist DSVs, Seamec has unrivalled experience in the on going sub sea inspection. As discussed earlier in this order, the functions of the company are completely divergent to the functions of the assessee.

Shahi Shipping Ltd.

4.4. In the case of Shahi Shipping Ltd., it owns 26 vessels and the company's fleet are classified as bulk cargo carriers, liquid cargo carriers, multipurpose vessels which are completely divergent to the functions of the assessee.

Shipping Corporation of India Ltd.

4.5. In the case of Shipping Corporation of India Ltd., it owns 79 vessels classified mainly into crude oil tanker, product tankers, chemical tankers, gas carriers, bulk carriers, liner ships, passenger cum cargo vessels which are completely divergent to the functions and the assets of the company.

As discussed earlier, the assessee company is engaged in the lease and sub lease of vessels without owning any vessels. The Ld.AR argued that the asset wise, turnover wise, functionally, risk wise, the companies selected by the TPO are uncomparable and required to be excluded from the transfer pricing study for arriving the ALP. The Ld.AR also submitted that the assessee's transfer pricing study also faulty since the assessee has taken the functionally divergent companies as comparables. The Ld.AR submitted during the appeal hearing that in transfer pricing study, the company has taken the future profits and computed it's PLI at 28.36% and computed the arithmetic mean PLI(OP/OC) of 19.22% which was also incorrect method of computation of margins for determining the ALP. The Ld.AR submitted that the assessee committed an error in arriving at the company's margin as well as in selection of comparables for transfer pricing study. Therefore, requested to exclude the comparables selected by the TPO and to remit the matter back to the file of the AO to rework the ALP by adopting the correct comparables with similar functions and deployment of comparable assets.

5. On the other hand, the Ld.DR supported the order of the lower authorities.

6. We have heard both the parties and perused the material placed on record. The assessee is engaged in the activity of chartering of vessels and made the payment of bareboat charges and the ship management services to it's AE. In a nut shell, the company has taken two vessels on lease and sub leased them and receiving the charter rentals. For the assessment year 2012-13, the company paid the Bareboat charter rentals of Rs.43,35,50,310/- apart from ship management services paid to Emas Offshore Services Pte Ltd., amounting to Rs.23,18,30,814/- aggregating to operating cost of Rs.68,63,58,779/- against operating revenue of Rs.48,58,04,962/- and incurred loss of Rs.20,05,53,817/- merely on leasing and sub-leasing activity before the administrative, marketing and finance expenses. The

operating profit to OP/OR was (-)29.22%. The OP/OC was (-)41.28%. Similarly, for the assessment year 2013-14, the loss incurred was Rs.53.96 crores which resulted in margin of Rs. (-)189.41%. Plain reading of the financial results of both the years clearly indicate that the payment made by the assessee company to it's AE is not at arm's length. Though the assessee assigned the reasons of delay in restrictions on external commercial borrowing and argued that had the RBI accorded permission for ECB loan within time, the company would have earned profit @29.09% the assessee could not explain the compelling reasons for taking the vessel on lease from AE by incurring huge leasing costs and receiving lesser bareboat rentals. For a query from the bench, with regard to the reason for taking the vessel from AE before getting permission for external commercial borrowing was not explained by the Ld.A.R. As stated by the Ld.AR, the assessee intended to purchase the vessels from the AE for which it had applied permission from RBI for external commercial borrowings which was delayed. Due to delay in getting permission from RBI, the assessee could not purchase the vessels and it has taken the vessel on lease by paying daily lease rent @12,500$ per day for each vessel aggregating to 25,000$ for both the vessels and leased out the vessels to third party for lesser rentals. Apart from the lease rentals, the assessee also made the payment of ship management services to another Associated Enterprise which has increased the losses. During the appeal hearing, the Ld.AR was asked to explain the compelling reasons for taking the vessels on lease of US$ 25,000/- per day without having the profitable deal on hand. The Ld.AR could not explain the reasons to take the vessels from AE on daily bare boat rentals@US$25000/- per day. From plain reading of financial statements for both the years , it is apparently clear that the assessee has engaged the vessels at higher rate and paid huge sums of bare boat rentals and the ship management services without plausible reason and received the lesser bare boat rentals which resulted into loss.

6.1. During the appeal hearing, the Ld.AR also did not explain the reasons with relevant documentation. It is obligation on the part of the assessee to follow the rule of law of the land and to acquire the vessels only after obtaining the necessary permission. In the instant case the assessee has neither paid any penal interest nor acquired any ships during intervening period of getting permission from the RBI. Therefore the government policies cannot be reason for any adjustment for determination of ALP. The assessee engaged in the leasing and sub-leasing of the vessels and the comparables selected by both the TPO as well as of the assessee are functionally divergent since none of the comparables are engaged in identical or similar functions. In this connection, the Ld.AR also could not explain whether the companies from which the assessee had received the bareboat rental are having related party transactions. The Ld.DR did not controvert the arguments advanced by the Ld.AR in respect of divergent comparables selected by both the TPO as well as the assessee in transfer pricing study.

6.2. We have gone through the submissions made by the assessee and observed that none of the companies selected by the TPO are engaged in the activity of lease and sub-lease of the vessels. The revenue did not place any evidence to controvert the argument of the Ld.AR. Therefore, we are of the opinion that the issue needs verification by the Ld.TPO/AO to select the correct comparables functionally, asset wise to arrive at the PLI to bench mark and arrive at the ALP. Therefore, in the interest of justice, we restore the matter back to the file of the Ld.TPO/AO to determine ALP after making proper transfer pricing study. Accordingly, the orders of the lower authorities for both the assessment years are set aside on the issue of determination of ALP and is remitted back to the file of the TPO/AO to redo the same afresh after giving opportunity to the assessee. The appeals of the assessee are allowed for statistical purpose.

6.3. During the appeal hearing, the next issue raised by the Ld.AR for the A.Y.2012-13 is with regard to the service tax paid to Government treasury. This issue was not raised before the DRP and the assessee has not raised the additional ground. Therefore, the assessee's appeal on this ground is dismissed.

7. The Ld.AR did not press any other ground raised in these appeals which are raised along with appeal memo as additional ground or revised grounds. The Ld.A.R also did not make any arguments on other grounds. Therefore all other grounds of appeals for the assessment years 2012-13 and 2013-14 are dismissed as not pressed.

8. In the result, the appeals of the assessee are partly allowed for statistical purpose.

The above order was pronounced in the open court on 10th October 2018.

Sd/- Sd/-

(वी.दुर्गा राव) **(डि.एस. सुन्दर सिंह)**
(V. DURGA RAO) **(D.S. SUNDER SINGH)**
न्यायिक सदस्य/JUDICIAL MEMBER **लेखा सदस्य/ACCOUNTANT MEMBER**

विशाखापटणम /Visakhapatnam
दिनांक /Dated :10.10.2018

L. Rama, SPS

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:-</u>

1. अपीलार्थी / The Appellant –Lewek Altair Shipping Private Ltd., #3-16-193/1, Srividya Colony, Suryaraopet, Kakinada - 533003
2. प्रत्यार्थी / The Respondent–The ACIT & DCIT, Circle-1, Kakinada
3. The Commissioner of Income Tax, DRP-1, Bengaluru.
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, विशाखापटणम /DR, ITAT, Visakhapatnam
5. गार्डफ़ाईल / Guard file

आदेशानुसार / BY ORDER

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Sr. Private Secretary
ITAT, VISAKHAPATNAM