आयकर अपीलीय अधिकरण

मुंबई पीठ "आई"

श्री विकास अवस्थी, न्यायिक सदस्य एवं

श्री गगन गोयल, लेखाकार सदस्य के समक्ष

IN THE INCOME TAX APPELLATE TRIBUNAL

MUMBAI BENCH "I", MUMBAI

BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &

SHRI GAGAN GOYAL, ACCOUNTANT MEMBER

आअसं.1079/मुं/2021 (नि.व. 2017-18)

ITA NO.1079/MUM/2021(A.Y.2017-18)

Avana Global FZCO,
D-301-305, Level 3, Tower II,
Seawoods Grand Central,
Plot No.R1, Sector-40, Nerul Node
SeawoodsDarave, Navi Mumbai 400 706.
PAN: AADCB-4021-A ..... अपीलार्थी/Appellant

बनाम Vs.

Deputy Commissioner of Income Tax-
(International Taxation),Circle – 1(1)(2) Mumbai,
Room No.528, 5th Floor,
Air India Building, Nariman Point,
Mumbai – 400 021 .....प्रतिवादी/Respondent

अपीलार्थी द्वारा/ Appellant by	:	Shri Poras Kaka, Sr. Advocate with Shri Divesh Chawla, Advocate
प्रतिवादी द्वारा/Respondent by	:	Shri Milind S. Chavan
सुनवाई की तिथि/ Date of hearing	:	22/03/2022
घोषणा की तिथि/ Date of pronouncement	:	16/06/2022

<u>आदेश/ORDER</u>

PER VIKAS AWASTHY, JM:

This appeal by the assessee is directed against assessment order date 12/04/2021 passed u/ss. 143 (3) r.w.s. 144C(13) of the Income Tax Act, 1961 [in short 'the Act'] for the Assessment Year 2017-18.

2. The brief facts of the case as emanating from records are : The assessee company is incorporated in UAE and is a tax resident of UAE. The assessee is engaged in operation of ships in international traffic. During the period relevant to assessment year under appeal, the assessee earned income of Rs.265,57,28,874/- from freight handling, terminal handling charges, inland haulage charges and detention charges in India. The assessee claimed that the aforesaid income earned is exempt under Article -8 of the India -UAE DTAA. The Assessing Officer rejected the contentions of assessee and held that since the assessee has a Permanent Establishment in India, the benefit of Article -8 of DTAA is not available to the assesseein respect of gross receipts of the shipping business. Hence, made addition by applying Rule-10 of the Income Tax Rules, 1962 [herein after referred to 'the Rules'] Aggrieved by the draft assessment order dated 03/12/2019 the assessee filed objections before the Dispute Resolution Panel (in short 'DRP'). The DRP vide directions dated 25/03/2021 rejected the objections. The Assessing Officer passed the impugned assessment order in accordance with the direction of the DRP. . The Assessing Officer made addition of Rs.12,39,99,720/- i.e. 7.5% of gross receipts from shipping business. Further the Assessing Officer made addition of Rs.3,12,71,900/- on account of Inland Haulage Charges (in short 'IHC') received by the assessee. Hence, the present appeal by the assessee.

3. The assessee in appeal has raised nine grounds. In ground No.1 to 7 of appeal, the assessee has assailed the addition made by the Assessing Officer in respect of gross receipts from shipping business and receipts on account of 'IHC'.

4. Shri Poras Kakaappearing on behalf of the assessee submitted at the outset that the only effective grounds in the grounds of appeal are ground No.2 & 5 only.

5. The ground No.2 of the appeal reads as under:

> *" Ground No.2 – On the facts and in the circumstances of the case and in law, the learned DCIT and Hon'ble DRP has erred in denying the benefit of Article- 8 of the India and UAE Tax Treaty to theAppellant by holding it liable to tax in India under section 44B of the Income-tax Act, 1961 (IT Act) with respect to its shipping income of Rs.12,39,99,720/- (being 7.5% of total freight collections of Rs. 1,65,33,29,603) derived from operation of ships in international traffic."*

6. The ld.Counsel for the assessee submitted that the issue raised in ground No.2 of the appeal is identical to the issue raised in Assessment Year 2016-17 in appeal by the assessee in ITA No.7113/Mum/2019 decided by the Tribunal vide order dated 30/08/2021. The ld.Counsel for the assessee pointed that the DRP while deciding the issue has categorically stated that the facts in the Assessment Year 2017-18 are pari-materia to the facts in Assessment Year 2016-17. Hence, the DRP followed findings and directions issued by the DRP in Assessment Year 2016-17 and rejected the objections of assessee. The ld.Counsel for the assessee further pointed that in Assessment Year 2016-17 the DRP agreed that the Hon'ble Bombay High Court in the case of Balaji Shipping (UK) Ltd. reported as 253 CTR 460 (Bom) has held that the feeder vessels are covered by the term "pool or slot arrangement" but refused to follow the same as the Department had field SLP against the said decision before the Hon'ble Supreme Court of India and the said SLP is pending for final disposal. The ld.Counsel for the assessee submitted that Co-ordinate Bench of the Tribunal after considering the judgment in the case of Balaji

Shipping (UK) Ltd. (supra) granted relief to the assessee in Assessment Year 2016-17.

7. Shri Milind S. Chavan representing the Department vehemently defended the assessment order and the findings of the DRP on this issue. However, the ld. Departmental Representative fairly admitted that issue has been considered by the Tribunal in assessee's own case in immediately preceding assessment year.

8. We have heard the submissions made by rival sides. Undisputedly, the facts in the present case are identical to the facts in Assessment Year 2016-17. It is also evident from the observations made by DRP in para 8.2 of the directions. The DRP while deciding the issue in impugned assessment year placed reliance on the directions of DRP for Assessment Year 2016-17. The assessee assailed the findings of DRP before the Tribunal in ITA No.7133/Mum/2019(supra) . The Co-ordinate Bench after examining the facts and the decision rendered in the case of CIT vs. Balaji Shipping (UK) Ltd. (supra) held as under:-

> *"5. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.*
>
> *6. The short question we are now required to adjudicate is whether benefit of article 8 can be declined in respect of freight collections earned from cargo/containers loaded on slot of other vessels that the OEL, FZCO was entitled to under the joint business/pooling arrangements.*
>
> *7. As learned DRP fairly accepts the issue is covered, in favour of the assessee, by Hon'ble jurisdictional High Court's judgement in the case of Balaji Shipping (supra). The mere fact that an appeal against the said judgement is pending before Hon'ble Supreme Court does not dilate the binding nature of this precedent. Once Hon'ble jurisdictional High Court takes a view, we are bound to follow the same-in letter and in spirit. Respectfully following the same, we uphold the plea, of the assessee and direct that benefit of article 8 must be extended to entire freight*

receipts-irrespective of whether the earnings are relating to feeder] vessels or by the ships in international traffic. The assessee gets the relief accordingly.

8. Ground no 1 & 2 are thus allowed."

In the absence of any contrary material we see no reason to take a different view. Respectfully following the order of Co-ordinate Bench ground No.2 of the appeal is allowed.

9. The ground No.5 of the appeal assailing addition in respect IHC reads as under:

> **"Ground 5** - On the facts and in the circumstances of the case and in law, the learned DCIT and Hon'ble DRP has erred in denying the benefit of Article 8 of the India - UAE Tax Treaty on Inland Haulage Charges amounting to Rs. 31,27,19,007 earned by the Appellant and taxing the same at 10% as per Rule 10 of the Income-tax, Rules 1962."

10. The ld.Counsel for the assessee submitted that the assessee issues bill of lading from point to point and not from Port to Port. The bill of lading includes the leg of Inland transportation, therefore, cannot be segregated from the international voyage. The IHC are inextricably linked to the movement of cargo in the international traffic. Inland Haulage is not a separate business activity of the assessee and no separate agreement is entered between the assessee and its customers for the Inland Haulage services. A single/ consolidated Bill of Lading is issued by the assessee to its customer which is a contract for carriage of goods. In the Bill of Lading the place of receipt and the place of delivery are mentioned in addition to port of loading and port of discharge. The ld.Counsel for the assessee submitted that Inland Haulage services are covered by Article-8 of India-UAE DTAA. He further placed reliance on the decision of Hon'ble Bombay High Court in the case of DIT(International Taxation) vs. Safmarine Container Line NV reported as 367

ITR 209 and the decision of Tribunal in the case of DDIT vs. A.P.Moller Maersk A/S reported as 90 taxmann.com 326(Mum-Trib) to assert his contention that 'IHC' are part of income derived from operation of ships in international traffic and is covered by DTAA.

11. On the other hand, the ld. Departmental Representative strongly supported the findings of Assessing Officer and the DRP. The ld. Departmental Representative submitted that Article -8 of the DTAA only refers to the shipping business in international traffic. Inland Haulage services are not covered by Article -8.

12. Both sides heard. Before we proceed to decide this issue it would be imperative to refer to the provisions of Article -8 of India-UAE DTAA.

"ARTICLE 8 –

Shipping –

1. Profits derived by an enterprise of a Contracting State from the operation by that enterprise of ships in international traffic shall be taxable only in that State.

2. For the purposes of this Article, profits from the operation of ships in international traffic shall mean profits derived by an enterprise described in paragraph (1) from the transportation by sea of passengers, mail, livestock or goods and shall include :

(a) the charter or rental of ships incidental to such transportation ;

(b) the rental of containers and related equipments used in connection with the operation of ships in international traffic ;

(c) the gains derived from the alienation of ships, containers and related equipments owned and operated by the enterprise in international traffic.

3. For the purposes of this Article, interest on funds connected with the operation of ships in international traffic shall be regarded as profits derived from the operation of such ships and the provisions of Article 11 shall not apply in relation to such interest.

4. The provisions of paragraphs (1), (2) and (3) shall apply to profits from the participation in a pool, a joint business or an international operating agency."

13. Article – 8 of DTAA deals with profits derived by operation of ships in international traffic. Clause 2(b) of Article-8 refers to profit from the rental of ship including operation of container and related equipment used in connection with operation of ships in international traffic. Though Article-8 of India -UAE DTAA does not spell out explicitly that rental of containers include trailers and related equipment for the transport of container as has been mentioned in India -Belgium DTAA Article 8(2)(c) or India -Denmark DTAA , Article -9(4)(b),nevertheless, considering the nature of activity and the services provided by the assessee to its customers vide a composite Bill of Lading it can be safely inferred that the activity of Inland Haulage is directly connected with transportation of goods in international traffic. The leg of transportation of containers from Inland to Port for further transportation in International traffic is a composite activity for which single Bill of Lading is issued by the assessee.

14. The Co-ordinate Bench in the case of A.P.Moller Maersk A/S after considering OECD Commentary and the decision rendered in the case of Balaji Shipping (UK) Ltd. observed as under:-

> *"9. In view of the OECD commentary<u>we have considered the issue that internationally and by the Tribunal and Hon'ble High Court accepted that any activity directly connected with such transportation will always be included within the term "operations of ships". The Activities of the IHC are connected directly or an ancillary activity that provides minor contribution and should not be regarded as a separate business to the operations of ships.</u> Further, the decision of Hon'ble Bombay High Court in the case of Balaji Shipping (UK) Ltd.(2012) 253 CTR 460 (Bom) the issue was whether receipts from slot chartering can be considered as shipping income eligible to the beneficial provision of the Tax Treaty between India and UK. The Hon'ble High Court observed that the slot hire agreements are at least indirectly, if not directly connected and interlinked with and is an integral part of the enterprise's business of operating ships. The High Court further observed that the slot hire agreements also have a nexus to the main business of the enterprise of operation of ships. They are ancillary to and complement the operations of ships by the enterprise. Accordingly, Hon'ble Bombay High Court upheld the view that the benefit of the Tax Treaty would even be extended to income from such activities. Noting the OECD commentary the High court held as*

follows:-

> *"35. Paragraph 4of the commentary indicates that Article applies to profits directly obtained from the transportation of passengers or cargo by ships owned, leased or otherwise at the disposal of a person as well as the profits from the activities which are not directly connected with the acquisition of the assessee's ships. In the latter case however, the activities must be ancillary to such operations viz. the operation of ships owned, leased or otherwise at the disposal of the assessee in international traffic. It indicates that the provision also applies to the activities that permit, facilitate or support the international traffic operations.*
>
> *36. As far as the first type of case is concerned viz. where the slot hire facility is availed of for carriage of goods from a port in India only up to the hub port abroad and is thereafter transshipped on vessels actually operated by the assessee up to the final destination, it is irrelevant whether slot hire agreements are considered to be directly connected with the operation of ships or not directly connected with the operation of ships by the enterprise. In such cases, the slot hire agreements are inextricably interlinked with and connected to the operation of ships by the enterprise. The first type of case would in fact be covered by paragraphs 4and 4.1 of the commentary."*

The Hon'ble High Court then concluded in para 42 as under:-

> *"42. Our views on the two types of cases involved in the present appeal are in consonance with the view of the Delhi High Court, the OECD commentary and the commentaries referred to above."*

10. We further noted that Hon'ble Bombay High court in Balaji's case followed the decision of the Hon'ble Delhi High Court in case of Director of Income-Tax. vs. KLM Royal Dutch Airlines (2009) 178 Taxman 291 (Del.).Hon'ble Delhi High Court which was followed by the Tribunal and Hon'ble Bombay High has held that where the activities are linked to each other, there is no scope for dissecting the activities. In that case, the recovery of rent from the Indian company was held to be income from international air traffic and not taxable in India as the same would construe activities directly and inextricably linked to the cargo handling business of the assessee. As per the ratio of this decision, activities which are linked or connected to each other such that one cannot be conducted efficiently without the other and which have a nexus to the main business of the assessee of operations of ships should be considered as integral part of income from shipping operations. As informed by Ld. Counsel the fact that these issues are also decided in favour of the assessee in subsequent year even by the Dispute Resolution Panel for AY 2011-12 by placing reliance on the decision of Hon'ble Mumbai Tribunal and jurisdictional High Court in case of Safmarine (supra)."

[Emphasized by us]

The aforesaid observations of the Bench are dehors the terms of Article - 8(2)(c) of India -Belgium Tax Treaty and Article 9(4) of India Denmark Tax Treaty.

15. The Hon'ble Jurisdictional High Court in the case of CIT vs. Safmarine Container Lines NV (supra) reiterated the law expounded in the case of Balaji Shipping (UK) Ltd. (supra). Thus, in the facts of the case and the decisions referred above we find merit in ground No.5 of the appeal. We have no hesitation in holding that Inland Haulage Charges earned by the assessee are inextricably linked to shipping business in international traffic. The activity of shipping container from inland to the Port for further shipping it to international traffic is an integral part of operation of ships. Hence, 'IHC' cannot be disintegrated from profit derived from shipping business as envisaged under Article -8 of India-UAE DTAA. Ergo, 'IHC' are not taxable as business profit in India. The ground No.5 of appeal is allowed.

16. The ld.Counsel for the assessee has made no submission in respect of grounds No.1, 3,4,6 & 7 of the appeal. Consequently, the same are dismissed.

17. In ground No.8 of appeal, the assessee has assailed charging of interest u/s. 234B of the Act . Charging of interest u/s. 234B is mandatory and consequential, hence, ground no.8 of appeal is dismissed.

18. In ground No.9 of appeal, the assessee has assailed initiation of penalty proceedings u/s.270A of the Act. Challenge to penalty proceedings at this stage is premature, hence, ground No.9 of the appeal is dismissed as such.

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

Order pronounced in the open court on Thursday the 16th day of June, 2022.

Sd/-	Sd/-
(GAGAN GOYAL)	(VIKAS AWASTHY)
लेखाकार सदस्य/ACCOUNTANT MEMBER	न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई/ Mumbai, दिनांक/Dated 16/06/2022

Vm, Sr. PS(O/S)

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., मुबंई/DR, ITAT, Mumbai
6. गार्ड फाइल/Guard file.

BY ORDER,

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(Dy./Asstt.Registrar)**ITAT, Mumbai**