IN THE INCOME TAX APPELLATE TRIBUNAL,

DELHI BENCH: 'D' NEW DELHI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER
AND
SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER

ITA No.1067/Del/2022

Assessment Year: 2016-17

M/s. Tata NYK Shipping Pte. Ltd., 6, Shenton Way, #18-08B, Oue Downtown 2, Singapore	**Vs.**	Commissioner of Income Tax, International Taxation-3, New Delhi
PAN :AADCT9945P		
(Appellant)		**(Respondent)**

Appellant by	Sh. Ajay Vohra, Sr. Advocate Sh. Aditya Vohra, Advocate Sh. Hardeep Singh Chawla, Advocate
Respondent by	Sh. Gangadhar Panda, CIT(DR)

Date of hearing	08.12.2022
Date of pronouncement	09.03.2023

ORDER

PER SAKTIJIT DEY, JM:

Captioned appeal has been filed by the assessee calling into question the validity of the order dated 25.03.2022 passed by

learned Commissioner of Income Tax, (International Taxation)-3, Delhi, under section 263 of the Income-tax Act, 1961 (for short 'the Act') for the assessment year 2016-17.

2. Briefly the facts are, the assessee is a non-resident corporate entity incorporated in Singapore in the year 2007 and a tax resident of Singapore. As stated, the assessee is engaged in the business of owning, operating and chartering of ships to carry dry bulk and break bulk cargo, including coal, iron ore, bauxite and steel products etc. The assessee is a joint venture between Tata Steel Limited an Indian company and NYK Holding (BV), a company incorporated in Netherlands, which in turn is a subsidiary of a Japanese company, viz., Nippon Yusen Kabushiki Kaisha (NYK Japan). In the financial year relevant to the assessment year under dispute, incomes earned by the assessee are from the following activities:

(i) Shipping from ports within India (coastal shipping) USD $ 9,62,019 (Rs.6,06,05,690/-)

(ii) Shipping from ports outside India to ports in India (inward freight) USD $ 13,62,19,221(Rs.903,54,20,929/-)

(iii) Shipping from ports in India to ports outside India (outward freight) USD $ 84,67,367 (Rs.56,13,86,432/-)

3. In the return of income filed for the impugned assessment year on 13.11.2016, the assessee offered total income of Rs.45,45,430/- comprising of coastal shipping income. Insofar as income from inward and outward freight, the assessee did not offer such income claiming that such income having earned from operation of ships in international traffic is exempt from taxation in India under Article 8 of India – Singapore Double Taxation Avoidance Agreement (DTAA). Assessee's case was selected for limited scrutiny under Computer Aided Scrutiny Selection (CASS) to examine the following:

> *"Whether value of international transactions in services have been correctly shown in Form 3CEB and return of income"*

4. In course of assessment proceedings, the Assessing Officer issued statutory notices under section 142(1) and 143(2) calling upon the assessee to reply to various queries made in the notices and also to furnish the necessary details. Further, noticing that the assessee had entered into international transactions with its Associated Enterprises (AEs), the Assessing Officer made a reference to the Transfer Pricing Officer (TPO) to examine arm's

length nature of such transactions. After considering the order of the TPO passed under section 92CA(3) of the Act, the Assessing Officer ultimately completed the assessment vide order dated 14.06.2019 accepting the income declared by the assessee. The assessment order so passed was taken up for review by learned CIT in exercise of power conferred under section 263 of the Act. While doing so, he was of the view that the assessment order passed is erroneous and prejudicial to the interest of Revenue, since, while accepting the return of income, the Assessing Officer has failed to conduct necessary enquiry/verification and appreciate the correct legal position. The lacunae found by learned CIT in the assessment order are as under:

(a) The Assessing Officer has not called for any details to ascertain the amount and nature of total remittances received by the assessee during the year. Though, the assessee had received amount of Rs.63,45,14,259/- from various AEs in India towards services rendered, however, in course of assessment proceedings, no details were called for to ascertain the taxability of these receipts.

(b) The Assessing Officer has not called for any explanation from the assessee with regard to not offering these incomes to tax in India.

(c) The Assessing Officer did not examine the chargeability of the aforesaid receipts as Fees for Technical Services (FTS) or business income by examining the relevant facts as well as provisions contained in Income Tax Act and India–Singapore DTAA. The Assessing Officer failed to examine whether the assessee has Permanent Establishment (PE) in India.

(d) The Assessing Officer failed to examine, whether any tax avoidance arrangement has been made to avail the benefit of India–Singapore DTAA. The Assessing Officer should have enquired whether the interposition of assessee in Singapore is a treaty shopping arrangement or whether the assessee is a conduit company in which event the treaty benefits are not available.

(e) In course of assessment proceeding for assessment year 2018-19, the Assessing Officer through extensive

inquiry/verification has concluded that the arrangement is a tax avoidance one.

(f) Since, the interposition of assessee in Singapore is a treaty shopping arrangement to obtain benefit under India–Singapore DTAA, therefore, if the facts in assessment year 2016-17 are identical, then taxable outcome would be different than what is decided in the assessment order.

5. Thus, on the aforesaid premises, learned CIT issued a show-cause notice to the assessee to explain, why the assessment order should not be revised. In response to the show-cause notice, the assessee furnished a detailed reply along with supporting evidences to justify its claim that the assessment order is neither erroneous, nor prejudicial to the interest of Revenue as the Assessing Officer has followed due process of law in completing the assessment. It was further submitted by the assessee that since, it's case was selected for limited scrutiny to examine, whether the value of international transaction in services have been correctly shown in Form 3CEB and return of income, the Assessing Officer had very limited scope and had to confine to the issue for which the case was

selected for scrutiny. It was further submitted that the assessee, being a tax resident of Singapore having valid Tax Residency Certificate (TRC) issued by the authority in Singapore, the Assessing Officer was justified in accepting assessee's claim of benefit under Article 8 of India–Singapore DTAA. It was submitted by the assessee that the Assessing Officer could not have travelled beyond the scope of limited scrutiny and examined various aspects/issues raised in the show-cause notice issued under section 263 of the Act. In support of such contention, the assessee relied upon a number of judicial precedents. However, learned CIT did not find merit in the submissions of the assessee. Insofar as the validity of exercise of jurisdiction under section 263 of the Act is concerned, learned CIT held that since the Assessing Officer has completely overlooked the legal position dealing with taxability of income arising at the hands of the assessee as per the provisions of Income Tax Act and the relevant DTAA, the exercise of power under section 263 of the Act is valid. In this context, learned CIT referred to Explanation 2 to section 263 of the Act. He observed that the assessment order was passed without making inquiries or verification which should have

been made and consequently the assessment order was passed allowing assessee's claim without enquiring into the claim.

5.1 Having held so, he proceeded to examine the taxability of shipping income earned by the assessee. In this regard, he observed that the transportation of goods is carried out by the assessee primarily to and from the Indian ports for the use of Tata group companies and 75% of the receipts of the assessee from its international shipping business pertain to ship movements to and from Indian ports. In this regard, he observed that the vessels engaged in the transportation of goods are owned by NYK Japan through its subsidiary based in Netherlands. Whereas, Indian subsidiary of the assessee, viz, Tata NYK Indian Shipping (India) Pvt. Ltd. (NYK India) provides business support services to the assessee for servicing the Indian market. He observed that both the assessee and the Indian subsidiary are under the supervision of the same Director Sh. Dinesh Shastri who has been a top ranking executive in the Tata Group for more than three decades. He further observed that as per the website of the assessee, its operation head and HR head are based in India. Therefore, setting up of a company

in Singapore for the purpose of carrying out shipping operation, which is centered on India is contrary to facts of the case. Learned CIT observed that the treaty benefits are available to a person who is a tax resident of either of the two contracting states. Referring to Article 4(1) of India–Mauritius treaty, learned CIT observed that the resident of a contracting State shall be the one who is liable to tax under the laws of that State. He observed, the liability to tax for treaty purpose refers to full or a comprehensive liability and not liability that is limited under the domestic law of the relevant contracting State. Referring to Commentaries on UN model and OECD model, he observed that fiscally transparent entities are excluded from the benefits of tax treaties. He observed that the income from shipping activity is exempt from tax in Singapore as per the domestic law of the country. Therefore, the assessee cannot be treated as tax resident of Singapore as it is not liable to tax in Singapore. Thus, the assessee is not entitled to any tax treaty benefit. Having held so, he further observed that the assessee cannot be considered to be a legitimate resident of Singapore. After referring to Base Erosion and Profit Shifting (BEPS) reports in

relation to treaty abuse, he observed that India has ratified Multilateral Instrument (MLI) which came into force in India from 1st October, 2019 and provisions will have effect on India's DTAAs from financial year 2020-21 onwards. He submitted, once MLI provisions are given effect, tax residents using treaty shopping to avoid payment of legitimate tax would no more be entitled to treaty benefits. He observed, as per the details available, assessee's income is primarily from Tata group companies for transportation of goods from various places in the world to Indian ports. The operation of shipping activities is managed and supervised by NYK India. There is rarely any sourcing and transportation of goods from Singapore to Indian ports. Therefore, there is no commercial rationale of incorporation of assessee in Singapore as a joint venture of Indian and Netherlands based companies. Thus, according to him, the interposing of assessee is only for getting benefits under India–Singapore DTAA. He observed, there is a back to back arrangement as receipts derived from Indian ports are immediately passed on to other group entities in the form of lease rental payments resulting in minimal taxation, even at the level of

Singapore. He observed, the assessee has employed a sale and lease back arrangement to create artificial payments in the form of lease rental with an objective to reduce tax liability in Singapore. Vessels, which are actually owned by the assessee are sold to group entities and immediately leased back. This is done to maintain commercial status quo while reducing the taxability by making a tax deductible lease rental payment as the assessee becomes a lessee. At the level of lessor the lease rental income is offset by the claim of depreciation being the owner of the asset after execution of sale and lease back arrangement. In this process, the tax liability is reduced under the domestic laws of both countries. He observed, since benefits similar to Article 8 of India–Singapore DTAA is not available either under India–Netherlands DTAA or India–Japan DTAA and shipping income is also differently treated in India, Netherlands and Japan, the assessee has been interposed as a company in Singapore to derive maximum tax benefit. Thus, he held that the arrangement lacks commercial reasoning. Ultimately, learned CIT held that the assessee is not entitled to the benefits of India–Singapore DTAA due to the following reasons:

1. The scheme of arrangement employed by the assessee is tax avoidance through treaty shopping mechanism.
2. The assessee company is not a tax resident for the purposes of tax treaty between India – Singapore as it does not satisfy the condition of "liable to tax".
3. The TRC is not sufficient to establish the tax residency if the substance establishes otherwise.
4. There is no commercial rationale of establishment of assessee company in Singapore.
5. The control and management of the assessee company is not conclusively established in Singapore in the light of the facts.

6. Thus, according to him, once the treaty benefits are not available, the receipts of the assessee have to be taxed under the Income Tax Act by applying the source rule as per section 5(2) read with section 9 of the Act. Having held so, he proceeded to determine the nature of income at the hands of the assessee. In this context, he observed that the shipping income earned by the assessee cannot be treated as business income as the definition of royalty under Explanation 2(iva) provides, the use or right to use any industrial, commercial or scientific equipment as royalty. He observed, since, the receipts of the assessee from Indian customers is for letting out of vessels, therefore, they have to be treated as royalty income, once, section 44B would not apply as its scope

extends only to business income. Thus, basis the aforesaid reasoning, he held the assessment order to be erroneous and prejudicial to the interest of Revenue and directed the Assessing Officer to treat the receipts of USD $13,62,19,221/- (Rs.903,54,20,929/-) as income from royalty and taxed it at the rate of 10% on gross basis. Accordingly, he passed the order.

7. Opening his argument, Sh. Ajay Vohra, learned Senior Counsel appearing for the assessee submitted that assessee's case was selected for limited scrutiny to examine, whether the value of international transaction in services have been correctly shown in Form 3CEB and return of income. In this context, he drew our attention to notice dated 19.07.2017 issued under section 143(2) of the Act. He submitted, as per Instruction no. 20 of 2015, dated 29.12.2015 issued by Central Board of Direct Taxes (CBDT), in limited scrutiny assessments, the inquiry by the Assessing Officer would remain confined only to the specific issues for which the case has been picked up for scrutiny. Drawing our attention to Instruction no. 5 of 2016, dated 14.07.2016 issued by CBDT, learned counsel submitted that the limited scrutiny assessments

should be restricted to the relevant parameters that form the basis for selecting the case for scrutiny. He submitted, by Instruction dated 30.11.2017 CBDT issued further directive on scope of limited scrutiny and re-emphasized that the Assessing Officer cannot travel beyond the issues for which the case was selected for scrutiny. He submitted, strictly adhering to directives of the CBDT in the Instructions issued, the Assessing Officer issued questionnaire along with notice under section 142(1) of the Act by calling for information in relation to the limited scrutiny issues. He submitted, in response to the questionnaire issued by the Assessing Officer, the assessee furnished a detailed reply with supporting evidences and details called for by the Assessing Officer. He submitted, since, the assessee had entered into international transactions with AEs, the Assessing Officer made a reference to the TPO in terms of section 92CA(1) of the Act to examine the arm's length nature of such transactions. He submitted, the TPO passed an order under section 92CA(3) of the Act holding that the international transactions referred in Form 3CEB are at arm's length requiring no further transfer pricing adjustments. In view of the order passed by the

TPO, the Assessing Officer proceeded to complete the assessment under section 143(3) of the Act accepting the income returned by the Assessee. He submitted, since, the mandate of the Assessing Officer was to examine the limited scrutiny issues and he could not have travelled beyond them in view of the CBDT Instructions/directions, under the garb of revisionary jurisdiction, the CIT cannot venture into examining issues, which the Assessing Officer could not have examined in the assessment proceedings due to the mandate of limited scrutiny assessment. Thus, he submitted, what the Assessing Officer could not have done directly, cannot be done indirectly by the CIT in revisionary jurisdiction. In support of such contention, he relied upon the following decisions:

1. *Paul John, Delicious Cashew Co. Vs. ITO, 1 SOT 889 (Cochine Trib.)*
2. *CIT Vs. Shri Paul John Delicious Cashew Co., 200 Taxman 154*
3. *Antariksh Realtors Private Ltd. Vs. ITO, ITA No.1626/Mum/2020, dated 22.10.2021*
4. *Balvinder Kumar Vs. PCIT, 187 ITD 454 (Del. Trib.)*
5. *Rajani Venkata Naga Annavarapu Vs. PCIT, ITA No.1817/Del/2020, dated 16.06.2021 (Del.- Trib.)*
6. *Gift Land Handicraft Vs. CIT, 108 TTJ 312 (Del.)*

7. *Aryadeep Complex (P.) Ltd. Vs. PCIT, [2022] 219 TTJ 735 (Raipur)*
8. *CIT Vs. Software Consultants, 341 ITR 240 (Delhi)*
9. *Simbhaoli Industries Ltd. Vs. DCIT, 78 ITD 161 (SB).*

8. He submitted, the CIT has committed gross jurisdictional error in invoking powers under section 263 of the Act in respect of issues which are beyond the scope of limited scrutiny for which the assessment proceedings were initiated. Thus, he submitted, the Revision Order passed is nonest and bad in law. Without prejudice, he submitted, the assessment order passed accepting the return of income cannot be held to be erroneous and prejudicial to the interest of the Revenue only for not bringing to tax income from shipping in international traffic. He submitted, as per Article 8 of Indian–Singapore DTAA, income earned from shipping business in international traffic is taxable only in the country of residence of the person/entity earning such income. He submitted, since, Assessing Officer's decision accepting assessee's claim is in consonance with Article 8 of India–Singapore DTAA, the assessment order cannot be held to be erroneous. Referring to the decision of the Hon'ble Supreme Court in case of Malabar Industries Co. Vs. CIT, 243 ITR

83 (SC), learned counsel submitted, for invoking section 263 of the Act twin conditions of the order being erroneous and at the same time being prejudicial to the interest of the Revenue have to be satisfied. He submitted, since, the assessee is a tax resident of Singapore having valid TRC, Assessing Officer's decision in allowing exemption in respect of income from shipping business in international traffic under Article 8 of the Treaty cannot be said to be erroneous and prejudicial to the interest of Revenue. Drawing our attention to Article 8 and specifically to the definition of the expression "international traffic", he submitted, as per the treaty, transportation income from movement of cargo from one port in India to a port outside India (outward freight) and income from movement of cargo from one port outside India to a port in India (inward freight) derived by a resident of Singapore is exempt from tax in India. Whereas, he submitted, income from movement of cargo from one port in India to another port in India is not covered under Article 8 of the treaty. Hence, the assessee has offered such income to tax in India under the provision of section 44B of the Act, which is applicable to income from shipping business. In support of

such contention, learned counsel relied upon the following decisions:

1. *LR2 Management KS Vs. ITO, 174 TTJ 441 (Rajkot Trib.)*
2. *Pearl Logistics & Ex-IM Corporation Vs. ITO [2017] 80 taxmann.com 217*
3. *Interworld Shipping Agency LLC Vs. DCIT, 189 ITD 213 (Mum. Trib.)*
4. *DDIT Vs. Cia De Navegacao Norsul, 27 SOT 316 (Mum.-Trib.)*

9. Proceeding further, he submitted, since, the assessee is a tax resident of Singapore and is holding a valid TRC issued by Singapore Tax Authorities, the assessee is entitled to benefit of India–Singapore DTAA. He submitted, the TRC issued by another sovereign State has to be accepted as evidence of residency of a particular assessee and the revenue cannot go behind the TRC to question the residential Status. In this regard, learned counsel referred to the clarification dated 01.03.2013, issued by the Finance Ministry. Further, he relied upon the following decisions:

1. *Serco (BPO) (P) Ltd. Vs. AAR, [2015] 60 taxmann.com 443*
2. *Blackstone Capital Partners (Singapore) VI FDI Three Pte. Ltd. Vs. ACIT in WP(C) No.2562/2022, judgment dated 30.01.2023*

10. Proceeding further, learned counsel submitted, the assessee is a tax resident of Singapore since its incorporation in 2007 and has been filing its tax returns in Singapore. He submitted, the tax returns filed by the assessee have been accepted by the Singapore Tax Authorities all along without any adverse decision/remark, either regarding the activities or the authenticity of the assessee. In this regard, he drew our attention to tax returns filed in Singapore. He submitted, when the Singapore Authorities have not made any allegation with respect to non-fulfillment of any condition mentioned under Article 4 of Indian – Singapore DTAA, no question can be raised by the CIT regarding the residency of the assessee. He submitted, as per the legal requirement in Singapore, the assessee is regularly filing its annual return with Accounting and Corporate Regulatory Authority (ACRA) in Singapore. Further, the assessee is also required to obtain audited local business spending report as per the directive issued by Maritime and Port Authorities of Singapore (MPA) and assessee has obtained such report from the auditor for the year under consideration. He submitted, the entire shipping operations of the assessee are managed from Singapore

and all key managerial personnel, i.e., Managing Director, Executive Director, Chief Financial Officer, and Chartering Operation & Legal Head are based in Singapore. In this regard, he drew our attention to the list of key managerial persons with address, designation and National Registration Identity Card number of Singapore. He submitted, the assessee owns substantial fixed assets of USD 260,625,000/- (Rs.1,728 crores) in Singapore and majority of which pertain to vessels. In this context, he drew our attention to the balance sheet and notes attached to the balance sheet. Thus, he submitted, it cannot be said that the assessee is not a tax resident of Singapore and is not having any commercial substance. He submitted, in past assessment years, assessee's income from international traffic has been held to be not taxable in India and this is the first year in which, the CIT has held that income derived from shipping business in international traffic is liable to tax in India. He submitted, when the facts in this assessment year are identical, the Revenue cannot be permitted to take a different view. In this context, be relied upon a decision of the Hon'ble Supreme

Court in case of Pr. CIT Vs. Maruti Suzuki India Ltd., [2019] 416 ITR 613 (SC).

11. Without prejudice, he submitted, the question whether the benefit of India–Singapore DTAA is available to the assessee or not, is a highly debatable issue, hence, outside the scope/ambit of section 263 of the Act. In this context, he relied upon a decision in case of CIT Vs. DLF Ltd., 350 ITR 555 (Delhi HC). He submitted, even assuming for argument sake but not accepting that the assessee is not entitled to treaty benefits in respect of income from shipping business in international traffic, such income cannot be taxed as royalty under section 9(1)(vi) of the Act. He submitted, when there is a special provision under the Act in shape of section 44B, which provides for computing profits and gains of shipping business of nonresident, it will override the general provision and income has to be computed under the special provision. He submitted, as per section 172 of the Act, in cases where treaty exemptions were not available, income from shipping business has to be taxed at the rate of 7.5% of the freight receipts. He submitted, the revisionary order has given rise to a situation where the income

earned from shipping business has been taxed in three different manners. He submitted, income from coastal shipping has been taxed under section 44B of the Act. Whereas, the income from inward shipping has been taxed as royalty under section 9(1)(vi) of the Act and income from outward shipping has not at all been brought to tax in India. He submitted, different treatment given to income derived by the assessee form shipping business shows inconsistency in the order passed under section 263 of the Act. Thus, he submitted, the order passed under section 263 of the Act, being wholly without jurisdiction, should be quashed.

12. Strongly relying upon various observations made by learned CIT in the revision order, learned Departmental Representative submitted that the assessee company has been set up in Singapore only for the purpose of obtaining tax advantage under India–Singapore DTAA. He submitted, considering the fact that the assessee is a joint venture between an Indian company and a Netherlands based company, which in turn is a subsidiary of Japanese company, ideally, the said venture could have been set up at Japan or Netherlands or India, as commercial outcome should be

similar irrespective of the place of operation. Therefore, choosing the operation base in Singapore by incorporating the joint venture lacks commercial reasoning. The primary reason for doing so is to avoid payment of legitimate tax by availing a favourable tax position under India–Singapore DTAA as well as under domestic tax regime of Singapore. He submitted, assessee's income is primarily from Tata group companies for transportation of goods from various places in the world to Indian ports. Further, the operation of shipping activities is managed and supervised by Tata NYK India, an Indian subsidiary of the assessee company. Thus, referring to India–Netherlands DTAA and India–Japan DTAA, learned Departmental Representative submitted, since, the effective management of shipping activity is not controlled from Netherlands, the income from shipping business would be liable for taxation in India as royalty income. Similarly, scope of Article 8 of India–Japan DTAA is extremely limited and does not include the nature of profits as derived by the assessee in the present case. In order to avoid the payment of legitimate tax, assessee company was interposed in Singapore to get the benefit of India–Singapore DTAA. More so,

considering the fact that shipping income is not subjected to tax in Singapore. Therefore, it is a classic case of treaty shopping, which is contrary to the object of DTAA. He submitted, the arrangement in interposing the assessee in Singapore lacks commercial substance. As regards assessee's submission regarding enlarging the scope of limited scrutiny in revision proceeding, learned Departmental Representative submitted that though, the assessee had substantial related party transactions, however, in From 3CEB report, the assessee has not reported all the transactions. He submitted, in course of assessment proceedings, the Assessing Officer failed to call for the necessary details and examine whether all the transactions with related parties/AEs were reported by the assessee in Form 3CEB report and return of income. He submitted, while international transactions with AEs during the year aggregated to more than Rs. 1141 crores, in Form 3CEB report, the assessee declared transaction of Rs.63.5 crores only. He submitted, since, the Assessing Officer failed to examine the issue in terms with limited scrutiny, the assessment order is erroneous and prejudicial to the interest of Revenue. Hence, validity of the proceedings

initiated under section 263 cannot be challenged. Further, he submitted, since, the assessee has been interposed as a company in Singapore only for the purpose of availing benefit under India–Singapore DTAA and there is back to back arrangement between the assessee and other group entities for remitting the shipping income as lease rent, the assessee is merely a conduit company and entire arrangement lacks commercial substance and has been created as a tax avoidance structure. Therefore, the assessee is not entitled to treaty benefits. He submitted, in course of assessment proceeding, the Assessing Officer has failed to examine this aspect. Thus, he submitted, learned CIT has validly exercised his jurisdiction under section 263 of the Act. Hence, the order passed should be upheld. In support, he relied upon the following decisions:

1. *Rampyari Devi Saraogi vs CIT*
   67 ITR 84(SC)
2. *CIT vs Indian Express (Mdurai) Pvt. Ltd.*
   140 ITR 705(Mad)

13. In rejoinder, learned counsel for the assessee submitted, neither in the show-cause notice, nor in the order passed under

section 263 of the Act, the CIT has sought to make out a case that the Assessing Officer had erred in not examining or verifying the limited scrutiny issue, i.e whether the value of international transactions in services have been correctly shown in Form 3CEB and return of income. He submitted, the CIT has invoked jurisdiction under section 263 of the Act on extraneous grounds by bringing to tax income from shipping business, that too, only with regard to inward freight. Thus, he submitted, at this stage, the Revenue cannot add/supplement fresh reasons or furnish new grounds for justifying the invocation of revisionary power. He submitted, the show-cause notice issued under section 263 of the Act is not on the basis that the assessee has not correctly reported its income in Form 3CEB and return of income. Thus, he submitted, the Revenue cannot provide a new dimension to revisionary proceedings as it is not permissible at this stage to substitute the reasons for which the revisionary proceedings were initiated. In case, it is done, it will amount to exercising revisionary jurisdiction to revise the order of CIT. In this regard, he relied upon the following decisions:

1. *CIT Vs. Jagadhri Electric Supply & Industrial Co. [1983] 140 ITR 490 (P&H)*
2. *DIT Vs. Shree Nashik Panchvati Panjrapole, 397 ITR 501 (Bom.)*

14. He submitted, since, the Tribunal has no power to enhance the assessment and take back benefits granted by the Assessing Officer, the submissions made by the Revenue to modify the order of CIT to enlarge the scope of direction of CIT in the order passed under section 263 of the Act is impermissible. He submitted, the submissions of learned CIT(DR) that the shipping income from inward and outward freight was derived out of the transactions with AEs in terms of section 92A of the Act is totally misplaced in as much as it is trite law that related parties under the relevant accounting standard and under the Act are separately defined and cannot be painted with the same brush. He submitted, AE has to be determined in terms of sub-section (1) and (2) of section 92A, both read together. In support of such contention, he relied upon the following decision:

1. *PCIT Vs. Page Industries Ltd., 431 ITR 409 (Kar.)*
2. *Hero MotoCorp Ltd. Vs. ACIT, ITA No.1980/Del/2012, dated 11.06.2013.*

15. He further submitted, transactions between two non-residents which are exempt from taxation are not required to be reported in form 3CEB. In support of such contention, he relied upon the following decisions:

1. *Goodyear, 334 ITR 69 (AAR), affirmed by the Delhi HighCourt in 360 ITR 159*
2. *Vanenburg Group, 289 ITR 464)AAR)*
3. *Dana Corp, 321 ITR 178 (AAR)*
4. *Dow Agro, 380 ITR 6668 (AAR)*

16. We have patiently and carefully considered the rival submissions made, both orally and in writing by the parties. We have also applied our mind to the judicial precedents cited before us. In the present appeal, we have been called upon to examine the issue as to whether learned CIT was justified in holding the assessment order passed under section 143(3) of the Act to be erroneous and prejudicial to the interest of Revenue, so as to, subject it to proceedings under section 263 of the Act. As discussed earlier, the assessee is a tax resident of Singapore and holds a valid TRC issued in its favour by the Singapore Tax Authorities. It is also a fact that the assessee is engaged in the business of owning,

operating and chartering of ships to carry dry-bulk and break-bulk cargo. In other words, the assessee operates ships in international traffic. Assessee's case for the assessment year under dispute was selected for limited scrutiny to examine whether the value of international transactions in services have been correctly shown in form 3CEB and return of income. As per section 92E of the Act, a person entering into international transaction or specified domestic transaction in a particular previous year shall have to obtain a report from an accountant in a prescribed form duly signed and verified by the concerned accountant setting forth the information as prescribed in the form. Rule 10E prescribes that the report from the accountant has to be furnished in Form 3CEB. Section 92B defines the expression "international transaction" to mean a transaction between two or more AEs. In other wards in terms of section 92E read with rule 10E, an assessee entering into international transaction with AEs has to furnish an audit report in From 3CEB reporting all information relating to such international transaction.

16.1 It is observed, in due compliance with section 92E read with rule 10E of the Act, the assessee had furnished the Audit Report in From 3CEB reporting international transactions with AEs at Rs.63,45,14,259/-. Out of which, an amount of Rs.1,92,59,093/- was received by the assessee from freight services provided to an AE. Whereas, the rest of the amount was paid towards services availed from the AEs. Since, the assessee had reported international transactions with AEs, the Assessing Officer made a reference to the TPO for examining the arm's length nature of the international transactions with the AEs. The TPO passed a clean order under section 92CA(3) of the Act accepting the transactions with the AE's to be at arm's length. In pursuance to the order of the TPO, the assessee completed the assessment under section 143(3) of the Act accepting the return of income.

17. At this stage, we must observe, in course of assessment proceeding, the Assessing Officer had issued a notice under section 143(2) of the Act on 19.07.2017 requiring the assessee to furnish the requisite information in respect of the limited scrutiny issues. Subsequently, the Assessing Officer issued a notice under section

142(1) of the Act on 01.04.2019 along with a questionnaire to produce the following information/documents:

1. *Furnish a detailed note on the business or profession carried out in India or outside India.*
2. *Furnish copy of Income Tax Computation, Profit & Loss Accounts, Balance Sheet, Audit Report in form 3CA/3CB/3CD, 3CEB (u/s 92E r.w.r. 10E) etc. (if applicable) for the last two years.*
3. *Furnish copy of Tax Residency Certificate.*
4. *Details of invoices raised to the Indian Customers/Income received during the relevant year.*
5. *Please furnish the nature of receipts along with the total amount received against these services during the year under consideration.*
6. *Please furnish whether value of international transactions in services have been correctly shown in Form 3CEB and return of income and correctly offered for tax for the year under consideration.*

18. In response to the query raised in the questionnaire, the assessee furnished its reply on 13.05.2019. The reasons for which the Revisionary Authority issued the show-cause notice under section 263 of the Act have been delineated in the earlier part of this order. In the revision order the Revisionary Authority has framed the following issues:

> "The issues are primarily two fold. First, whether the assessment order passed by the AO without calling for relevant details and making necessary verification/inquiry would require revision under section 263 of the Act being erroneous and prejudicial to the interest of revenue. Second, whether the income from shipping in international traffic is exempt from taxation in India in view of Article 8 of India–Singapore DTAA. Third, whether the shipping income from coastal traffic is liable for taxation under section 44B of the Income-tax Act."

19. Contents of the show cause notice issued under section 263 of the Act and the issues framed make it evident that there is no allegation of misreporting by the assessee in Form 3CEB or the return of income. The allegation is of not making any enquiry/verification. In this regard, we must say that learned CIT has completely misconceived the facts. A perusal of Form 3CEB report, a copy of which is at page 249 of the paper-book, clearly reveals that out of the amount of Rs.63,45,14,259/- reported by the assessee, only an amount of Rs.1,92,59,093/- represents income of the assessee and the rest of the amounts are payments made by the assessee. In fact, these facts are clearly reflected in the order passed by the TPO. Whereas, learned CIT has assumed that aggregate amount of transactions reported in Form 3CEB represents assessee's receipts.

20. Keeping in perspective the aforesaid facts, if we examine the scope of limited scrutiny, it can be seen that the Assessing Officer has confined himself to the mandate given to him as per the norms of limited scrutiny. The questionnaire issued by the Assessing Officer in course of the assessment proceeding bears testimony to this fact. When the TPO has accepted the transactions with the AEs to be at arm's length, the Assessing Officer had nothing more to do. Moreover, when the assessee is a tax resident of Singapore holding a valid TRC issued by the Singapore Tax Authorities, the Assessing Officer had to grant benefit to the assessee as per the treaty. At the stage of assessment, the Assessing Officer certainly could not have enlarged the scope of limited scrutiny to examine, whether the assessee is entitled to treaty benefits or not, when the TRC is a valid piece of evidence available before him. Thus, when the Assessing Officer could not have examined the issues raised by learned CIT traversing beyond the scope of limited scrutiny, learned CIT cannot hold the assessment order to be erroneous and prejudicial to the interest of Revenue for non examination of issues, which are beyond the mandate given to the Assessing Officer. Therefore, what the

Assessing Officer could not have done directly in view of limited scrutiny norms, in the garb of revisionary powers under section 263 of the Act, learned CIT cannot do indirectly by enlarging the scope of limited scrutiny. In this regard, we rely upon the decision of Coordinate Bench in case of Antariksh Realtors Private Ltd. (supra) and Balvinder Kumar (supra). Therefore, the Assessing Officer having confined himself to the issues of limited scrutiny, the Assessment Order passed cannot be considered to be erroneous and prejudicial to the interest of Revenue.

21. Even otherwise also, learned CIT has misconceived the facts and misapplied the legal position while concluding that the assessee is not entitled to treaty benefit as it has been interposed as a conduit company for treaty shopping purpose. In this regard, the allegation of learned CIT is 75% of assessee's receipts from shipping business is centered around India. Further, the assessee is a JV of Indian company and a Netherlands based company, which is a subsidiary of Japanese company. Therefore, there was no commercial rationale for incorporating Assessee Company in Singapore. Learned CIT has alleged that only for the purpose of

availing the benefits under India-Singapore Treaty the assessee has been set up in Singapore as similar benefit could not have been availed by the assessee either under India–Netherlands DTAA or India–Japan DTAA. Having regard to the aforesaid allegation of learned CIT, we must observe that the assessee company was incorporated in Singapore in the year 2007 and continued its business since then. It is also a fact that the assessee holds substantial fixed assets in Singapore amounting to Rs.1728 croers, out of which, an amount of Rs.1324 crores pertains to vessels. It is also a fact that Singapore has grown into a large shipping hub in the world. Therefore, there is valid reason for setting up of the assessee company in Singapore for shipping business.

22. In any case of the matter, the Revenue certainly cannot control the mode and manner in which the assessee wants to carry on its business activity. If the assessee is constituted within a legal framework and its activities are legal, Revenue certainly cannot step into the shoes of the assessee to question the business prudence. It is also relevant to observe, though, learned CIT has made serious allegations regarding scheme of tax avoidance, the arrangement

lacking commercial rationale and substance, conduit company, avoiding payment of tax in Singapore and Netherlands etc., however, these are found to be unilateral allegations without any corroborative evidence. Facts and materials on record reveal that the assessee regularly files tax returns before the tax authorities in Singapore. It also files reports before the corporate affairs authorities. There is no allegation by any of the authorities in Singapore or Netherlands against the assessee. That being the case, the allegations made by learned CIT that the assessee has not paid legitimate tax dues in Netherlands and Singapore are unsubstantiated, inasmuch as, are either baseless or imaginary.

23. One more allegation made by the CIT to hold that the assessee cannot be considered to be a tax resident of Singapore is because its key person is also a key person in Tata NYK India. However, from the materials placed before us, we find the aforesaid allegation of learned CIT to be baseless. From the list of key managerial personnel furnished in the paper-book it is observed that all key managerial personnel are based in Singapore and were holding National Registration Identity Card issued by the Government of

Singapore. It is also relevant to observe, whether the assessee is a tax resident of Singapore or not is a highly debatable issue and has to be decided based upon evidence gathered through proper investigation. Conclusion on these issues cannot be reached on conjectures, surmises, doubts and suspicion. Therefore, not only they are outside the scope of limited scrutiny, but, based on such debatable issues proceedings under section 263 of the Act cannot be invoked. Further, learned CIT has observed that the assessee cannot be treated as tax resident of Singapore as it is not liable to tax in Singapore. Reason being, shipping income is exempt from taxation in Singapore. In this context he has referred to Article 4(1) of the India-Mauritius DTAA. However, he has completely ignored the fact that unlike India-Mauritius Treaty, there is no such condition that a person liable to tax can only be a resident as per definition of resident under Article 4 of India-Singapore DTAA. In any case, whether a particular person is a resident of a particular country or not is a highly debatable issue requiring interpretation of treaty provisions. It is more so in a case where the assessee is holder of valid TRC as TRC is recognized to carry proof of residency.

24. As could be seen, holding the assessee not to be a tax resident of Singapore, learned CIT has observed that the assessee is liable to be taxed under the domestic law. Having held so, he has held that the receipts from shipping business in international traffic cannot be treated as business profit to be taxed under section 44B of the Act. He has held, since, the assessee leases vessels and earns lease rentals, such receipts are to be treated as royalty under section 9(1)(vi) read with explanation (2)(iva), as, it amounts to equipment royalty. While coming to such conclusion, learned CIT has observed that the assessee does not own any ships/vessels but has taken them on lease from NYK Japan through its subsidiary based in Netherlands. On perusal of record, including the balance sheet of the assessee, we find the aforesaid observations contrary to facts and materials on record. As per the balance sheet of the assessee, the assessee owns substantial number of vessels and large numbers of vessels are under construction. It is further observed that contrary to the allegation of learned CIT, the assessee has not entered into any back to back arrangement, wherein, receipts derived by it from Indian customers has been passed on to other

group entities in the form of lease rent. Further, the assessee has not entered into any transaction of sale and lease back of vessels in the year under consideration. It is also evident that the assessee has not paid any lease rent to NYK Netherlands and even NYK Netherlands has not paid any dividend to NYK Japan. Therefore, the allegations of learned CIT are not borne out from record. As per Article 8 of India–Singapore DTAA receipts from operation of ships and aircrafts in international traffic is taxable in the country of residence of the recipient. Therefore, as per the treaty provisions, amounts received by the assessee from operation of ships in international traffic would be exempt. Therefore, when the TRC was available before the Assessing Officer, in a way, he was justified in allowing benefit to the assessee under Article 8 of the Treaty. Though, the view of the Assessing Officer in granting benefit under treaty provisions may not be the only view but certainly it is one of the possible views under the given facts and circumstances.

25. In any case of the matter, whether the assessee is entitled to treaty benefit or not is a highly debatable issue, hence, on such an

issue an order cannot be considered to be erroneous and prejudicial to the interest of Revenue.

26. Lastly, we will deal with the decision of learned CIT in treating the receipts from operation of ships in international traffic to be in the nature of royalty income. As discussed earlier, the assessee owns substantial number of vessels for transportation of goods from the ports outside India to ports in India and vice versa. Invoices raised by the assessee demonstrate that the assessee charged fee for transportation of goods and not towards leasing of the vessels. Therefore, the finding of learned CIT that the receipts from the shipping business is in the nature lease rental, hence royalty, appears to be contrary to facts on record. At this stage, we must observe, the assessee had three types of shipping income in the year under consideration, viz., income from coastal shipping, income from inward freight and income from outward freight. Insofar as, income from coastal shipping is concerned, the assessee has offered it to tax under section 44B of the Act. Whereas, income from inward freight and outward freight was claimed as exempt under Article 8 of the treaty. Interestingly, learned CIT has held the inward freight

income as royalty and has directed the Assessing Officer to tax such income amounting to Rs.903,54,20,929/- by applying the rate of 10% on gross basis. However, in respect of income from coastal shipping and outward freight, learned CIT has accepted the claim of the assessee as his specific direction is only with regard to the income from inward freight. Further, though, in the show cause notice issued under section 263 of the Act learned CIT has observed assessee's receipts are in the nature of FTS, however, ultimately he has treated a part of the receipts as royalty. Thus, there are gross inconsistencies in the approach of learned CIT. A conjoint reading of the show cause notice as well as order passed under section 263 of the Act coupled with the fact that ultimately he has restricted his directions only to inward freight income, thereby, accepting assessee's claim under section 44B in respect of income from coastal shipping and claim of exemption under Article 8 of the treaty in respect of income from outward freight amounting to Rs.56,13,86,432/-, reveals the mechanical approach of learned CIT in invoking jurisdiction under section 263 of the Act. Meaning thereby, various inconsistencies in the approach of learned CIT

gives an impression that he himself was not sure about the nature and character of shipping income earned by the assessee.

27. Though, before us, learned Departmental Representative made a submission that the deficiencies/shortcomings in the order passed under section 263 of the Act can be made good by the Tribunal, however, we are not impressed with such argument. In our view, we cannot assume the role of a second Revisionary Authority to review the order of learned CIT and fill up the lacunae in the said order. It is relevant to observe, in course of hearing, learned Departmental Representative has made extensive argument on the issue of treaty shopping, non-reporting of transactions with AEs in Form 3CEB report and various other issues. However, we are not able to take cognizance of such arguments as such issues were neither dealt with by learned CIT in the show-cause notice, nor in the revision order, hence, are extraneous for the purpose of adjudicating the validity of the order passed under section 263 of the Act. In case of DIT vs Shree Nashik Panchvati Panjrapole (supra), the Hon'ble Bombay High Court has held that an appeal arising out of an order passed under section 263 of the Act has to

be decided only on the grounds based on which the CIT exercised powers of revision under section 263 of the Act. Therefore, at this stage, learned Departmental Representative cannot improve upon the basis and reasoning on which learned CIT has assumed jurisdiction under section 263 of the Act and passed the impugned order. In any case of the matter, whether a particular entity is an AE depends upon fulfillment of both conditions of section 92A and is a matter of deep enquiry and investigation. Neither learned CIT has made any allegation that all transactions of the assessee are coming within the definition of "international transaction" nor there is any specific allegation that such transactions are with AEs. Rather, it is evident, the major factor for initiating proceeding under section 263 of the Act is the assessment order passed for assessment year 2018-19, which, in any case, was posterior to completion of assessment for the impugned assessment year.

28. Insofar as, the judicial precedents cited before us by learned counsel for the assessee, though, we do not find the need to deliberate in detail on them, suffice to say, they support the view expressed by us in foregoing paragraphs. Thus, in ultimate

analysis, we hold that learned CIT was not justified in assuming jurisdiction under section 263 of the Act to revise the assessment order as the assessment order cannot be considered to be erroneous and prejudicial to the interest of revenue.

29. In view of the aforesaid, we set aside the impugned order of learned CIT passed under section 263 of the Act and restore the assessment order. Before parting, we must observe, our discussions, observations and findings in foregoing paragraphs are purely in the context of validity of exercise of revisionary jurisdiction within the contours of section 263 of the Act.

30. In the result, the appeal is allowed.

Order pronounced in the open court on 9th March, 2023

Sd/-	**Sd/-**
(PRADIP KUMAR KEDIA)	**(SAKTIJIT DEY)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 9th March, 2023.
RK/-
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi