

आयकरअपीलीयअधिकरण
मंबईपीठ“के”
श्रीविकासअवस्थी. न्यायिकसदस्यएवं
श्रीएमबालगणेश, लेखाकारसदस्यकेसमक्ष
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH “K”, MUMBAI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI M. BALAGANESH, ACCOUNTANT MEMBER
आअसं. 197/मुं/2013 (नि.व. 2008-09)
ITA NO.197/MUM/2013(A.Y.2008-09)

The Great Eastern Shipping Co.
Kalyaniwalla & Mistry,
3rd Floor, Army & Navy Building,
148, M.G.Road, Fort,
Mumbai 400 001.

PAN: AAAC-1565-C

..... अपीलार्थी/Appellant

बनाम Vs.

The Additional Commissioner of Income-tax,
Range – 10(2),
Room No.525B, 5th Floor,
Aaykar Bhavan, M.K.Road, ,
Mumbai – 400 020.

.... प्रतिवादी/Respondent

अपीलार्थी द्वारा/Appellant by : Shri Percy j. Pardiwalla, Sr. Advocate with
S/Sh. Jitendra Jain& Rashid Poonawala

प्रतिवादी द्वारा/Respondent by : Dr.Yogesh Kamat , CIT and
Shri Sambit Mishra

सुनवाई की तिथि/Date of hearing : 20/05/2022

घोषणा की तिथि/Date of pronouncement : 11/08/2022

आदेश/ORDER

PER VIKAS AWASTHY, JM:

This appeal by the assessee is directed against the assessment order dated 15/11/2012 passed u/s. 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961[in short ‘the Act’] for the Assessment Year 2008-09.

2. The assessee in appeal has raised as many as 24 grounds and further raised three additional grounds of appeal. The gist of grounds raised by the assessee in appeal is as under:

NON-TRANSFER PRICING ISSUES:

- (i) Ground No.1: Against reallocation of interest expenditure pertaining to non-tonnage activities to tonnage activities.
- (ii) Ground No.2 to 9: Disallowance u/s. 14A of the Act.
- (iii) Ground No. 10 to 12: Income received under tonnage business treated as non-tonnage income.
- (iv) Ground No.13: Disallowance of expenditure while computing Short Term Capital Gain.
- (v) Ground No.14: AO failed to comply with the directions of the DRP in not granting credit for TDS.

TRANSFER PRICING ISSUES(T.P ISSUES):

- (i) Ground No.15 : General
- (ii) Ground No.16 to 18: T.P adjustment on interest on foreign currency loans to Associated Enterprises.
- (iii) Ground NO.19 to 21: T.P adjustment in respect of performance guarantee given on behalf of the Associated Enterprises.
- (iv) Ground No.22 to 24: T.P. Adjustment in respect of financial guarantee given on behalf of the Associated Enterprises.

ADDITIONAL GROUNDS OF APPEAL:

- (i) Ground No.1: Disallowance u/s. 14A r.w.r 8D.
- (ii) Ground No.2: Challenge to recording of satisfaction u/s. 14A(2).
- (iii) Ground No.3: Inclusion of disallowance u/s. 14A while computing book profits u/s. 115JB of the Act.

3. Shri Percy j. Pardiwalla narrating the facts of case submitted that the assessee is engaged in the business of shipping, property development and finance. The Id.Counsel for the assessee submitted that majority of the issues raised in the appeal have been considered and adjudicated by the Tribunal in assessee's own case in the preceding assessment years. The Id.Authorized Representative of the assessee furnished copy of Tribunal order in assessee's own case in ITA No.4507/Mum/2011 for the assessment year 2006-07 decided on 14/09/2012 and a copy of Tribunal order in ITA No.397/Mum/2012 for assessment year 2007-08 decided on 10/01/2014.

4. Both sides heard. Orders of authorities below and documents on record examined. We have also considered decisions of Co-ordinate Bench in assessee's own case for preceding assessment years.

5. In ground No.1 of appeal, the assessee has assailed the findings of DRP and Assessing Officer in respect of attribution of interest expenditure pertaining to non-tonnage income aggregating to Rs.5.98 crores to the tonnage income. The assessee has claimed interest expenditure to the tune of Rs.9,21,62,168/- under non-tonnage activities. In assessment proceedings assessee was asked to substantiate the fact that aforesaid interest expenditure pertains to non-tonnage activities. The Assessing Officer after examining the details furnished by the assessee concluded that interest expenditure of Rs.5,98,48,390/- are in respect of tonnage tax activities. The Id.Counsel for the assessee referred to the Profit and Loss Account for the Financial Year ending as on 31/03/2008 and submitted that during the relevant period, the total interest and finance charges were Rs.149.28 crores. Bifurcation of income and expenditure between business of shipping (qualifying ships)and

other business (Business other than of the business of qualifying ships) is at page 34 of the Paper Book. A perusal of computation of book profit would show that interest and finance charges Rs.9.21 crores was allocated to non-tonnage activities(Business other than of the business of qualifying ships). The Id.Counsel for the assessee stated that in the preceding assessment years i.e. assessment year 2006-07 and 2007-08 interest and finance charges for similar reasons were disallowed. The matter travelled to the Tribunal. The Tribunal after examining the issue held that the assessee furnished complete details of loans utilized for non-tonnage and tonnage activities. The CIT(A) in assessment year 2006-07 had deleted the addition, the Tribunal upheld the findings of First Appellate Authority.

6. The Id.Departmental Representative fairly admitted that the issue pertaining to reallocation of interest expenditure between tonnage and non-tonnage activities was considered by the Tribunal in assessee's own case for preceding assessment years.

7. A perusal of assessment order would show that excerpts from the chart furnished by the assessee giving details of the loans initially taken for shipping business but subsequently utilised for non-tonnage activities has been reproduced. The Assessing Officer disallowed interest expenditure without appreciating the facts on record. Undisputedly, the loans were initially taken for acquiring/maintaining ships. Subsequently, the ships were sold and the sales proceeds were utilized for non-tonnage activities. Therefore, the loans taken for business of qualifying ships were eventually utilized for the purpose of business other than that of the business of qualifying ships (non-tonnage

activities). In assessment year 2006-07 under similar set of facts, the Co-ordinate Bench held:

“6.the Assessing Officer himself has stated in the assessment order that the loans availed of by the assessee for shipping activities had been diverted to non-tonnage tax activities. As rightly held by the learned Commissioner of Income-tax (Appeals), if this was the position as admitted by the Assessing Officer himself, interest expenditure incurred on such loans should be treated as incurred for the purpose of non-tonnage tax activities as claimed by the assessee. As such, considering all the facts of the case, we find no infirmity in the impugned order of the learned Commissioner of Income-tax (Appeals) deleting the disallowance of Rs. 4.35 crores made by the Assessing Officer out of interest expenditure after having found on verification of the relevant details that the said interest expenditure was incurred wholly and exclusively for the purpose of non-tonnage tax activities. The impugned order of the learned Commissioner of Income-tax (Appeals) giving relief to the assessee on this issue is accordingly upheld and the ground as raised originally by the Revenue in this appeal is dismissed.”

Thus, in the facts of case and the decision of Co-ordinate Bench in assessee's own case for assessment year 2006-07, ground No.1 of the appeal is allowed.

8. In ground No.2 to 9 of appeal, the assessee has assailed disallowance under section 14A of the Act on different facets. During the period relevant to the assessment year under appeal the assessee has earned dividend income of Rs.24.25 crores, out of which the assessee has earned dividend income of Rs.15.91 crores from investments made in foreign group companies. The dividend income from overseas entities has been offered to tax. The assessee has made suo-motu disallowance of Rs.36,63,327/- under section 14A of the Act in respect expenditure incurred in relation to earning of income exempt from tax. The Assessing Officer recomputed disallowance u/s.14A r.w.r. 8D at Rs.19.99 crores. The Id.Counsel for the assessee submitted that the Assessing Officer while computing disallowance u/s 14A of the Act has included interest expenditure under tonnage scheme as well. He submitted that for the purpose

of disallowance u/s 14A r.w.r 8D interest expenditure pertaining to tonnage tax income should not be considered. The Id.Counsel for the assessee further submitted that for the purpose of disallowance u/r. 8D(2)(iii), only dividend yielding investments should be considered. He referred to table indicating investments yielding tax free income at page-51 of the Paper Book and the details of current investments at page- 13 of the Paper Book. The Id. Counsel further referred to computation of suo motu disallowance made under section 14A of the Act at page 49 of the Paper Book. Further, referring to reserves and surplus at page- 7 of the Paper Book he submits that own funds of the assessee are sufficient to cover investments in mutual funds as reflected in Schedule 5 at page 13 of the paper book. The Id.Counsel for the assessee further argued that total expenditure towards administrative cost of Treasury Department is Rs.69.59 lakhs (at page 49 of the paper book). The entire administrative expenditure cannot be attributed for the purpose of investments. The assessee has other operational activities as well. Therefore, disallowance calculated by Assessing Officer under rule 8D is erroneous. To support his submissions, he placed reliance on the decision rendered in the case of Godrej & Boyce Mfg. Co. Ltd. reported as 328 ITR 81 (Bom).

The Id. Counsel for the assessee fairly admitted that the assessee has raised a plea that no disallowance under section 14A could have been made in respect of investments held as stock in trade, however, this argument of the assessee would not sustain as this issue has been decided against the assessee by the Tribunal in past.

8.1. The Id. Counsel for the assessee further pointed that the assessee has raised three additional grounds. The assessee is not pressing additional

ground No.2. As regards additional ground No.1, the prayer of the assessee is that only dividend yielding investments should be considered. In additional ground No.3, the assessee has assailed that disallowance under section 14A of the Act should not be considered while computing book profits under section 115JB of the Act. To support this contention reliance is placed on the decision of Special Bench in the case of ACIT vs. Vireet Investments Pvt. Ltd. 58 ITR(T) 313(Del).

9. Per contra, the Id.Departmental Representative vehemently defended directions of the DRP and the assessment order qua disallowance made under section 14A r.w.r. 8D.

10. Both sides heard. The assessee has made suo motu disallowance of Rs.36,63,327/- under section.14A of the Act. The assessee has filed computation of disallowance at page 49 of the Paper Book. The Assessing Officer rejected assessee's computation of disallowance under section 14A of the Act and has recomputed disallowance after invoking provisions of rule 8D and made disallowance of Rs.19,99,31,558/-. The assessee has primarily made threefold submissions:

- (i) The first contention of the assessee is that interest expenditure under tonnage scheme cannot be considered for section 14A of the Act;
- (ii) The entire expenditure towards administrative and treasury department cannot be considered for making investments as the assessee is also having other line of business; and
- (iii) The third contention raised by the assessee is that assessee was having sufficient own funds for making investments.

10.1. In so far as the first argument of assessee, if any loan has been taken for shipping business (qualified for tonnage tax scheme) and live link is established between the loan taken and the particular purpose, interest payment on such loan should not form part of interest expenditure for the purpose of Section 14A of the Act.

10.2. It is accepted position that the entire administrative cost cannot be allocated for earning income exempt from tax if the assessee has other businesses as well. In the instant case the contention of the assessee is that the assessing officer has made disallowance u/s14A of the Act of an amount more than the entire administrative cost of the Treasury Department.

10.3. The third contention of the assessee is own interest free funds of the assessee are sufficient to cover the investments made. It is a settled legal position that where assessee is having mixed bag of own interest free funds and interest bearing funds, the presumption would be that for investment purpose own interest free funds would be utilised by the assessee.

10.4. Taking into consideration entire facts of the case, we deem it appropriate to restore this issue back to the file of Assessing Officer to re-examine the issue in light of above observations. If own interest free funds of the assessee are much more than the investments made no disallowance under rule 8D(2)(ii) is warranted.

10.5. The assessee has raised additional grounds of appeal as well in respect of disallowance u/s.14A of the Act. The findings on the same are as under: -

- While computing disallowance under section 14A of the Act r.w.r 8D(2)(iii), the Assessing Officer shall take into account only dividend yielding investments;
- While computing book profits under MAT provisions disallowance under section 14A of the Act has to be disregarded in line with the decision of Special Bench in the case of ACIT vs. Vireet Investment Pvt. Ltd. (supra).

10.6. Consequently, ground of appeal No.2 to 9 of the appeal are allowed for statistical purpose. Additional ground No.1 and 3 are allowed. Additional ground No.2 is dismissed as not pressed.

11. In ground No.10 to 12 the assessee has assailed that the income pertaining to tonnage tax business has to be excluded from non-tonnage tax income. The ground of appeal No.10 to 12 are reproduced herein below:

"10) The learned DRP erred in holding that the crude oil refund received of Rs.50,030/- and the miscellaneous income pertaining to the tonnage tax business of the Appellant of Rs.28,711/- are to be excluded from the tonnage income of the Appellant and in treating the same as non-tonnage tax income.

11) The learned DRP erred in directing the AO to exclude the general average claims received aggregating to Rs.2,84,01,893/- from the tonnage income of the Appellant and treat the same as non-tonnage tax income in case the Department had preferred an appeal to the Hon'ble ITAT on this issue in the preceding A.Y.2007-08, and in ignoring the facts of the case and the order of the Hon'ble ITAT for A.Y. 2006-07 and the CIT(A)'s Order for A.Y.2007-08 in the Appellant's own case.

12) The learned DRP erred in directing the AO to exclude liabilities of prior periods written back aggregating to Rs.15,90,4347- from the tonnage income of the Appellant and treat the same as non-tonnage tax income in case the Department had preferred an appeal to the Hon'ble ITAT on this issue in the preceding A.Y.2007-08, and in ignoring the facts of the case and the order of the Hon'ble ITAT for A.Y. 2006-07 and the CIT(A)'s Order for A.Y.2007-08 in the Appellant's own case."

12. The Id. Counsel for the assessee submitted that the DRP/Assessing Officer treated following income/receipts alleged to be under non-tonnage tax business, which according to the assessee pertains to tonnage tax business of the assessee:

(i) Crude Oil Refund - Rs.50,030/-

(ii) Miscellaneous income - Rs.28,711/-

The Id.Counsel further submitted that in assessment year 2006-07 the Assessing Officer had shifted income from tonnage tax business to non-tonnage tax income for similar reasons. The Tribunal in appeal ITA No. 4507/Mum/2011 decided on 14/9/2012 decided the issue in favour of the assessee. He further pointed that the issue raised in ground No.11 and 12 were also considered by the Tribunal in appeal of the assessee for assessment year 2006-07.

13. We find that identical grounds were subject matter of appeal in assessment year 2006-07. The Co-ordinate Bench following the decision rendered in the case of Shipping Corporation of India in ITA No.145/Mum/2011 decided these grounds in favour of the assessee. The relevant extract of the findings of Tribunal in assessee's own case for assessment year 2006-07 are reproduced herein below:

"14. As submitted by the learned counsel for the assessee and remained uncontroverted/unrebutted by the by the learned DR who has simply relied on the order of the AO in support of the Revenue's case, the issues raised in ground Nos2, 3 and 4 of the assessee's appeal are squarely covered in favour of the assessee by the decision of coordinate bench of this Tribunal in the case of Shipping Corporation of India Ltd. rendered vide its order dated 29 July, 2011 passed in ITA No. 145/Mum/2011. A copy of the said order is placed on record before us and perusal of the same shows that similar issues involved in the case of Shipping Corporation of India Ltd. have been decided by the Tribunal in favour of the assessee wherein after identifying the issues and referring to the relevant

provisions of the Act laying down the tonnage tax scheme, the Tribunal has given its findings/decision in paragraph No. 29 and 30 which read as under :

" 29. Provisions of section 115VA provides that the income from business of operating qualifying ships may be computed in accordance with the provisions of chapter XII-G, and that the income so computed shall be deemed to be the profits and /Income from qualifying ships are defined in section 115VC, and there is no dispute on this aspect. Section 115VE mandates that profits from business of a company engaged in the business of operating qualifying ships shall be computed under the tonnage tax scheme. It also specifies that such business of operating qualifying ships shall be considered as a separate business distinct from all other activities or business carried on by the company. The mode of computation of tonnage income is given under section 115VG. The term "relevant shipping income" has been defined in section 115VI. It is basically classified into two categories i.e., profits from core activities referred to in sub-section 2 and profits from incidental activity referred to in sub-section 5. The issue is, whether the income by way of right back of provisions of sundry credit balances and prior period expenses can be considered as Income from core activities of a tonnage tax company. In our opinion, write back of these items is to be considered as income from core activity. In a going concern, such write backs and making of supplementary provisions takes place. The Assessing Officer as well as the Commissioner (Appeals) have treated the very same income which is taxable under section 41(1) differently. The first being expenditure claimed in pre- tonnage tax scheme assessment years and the second being expenditure claimed in post tonnage tax scheme assessment years. Such a segregation is not permissible under the Act. Both the incomes are incomes from core activity and just because tax rates different, they cannot be treated as non-business income. The Assessing Officer as well as the Commissioner (Appeals) seem to have been influenced by the fact that the assessee has an income of Z 800 crores in its Profit & Loss account and whereas he has offered only Z 18 crores to tax under the tonnage tax scheme. The decision whether a particular income has to be brought to tax or not, cannot be based on such a view of the matter. The legislature in its wisdom provided the manner of computation of income under the tonnage tax scheme. In section 115VA, it is clearly provided that sections 28 to 43C would not over ride the computation of profits and gains under section 115VA. As section 41(1) falls within sections 28 to 43C, no separate addition under that section can be made. As section 41(1) seeks to bring to tax certain specified items of receipts under the head "profits and gains of business" the scheme should not be invoked while computing profits and gains of business under Chapter-XII-G. Hence, we are of the opinion that the argument of the assessee should succeed.

30. With the introduction of chapter-XII-G, the entire methodology of taxing income from the business of operating qualifying ships has changed and

recourse to the normal provisions of the Act in a peace-meal manner is not authorized by law. Though the assessee has computed other income while filing its return of income, in our opinion, the income arising from section 41(1), cannot be classified as, either income from other sources or income from incidental activities. When all the ships of the assessee are qualifying ships and when there is no other activity other than core activities and incidental activities, in our opinion, a third category of other business income cannot be created. As pointed out by the learned Sr. Counsel, if such introduction is allowed then, a claim of the assessee of deduction under section 43B i.e., deduction only on actual payment would be required through the expenditure actually belongs to pre-tonnage period, to be allowed. The Assessing Officer cannot take recourse to sections 28 to 43C, when there is no other activity or business carried on by the company, other than business of operating qualifying ships. In view of the above discussion, we allow ground no. 1 of the assessee,"

15. As the ratio of the decision rendered by the Tribunal in the case of Shipping Corporation of India Ltd, (supra) is directly applicable to the issues raised in ground Nos. 2, 3 and 4 of the assessee's appeal filed in the present case, we respectfully follow the said decision of the coordinate bench of this Tribunal and allow ground Nos. 2, 3 and 4 of the assessee's appeal.

We observe from the impugned assessment order, that the aforementioned issues were decided by the Commissioner of Income Tax (Appeals) in immediate preceding AY i.e. AY 2007-08 in favour of the assessee. The Revenue filed appeal against the said order before the Tribunal. The appeal of Revenue in ITA No.437/Mum/2012 for AY 2007-08 was dismissed by the Co-ordinate Bench vide order dated 10-01-2014. No contrary decision or material has been brought to the notice of Bench distinguishing facts. Therefore, following the decision of Coordinate Bench in assessee's own case in the preceding assessment years, ground No.10 to 12 of the appeal are allowed for parity of reasons.

14. In ground No.13 of appeal, the assessee has assailed disallowance of expenditure aggregating to Rs.10,52,750/- in connection with transfer of residential flats while computing short term capital gains. The Id.Counsel for the assessee referred to the statement at page 71 of the Paper Book, wherein

short term capital gain u/s. 50 of the Act for the year ended 31st March 2008 has been computed. He pointed that one of the flat sold by the assessee during the period relevant to the assessment year under appeal was Flat No.18B, Manek, L D Ruparel Marg, Mumbai. While computing capital gain on said flat expenditure relating to building repair funds and share certificate was reduced from total consideration. He pointed that a perusal of Inter Departmental Memo at page 72 would show that 50% of the charges were paid by the purchaser and the remaining 50% were borne by the assessee. Therefore, to the extent of expenditure incurred by the assessee should have been allowed. In support of his submissions, the Id.Counsel for the assessee placed reliance on the decision rendered in the case of Additional CIT vs. Madhur I. Teckchandani, 93 TTJ 721 (Mum).

15. Per contra, the Id.Departmental Representative vehemently defending assessment order submitted that it is not clearly emanating from records that whether the building repair fund and share certificate expenses are recurring expenditure or one time expenditure charged at the time of transfer. The issue can be remanded to the Assessing Officer for the purpose of verification.

16. Both sides heard. The limited issue in ground No.13 is whether the building repair fund and expenditure towards share certificate should be allowed to be deducted from total sale consideration while computing capital gain on sale of 'Manek flat.' The contention of the assessee is, the said expenses were incurred at the time of sale of flat. 50% of the expenditure were borne by the assessee and the remaining 50% were paid by the purchaser. In support of this contention the assessee has placed reliance on

inter departmental memo furnished before the Assessing Officer. It is a well settled legal position that expenditure incurred at the time of sale of asset, if borne by the seller/to the extent borne by the seller has to be reduced from the total consideration. In the instant case, the expenditure towards building repair funds and share certificate were paid by the assessee and the purchaser in equal ratio. Since, expenditure was incurred at the time of sale of flat, the said expenditure is allowable to the extent paid by the assessee and hence, deductible from total sale consideration. We find merit in ground No.13 of the appeal, hence, the same is allowed in the terms aforesaid.

17. In ground of appeal No.14, the assessee is seeking direction to the Assessing Officer for complying with directions of the DRP to grant credit of TDS aggregating to Rs.5,03,591/-. The Assessing Officer is directed to comply with the directions of the DRP with respect to allowing credit of TDS. The ground No.14 of the appeal is thus allowed for statistical purpose.

18. The ground No.15 of the appeal is general in nature hence, require no adjudication.

19. In grounds No.16 to 18 of appeal, the assessee has assailed findings of the Assessing Officer/TPO in benchmarking foreign loan transaction to the overseas Associated Enterprise (AE). We find that identical issue was subject of appeal before the Co-ordinate Bench in assessment year 2007-08 in in ITA No.397/Mum/2012 decided on 10/01/2014. The Co-ordinate Bench after examining the issue in detail held as under:

"16.1. The Ld. CIT(A) has directed to apply the aforesaid rates for the purpose of determining the arm's length price. We do not agree with this finding of the Ld. CIT(A) for the simple reason that the loan of USD 4 million was given in earlier accounting year and as per the agreement, the rate of interest was taken at 5%. The

*fixed rate of interest cannot be accepted to be changed with the subsequent change in LIBOR , if any , and as the loan of USD 17 million has been repaid within the year itself, there is no logic in taking the rate for more than 5 years at 6 months LIBOR plus 350 basis point. In our humble opinion, **the benchmarking done by the assessee are based on the interest paid by it on its own borrowings of loan in foreign currency from KEXIM bank and also from State Bank of India as mentioned elsewhere in this order we find that the interest charged by the assessee on the loan given by it to its AE is at arm's length and therefore, no further adjustment is required.** We, accordingly, reverse the findings of the Ld. CIT(A) with a direction that no Transfer Pricing adjustment is required on the interest charged by the assessee to its AE. Ground No. 6 to 11 are accordingly allowed."*

[Emphasized by us]

No contrary decision or any distinguishable fact has been brought to the notice of the Bench. Facts in the impugned assessment year being similar, ground No.16 to 18 of the appeal are allowed, for parity of reasons.

20. In ground No.19 to 21 of appeal, the assessee has assailed TP adjustment in respect of Performance Guarantee given by the assessee on behalf of AE. The Id. Counsel for the assessee submitted that the assessee had extended Performance Guarantee in respect of its 100% subsidiary in Singapore to the shipyard. The terms and conditions of the Performance Guarantee agreement clearly indicate that there was no financial liability on the assessee company. In the eventuality of Performance Guarantee being invoked, the assessee would acquire the asset. Thus, the assessee would not be at loss in any case. The business of assessee and its AE is the same i.e. operation of ships, therefore, the asset that would be acquired by the assessee in eventuality of operation of Performance Guarantee would be utilized for the purpose of assessee's business. It would not be an unwanted asset. The Id. Counsel submitted that the DRP has upheld performance guarantee commission @1% p.a. instead of 3% proposed by the TPO.

21. Per contra, the Id.Departmental Representative vehemently defended the impugned order and the directions of the DRP on this issue and prayed for dismissing the grounds raised by the assessee assailing the adjustment.

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 ALP of the performance guarantee facility as 'Nil'. The DRP has determined ALP of the transaction @1%. 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.

23. In ground No. 22 to 24 of appeal, the assessee has assailed TP adjustment in respect of financial guarantee given by the assessee on behalf of

its AE. The Id.Counsel for the assessee submitted that the assessee has made suo-motu charge of 0.55%. The Id. Counsel referred pages 92 to 95 of the paper book to show different rates of guarantee commission charged by different banks. He pointed that vide letter dated 15/07/2011 State Bank of India has given rate of commission charged by it. The rates vary from 2.75% to 1.75% depending upon the quantum of facility availed. Similarly, information was sought by the Transfer Pricing Officer from the Allahabad Bank. As per letter dated 12/07/2011 from Allahabad Bank (at page 94 of the paper book) for extending facility of financial guarantee, charges varies from 0.75% per quarter to 0.60% per quarter. The Id Counsel pointed that ABN AMRO Bank charges guarantee commission @0.35% p.a. (page 139 of paper book) and HSBC Banks charges 0.55% p.a. guarantee commission (page 146 of the paper Book). He further referred to the decision of Tribunal in the case of Greatship (India) Ltd. in ITA NO.1287/Mum/2017 decided on 05/04/2020.The Tribunal after considering various case laws, wherein different rates for guarantee commission were charged, upheld 0.43% commission p.a. charged by the assessee as ALP. In the instant case the TPO had made adjustment by determining guarantee commission @3%. The rate of guarantee commission was restricted by the DRP to 1.5%.

As is evident from the letters from various banks on record, different rates of guarantee commission are charged by different banks depending upon the extent and duration of facility availed. Taking note of wide-ranging guarantee commission rates being charged by different banks, we adopt guarantee commission rate approved by Hon'ble Bombay High Court in the case of Everest Kanto Cylinders Ltd., 378 ITR 57(Bom), i.e 0.55%.We uphold guarantee commission charged by the assessee at 0.55%. Hence, no

adjustment is warranted on this issue. The, assessee succeeds on ground No.22 to 24 of the appeal.

24. In the result, appeal by assessee is partly allowed in the terms aforesaid.

Order pronounced in the open court on Thursday the 11th day of August, 2022.

Sd/-

(M. BALAGANESH)

लेखाकार सदस्य/ACCOUNTANT MEMBER

मुंबई/Mumbai, दिनांक/Dated: 11/08/2022
Vm, Sr. PS(O/S)

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य/JUDICIAL MEMBER

प्रतिलिपि अग्रेषितCopy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त(अ)/The CIT(A)-
4. आयकर आयुक्तCIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT, Mumbai
6. गार्ड फाइल/Guard file.

BY ORDER,

//True Copy//

(Dy./Asstt.Registrar)/
Sr.Private Secretary,ITAT, Mumbai