IN THE INCOME TAX APPELLATE TRIBUNAL, 'K' BENCH MUMBAI

BEFORE: SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SHRI S.RIFAUR RAHMAN, ACCOUNTANT MEMBER

IT(TP)A No.1129/Mum/2016
(**Assessment Year :2011-12**)

ITA No.1795/Mum/2019
(**Assessment Year :2015-16**)
&
ITA No.1596/Mum/2018
(**Assessment Year :2013-14**)

The Great Eastern Shipping Co. Ltd. Kalyaniwalla & Mistry 3rd Floor, Army & Navy Building, 148, M.G. Road, Fort, Mumbai – 400 001 **PAN/GIR No.AAACT1565C**	Vs.	The Asst. Commissioner of Income Tax, Circle-5(3)(2) Mumbai
(Appellant)	..	**(Respondent)**

ITA No.2426/Mum/2019
(**Assessment Year :2015-16**)
&
ITA No.2076/Mum/2018
(**Assessment Year :2013-14**)

The Asst. Commissioner of Income Tax/ DCIT, Circle-5(3)(2) Mumbai	Vs.	The Great Eastern Shipping Co. Ltd. Kalyaniwalla & Mistry 3rd Floor, Army & Navy Building, 148, M.G. Road, Fort, Mumbai – 400 001 **PAN/GIR No.AAACT1565C**
(Appellant)	..	**(Respondent)**

Assessee by	Shri Jeet Kamdar
Revenue by	Shri Rajesh Pardeshi
Date of Hearing	**11/01/2024**
Date of Pronouncement	**31/01/2024**

आदेश / O R D E R

PER AMIT SHUKLA (J.M):

The aforesaid cross appeals have been filed by the assessee as well as by the Revenue by separate impugned orders against final assessment order dated 29/01/2016 passed u/s.143(3) r.w.s. 144C(13) in pursuance of directions given by the DRP dated 28/12/2015 for the A.Y.2011-12; order against 31/01/2018 passed by ld. CIT(A)-10, Mumbai for the A.Y.2013-14 and cross appeals filed by the assessee as well as by the Revenue against order dated 28/01/2019 passed by CIT(A)-10, Mumbai for the A.Y.2015-16.

2. Since issues involved in all the years are common, therefore, the same were heard together and have been disposed of by way of this consolidated order. We will take up take up the appeal for A.Y.2011-12 first.

3. The ground Nos.1 to 9 and additional ground Nos.1& 2 relate to disallowance u/s.14A of the Act made by the ld. AO has been challenged by the assessee.

4. The brief facts qua the issue of disallowance u/s.14A of the Act are that assessee while filing the return of income has computed disallowance of Rs.1,17,99,604/- u/s.14A. The working of the disallowance by the assessee was in the following manner:-

- The actual administrative expenditure incurred by the Treasury Division, including employee costs and other relatable expenses aggregating to Rs.22,54,612/-, was allocated by the assessee between the taxable and non-taxable gross receipts of the Treasury Division and the disallowance of Rs.9,93,218/- under Rule 8D(2)(1) was computed by the assessee.

- The interest payable on the borrowings utilized for the investment in equity and preference shares of Greatship (India) Ltd. of Rs.1,46,69,996/- as reduced by the amount disallowed under Section 43B of the Act of Rs 75,26,834/-, has also been considered as direct expenditure when computing the disallowance under Rule 8D(2)(i).

- Hence, the total disallowance under Rule 8D(2)(i) was computed by the assessee at Rs.81,36,380/-.

- As regards the disallowance under Rule 8D(2)(ii), the assessee has considered the interest expenditure of the non-tonnage tax business at Rs.54,45,49,733/- as reduced by the amount disallowed under Section 43B of the Act of Rs.4,30,66,574/-, The interest on cancellation of vessel construction contract of Rs.42,75,635/- interest on service tax of Rs.2,67,363/- and interest on income tax of Rs.1,77,08,310/- which have been suo moto disallowed by the assessee in the Return of Income have also been excluded. The interest payable on the borrowings utilized for the investment in Greatship (India)

Ltd. of Rs. 1,46,69,996/- has been excluded when computing the indirect interest expenditure disallowed in accordance with the provisions of Rule 8D(2)(ii), as such interest expenditure has already been considered as a direct expenditure under Rule 8D(2)(1). The assessee has further reduced the net interest expenditure on borrowings which were fully utilized for investment in growth schemes of Mutual Fund units aggregating to Rs.45,11,45,621/-, whereby the net interest expenditure attributable to the earning of exempt dividend income was Rs. 1,34,16,234/-. The disallowance of such indirect interest expenditure has therefore been computed at Rs.36,63,224/- in accordance with the formula prescribed under Rule 8D(2)(ii).

- Further, as the actual administrative expenditure was disallowed by the assessee under sub-clause (1), no further disallowance was warranted under sub-clause (iii) of clause (2) of Rule 8D. Hence, the aggregate disallowance under Section 14A was computed at Rs.1,17,99,604.

- The assessee filed the revised working of the disallowance under Section 14A of the Act during the course of the assessment proceedings as certain investments were inadvertently considered as yielding exempt dividend income when filing the Return of Income, whereby the aggregate disallowance under Section 14A of the Act was computed at Rs. 1,14,95,165/-.

5. However, the ld. AO did not accept the assessee's computation of disallowance and proceeded to recomputed the disallowance u/s.14A r.w.r.8D. First of all, he accepted the amount liable for disallowance under clause 2(i) of Rule 8D at Rs.81,36,380/- as computed by the assessee. However, the ld. AO has considered the total interest expenditure of the tonnage

and non-tonnage business of the assessee of Rs.145,25,78,710/- as reduced by the amount disallowed under Section 43B of the Act of Rs. 4,30,66,574/-. The ld. AO has further reduced the interest on service tax of Rs.2,67,363/- and interest on income tax of Rs. 1,77,08,310/-, which were suo moto disallowed by the assessee in the Return of Income. The ld. AO has also reduced the interest payable on the borrowings utilized for the investment in Great Eastern ship (India) Ltd. of Rs.1,46,69,996/-. The ld. AO has, therefore, considered the interest expenditure at Rs. 137,68,66,467/- (as against the net interest expenditure attributable to the non-tonnage tax activities of Rs. 1,34,16,234/- considered by the assessee while applying clause 2(ii) of Rule 8D) and computed the disallowance under Rule 8D(2)(ii) at Rs.34,47,00,310/-, The AO also disallowed a further notional amount of Rs. 12,01,70,250/- as indirect administrative expenditure under clause 2(iii) of Rule 8D, being the amount computed @0.5% of the average value of investments held by the assessee. Hence, the aggregate disallowance under Section 14A computed by the ld. AO was Rs.47,30,06,940/-.

6. The ld. DRP directed the AO to consider the aggregate interest expenditure incurred by the assessee pertaining to the tonnage and non-tonnage activities for computing the amount liable for disallowance under clause 2(ii) of Rule 8D. However, in case the total disallowance so computed exceeds the total interest expenditure claimed against the non- tonnage income, the disallowance is to be restricted to the total expenditure by

way of interest claimed against the non-tonnage income only since the disallowance computed considering the total interest expenditure exceeds the total interest expenditure claimed against the non-tonnage income, the interest expenditure liable for disallowance has been restricted to the total expenditure by way of interest claimed against the non-tonnage income only, whereby the ld. AO has computed the disallowance under Rule 8D(2)(ii) at Rs 1,34,16,234/-, Further, the learned DRP has directed the ld. AO to compute the amount liable for disallowance under clause 2(i) of Rule 8D at Rs.81,36,380/- and has confirmed the disallowance under clause 2(iii) of Rule 8D of Rs. 12,01,70,250/-. Hence, the aggregate disallowance under Section 14A was computed by the ld.AO at Rs.14,17,22,864/-

7. Before us ld. Counsel for the assessee submitted that this precise issue is covered by the decision of the Tribunal in assessee's own case for A.Y.2008-09 and 2009-10. It has been again followed in the subsequent assessment years from 2010-11 to 2014-15. Besides this, ld. Counsel has also made submission on merits whereas ld. DR relied upon the order of the authorities below.

8. After considering the relevant finding given in the impugned orders as well as material referred to before us at the time of hearing by the ld. Counsel, we find that it is an undisputed fact that assessee company is engaged in the business of shipping and treasury and financial operations. In so far as shipping business is concerned, it has preferred to be taxed under

tonnage scheme. Assessee has prepared separate profit and loss account for the tonnage tax and non-tonnage tax business activities for which separate books of accounts have been maintained in accordance with the provision of Section 115VW(i) of the Act. The profit and loss account of the tonnage tax business and the profit and loss account of the other business of the company have been duly reconciled with the audited profit and loss account of the company and the gross receipts and the operating expenses and administrative and other costs pertaining to the tonnage tax and non-tonnage activities have been reflected in the segmental profit and loss account. The tonnage tax income of Rs.1,80,53,56,326/- have been excluded while computing the business income in accordance with the provisions of Section 115V-I of the Act and the tax is paid of income computed in accordance with the provisions of Section 115V-I of the Act based on the tonnage of the ships operated by the assessee company. Accordingly, the gross receipts of the tonnage tax business (Rs.14,03,07,80,962/-) and the expenses pertaining to the tonnage tax business (Rs.12,22,54,24,636/-) have been excluded while computing the business income of the assessee company.

9. In so far as disallowance under Rule 8D(2)(ii) is concerned, the actual administrative expenditure incurred by the Treasury division including employee costs and other relatable expenses has been allocated by the assessee company between the taxable and non-taxable gross receipts of the Treasury division and

disallowance has been computed accordingly. There is no dispute regarding disallowance under this clause. However, as regards disallowance of interest expenditure in accordance with provisions of 8D(2)(ii), the assessee has bifurcated the interest expenditure in the following manner:-

Particulars	***Amount(Rs.)***
Tonnage Tax Activities	90,80,28,977/-
Non Tonnage Tax Activities	54,45,49,733/-
Total	**1,45,25,78,710/-**

10. Out of the aforesaid interest expenses of Rs. 145,25,78,710/-, the interest expenditure pertaining to the Tonnage tax activities amounting to Rs.90,80,28,977/- has been excluded and disallowed as part of the tonnage tax income while computing the total income of the assessee. We find that both ld. AO and ld. DRP have considered the total interest expenditure of the assessee company aggregating Rs 145,25,78,710/-, which includes the interest expenditure of the tonnage tax business of the assessee of Rs.90,80,28,977/- for computing the disallowance under Rule 8D(2)(ii), without appreciating the fact that such interest expenditure was directly attributable to the tonnage tax activities and was therefore, already excluded from the total income pursuant to which such interest expenditure was not claimed against the exempt income. Hence, interest expenditure directly attributable to the tonnage tax business cannot be considered as part of the indirect interest expenditure for computing the amount liable for disallowance under Rule

8D(2)(ii). In any case, we find that this issue is covered in favour of the assessee by the Tribunal in assessee's own case for A.Y.2008-09 wherein, it has been held that interest expenditure pertaining to tonnage tax business has to be excluded while computing disallowance under Rule 8D(2). The said decision has been followed in assessee's own case for A.Y.2009-10, 2010-11, 2012-13 and 2014-15.

11. Apart from that, it has also been contended that assessee had a huge surplus funds which is evident from the perusal of the balance sheet that reserves and surplus in share capital were Rs.5,35,177 lakhs and the share capital amounts to Rs.15,229 lakhs respectively. Thus, assessee's own funds aggregated to Rs.5,50,406 lakhs where as the investments made by the assessee at the yearend aggregated to Rs.3,30,231/- lakhs. Thus, investments are more than the reserves for the company itself. Further, it has also been stated that no borrowing attributable to the investments yielding tax free income and such investments are out of own funds and internal accruals generated by the company. From the perusal of the balance sheet we find the aforesaid contention is correct and once it is an admitted fact that assessee has own surplus funds for exceeding the investments made, then no disallowance of interest can be made. This issue now stands covered by the judgment of the Hon'ble Supreme Court in the case of **South Indian Bank Ltd., reported in 130 taxmann.com 178**.

Accordingly, disallowance made by the ld.AO under Rule 8D(2) is deleted.

12. In so far as indirect administrative expenditure is concerned, the total expenditure of the Treasury Division aggregates to Rs.22,54,612/. This actual administrative expenditure was allocated by the assessee between the taxable and non- taxable gross receipts of the Treasury Division Consequent thereto, the actual amount of expenditure liable for disallowance under clause 2(i) of rule 8D amounted to Rs 9,93,218/- It is the submission of the assessee that no further disallowance of indirect administrative expenditure is warranted.

13. The AO has however disallowed a further sum of Rs. 12,01,70,250/-, under clause 2(iii) of Rule 8D, being the amount computed 0.5% of the average value of investments held by the assessee. However, the actual expenditure claimed of the Treasury Division based on the divisional Profit & Loss Account was only Rs 22,54,612/- The administrative expenditure under clause 2(i) & 2(ii) of Rule 8D cannot exceed the actual expenditure incurred by the Treasury Division of Rs 22,54,612/-. Since, assessee has disallowed s.9,93,218/- in Rule 8D(2)(1), the balance amount of Rs.12,61,934/- at the most can be considered under Rule 8D(2)(iii). Thus, as against the actual aggregate administrative expenditure of Rs.22,54,612/- incurred by the Treasury Division of the assessee company and claimed accordingly, the ld. AO has disallowed notional expenditure aggregating to Rs. 12,01,70,250/-under clause 2(iii) of Rule 8D,

which is completely erroneous and unwarranted. This issue is also decided by the Tribunal in assessee's own case for the earlier years. Thus, the enhancement made by the ld. AO over and above the disallowance made by the assessee is uncalled so the same is directed to be deleted.

14. Coming to the disallowance u/s.14A while computing the book profit u/s.115JB, this issue now stands covered in the favour of the assessee by the decision of the Tribunal in assessee's own case in the earlier years whereas the Tribunal has followed the decision of the Special Bench in the case of Vireet Investments Pvt. Ltd. reported in 82 taxmann.com 415.

15. In ground No.10 assessee has raised the issue of foreign exchange gain written back on cancellation of vessel construction contract taxed u/s. 28(iv) of the Act.

16. The brief facts are that the assessee company had excluded the foreign exchange gain written back on cancellation of the vessel contract, which was earlier capitalized to the vessels, when computing the Total Income for the year ended 31/03/2011, relevant to the Assessment Year 2011-12, as the same constituted a capital receipt.

17. The AO has, vide the Draft Assessment Order, treated the capital receipt in respect of the foreign exchange gain written back on cancellation of the vessel construction contracts amounting to Rs. 1,80,76,104/-, which was earlier capitalized to the vessels, as the income of the assessee by resorting to the

provisions of Section 28(iv) of the Act. The AO has stated that the gain is not related to the vessel as the vessel has not been acquired by the assessee and hence, the gain cannot be related to a capital asset. The AO has, therefore, proceeded to tax the said amount as a revenue receipt.

18. The learned DRP has held that the assessee has not clarified the treatment given to Capital Work-in-Progress on cancellation of the contract and has, therefore, directed the ld. AO to provide an opportunity to the assessee to explain the relevant facts. The facts which have been brought before the ld. AO can be highlighted in the following manner:-

i) The assessee company had entered into a contract with the shipyard for construction of vessels Hull No. 2311 and Hull No. 2312.

ii) Some of the stage payments to the shipyard were made out of the foreign currency loans.

iii) The exchange difference on revaluation of the foreign currency loans was credited to the Ships under Construction account and formed part of the Capital Work in Progress of the assessee

iv) Subsequently, the said contracts were cancelled and the interest expenditure attributable thereto up to the date of the cancellation was written off to the Profit and Loss Account of the assessee as there was no qualifying asset on which to capitalize such interest. The said interest expenditure was suo moto disallowed by the assessee while computing the total income for the previous year under consideration being capital in nature.

v) Similarly, the exchange difference earlier capitalized was written back and credited to the Profit and Loss Account during the previous year under consideration. The said exchange difference was excluded by the assessee while computing the total income for the previous year under consideration being capital in nature.

vi) The stage payments made to the shipyard were not refunded to the assessee but were adjusted towards the construction of other vessels. Such refund adjustment has no impact on the Profit and Loss Account for the year under consideration

vii) The cancellation of the contracts on capital account for construction of the vessels ie capital assets, cannot be an event so as to change the nature of the transaction. If the contracts for the construction of the vessels had not been cancelled, the exchange gain on revaluation of foreign currency loans would have been credited in the books of account as a capital receipt i.e. the exchange gain on repayment of foreign currency loans for acquisition of vessels would have been added to the cost of ships in the block of assets in accordance with the provisions of Section 43A of the Act.

viii) It may also be noted that if there was an exchange loss, the same would never have been allowed as a deduction on revenue account. That being so, such exchange gain written back on cancellation of the vessel construction contracts is a capital receipt not exigible to tax.

(ix) The ld.AO has accepted the disallowance of interest expenditure of Rs.42,75,635/-suo moto made by the assessee company in the Return of Income as being capital in nature, but has brought to tax the receipt of a capital nature in the hands of the assessee.

19. However, ld. AO in his final assessment order held that assessee has not given any clarification regarding the treatment given to the 'capital work in progress'. Accordingly, he held that any absence of any proper explanation, the exchange difference written back on cancellation of the vessel construction contract is a benefit which has arisen to the assessee and such benefit is covered within the provisions of Section 28(iv) of the Act and accordingly, he taxed the said amount.

20. Section 28(iv) reads as under:-

> *28. The following income shall be chargeable to income-tax under the head "Profits and gains of business or profession:*
>
> *(iv) the value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession.*

Thus, chargeability of income u/s.28(iv) of the Act, the following conditions are relevant:-

a) For any receipt to be chargeable as income under Section 28(iv) of the Act, the receipt must be on revenue account, must arise from the business of the Appellant and must form part of the income stream of the Appellant.

b) The word 'income" used in the operative part of the aforesaid section is capable of different meaning as defined in Section 2(24) of the Act wherein it covers income relating to capital and also to the revenue account transactions. However, since Section 28 forms part of Part "D" of Chapter IV of the Act, what is to be considered under this section is 'income' on revenue

account and not on capital account. Section 28(iv) is nothing but the extended definition of business income and therefore, the benefit of perquisite must relate to the revenue account of the assessee.

21. Here in this case the said receipt was in capital account and therefore, prima facie Section 28(iv) is not applicable. The reason being the income which can be taxed u/s.28(iv) must be not only referable to a benefit or perquisite, but must be arising from business or exercise of profession. Here, assessee is in the business of operation of ships and not in the business of constructing or buying / selling ships. Further, it speaks about value or benefit or perquisite whether convertible into money or not, arising from business and therefore, the benefit or perquisite arising in cash would be outside the purview of the said section. This has been held so by the **Hon'ble Supreme Court** in the case of **Mahindra & Mahindra Ltd reported in 93 taxmann.com 32** wherein the Hon'ble Supreme Court held that waiver of loan for acquiring capital assets cannot be taxed as a perquisite u/s.28(iv) of the Act as receipt in the hands of the assessee are in the form of cash / money and further, the same cannot be taxed as a remission of liability u/s.41(1) of the Act as waiver of loan does not amount to cessation of trading liability. Thus, we hold that foreign exchange gain written back on cancellation of vessel construction contract which were earlier capitalised in the vessels as capital receipt and outside the purview of chargeability u/s. 28(iv) of the Act. Accordingly, this ground of assessee is allowed.

22. In ground No.12 assessee has raised short grant of TDS credit stating that ld. AO was erred in not granting credit for tax deducted at source aggregating to Rs.31,07,806/- while framing the final assessment order. Accordingly, we are directing the ld. AO to examine this issue and grant credit in accordance with law.

23. Ground No.13 relating to credit not granted for Dividend Distribution Tax paid has not been pressed, therefore, the same is dismissed as not pressed.

24. In ground No.15-17 and additional ground Nos. 1 & 2 relating to TP adjustment on performance guarantee given on behalf of the AE, the facts in brief which has been stated are that the assessee is a company engaged in the business of shipping and its ultimate holding company of the Great Eastern Shipping Co. group. The assessee has formed two step down subsidiaries in Singapore Greatship Global Offshore Services Pre Ltd (GGOS) incorporated on 08/05/2007 and Greatship Global Energy Services Pte. Ltd. (GGES) incorporated on 23/10/2006 since Singapore is one of the busiest ports in the world. The Appellant's immediate subsidiary, Greatship (India) Ltd infused substantial share capital into the subsidiaries).

25. During the current financial year 2010-2011, one of the step-down subsidiaries, GGES placed an order on Lamprell Energy Ltd., a shipyard in Singapore for building of a new vessel in the financial year 2010-11. The assessee gave a performance

guarantee to the shipyard on behalf of its AE, GGES for USD 128.68 million (Rs.573.77 crores) on 28/02/ 2011. Before us, copy of vessel construction agreement dated 16/01/2011 has been placed in the paper book from pages 22-90 and performance guarantee given by the assessee to the shipyard on behalf of its AE, GGES is also placed at pages 20 & 21. Further, statement giving details of performance guarantee to the shipyard on behalf of its AE has also been given. It has been stated that performance guarantee was in existence for the period of one month during the F.Y.2010-11. Further, it has been stated that the performance guarantee given to the shipyard was to secure GGES' obligations to make payments of certain installments under the vessel construction agreement with Lamprell Energy Ltd. (para 4.11 of the vessel construction agreement). At the same time para 4.11 of the vessel construction agreement provided that if the assessee is called upon to make any payment due to the invocation of the performance guarantee, the purchaser (GGES/AE) shall novate the vessel construction agreement to the assessee and the shipyard agrees to this arrangement. Para 4.11 states that upon invocation of the performance guarantee, the assessee will be substituted as the purchaser in place of GGES and the parties shall follow all the procedures and execute the necessary documents for the transfer of the vessel under construction to the assessee.

26. In other words, if the performance guarantee given by the assessee to the shipyard is invoked, the assessee will step into the shoes of its AE, become the owner of the vessel, take delivery of the vessel and deploy the vessel. The situation is akin to the assessee itself placing an order for construction of a vessel and taking delivery of the same.

27. Therefore, neither did the assessee charge any guarantee commission from its AE, nor did it make any suo moto TP adjustment, in respect of the performance guarantee given on behalf of its AE as the assessee contended that the transaction of giving performance guarantee to the shipyard on behalf of its AE was a risk-free transaction.

28. The ld. TPO benchmarked the transaction of performance guarantee by adopting a rate of rate of 3% p.a. The TPO proposed a transfer pricing adjustment of Rs. 17.21 crores i.e. Rs.573.77 crores x 3% p.a.

29. The ld. DRP followed its own order for the preceding Assessment Years 2008-09, 2009-10 and 2010-11 and held that the ALP of performance guarantee is 1% p.a.

30. Thus, in the final assessment order, the TP adjustment in respect of performance guarantees is Rs.5,73,77,074/-i.e. Rs. 573.77 crores x 1% p.a.

31. Before us ld. Counsel submitted that this issue is covered by the decision of the Tribunal in assessee's own case for the

preceding assessment years, however, he submitted that the Tribunal had taken a different view for A.Y.2008-09 as compared to A.Y.2009-10 and 2010-11. In A.Y.2008-09, the Tribunal vide its order dated 11/08/2022 agreed the assessee's contention that there was no risk involved in the transaction of performance guarantee as on enforcement of the guarantee clause, the assessee would acquire the vessel and the same can be used by the assessee in its own business. Paras 22 and 22.1 at page 16 of the Tribunal's order for the Assessment Year 2008-2009 which contain the findings of the Tribunal are reproduced hereunder for ready reference:

"22 Both sides heard The assessee had extended performance guarantee to shipyard in respect of its 100% subsidiary based in Singapore. The assessee has taken AP of the performance guarantee facility as Nil. The DRP has determined ALP of the transaction @19%. The agreement in respect of which performance guarantee has been extended by the assessee on behalf of its foreign subsidiary is with respect to construction of a ship. Guarantee has been extended to a shipyard. If guarantee is invoked, the assessee would be under obligation to pay guarantee, in turn the assessee would acquire the vessel. We find force in the argument of the Counsel for the assessee, there is no element of risk involved In any case, on enforcement of guarantee clause the assessee would acquire vessel, the same can be used by the assessee in its own business.

22:1 We find that the Tribunal in the case of ACIT vs. KEC International Ltd 108 taxmann.com 172 (Mumbai) deleted adjustment made on account of performance guarantee where there was absolutely no risk involved for the assessee in issuing performance guarantee on behalf of its AE. Thus, in the facts of the case and the decision by the Coordinate Bench, we hold that no adjustment is warranted on account of performance

guarantee. The assessee succeeds on ground no 19 to 20 of the appeal.

32. Subsequently, the Tribunal vide its order dated 13/09/2023 for A.Y.2009-10 set aside the issue to the file of ld. AO / ld. TPO by holding that –

a) The performance guarantee given by the assessee is in the nature of financial guarantee with risk mitigation

b) The performance guarantee needs to be benchmarked.

c) Since the assessee has adequate security, therefore, the benchmarking of the performance guarantee needs to be substantially lower than pure financial guarantee. Therefore, the Tribunal rejected the rate of 1% p.a. adopted by the DRP and held that it is exorbitant, high and without any basis (Here, it is pertinent to note that in AY 2009-2010, the assessee had given performance guarantees to shipyards and financial guarantees to banks on behalf of its AEs, whereas in the current financial year 2010-2011, the assessee has given only one performance guarantee to shipyard and there are no financial guarantees given to banks on behalf of its AE).

33. In A.Y.2010-11 and 2012-13, the Tribunal followed the order for A.Y.2009-10. Further ld. Counsel submitted that there is no risk involved in the performance guarantee given by the assessee to Lamprell Energy Ltd, on behalf of its AE, GGES because if the performance guarantee is invoked, the vessel under construction would be vest in the hands of the assessee and the assessee would be able to deploy the vessel. Therefore,

the Tribunal order in assessee's own case for A.Y.2008-09 needs to be followed and ALP of the performance guarantee should be determined to be Nil.

34. He further submitted that assessee by way of addition ground has raised the following issue:-

Additional Grounds of Appeal

1. Without prejudice to the grounds 14 to 17, and in any event, the Appellant submits that the transfer pricing adjustment made in respect of the performance guarantee given by the Appellant Company on behalf of its Associated Enterprise should be restricted to 1 month as the performance guarantee was given on 28th February, 2011

2. Without prejudice to grounds 14 to 17, the Appellant submits that transfer pricing adjustment cannot exceed Rs. 47,81,422/- as against the transfer pricing adjustment

35. On the other hand, ld. DR submitted that this issue has already been decided by the Tribunal in A.Y.2009-10 which has been followed in subsequent years.

36. First of all we find that in A.Y.2008-09, the Tribunal has deleted the said adjustment on account of performance guarantee on the ground that there was absolutely no risk involved in issuing performance guarantee on behalf of its AE and accordingly, no adjustment was deleted. However, in the subsequent years, the Tribunal held that performance guarantee given by the assessee is in the nature of performance guarantee with a risk mitigation and therefore, performance guarantee needs to be benchmarked. However, it has been held that since

assessee had adequate security, therefore, benchmarking of the performance guarantee needs to be substantially lower than the pure financial guarantee an accordingly, the Tribunal has rejected the rate of 1% p.a. is exorbitant, high and without any basis. However, it has been pointed out that in A.Y.2010-11 assessee has given only one performance guarantee to the shipyard and no financial guarantee given by the assessee on behalf of its AEs.

37. Since, immediately preceding and succeeding years, the Tribunal has held that performance guarantee needs to be benchmarked and therefore, we set aside this issue to the file of the ld. AO / ld. TPO holding that; *firstly,* 1% per annum cannot be applied as it is too high and without any basis; *Secondly,* assessee has adequate security and therefore, benchmarking of the performance guarantee needs to be substantially lower than the pure financial guarantee; *Thirdly,* the assessee has entered into contract on 16/01/2011 with Lamprell Energy Ltd., to construct this. It has given performance guarantee to the said company on 28/02/2011. Thus, the performance guarantee was in existence only for one month during the F.Y.2010-11 and therefore, if at all any transfer pricing adjustment it should be made only for the period of one month. With this direction, this ground of appeal is treated as partly allowed for statistical purposes. Accordingly, assessee's appeal is partly allowed.

38. Now, we will take up cross appeal for A.Y.2013-14. Assessee's appeal in ground No.1-6 and additional ground No.1&2 relates to disallowance u/s.14A made by the ld. AO. Here in this year also while filing the return of income, the assessee has computed the disallowance of Rs. 16,92,25,210/- under section 14A as under:-

39. The actual administrative expenditure incurred by the Treasury Division, including employee costs and other relatable expenses aggregating to Rs.48,71,125/-, was allocated by the assessee between the taxable and non-taxable gross receipts of the Treasury Division and the disallowance of Rs 21,82,125/- under Rule 8D(2)(1) was computed by the assessee.

40. The interest payable on the borrowings utilized for the investment in equity and preference shares of Greatship (India) Ltd. of Rs. 16,57,59,189/- and other charges attributable thereto of Rs.12,83,896/-, have also been considered as direct expenditure when computing the disallowance under Rule 8D(2)(i). Hence, the total disallowance under Rule 8D(2)(i) was computed by the assessee at Rs. 16,92,25,210/-.

41. As regards the disallowance under Rule 8D(2)(ii), the assessee has considered the interest expenditure of the non-tonnage tax business at Rs.88,17,44,894/- as reduced by interest on delayed payment of taxes suo moto disallowed by the assessee in the Return of Income of Rs. 10,875/-. The interest payable on the borrowings utilized for the investment in Greatship (India) Ltd. of Rs. 16,57,59,189/-, has been excluded

when computing the indirect interest expenditure disallowed in accordance with the provisions of Rule 8D(2)(ii), as such interest expenditure has already been considered as a direct expenditure under Rule 8D(2)(1). The assessee has further reduced the interest expenditure on borrowings which were fully utilized for investment in growth schemes of Mutual Fund units aggregating to Rs.71,59,74,830/-, whereby the net interest expenditure attributable to the earning of exempt dividend income was Rs. Nil. The disallowance of such indirect interest expenditure has therefore been computed at Rs. Nil in accordance with the formula prescribed under Rule 8D(2)(ii).

42. Further, as the actual administrative expenditure was disallowed by the assessee under sub-clause (i), no further disallowance was warranted under sub-clause (iii) of clause (2) of Rule 8D. Hence, the aggregate disallowance under Section 14A was computed at Rs. 16,92,25,210/-.

43. The ld. AO has recomputed the disallowance under section 14A of the Act in accordance with the provisions of Rule 8D of the Income-tax Rules. The AO has accepted the amount liable for disallowance under clause 2(i) of Rule &D at Rs.16,92,25,210/- as computed by the assessee. However, the AO has considered the total interest expenditure of the tonnage and non-tonnage business of the assessee of Rs 2,09,12,43,717/- as reduced by interest on delayed payment of taxes suo moto disallowed by the assessee in the Return of Income of Rs.10,875/- The ld.AO has also reduced the interest payable on the borrowings utilized for

the investment in Greatship (India) Ltd. of Rs. 16,57,59,189/-. The ld.AO has therefore considered the interest expenditure at Rs.1,92,54,73,653/-, as against the net interest expenditure attributable to the non-tonnage tax activities of Rs. Nil considered by the assessee while applying clause 2(ii) of Rule 8D and has computed the disallowance under Rule 8D(2)(ii) at Rs.50,95,67,732/-. The AO also disallowed a further notional amount of Rs. 12,99,65,500/- as indirect administrative expenditure under clause 2(iii) of Rule 8D, being the amount computed @0.5% of the average value of investments held by the assessee. Hence, the aggregate disallowance under Section 14A computed by the ld.AO was Rs.80,87,58,442/-.

44. The ld. CIT (A) has directed the ld.AO to compute the disallowance under section 14A of the Act in accordance with the provisions of Rule 8D. The ld CIT(A) has directed the ld.AO to consider the aggregate interest expenditure incurred by the assessee pertaining to the tonnage and non-tonnage activities for computing the amount liable for disallowance under clause 2(ii) of Rule 8D, However, in case the total disallowance so computed exceeds the total interest expenditure claimed against the non-tonnage income, the disallowance is to be restricted to the total expenditure by way of interest claimed against the non-tonnage income only. The ld. CIT(A) has also directed the Assessing Officer to exclude the interest expenditure on Non Convertible Debentures, fully utilized for investment in growth schemes of Mutual Fund units aggregating to Rs.71,59,74,830/-, when

computing the disallowance under clause 2(ii) of Rule 8D. Since the disallowance computed considering the total interest expenditure exceeds the total interest expenditure claimed against the non-tonnage income, the interest expenditure liable for disallowance has been restricted to the total expenditure by way of interest claimed against the non-tonnage income only, whereby the Assessing Officer has computed the disallowance under Rule 8D(2)(ii) at Rs. Nil. Further, the learned CIT(A) has directed the Assessing Officer to compute the amount liable for disallowance under clause 2(i) of Rule 8D at Rs. 16,92,25,210/- and has confirmed the disallowance under clause 2(iii) of Rule 8D of Rs. 12,99,65,500/-. Hence, the aggregate disallowance under Section 14A will be Rs.29,91,90,710/-.

45. We have already given our finding in appeal for A.Y.2011-12 and accordingly, our finding given therein will apply *mutatis mutandis* in this appeal also and accordingly, the disallowance made by the ld. AO over and above the amount offered by the assessee are deleted.

46. In 2015-16 Revenue has raised the following grounds:-

"The Ld. CIT(A) has erred in attributing interest expenditure pertaining to the tonnage income of the assessee, aggregating to Rs. 2,52,41,504/- to the non tonnage income of the assessee. Having regard to the facts and circumstances of the case, and to all that the interest expenditure be allowed as part of the tonnage income as calculated by the Assessing Officer

2. "The Ld.CIT(A) has erred in not allowing the decision of the Assessing Officer in considering the interest expenditure of the

tonnage tax business of the assessee amounting to Rs. 1, 17,72,81,805/-."

3. The Ld.CIT(A) has erred in not allowing the decision of the Assessing Officer wherein the Assessing Officer has not reduced interest expenditure of Rs. 52,24,40,103/- from the non-tonnage tax interest expenditure."

48. In Revenue's appeal, ground No.1 relates to interest expenditure between tonnage and non-tonnage activities. The relevant qua this issue are that-

i) The statement giving the details of the loan-wise interest expenditure pertaining non-tonnage tax activities for the year ended March 31, 2013, was submitted to the to the ld.AO during the course of the assessment proceedings. The said statement gives the details of the loan, the loan amount outstanding, the purpose of the loan, the rate of interest, the amount of interest paid and the reason for treating such interest expenditure as part of the non-tonnage tax activities of the Company.

ii) The actual interest expenditure has been claimed, based on the utilization of the loan funds and there is no allocation of interest expenditure between tonnage and non-tonnage tax activities of the Company. Such loans have been utilized by the Treasury Division of the Company for granting loans and deposits and investing in mutual funds and other securities as part of the business activities of the Company.

iii) The disallowance under Section 14A of Act, which has been computed by the assessee company while filing the Return of Income, is also based on the loan utilization for non- tonnage tax activities.

iv) There are instances where a loan transaction is finalized and the loan is disbursed, but such funds are not immediately required for tonnage activities. Similarly, if certain vessel loan funds are utilized for non-tonnage tax activities during the year, then the interest expenditure is considered as part of the non-tonnage tax activities of the assessee company. Thus, such funds are utilized for non-tonnage tax activities and consequent thereto, the interest expenditure for such funds, forms part of the non-tonnage tax activities of the assessee company.

v) The ld. AO has himself confirmed in the Assessment Order that it is evident from the chart furnished by the assessee company that a substantial part of the interest expenditure relates to loans which were utilised for the purpose of either acquiring qualifying ships or for other ship related activities, which have subsequently been diverted to non-tonnage tax activities. Consequent thereto, the interest expenditure would also form part of the non-tonnage tax activities.

vi) The Assessing Officer has stated that in view of the consistent stand taken in previous assessment years, interest expenditure aggregating to Rs.4,72,31,989/- is attributed to the tonnage tax activities of the company since this expenditure has direct linkage with loans which were utilized for acquiring qualifying ships within the meaning of Section 115VD of the Act.

48. We find that this issue is already covered in favour of the assessee by the Tribunal in assessee's own case for A.Y.2006-07, 2007-08 and 2008-09 and also for A.Y.2014-15. Therefore, this issue is decided in favour of the assessee.

49. The ground No.2 relates to general average claims. During the year under consideration, the assessee company had

received certain amounts towards general average claims, being the insurance claims received on account of damages to ships which were insured, which were reflected under Miscellaneous Operating Income in the audited Profit & Loss Account.

50. The ld. AO has excluded an amount of Rs.83,18,599/- forming part of the general average claims received during the year, since the corresponding expenditure for which the claim was received, was incurred in an earlier year when the tonnage tax scheme was not in existence. The AO has further stated that the said income, in the normal course, would have been liable to tax under Section 41(1) of the Act.

51. After considering the relevant finding of the ld. AO, the submissions made before us it is seen that Section 115VL clearly states that Section 30 to 43B shall apply as if every loss, allowance, or deduction referred to therein and relating to or allowable for any of the relevant previous years, had been given full effect to for that previous year itself. The AO stated that the provisions of Section 41(1) would have applied to the claims received and such claim receipts are clearly covered under the provisions of Section 41(1) of the Act and in any event, the said section would have been applied to tax such income. Based on Section 115VL, the said section shall also apply while computing the tonnage income of the assessee company. Hence, the section itself provides that since such income would have been considered while computing the income under the normal provisions of the Act after taking into account the provisions

enumerated from Sections 30 to 43B of the Act, the same would also have to be considered while computing the shipping income for the purposes of the tonnage tax scheme. Further, Section 115VM provides that Section 72 of the Act shall apply in respect of any loss that has accrued to a company before its option for the tonnage tax scheme and which is attributable to the tonnage tax business as if, such losses had been set off against the relevant shipping income in any of the previous years when the Company is under the Tonnage Tax Scheme.

52. Thus, any loss which is brought forward from a non-tonnage tax year must be set off against the tonnage tax income, even if the shipping company has opted for the tonnage tax scheme. As a corollary thereof, any income which has resulted from any expenditure claimed in an earlier year and which has accrued as the income for the year to which the tonnage tax scheme applies would also most certainly have to be considered as part of the tonnage tax income accordingly. In any case, this issue is covered in favour of the assessee by the Tribunal in assessee's own case for A.Y.2006-07, 2007-08 and 2008-09, respectfully following the same, this issue is passed against the department. Accordingly, the appeal of Revenue is dismissed.

53. Now, we take up the cross appeal in A.Y.2015-16.

54. In assessee's appeal in ground Nos.1-4 and additional ground Nos. 1 & 2 relates to disallowance u/s.14A of the Act. Facts in the present year are as under:-

(i) While filing the return of income, the assessee has computed the disallowance of Rs.19,04,37,434/- u/s.14A as under:-

> The actual administrative expenditure incurred by the Treasury Division, including employee costs and other relatable expenses aggregating to Rs.80,68,758/-, was allocated by the assessee between the taxable and non-taxable gross receipts of the Treasury Division and the disallowance of Rs.34,09,857/- under Rule 8D(2)(i) was computed by the assessee.
>
> The interest payable on the borrowings utilized for the investment in equity and preference shares of Greatship (India) Ltd. of Rs. 18,57,59,523/- and other charges attributable thereto of Rs. 12,68,054/-, have also been considered as direct expenditure when computing the disallowance under Rule 8D(2)(i).
>
> Hence, the total disallowance under Rule 8D(2)(i) was computed by the assessee at Rs. 19,04,37,434/-.
>
> As regards the disallowance under Rule 8D(2)(ii), The assessee has considered the interest expenditure of the non-tonnage tax business at Rs.70,84,87,169/- as reduced by interest on delayed payment of taxes suo moto disallowed by the Appellant in the Return of Income of Rs.2,87,543/- The interest payable on the borrowings utilized for the investment in Greatship (India) Ltd. of Rs.18,57,59,523/-, has been excluded when computing the indirect interest expenditure disallowed in accordance with the provisions of Rule 8D(2)(ii), as such interest expenditure has already been considered as a direct expenditure under Rule 8D(2)(i). The assessee has further reduced the interest expenditure on borrowings which were fully utilized for investment in growth schemes of Mutual Fund units aggregating to Rs.52,24,40,103/-, whereby the net interest expenditure attributable to the earning of exempt dividend income was Rs. Nil. The disallowance of such indirect interest expenditure has

therefore been computed at Rs. Nil in necordance with the formula prescribed under Rule 8D(2)(ii).

Further, as the actual administrative expenditure was disallowed by the assessee under sub-clause (i), no further disallowance was warranted under sub-clause (iii) of clause (2) of Rule 8D. Hence, the aggregate disallowance under Section 14A was computed at Rs. 19,04,37,434/-.

(ii) The ld.AO has recomputed the disallowance under section 14A of the Act in accordance with the provisions of Rule 8D of the Income-tax Rules. The ld.AO has accepted the amount liable for disallowance under clause 2(i) of Rule 8D at Rs. 19,04,37,434/- as computed by the Appellant. However, the ld.AO has considered the total interest expenditure of the tonnage and non-tonnage business of the Appellant of Rs. 188,57,68,974/- as reduced by interest on delayed payment of taxes suo moto disallowed by the Appellant in the Return of Income of Rs.2,87,543/-. The ld.AO has also reduced the interest payable on the borrowings utilized for the investment in Greatship (India) Ltd. of Rs. 18,57,59,523/-. The ld.AO has therefore considered the interest expenditure at Rs. 169,97,21,908/-, as against the net interest expenditure attributable to the non-tonnage tax activities of Rs. Nil considered by the assessee while applying clause 2(ii) of Rule 8D and has computed the disallowance under Rule 8D(2)(ii) at Rs.35,96,50,523/-. The ld.AO also disallowed a further notional amount of Rs.9,87,35,619/- as indirect administrative expenditure under clause 2(iii) of Rule 8D, being the amount computed @0.5% of the average value of investments held by the assessee. Hence, the aggregate disallowance under Section 14A was computed by the ld.AO at Rs.64,88,23,575/-.

(iii) The ld CIT(A) has directed the ld.AO to compute the disallowance under section 14A of the Act in accordance with the provisions of Rule 8D. The learned CIT(A has directed the ld.AO to consider the aggregate interest expenditure incurred by the assessee pertaining to the tonnage and non-tonnage activities for computing the amount liable for disallowance under clause 2(ii)

of Rule 8D. However, in case the total disallowance so computed exceeds the total interest expenditure claimed against the non-tonnage income, the disallowance is to be restricted to the total expenditure by way of interest claimed against the non-tonnage income only. The learned CIT(A) has also directed the ld.AO to exclude the interest expenditure on Non Convertible Debentures, fully utilized for investment in growth schemes of Mutual Fund units aggregating to Rs.52,24,40, 103/-, when computing the disallowance under clause 2(ii) of Rule 8D. Since the disallowance computed considering the total interest expenditure exceeds the total interest expenditure claimed against the non-tonnage income, the interest expenditure liable for disallowance has been restricted to the total expenditure by way of interest claimed against the non-tonnage income only, whereby the ld.AO has computed the disallowance under Rule 8D(2)(ii) at Rs Nil. Further, the learned CIT(A) has directed the Assessing Officer to compute the amount liable for disallowance under clause 2(i) of Rule 8D at Rs.19,04,37,434/- and has confirmed the disallowance under clause 2(iii) of Rule 8D of Rs.9,87,35,619/-. Hence, the aggregate disallowance under Section 14A will be Rs.28,91,73,053/-.

55. Since the same issue is involved, therefore, our finding given in the aforesaid years will apply equally and accordingly, the addition / disallowance made by the ld.AO are deleted.

56. In Revenue appeal of ground No.1 is similar to ground raised in appeal for A.Y.2013-14. Accordingly, in the finding given above that this issue is covered in favour of the assessee by the order of earlier years and ground is dismissed.

57. Ground No. 2 & 3 of Revenue appeal has challenged the disallowance u/s.14A wherein the department has contended that ld. CIT(A) in not considering the interest expenditure of the tonnage tax business of the assessee company aggregating to Rs.

1,17,72,81,805/- in computing disallowance u/s.14A. We have already decided this issue in favour of the assessee following earlier years. Accordingly, these grounds are treated as dismissed.

58. In the result, appeals of the assessee are allowed and appeals of the Revenue are dismissed.

Order pronounced on 31st Jan, 2024.

Sd/-	**Sd/-**
(S.RIFAUR RAHMAN)	**(AMIT SHUKLA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai; Dated 31/01/2024
KARUNA, *sr.ps*

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai