

THE INCOME TAX APPELLATE TRIBUNAL
"E" Bench, Mumbai
Shri Shamim Yahya (AM) & Shri Ravish Sood (JM)

I.T.A. No. 6730/Mum/2018 (Assessment Year 2004-05)
I.T.A. No. 6731/Mum/2018 (Assessment Year 2001-02)

Tolani Shipping Co. Ltd. 10-A, Bakhtawar R.P. Goenka Marg Nariman Point Mumbai-400 021. PAN AACT4127C (Appellant)	Vs.	DCIT-5(3)(2) Room No. 573 5 th Floor Aayakar Bhavan M.K. Road Mumbai-400020. (Respondent)
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Assessee by	Shri Satyaprakash Singh
Department by	Shri R. Manjunatha Swamy
Date of Hearing	13.01.2021
Date of Pronouncement	30.03.2021

ORDER

Per Shamim Yahya (AM) :-

These are appeals by the assessee against respective orders of learned CIT(A) for A.Y. 2001-02 and 2004-05 respectively. Since appeals were heard together these are being disposed of by this common order.

A.Y. 2001-02 :

2. This appeal is directed against the order of learned CIT(A) dated 1.8.2018 and pertains to A.Y. 2001-02.

3. The grounds of appeal read as under :

1. The Learned CIT(A) has erred in giving direction to disallow the administrative expenses under Rule 8D(2)(iii) amounting to ONE-HALF percent of the Assessee's value of investments and add back to the Total Income without considering that no such disallowance was made by the Learned A.O. in original assessment Order u/s. 143(3) of the Act and no such disallowance was made in the first appeal in the Order dated 18.02.2005 by the Learned CIT(A) and therefore disallowance without giving any opportunity to the Assessee is invalid under the Income-tax Act, 1961 .

2. The Learned CIT(A) has erred in not considering that the shares are held under DEMAT and dividend is credited directly to the bank account of the Company and therefore Company does not incur any expenditure for earning dividend income and therefore disallowance of amount @ 0.5% of average of investments is not valid.
3. The Learned CIT(A) has erred in not considering that Hon'ble Supreme Court in the case of Godrej & Boyce Mfg. Co. Ltd. 349 ITR 449 reversed the judgement of Hon'ble Bombay High Court in the case of Godrej & Boyce Mfg. Co. Ltd. 194 Taxmann 203 and held that no disallowance can be made under Section 14A for expenses incurred for investments yielding tax-free income if the same was not disallowed in earlier years on the PRINCIPLES OF CONSISTENCY as held by Hon'ble Supreme Court in the case of RADHASOAMI SATSANG VS. CIT 193 ITR 321.
4. Brief facts on this issue are that the assessee has earned dividend income of Rs. 39,68,141/- which was claimed exempt under section 10(33) of the I.T. Act. The Assessing Officer found that the assessee-company has debited an interest expenses of Rs. 15,24,00,244/- in the profit and loss account but has not attributed any expenditure towards earning of such exempt income. The assessee argued before the AO that investments in shares and units of mutual funds have been made out of own funds and therefore there is no reason for portion of interest to be disallowed. However, the AO rejected the claim of the assessee observing that the assessee has failed to prove any nexus between the deployment of own funds and its utilisation for investments, income from which is claimed exempt. Thus the AO apportioned an amount of Rs. 2,29,93,962/- as interest expenditure relatable to investment, which was disallowed u/s 14A and added back to the total income of the assessee.
5. Upon assessee's appeal learned CIT(A) found the assessee's contention appropriate that the assessee had sufficient interest free funds. In this regard learned CIT(A) placed reliance upon Hon'ble Jurisdictional High Court decision in the case of CIT Vs. Reliance Utility and Powers Ltd. (313 ITR 340). The assessee also has gave a chart of interest free funds. This was accepted by learned CIT(A) and he held that the disallowance of Rs.2,29,93,962/- on account of interest expenditure relatable to exempt income u/s. 14A is

deleted. However, learned CIT(A) placed reliance upon several case laws including Hon'ble Bombay High Court decision in the case of Godrej & Boyce Manufacturing Company Limited, 328 ITR 81 and held that the disallowance u/r. 8D(2)(iii) equal to half percent of average value of investment would be appropriate. In this regard he noted that the assessee claimed that investment in subsidiary companies investment in debenture and bonds and investment immovable property amounting to Rs. 11,91,92,670/- cannot be considered for disallowance under the provision of 14A. That the same generate taxable income. He held that this assertion of the assessee needs verification. Therefore he directed the Assessing Officer to verify this fact and compute disallowance u/s. 14A @ 0.5% of the average value of investment.

6. Against this order the assessee is in appeal before us.

7. We have heard both the counsel and perused the records. We note that learned CIT(A) has granted substantial relief to the assessee. He has deleted the addition u/r. 8D(2)(ii). He has only directed disallowance u/r. 8D(2)(iii) amounting to half percent of assessee's investment which earned exempt income. We find that there is no infirmity in the above direction of learned CIT(A). Assessee's claim that this limb of disallowance u/r. 8D(2)(iii) was not invoked by the Assessing Officer is not at all sustainable. The Assessing Officer had made disallowance of Rs.2,29,93,962/- under section 14A. Learned CIT(A) had deleted that and directed for a disallowance of 0.5% of the average value of investment under rule 8D(2)(iii) after necessary verification by the Assessing Officer. We find that the disallowance sustained by learned CIT(A) in effect is much less than that by the Assessing Officer. Even if investment have been made out of available interest free fund the same by no stretch of imagination goes on to the prove that no disallowance under rule 8D(2)(iii) is required. We are not at all convinced by the assessee's contention that due to technicality there is infirmity in the direction of learned CIT(A) as the Assessing Officer initially has not proposed any such disallowance. Hence,

we uphold the order of learned CIT(A). Hence, this appeal by the assessee for A.Y. 2001-02 stands dismissed.

A.Y. 2004-05 :

8. This appeal by the assessee is directed against the order of learned CIT(A) dated 29.8.2018 and pertains to A.Y. 2004-05. This order of learned CIT(A) is a combined order against the order of A.O. dated 24.2.2014 and another order of the Assessing Officer under section 154 of the I.T. Act dated 20.11.2015. The assessee has filed summary of grounds of appeal as under :-

“Ground Nos. 1 and 2

1. The sum of Rs.9,81,23,493/- representing 19.62% of the profit earned on account of freight paid to subsidiary company to be considered shipping business income for the purpose of computation of deduction u/s.33AC.

Ground No. 3

2. The sum of Rs.3,96,81,035/- should be considered as shipping business income for the purpose of allowing deduction u/s.33AC.

Ground No. 4

4. The sum of Rs.13,86,926/- on account of interest u/s.244A same should be reduced from the Income under the head Income from Other Sources as the same has been withdrawn by the Department.

Ground No. 5

5. Allow set-off of brought forward unabsorbed Long-term Capital loss of Rs. 11,86,28,448/- against the Capital Gains of Rs.6,97,21,921/- arising on account of profit on sale of depreciable asset u/s.50.

Ground No. 6

6. Without prejudice to Ground No.5 above, to compute tax on Capital Gain of Rs.6,97,21,921/- computed u/s.50 on account of sale of vessel is on sale at 20% as Long-term Capital Gain instead of the tax rate of 37.5% as Short term Capital gain.

Ground No. 7

7. To considered Technical Management fees of Rs.6,95,625/- as shipping business income for the purpose of allowing deduction u/s.33AC.

Ground No. 8

8. Rectification of MAT credit allowed u/s.115JAA is allowed as deduction in subsequent years when tax is charged as per the provisions of the Act to avoid charging double taxation which is contrary to the provisions of Income-tax Act and therefore the matter of not giving credit for tax paid as

per Book Profit is debatable and therefore the same cannot be considered u/s.154 as mistake apparent on record.

9. The assessee has also filed additional ground of appeal the same read as under:-

“The Learned A.O. while computing the Book Profits u/s.115JB erred in considering deduction u/s.33AC amounting to Rs.40,19,96,248 as against the amount of Rs.46,00,00,000 carried to 33AC reserve in the Profit and Loss Account.”

Apropos ground No. 1,2&3:-

10. Brief facts are that the assessee company is engaged in the business of shipping. The assessee had filed a return of income for AY 2004-05 on 01.11.2004, declaring total income at Rs.4,11,91,919/-. The return was processed u/s 143(1) of the Act on 07.01.2005 and subsequently selected for scrutiny. Thereafter, the assessee company revised the taxable income to Rs.3,33,45,240/-by filing a revised statement of income along with letter dated 25.09.2006. An assessment u/s 143(3) of the Act determining the total income of, Rs.61,35,50,490/- was concluded on 29.12.2006. Aggrieved, the assessee filed an appeal before the CIT (A) on 25.01.2007.

11. Thereafter, on application of the assessee u/s 154, the AO passed a rectification order on 09/02/2007 u/s. 154, recomputing the deduction allowable u/s. 33AC of the Act, at Rs.46,00,00,000/- and reducing the assessed income to Rs.47,67,42,540/-. In both these orders, unabsorbed depreciation was not allowed to be carried forward, as there remained no unabsorbed depreciation for carry forward as per the assessment order for AY 2003-04 completed earlier on 29/03/2006.

12. Consequent upon the CIT(A)'s order dated 14/11/2007 for AY 2003-04, an order giving effect was passed on 18/01/2008 whereby the unabsorbed depreciation allowed for carry forward for set off, was determined at Rs.17,91,84,264/-. Consequent to the order giving effect to the appellate order for AY 2003-04, a rectification order dated 30/01/2008 was passed to compute the total income for the AY 2004-05 to set off the unabsorbed

depreciation of Rs.17,91,84,264/-brought forward from earlier years and the total income was determined at Rs.37,86,79,900/-. Thereafter, pursuant to an appeal against the assessment order passed u/s 143(3), the CIT(A) passed an order dated 30/01/2009 and granted partial relief to the assessee. An order giving effect was passed on 23/03/2009.

13. Subsequently, the AO noticed that in the rectification order passed u/s. 154 dated 30.1.2008 deduction u/s. 33AC was allowed without considering the effect of set-off of unabsorbed depreciation amounting to Rs.17,91,84,264/-. The unabsorbed depreciation amounting to Rs.17,91,84,264/- was wrongly adjusted towards business income after allowing deduction u/s 33AC, whereas the unabsorbed depreciation should have been deducted from operation of ships before allowing deduction u/s 33AC. Hence, to rectify the mistake in allowing deduction u/s 33AC and to give final effect to the order of the CIT(A) dated 30.01.2009, an order was passed on 18.05.2010, and the total income was determined at Rs.22,59,46,894/-.

14. The assessee filed an appeal before the CIT(A) against the order of the AO giving effect to CIT(A)'s order on 18/05/2010, who dismissed all the grounds raised by the assessee vide order dated 19/03/2012. Meanwhile, the AO also passed an order dated 10/02/2011 u/s 154 of the Act levying interest of Rs. 19,71,486/- u/s 220 (2) of the Act. The assessee filed another appeal before the CIT(A) against the order of the AO, who granted partial relief to the assessee vide order dated 04/10/2013, directing the AO to rectify the mistake and compute the interest u/s. 220 (2) of the act after a speaking order after giving proper effect to the directions given in the CIT(A)'s order, credit of TDS and taxes paid by the assessee.

15. Pursuant to the directions issued by the CIT(A) the Assessing Officer has passed an order dated 24/02/2014. Aggrieved, with this order of the Assessing Officer the assessee has filed the appeal before learned CIT(A).

Further, the Assessing Officer also passed another order u/s 154 of the act on 20.11.2015 and relying on the provisions of section 115JAA, the Assessing Officer restricted the credit for tax paid under MAT to the extent of Rs. 19,65,076/- pertaining to AY 1999-2000 and 2000-01 for set off in AY 2004-05 as against set-off of Rs. 1,99,46,785/- allowed earlier on the ground that MAT credit from AY 2001-02 to 2005-06 is not allowable as deduction as per provisions of section 115JAA. Assessee also filed appeal against the this order to the learned CIT(A). The learned CIT(A) has noted for adjudication the ground raised by the assessee against both the orders of Assessing Officer. After noting grounds raised against both the assessment order the learned CIT(A) proceeded to treat and adjudicate the ground as arising in a single appeal.

16. Thereafter the learned CIT(A) as regards the impugned ground noted that the assessee has challenged the exclusion of Rs.9,81,23,493/- representing 19.62% of the profit earned on behalf of the subsidiary while computing income from operations of ships for the business for determining the deduction allowable under section 33AC of the Act. Learned CIT(A) did not go into the merits of the issues raised. He was of the opinion that instant appeal is directed against the order of the Assessing Officer, pursuant to the directions of learned CIT(A) to grant partial relief to the assessee vide order dated 4.10.2013 directing the Assessing Officer to rectify the mistake and compute the interest under section 220(2) of the Act by speaking order after giving effect to the directions given in the learned CIT(A)'s order, credit of TDS and taxes paid by the assessee. Hence, learned CIT(A) was of the opinion that the Assessing Officer was correct in not taking care of this issue. He declined to adjudicate merits of the issues raised. He referred to the earlier order of learned CIT(A) dated 30.1.2009, wherein learned CIT(A) has held that he agreed with the Assessing Officer that the assessee is entitled to deduction u/s. 33AC only in respect of 'profits and gains of business' which can be said to be derived from the business of operation of ships. Hence, only those profits

are eligible for deduction under section 33AC which are directly derived from assessee's own shipping operations. That the case laws cited by the Assessing Officer are applicable hence he upheld the decision of the Assessing Officer. However, he further held that the Assessing Officer has reduced the profit on sale of assets which are already deducted by the assessee in computation of income. But this mistake is apparent from record has already been corrected vide order passed under section 154 of the Act dated 9.2.2007 by the Assessing Officer, wherein dividend income, interest earned, management fee and profit on sale of assets which were already deducted in the computation of income but again reduced by the Assessing Officer have been added back and deduction under section 33AC has been increased to the extent of reserve created of Rs. 46,00,00,000/-. Hence, the assessee is not entitled to any further deduction.

17. Referring to the above order of earlier learned CIT(A) present learned CIT(A) held that this issue has been covered by earlier learned CIT(A)'s order. Therefore he found no error on the order of the Assessing Officer on this issue.

18. Against this order assessee has filed the appeal before us.

19. We have heard both the counsel and perused the records. In this regard submission of assessee's counsel are as under :-

"The Learned CIT(A) has erred in not considering the ground against reduction of sum of Rs.9,81,23,4937- representing 19.62% of the profit earned on account of freight paid to subsidiary company overlooking that the freight was paid at the same rates which was received by the Appellant Company and therefore the Appellant Company has not earned any profit on the same and therefore the same cannot be reduced from shipping business income for the purpose of computation of deduction u/s.33AC and Hon'ble ITAT is entitled to consider the same as information is available with the Department as under and as the Hon'ble ITAT is the final facts finding body.

Sr. No.	Voyage No.	Rate of freight received from Govt. Concerns on the voyage (USD)	Rate of freight paid to the subsidiary company on the voyage (USD)
a)	PG01	11.45	11.45

b)	PG02	14.85	14.85
c)	PG 10	20.00	20.00
d)	PPN271	11.45	11.45
e)	PPN 272	13.75	13.75
f)	PG06	14.50	14.50
g)	PG08	14.50	14.50
h)	PPR05	14.50	14.50
i)	PPR02	14.50	14.50

The Learned CIT(A) erred in not considering the profit earned on shipping freight even though shipping freight earned on inchartered ships are entitled for deduction u/s.33AC of the Income-tax Act. This information is available on record of Department and therefore the Hon'ble ITAT is entitled to consider the same since Hon'ble ITAT is the final fact finding body.”

20. Further learned Counsel of the assessee contended that this issue is squarely covered in favour of the assessee by the decision in the case of DCIT Vs. Orion Agencies Ltd. (32 SOT 527)(Mum) and Sirius Shipping Co. Ltd. Vs. ACIT (257 ITR 38)(Chennai).

21. As regards the issue of other amount to be included for consideration as business income for the purpose of allowance of deduction u/s. 33Ac of the Act, learned Counsel of the assessee has made following submission :-

“The Learned CIT(A) has erred in not considering the ground of Appellant that the following amounts earned by Assessee company should be considered as business income for the purpose of allowing deduction u/s.33AC as held repeatedly by Mumbai ITAT. The information is available on record and therefore the Hon'ble ITAT is entitled to consider the same:-

Sr. No.	Particulars	Amount (in Rs.)
1.	Brokerage and Commission	46,50,833/-
2.	Sundry Balances written back (Para 4 to 7)	1,94,275/-
3.	Foreign exchange difference (net)	2,03,29,551/-
4.	Insurance claims	1,44,86,719/-
5.	Miscellaneous earnings	61,372/-
6.	Interest on Loan to employees	1,58,288/-
	TOTAL	3,96,81,035/-

The Appellant has not taken this ground before Hon'ble ITAT against the Order of CIT(A) dated 30.01.2009 for not considering the sum of Rs.3,96,81,035/- because of the observation of the Learned CIT(A) in Order dated 30.01.2009 vide para 14.4 (Page 14) that "However, it is seen that the A.O. has also reduced the profit on sale of assets which are already deducted by the Appellant in computation of income. But this mistake which is apparent from records has already been corrected vide order passed u/s.154 of the Act dated 09.02.2007 by the A.O. wherein dividend income, interest

earned, management fee and profit on sale of assets which were already deducted in the computation of income but again reduced by the A.O. have been added back and deduction u/s.33AC has been increased to the extent of reserve created of Rs.46,00,00,000/-. Hence the appellant is not entitled to any further deduction." but the Learned A.O. has reduced the deduction u/s.33AC to Rs.40,19,96,247- vide Order dated 24.02.2014 instead of deduction u/s.33AC 46,00,00,000/-. The Hon'ble ITAT is entitled to consider the same as information is available in the records of the Department and Hon'ble ITAT is final fact finding body."

22. Furthermore, learned Counsel of the assessee contended that this issue is squarely covered by the following case laws :-

- Mercator Lines Ltd vs. DCIT 17 SOT 54 (Mum)
- Dolphin Offshore vs. ACIT 38 SOT 404 (Mum)
- GAL Offshore vs. CIT 175 Taxmann 485 (Bom)
- Shipping Corporation of India Ltd vs. Ad din CIT 15 Taxmann.com 141 (Mum)
- DCIT vs. Mercator Lines Ltd 28 Taxmann.com 256 (Mum)
- Dredging Corporation of India Ltd vs. ACIT 13 Taxmann.com 37 (Vish.)

23. Per contra, learned Departmental Representative relied upon the orders of the authorities below.

24. We have carefully considered the submissions. We note that learned CIT(A) has gone into hyper technicality and not adjudicated the issue on merits. He noted that on this issue the Assessing Officer's order is upheld by earlier learned CIT(A). It is settled law that when the substantial interest of justice demands the authorities should not take refuge under the web of hyper technicality. Moreover, it is settled law that no tax can be collected except under the mandate of law as enshrined in Article 265 of the Constitution of India. Furthermore, the Hon'ble Supreme Court in CIT vs. Shelly Products and another 261 ITR 367 (SC) has reiterated this view.

25. Upon careful consideration, we note that the one issue arising here is as to whether the impugned amount represents profit earned on account of freight paid to the subsidiary company is to be considered as shipping business income for the purpose of computation of deduction u/s. 33AC or

not. The assessee's submission is that the freight paid to the subsidiary company was of the same rate which was received by the assessee company and therefore the assessee company has not earned any profit on the same and therefore same cannot be reduced from shipping business income for the purpose of computation of deduction u/s. 33AC of the Act. In this regard we note that learned counsel has referred decision in the case of Orion Agencies Ltd. (supra). We also note that in the assessment order under section 143(3) of the Act, the Assessing Officer has denied this claim by holding that 19.62% comprises the freight attributed by the assessee company to the Singapore based associate companies and that income earned through hiring of vessels belonging to others cannot be said to be the income derived from operation of ships. In the case of Orion Agencies Ltd. (supra) it was held that it is not mandatory that ships/barges must be owned by the assessee and profit must be derived out of such ships/barges. The ITAT has expounded as under :-

“Now the question arose as to whether the business of 'operation of running and maintaining the barges of JNPT (third party) constituted the business of operation of ships' within the meaning of section 33AC. This issue has two components and they are : (i) ownership issue; and (ii) the activity of operation of running and maintaining the barges. [Para 11]

The owning a ship/barge is different from the application of the earning of the business of operation of ships/barges. The provisions of section 33AC(1) refer to the conditions of: (i) status; (ii) object of the business of the company; (iii) eligibility of profits and the application of the same; and (iv) credit to the shipping reserve account. These conditions do not refer to the ownership of the ships/barges. What is needed is the 'carrying on the business of operation of ships' and not the 'owning of the ships/barges' and the intention of deduction may be to generate internal resources to augment the fleet, which the assessee in any case would be doing by complying with the conditions (iii) and (iv) above. Under these circumstances, the owning the ships/barges is not a condition for availing of the benefits of section 33AC. In other words, the ships/barges owned by the third party, i.e., JNPT in the instant case when they were operated in the assessee's business, the assessee was entitled to the deduction.”

26. Similarly in the case of Sirius Shipping Co. Ltd. (supra) it has been held as under :-

Held, (i) that the delay in filing the appeal was only of 113 days and the assessee acted bonafide on the advice of its counsel. The delay had to be condoned.

(ii) That the normal rule of construction is that the intention of the Legislature is primarily to be gathered from the words used in the statute, A careful analysis of section 33AC shows that the deduction contemplated under section 33AC is related not to the asset possessed at the time of claiming of this deduction by the assessee but to the total income debited to the profit and loss account and credited to the special reserve in the relevant previous year. Thus it can be seen that the deduction is only income based and not asset related. Further, clause (b) of sub-section (2) of section 33AC gives a licence to the assessee to utilise the amount credited to the special reserve for the purposes of the business of the assessee other than for distribution of dividends or profits or for remittance outside India as profits or for creation of any asset outside India until the acquisition of a new ship as contemplated in clause (a) of sub-section (2) of section 33AC. Thus, the assessee is entitled and empowered by clause (b) of sub-section (2) of section 33AC to utilise the profits credited to the special reserve for the purposes of its business (other than for acquiring the ship) until the acquisition of a new ship except by way of distribution of dividends or profits or for remittance outside India as profits or for creation of any asset outside India. In other words, except the prohibited items in clause (b) of subsection (2) the assessee is free to use the amount credited to the special reserve for the general purposes of the business of the assessee till it acquires a new ship. Thus, it can be seen that it is not a precondition at the threshold level that the assessee should own a ship for claiming the deduction under section 33AC but the assessee should be a Government company or a public company with the main object of carrying on the business of operation of ships. Whenever the Legislature wanted to insist on the ownership of an asset it has specifically mentioned so, as in sections 32, 32A, 32AB, 33 and 33A. As nothing is mentioned in section 33AC about the ownership of ships, the Legislature was not intending to make the ownership of ship a precondition at the threshold level for claiming deduction under section 33AC. Even in the circulars issued by the Central Board of Direct Taxes, namely, Circular No. 554 of February 13, 1990, and No. 636 of August 31, 1992, wherein certain amendments of section 33AC have been explained, the Board has been silent about the ownership of ship by the assessee at the threshold level. Unlike in section 36(I)(viii), in section 33AC there is a licence given to the assessee to utilise the amount credited to the reserve for the general purpose of the business till the assessee acquires a ship. There is no restriction in section 33AC to the number of assesseees who could claim such deduction and further the deduction under section 33AC is with reference to the profit or income of each and every assessee and not linked to any particular turnover like in section 80HHC.

(iii) That the phrase "running and maintenance" is nothing but "operation of ships", as envisaged by section 33AC. The nomenclature found in the agreement, namely "technical manager", could not change the nature of the business done by the assessee-company in the operation of ships. So long as the assessee had not contravened the provisions of section 33AC(2)(b), the assessee could not be denied the claim of deduction under section 33AC. In this case since the assessee had not contravened the provisions of section 33AC(2)(b) and had already bought a new ship within the specified period of eight years, it was entitled to the deduction under section 33AC."

27. From the above exposition it is abundantly clear that the ownership by the assessee is not criteria for deduction under section 33AC. The issue raised is squarely covered by the above said case law referred by the assessee's counsel. No contrary decision has been produced. While adjudicating this issue learned CIT(A) originally has mentioned that the case laws relied upon by the Assessing Officer are very much applicable. We find that as a matter of fact, the Assessing Officer has not mentioned any case laws on this issue. In this view of the matter in our considered opinion assessee's plea succeeds that denial of deduction on the ground that these freights were paid to the subsidiary company ships is not sustainable. Accordingly this issue is decided in favour of the assessee.

28. As regards the issue of different item to be considered as business income for the purpose of computation of deduction, upon careful consideration, we find that the issue is squarely covered in favour of the assessee by the aforesaid decisions. The Assessing Officer in the original order after noting the assessee's submission in this regard has rejected the contention on the ground that other income and profit earned cannot be said to be derived from operation of the ships. In this regard he has referred to the decision of Hon'ble Supreme Court in the case of Pandian Chemicals Ltd. Vs. CIT (262 ITR 268). He also referred to the decision of Hon'ble Supreme Court in the case of CIT Vs. Sterling Foods (237 ITR 579). In our considered opinion above case laws are not at all applicable on the facts of the present case. The above case laws referred by the assessee's counsel fully covers this issue. We may consider these case laws by referring to the brief head note as under :-

“ITAT Mumbai in the case of Mercator Lines Ltd. Vs. DCIT (17 SOT 54) has held that for the purpose of computation of deduction u/s. 33AC profit from business means any profit generated during course of business of operation of ships and does not confine only for operation of ships and sales of scrap by the assessee was certainly generated during course of business of operation of ships and as such eligible for deduction under section 33AC of the Act.

In the case of Dolphin Offshore Vs. ACIT (38 sot 404), it was held that:-

“the assessee, a public company, was owner of a shipping vessel -during relevant assessment years, assessee earned income from shipping operations-assessee's claim for deduction under section 33AC was rejected by revenue authorities on ground that shipping was not core business of assessee - On instant appeal, it was seen that no other activity had been done by assessee except operations of ships and income earned from said operation had been shown as charter hire fees - It was also noted that reserve account had been maintained by assessee and surplus amount, as per conditions of section 33AC, had been transferred to reserve account - Whether, on facts, revenue authorities were not justified in rejecting assessee's claim – held Yes.

In the case of Gal Offshore Services Ltd. Vs. CIT (175 Taxman 485), Hon'ble Bombay High Court has held that :-

Section 33AC of the Income-tax Act, 1961 - Shipping business, reserves for - Assessment 1994-95 - Whether amendment to section 33AC by Finance Act, 1995 is clarificatory and/or retrospective - Held, no - Whether section 33AC(1), as applicable to assessment year 1994-95, required that assessee in order to be eligible for deduction under said section had to actually operate ships or that amount in respect of which deduction was to be allowed had to be income earned from shipping business - Held, no - Whether where was a company formed and registered in India and one of its main objects was to on business of operation of ships, its claim of deduction under section 33AC for assessment year 1994-95 could be disallowed on ground that it was not carrying on actual shipping business in that year - Held, no

In the case of Shipping Corporation of India Ltd. Vs. Addl. CIT (15 Taxmann.com 141) it was held that :-

Section 115VA, read with section 41(1) of the Income-tax Act, 1961 - Shipping business -Computation of profits and gains from business of operating qualifying ships - Assessment year 2007-08 - Whether provisions of sections 28 to 43C cannot override computation of projects and gains under section 115VA - Held, yes - Whether, therefore, where assessee's income was computed in accordance with provisions of section 115VA, Assessing Officer could not make separate additions in respect of write back of sundry creditors, prior period adjustments, etc., under section 41(1) - Held, yes [In favour of assessee]

II. Section 115VA, read with section 56, of the Income-tax Act, 1961 - Shipping business -Computation of profits and gains from business of operating qualifying ships - Assessment year 2007-08 - Assessee-company was engaged in business of merchant shipping -Income earned by assessee in form of freight income, carter hire income, etc., was computed under section 115VA - Assessee also earned certain interest income on loans/advance to employees - Assessing Officer brought said interest income to tax under head 'Income from other sources' - Whether in view of fact that loans were advanced to employees involved in core activity of assessee-company, interest income derived from such activity was taxable under head

'Income from business' and, therefore, it could not be brought to tax separately - Held, yes [In favour of assessee]

III. Section 115VA, read with section 45, of the Income-tax Act, 1961 - Shipping business -Computation of profits and gains from business of operating qualifying ships - Assessment year 2007-08 - Assessee earned certain income from sale of ships - Revenue authorities brought to tax said income under head 'capital gains' - It was undisputed that even though income was from core activity nevertheless, it was taxable under head 'Capital Gains' and did not fall within ambit of sections 28 to 43C - Whether in view of above, receipt in question could not be considered as turnover as per provisions of section 115VA and, thus, it was out of purview of Chapter-XII-G of Act - Held, yes - Whether, consequently, authorities below were justified in making separate addition in respect of income arising from sale of ships - Held, yes [In favour of revenue]

In the case of DCIT Vs. Mercator Lines Ltd. (28 taxmann.com 256) it was held by the Tribunal that :-

Section 33AC of the Income-tax Act, 1961 - Shipping Business - Reserves for -Computation of deduction - Assessment year 2003-04 - Assessee claimed deduction under section 33AC on insurance claim amount received towards repairs carried out in respect of a vessel - Assessing Officer held that such insurance receipt could not be taken to be assessee's business income and, therefore, same was not eligible for deduction under section 33AC - Commissioner (Appeals) however allowed assessee's claim - Whether only if insurance claim was found to be assessee's profits derived from business operation of ships, amount so received shall be taken as an eligible profit for purpose of creating reserve and allowing deduction in terms of provision of section 33AC - Held, yes [Para 6] [Matter remanded]

In the case of Dredging Corporation of India Ltd. Vs. ACIT (13 Taxmann.com 37), the Tribunal held that :-

Section 115VA, read with section 115V-I, of the Income-tax Act, 1961 and rule 11R of the Income-tax Rules, 1962 - Shipping business - Computation of profits and gains from business of operating qualifying ships - Assessment years 2006-07 to 2008-09 - Certain incomes of assessee were considered as income not generated from assessee's core activity of operating qualifying ships and, hence, assessee could not claim exemption of same under 'tonnage tax scheme' - Whether income earned on sale of scrap and assets would be income directly relatable to activity of 'operating qualifying ships' - Held, yes -Whether amount received on insurance claims would be income directly relatable to activity of operating qualifying ships - Held, yes - Whether where assessee had entered into certain transactions in foreign currency in connection with its core activity of "operating qualifying ships", exchange differences arising out of such activities should be treated as related to 'operating qualifying ships' - Held, yes - Whether, however, incomes earned from recoveries for vehicle-use and recoveries of rent for leased out quarters to staff would be independent source of income not

connected with activities of 'operating qualifying ships' - Held, yes - Whether further receipts from (a) interest on housing loan and other advances, (b) recovery towards late attendance, (c) sale of tender documents (d) Training fees (e) fee for supply of information under RTI Act and (f) liquidated damages collected from various contractee parties as compensatory payment for failure to execute contract works within stipulated time, would not be related to activity of operating qualifying ships' - Held, yes [Partly in favour of assessee]

30. Thus it is amply evident that these items rejected by the Assessing Officer have been considered and accepted as business income for the purpose of determining deduction allowable under section 33AC of the Act in the above case laws.

31. Respectfully following the precedents, we set aside the order of learned CIT(A) and decide this issue in favour of the assessee.

Apropos ground No. 4

32. In this regard we note that learned CIT(A) was considering the assessee's challenge to ground relating to allowability of interest under section 244A of the Act on the excess amount of tax paid by the assessee. Learned CIT(A) directed that the Assessing Officer should grant interest under section 244A of the Act as provided under the Act. In the absence of any further detail furnished by the assessee, we find that there is no infirmity in the direction to grant interest under section 244A of the Act as per provisions of the Act. We find that learned CIT(A) has already directed the Assessing Officer to follow the prescription of the Act. Hence, no separate adjudication is required. Hence, we uphold the order of learned CIT(A). This ground raised by the assessee stands dismissed.

Apropos ground No. 5&6 :-

33. This issue arises out of adjudication of ground No. 8 by the learned CIT(A). learned CIT(A) has noted that the assessee has claimed that short-term capital gain amounting to Rs. 7,91,43,378/- on account of sale of VESSEL assessed to tax @ 37.5% is taxable at the rate of 20% as provided in Section

112 of the Act as Long-term Capital Gain and Long-term Capital Loss of Rs.20,74,036/- incurred by the Appellant should be deducted from the same. That this claim of the appellant is based on a subsequent decision of the Hon'ble Tribunal in the case of Smita Conductors Ltd. ITA No. 4004/Mum/2011 dated 17.09.2013. That apparently, this issue was neither the subject matter of appeal before his learned predecessor CIT(A) nor has he issued any directions to the AO in this regard. Therefore, he found that there is no error in the order of the AO.

34. We have heard both the parties and perused the records. We note that there are contradictory decisions on the above subject. However, now we note that the assessee has raised alternate contention that the assessee should have allowed set off of brought forward unabsorbed long term capital loss of Rs. 11,86,28,448/- against the short term capital gains of Rs. 6,97,21,921/-. We find that this alternative contention is covered in favour of the assessee by the decision of Hon'ble Jurisdictional High Court in the case of CIT Vs. M/s. Manali Investment (ITA No. 1658 of 2021 in which the Hon'ble Jurisdictional High Court has held as under :-

“1. In this appeal by the Revenue for A.Y. 2005-06, following re-framed question of law has been proposed for our consideration.

Whether on the facts and in the circumstances of the case and in law, the Tribunal was correct in holding that the assessee is entitled to set off under Section 74 in respect of capital gain arising on transfer of capital assets on which depreciation has been allowed in the first year itself and which is deemed as short term capital gain under Section 50 of the Income Tax Act relying upon the judgment of this Court in the case of CIT V/s. Ace Builders Limited even though the said decision was rendered in the context of eligibility of deduction under Section 54E ?

2 The respondent – assessee had during the subject assessment year sold its meters and transformers on which it had claimed depreciation. On sale, the respondent assessee claimed long term capital gains and sought to set off the same against its carried forward long term capital loss in terms of Section 74 of the Income Tax Act, 1961. The assessing officer disallowed the claim and held that in view of Section 50 of the Act, the gain is in the nature of short term capital gain.

3. On further appeal, the Tribunal by the impugned order has allowed

the claim of the respondent assessee to set off its long term losses in terms of Section 74 of the Act against the long term capital gains on sale of transformers and meters. In the case of Ace Builders Limited, this Court held that by virtue of Section 50 of the Act only the capital gains is to be computed in terms thereof and be deemed to be short term capital gains. This deeming fiction is restricted only for the purposes of Section 50 of the Act and the benefit under Section 54E of the Act which is available only to long term capital gains was extended. Further, an identical issue with regard to set off against long term capital loss arose in an appeal filed by the Revenue in the matter of Commissioner of Income Tax 9 V/s. Hathway Investments Private Limited, being Income Tax Appeal No.405 of 2012. This court by its order dated 31st January, 2013 refused to entertain the appeal filed by the Revenue. The Revenue has not been able to point out any distinguishing features in the present case warranting a departure from the principles laid down by this court in the matter of Ace Builders (P) Limited (supra) and in our order dated 31st January 2013 in Income Tax (L) No. 405 of 2012.

35. Accordingly, the alternate ground No. 5 is decided in favour of the assessee. While deciding the alternate ground we have noted that though this issue is being raised for the first time but it is a legal issue. Moreover, even in the case of Goetz India Ltd. Vs. CIT (284 ITR 323), Hon'ble Supreme Court has accepted the jurisdiction of the ITAT in considering a ground not raised earlier even without filing revised return. Accordingly, the alternate ground as above stands allowed.

36. Since ground No. 6 is without prejudice to ground No. 5, the ground No. 6 is rejected.

Apropos ground No. 7 :-

37. In the absence of any detail as to from where this issue is arising or whether the same issue was dealt with by learned CIT(A), we dismiss this ground raised by the assessee.

Apropos ground No. 8 :-

38. Detailed ground in this regard read as under :-

“The Learned CIT(A) has erred in his combined Order dated 29.08.2018 against appeal no.201 and appeal no.432 in considering in PARA 7.5 to 7.7 (Page 16 of Order) in which it is held that the Appellant is entitled only credit for tax paid under the provisions of Book Profit under Sections 115JA and

115JB, overlooking that difference between Book Profits and income as per the provisions of the Act is mainly on account of higher depreciation allowable under the provisions of the Act as compared to depreciation allowable under the provisions of Companies Act and therefore once tax is paid on BOOK PROFIT under the provisions of Companies Act and later on tax is charged as per provisions of the Act, the tax charged earlier is allowed as deduction in subsequent years when tax is charged as per the provisions of the Act to avoid charging double taxation which is contrary to the provisions of Income-tax Act and therefore the matter of not giving credit for tax paid as per Book Profit is debatable and therefore the same cannot be considered u/s. 154 as mistake apparent on record.”

38. Upon hearing both the parties and perusing the records, we find that learned CIT(A) has adjudicated the issue by elaborately referring to the scheme of the Act and explanatory note. He has decided the issue as under :-

“Tax credit in respect of tax paid on deemed income relating to certain companies.

(i) Where any amount of tax is paid under sub-section (1) of section 115JA by an assessee being a company for any assessment year, then, credit in respect of tax so paid shall be allowed to him in accordance with the provisions of this section.

(1A) Where any amount of tax is paid under sub-section (1) of section 115JB by an assessee, being a company for the assessment year commencing on the 1st day of April, 2006 and any subsequent assessment year, then, credit in respect of tax so paid shall be allowed to him in accordance with the provisions of this section.

7.6 The relevant para of Explanatory Notes to the Finance Act, 2005, (Circular No. 003 of 2006 dt. 27th February, 2006) which explains the intention behind the insertion of the new provision, reads as follow;

3.23 Allowing tax credit for MAT paid u/s 115JB against tax liability in subsequent years under other provisions under the existing provisions of section 115JB, where the income-tax payable by a company in the previous year is less than seven and one-half per cent, of its book profit such book profit is deemed to be the total income of the company and it is liable to pay income-tax at the rate of seven and one-half per cent, of such book profit. No credit of such tax paid by the company under this section is allowed against the tax liability which arises in subsequent years under the other provisions of the Act.

With a view to provide credit for such payment, section 115JAA has been amended to provide that where any amount of tax is paid under sub-section (1) of section 115JB by a company for any assessment year beginning on or after the 1st day of April, 2006, credit in respect of the taxes so paid for such assessment year shall be allowed on the

difference of the tax paid u/s 115JB and the amount of tax payable by the company on its total income computed in accordance with the other provisions of the Act. The amount of tax credit so determined shall be allowed to be carried forward and set off in a year when the tax becomes payable on the total income computed under the regular provisions. However, no carry forward shall be allowed beyond the fifth assessment year immediately succeeding the assessment year in which the tax credit becomes allowable. The set off in respect of the brought forward tax credit shall be allowed for any assessment year to the extent of the difference between the tax on the total income and the tax which would have been payable u/s 115JB for that assessment year.

7.7 As is clearly evident from the explanatory note, the purpose of amendments made by the Finance Act, 2005 in the provisions of section 115JAA was to provide credit for tax paid u/s 115JB to tax payer which was not available earlier. However, the benefit available in respect of amount of tax paid under sub-section (1) of section 115JB is available for assessment year beginning on or after the 1st day of April, 2006. No benefit is available in respect of any payment made u/s 115JB prior to is so clear and there is no ambiguity or debate in this case. In view of the above it is held that the action of the AO is as per law and it is done within jurisdiction allowed u/s 154 of the Act. In view of the aforesaid, the above grounds of appeal are rejected.”

40. Upon careful consideration, we find that learned CIT(A) has passed reasonable order and it does not require any interference from our part. Hence, we uphold the order of learned CIT(A). This ground raised by the assessee stands dismissed.

Apropos additional ground :-

41. Additional grounds raised read as under :-

“In the Profit and Loss Account the Appellant created reserve u/s.33AC amounting to Rs.46,00,00,000. However, in the Rectification Order passed u/s.154 dated 20.11.2015 and the Order dated 24.02.2014 giving effect to CIT(A)'s Order, the Learned A.O. has while computing the Book Profit u/s.115JB has considered deduction u/s.33AC amounting to Rs.40,19,96,248 instead of the amount credited to reserve u/s.33AC and debited to Profit and Loss Account amounting to Rs.46,00,00,000.

In the original appeal filed before CIT(A) and the Hon'ble ITAT the above grounds of appeal remained to be included. The Appellant therefore has filed the additional grounds of appeal raising the above ground.

As the facts of the case and details are available with the Assessing Authorities and therefore the Appellant is entitled to raise the additional ground as held by Hon'ble Mumbai ITAT in the case of Grasim Industries

Ltd. vs. Department of Income-tax M.A. No.247/Mum/2010 arising out of ITA No. 6253/Mum/99 dated 25.03.2011.”

42. Upon careful consideration and hearing both the parties, we note that the assessee is raising a legal issue. We note that it is settled law that book profit shown by the assessee has to be as per the profit shown in the profit and loss account subject to only those adjustments as provided in the Act. As mandated by Hon'ble Apex Court in the case of Apollo Tyres Ltd. Vs. CIT (255 ITR 273) no tinkering with the book profit as per profit and loss account is permitted otherwise than mandated by the provisions of the Act as contained in section 115JB of the Act. This is more so in rectification order passed. Hence, with the above observation this issue is remitted to the file of the Assessing Officer to consider the issue afresh and follow the mandate of law as above.

43. In the result, this appeal by the assessee for A.Y. 2001-02 is dismissed and that for A.Y. 2004-05 stands partly allowed.

Pronounced in the open court on 30.3.2021

Sd/-
(RAVISH SOOD)
JUDICIAL MEMBER

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 30/03/2021

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

PS

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai