# आयकर अपीलीय अधिकरण, 'सी' न्यायपीठ, चेन्नई।
# IN THE INCOME TAX APPELLATE TRIBUNAL
# 'C' BENCH: CHENNAI

**श्री यस यस विश्वनेत्र रवि, न्यायिक सदस्य एवं श्री अमिताभ शुक्ला, लेखा सदस्य के समक्ष**
**BEFORE SHRI SS VISWANETHRA RAVI, JUDICIAL MEMBER AND**
**SHRI AMITABH SHUKLA, ACCOUNTANT MEMBER**

**आयकर अपील सं./ITA No.1088/Chny/2024, Assessment Years: 2012-13**
**आयकर अपील सं./ITA No.1089/Chny/2024, Assessment Years: 2013-14**
**आयकर अपील सं./ITA No.1090/Chny/2024, Assessment Years: 2016-17**

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| **OPG Power Generation Private Limited,**<br>**No.6, Sardar Patel Road,**<br>**Guindy, Chennai-600 032.**<br>**[PAN: AAACO8193M]** | **Assistant Commissioner of Income Tax,**<br>**Central Circle-1(1),**<br>**Chennai.** |
| **(अपीलार्थी/Appellant)** | **(प्रत्यर्थी/Respondent)** |

**अपीलार्थी की ओर से**/ Assessee by : Shri V.Ravichandran, FCA
**प्रत्यर्थी की ओर से /Revenue** by : Shri R.Clement Ramesh Kumar, CIT & Ms.R.Anita, Addl.CIT

**सुनवाई की तारीख**/Date of Hearing : 12.12.2024
**घोषणा की तारीख** /Date of Pronouncement : 26.02.2025

## आदेश / O R D E R

**PER AMITABH SHUKLA, A.M :**

The below mentioned appeals have been filed by the appellant assessee for AY-2012-13, 2013-14 and 2016-17 contesting the order of Ld. First Appellate Authority indicated Column-E, herein below:-

| S. No. | Appeal Nos. | AYs | Appel-lant | CIT(A) Order Details | Respondent |
|---|---|---|---|---|---|
| A | B | C | D | E | F |
| 1 | **ITA No. 1088 / Chny / 2024** | 2012-13 | **OPG Power Generation Private Limited, No.6, Sardar Patel Road, Guindy,** | DIN & Order No.ITBA / APL / M / 250 / 2023-24 / 1061377012(1) dated 22.02.2024 | **Assistant Commissioner of Income Tax, Central Circle-** |

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| 2 | **ITA No. 1089 / Chny / 2024** | 2013-14 | **Chennai-600 032. [PAN: AAACO8193M]** | DIN & Order No.ITBA / APL / M / 250 / 2023-24 / 1061378332(1) dated 22.02.2024 | **1(1), Chennai.** |
| 3 | **ITA No. 1090 / Chny / 2024** | 2016-17 | | DIN & Order No.ITBA / APL / M / 250 / 2023-24 / 1061378546(1) dated 22.02.2024 | |

All the above appeals are centering around a common issue and hence for the purposes of convenience, adjudicated together. For the purposes of this adjudication the facts and figures for AY-2012-13 have been taken. As facts have been reported to be identical in AY-2013-14 and 2016-17, the decision for AY-2012-13 shall apply mutatis mutandis for appeals qua AY-2013-14 and 2016-17.

2.0 The first ground of appeal raised by the assessee is regarding the assessment being passed without jurisdiction and hence was barred by limitation. We have noted that in para 7.3 at page 22 of his order, the Ld. CIT(A) has vividly held that the assessee did not provide him any details or evidences as to how the impugned order of the Ld.AO was without any jurisdiction. Accordingly, in the absence of any supporting documents, the Ld. CIT(A) dismissed the challenge of the assessee. During the course of present proceedings also the assessee has not adduced any evidence as to how the impugned assessment order is bad in law and barred by limitation. **Accordingly, in the absence of any details / submissions made by the appellant assessee the ground of appeal no.1 is dismissed.**

3.0 The next issue which has been raised by the assessee through its four grounds of appeal is regarding the action of the Ld. AO in making an addition of Rs.8,83,16,208/- u/s 40(a)(i). Conveying brief factual matrix of the case, the Ld. Counsel for the assess informed that the assessee company is engaged in the business of power generation and had filed its return of income for AY-2012-13 declaring an income of Rs.2,90,56,190. Assessment u/s 143(3) was completed on 30.12.2016 determining income at Rs.4,34,41,442/-. Subsequently, notice u/s. 148 was issued on 28.03.2019 for reassessment. It was noted from 15CA certificates of the assessee that it had made freight payments to foreign entities totaling to Rs.8,83,16,208/- during FY-2011-12 on which no TDS was made u/s 195. The Ld. AO had premised that the impugned expenditure of Rs.8,83,16,208/- fell under the mischief of section 40(a)(i) r.w.s.195 of the act. Before the Ld. AO the assessee had argued that section 5(1) of the act is not applicable in this case as the income was neither received nor accrued to the non-resident recipients. The Ld. AO held that provisions of section 5(2) are attracted in assessee's case. It was concluded that in the case of Shipping Companies the right to receive the payment accrues or arises in India on completion of services i.e on delivery of goods on Indian shores. The Ld. AO therefore held the assessee is a defaulter under section 40(a)(i) r.w.s.195 of the act and made the impugned addition of Rs.8,83,16,208/-.

3.1 The Ld. Counsel informed that the Ld. First Appellate Authority rejected assessee's submissions. Before the Ld. CIT(A) the assessee submitted that section 172 of the Act is an independent code and does not applies to non-resident shipping companies outside India. The Ld. Counsel had also argued that it's case is covered by CBDT circular No.723 of 1995 which mandates non-deduction of tax in such cases. The Ld. CIT(A) concluded that section 172 is not applicable in appellant's case. The Ld. First Appellate Authority had asked assessee to file certificate from the respective shipping companies regarding their non-availability of Permanent Establishment (PE) in India, copies of agreement entered with them. The assessee did not file the requested certificates from the respective shipping companies but merely gave a self-certificate that the impugned companies are *"….Residents of the respective countries and did not have any permanent establishment in India in the previous year relevant to above assessment years*…". It was concluded that the mere act of parking of ships on Indian port and the activity of goods downloads would lead to a presumption of a business connection of said shipping companies in India. It was further concluded that mere self-serving statement of absence of PE's by the assessee do not have any value. The Ld. First Appellate Authority held that in such situations provisions of section 9(1)(i) gets attracted. It was also observed that assessee ought to have obtained nil tax deduction

certificate u/s 195 of the act. The Ld. Counsel observed that with the above findings, disallowance u/s 40(a)(i) was confirmed.

4.0 Before us, the Ld. Counsel placed heavy reliance upon the board instruction no.1934 dated 14.02.1996 titled 'Charter Hire for chartering foreign vessels on time charter basis on account of Government departments / Public Sector undertakings'. It was submitted that the said instruction clearly prescribe that no income tax is payable in respect of freight on import of cargo unless such freight is paid in India to Non-resident company or its agents. The Ld. Counsel for the assessee fiercely argued that the said instruction is not restricted to only Government departments / Public Sector undertakings but also to all categories of entities in private sector. In support of its arguments the Ld. Counsel drew strength from the decision of Hon'ble ITAT, Mumbai Tribunal as delivered in the case of Reliance Industries Limited ITA 6165 to 6177 / Bom / 1995. The Ld. Counsel for the assessee submitted that impugned shipping companies were made payments outside India and hence they were not eligible to fall under Indian tax jurisdiction. The Ld. Counsel insisted that its activities do not fall into the category of time charter so as to bring it within the purview of judgement of Hon'ble Madras High Court in the case of Poompuhar Shipping Corporation dated 09.10.2013. , which brought concept of royalty.

5.0 The Ld. DR vehemently argued in favour of order of lower authorities. It was submitted that the impugned board instruction no.1934 dated 14.02.1996 is not applicable since it is only for Government departments and public sector undertakings. It was also submitted that the impugned instruction is for time charter and that in the event the said circular applies to the assessee, then the assessee will be hit by decision of Hon'ble Madras Court in the case of Poompuhar Shipping Corporation dated 09.10.2013 stipulating that income of such shipping companies would be deemed as royalty income. The Ld. DR also informed that one of the shipping companies namely World Shipping Private Ltd also have an Indian office alluding as its PE. The Ld. DR also raised a concern that one of the companies namely Noble Chartering is having its address in British Virgin Islands whereas the appellant claims to have submitted remittance to USA giving rise to the issue of application of DTAA with British Virgin Islands or USA.

6.0 The Ld. DR observed that perusal of terms of agreement between the shipping companies and the assessee clearly allude that the assessee is liable to pay shipping freight to the companies upon unloading and receipt of goods at the Indian shipping base which conclusively establishes that the services were rendered in India and hence the income would be taxable in India only. The Ld. DR argued that section 5(2) of the act provides that all income of a non-resident shall

be exigible to taxes in India in case it is accrues or arises or is deemed to accrue or arise in India. The Ld. DR invited reference to page-2 of the agreement between assessee and Noble Chartering dated 28.03.2012 which contained payment terms stipulating that all payments would be made "before breaking bulk", reproduced hereunder:

***"….Payment terms:***

***100 pct frt on B/L qty to be paid within 4(four) banking days after signing / releasing of bills of lading marked "FRT PAYABLE AS PER C/P" but in any case always before breaking bulk. Freight payment guaranteed by OPG Power Generation Pvt Ltd….."***

7.0 The Ld. DR informed that in shipping parlance "before breaking bulk" refers to act of opening of hatches of the ship for commencement of unloading of goods from it on to a shipping port. Thus it was argued that as the right to receive freight by the shipping company was directly related to its delivery of goods to the assessee on in Indian shipping port, the impugned freight income would fall under section 5(2) of the act and be deemed to have accrued or arisen in India. The Ld. DR relied upon the decision of Hon'ble Apex Court in the case of ED Sasoon 1954 AIR 470. The Ld. DR further submitted that the assessee has not produced 15CA certificates so as to allude the country of remittance in respect of the impugned shipping companies.

8.0 We have heard rival submissions in the light of material available on records. We have noted that Revenue is contending that considering the fact that the assessee has received the goods from foreign shipping companies on Indian soil / Indian shipping ports, the freight income of foreign shipping companies, so received, would be eligible to tax in India. Strength was drawn from provisions of section 9 r.w.s 5 of the act. Revenue has also contended that the exemption from tax granted vide instruction No. 1934 supra is also not applicable in this case as the same pertains to Government Departments and Public Sector Undertakings. Absence of 15CA certificates and also PE certificates have also been cited in furtherance of its claim by the Revenue. The assessee holds the view that instruction No. 1934 as well as decision of Reliance Industries Limited ITA 6165 to 6177 / Bom / 1995 is fully applicable in its case. The assessee has argued that the impugned shipping companies do not have their PE in India and payments were made outside and therefore disallowance u/s 40(a)(ia) is legally impermissible.

9.0 At the outset, we deem it necessary to examine the contents of the impugned instruction 1934 which is seminal to the controversy. For the purposes of clarity the said instruction is extracted hereunder:-

**Instruction : No. 1934 - Charter hire for chartering foreign vessels on time charter basis on account of Government Department/Public Sector Undertakings**

Charter hire for chartering foreign vessels on time charter basis on account of Government Department/Public Sector Undertakings

**1.** The Ministry of Surface Transport has pointed out that according to the Government of India Policy, all Government Departments and PSUs/Autonomous Bodies should finalise their import contracts on FOB basis and shipping arrangements for cargo are to be made by the Chartering Wing (TRANSCHART) of Ministry of Surface Transport. For making shipping arrangements cargo preference is given to Indian ships without any price preference. In the event of non-availability of suitable Indian vessels in required position, foreign vessels are chartered at the most competitive freight rates to meet the requirements of Indian indentors.

**2.** The question of income-tax being payable in respect of freight on import of cargo has been examined earlier and in O.M. dated 12th April, 1984 (*Annex*), the Department of Revenue had clarified that no income-tax was payable in respect of freight on import of cargo unless such freight is paid in India to non-resident shipping company or its agent. It has been clarified by the Ministry of Surface Transport that according to normal international practice and also according to the agreements with the foreign ship owner 90% of the freight is to be paid within seven days of the vessel completing loading of cargo and sailing from the loading port. The balance of 10% is remitted after the import of cargo is unloaded in India.

**3.** At the time of remittances of this 10%, the normal practice has been to issue a No Objection Certificate for the remittance of 1% without deduction of tax at source on the ground that income has not accrued in India. The Reserve Bank of India is, however, now insisting that an NOC should be obtained in respect of the entire 100% of the freight charges before the remittance is permitted.

**4.** *No income-tax is payable in respect of the freight on import of cargo unless such freight is paid in India to the non-resident shipping company or its agent. Transchart has explained that the entire freight charges are remitted by telegraphic transfer through a bank in a foreign country and no part of freight charges are received in India by the foreign shipping company or its agent. The Board have therefore decided that the NOC should be issued in respect of the entire 100% of the freight charges subject to the remittance falling within the parameters discussed above.*

**Instruction** : *No. 1934, dated 14-2-1996.*

10.0 A plain reading of the impugned instruction clearly alludes that the same is definitely released w.r.t hiring of foreign vessels by Government Departments / Public Section Undertakings. Para-1 of the instruction brings out the objective for releasing the said instruction. It thus clarifies that the same is w.r.t. activity regulated by Ministry of Surface Transport. The impugned instruction presumes situation in which Government Departments / Public Section Undertakings are compelled to choose foreign shipping companies, for their operations, on account of non-availability of suitable Indian shipping companies. Therefore to conclude that the same is applicable for Private Shipping Companies also is an argument which is far from convincing. The argument of the Ld. Counsel regarding application of decision of Hon'ble Coordinate Bench of ITAT Mumbai in the case of Reliance Industries Limited ITA 6165 to 6177 / Bom / 1995 has been examined at length. It has been noted that the facts of the case adjudicated by Hon'ble ITAT Mumbai in Reliance Industries Limited supra are different than the present case. Para-4 & 5 of the said order clearly stipulates that, the Hon'ble Bench had considered a situation of "time charter" agreements. Pertinently the Ld. Counsel for the assessee, responding to Ld. DRs argument, during hearing on 12.12.2024, vehemently made a statement on Bar that its case is not that of a "time charter" agreements. Thus there cannot be any case of the assessee to rely upon the decision of

Reliance Industries Limited supra. Incidentally, the instruction No.1934 heavily relied upon the assessee also covers cases for chartering Foreign Vessels on time charter basis as vividly evident from its very subject line. Thus, seen neither the instruction No.1934 nor the decision of Reliance Industries Limited supra come to the rescue of the assessee.

11.0 We have found sufficient force in the argument of the Ld. DR that the agreements entered between the assessee and the Foreign Shipping Companies regarding payment at the time of “Break bulk” would make the freight income of such Foreign Shipping Companies clearly liable for taxation in India under the provisions of section 5 r.w.s 9 of the act. We have also noted that in AY-2016-17, in para 2.1 of page 2 of its order the Ld. AO had recorded that the assessee had filed a letter 27.12.2019 stating that it had made payment of Rs.20,27,17,742/- without making any TDS as the payments were to non-resident outside India for services that were rendered outside India and no income accrued or deemed to accrue in India. The said observation of the assessee primarily hinges upon a conclusion drawn by the assessee that the freight payments made to foreign shipping companies were not taxable in India. The assessee cannot enjoy the authority of drawing any such powers. In case, it was confident that the impugned freight payments made to foreign shipping companies were not taxable in India then it should have applied for a Nil deduction certificate u/s 195. The assessee is not vested with an

authority to draw its unilateral conclusions, qua taxability or otherwise of a transaction in India, which is a statutory granted authority / duty to a taxman.

12.0 Hon'ble Apex court in the case of ED sasoon 1954 AIR 470 , on the issue of taxability of income accruing or arising in India relying upon decision of Roquers Pyatt Shellac and Company observed that ***"…It is clear that income may accrue to an assessee without the actual receipt of the same. If the assessee acquires the right to receive the income, the income can be said to have accrued to him though it may be received later on its being ascertained. The basic conception is that he must have acquired the right to receive income. There must be a debt owed to him by somebody…"***. We have also noted that provisions of section 44B of the act are also not applicable in this case since they do not apply to cases falling u/s 5(2) qua taxation of non-resident.

13.0 We have also found sufficient force in the Revenue's argument that the assessee has failed to file 15CA certificates and PE certificates to allude any credibility in the hypothesis of non-taxability of freight charges paid to Foreign Shipping Companies. An evidence for its benefit is to be led by the party seeking such benefit. In the present case, therefore, it was bounden upon the assessee to have produced impugned evidences

in its support. Absence thereof strengthens, Revenue's argument qua taxation of impugned income in India.

14.0 Accordingly, in view of the agreements made between the assessee and the Foreign Shipping Companies alluding towards services rendered on shipping ports in India, non-applicability of instruction No.1934 as well as the decision of Hon'ble ITAT Mumbai in Reliance Industries Limited supra, absence of 15CA and PE certificates, we are of the considered view that the addition made by the Ld. AO of Rs. 8,83,16,208/- u/s 40(a)(i) for AY-2012-13 and its confirmation by the Ld. First Appellate Authority is based upon correct interpretation of law and accompanying judicial pronouncements on the matter. We are of the view that there is no case for any interference in the impugned orders at this stage. **The order of the Ld. CIT(A) is confirmed and all the grounds raised by the assessee on this issue are dismissed.**

15.0 In the result the appeal of the assessee vide ITA No.1088/Chny/2024 for AY-2012-13 is dismissed.

**ITA No.1089/Chny/2024 for AY-2013-14 and**

**ITA No.1090/Chny/2024 for AY-2016-17**

16.0 Both the parties have admitted that the facts of the case as available in ITA No.1088/Chny/2024 for AY-2012-13 are identical to facts of the case in ITA No.1089 & 1090 supra. Accordingly, the decision in

ITA No.1088 supra shall apply mutatis mutandis in ITA No.1089 & 1090 supra.

17.0 In the result the appeal of the assessee vide ITA No.1089/Chny/2024 for AY-2013-14 and ITA No.1090/Chny/2024 for AY-2016-17 are also dismissed.

18.0 In the result, the appeals of the assessee are decided as under:-

| ITA Nos | Assessment Year | Result |
|---|---|---|
| ITA No.1088 / Chny / 2024 | 2012-13 | Dismissed |
| ITA No.1089 / Chny / 2024 | 2013-14 | Dismissed |
| ITA No. 1090 / Chny / 2024 | 2016-17 | Dismissed |

Order pronounced on 26th , February-2025 at Chennai.

**Sd/-**
**(यस यस विश्वनेत्र रवि)**
**(SS VISWANETHRA RAVI)**
**न्यायिक सदस्य / Judicial Member**

**Sd/-**
**(अमिताभ शुक्ला)**
**(AMITABH SHUKLA)**
**लेखा सदस्य /Accountant Member**

**चेन्नई**/Chennai, **दिनांक**/Dated: 26th , February-2025.
*KB/-*

आदेश की प्रतिलिपि अग्रेषित**/Copy to:**
1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त/**CIT -** Chennai.
4. विभागीय प्रतिनिधि/DR
5. गार्ड फाईल/GF