आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ,L,मुंबई ।

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "L", MUMBAI

श्री अमित शुक्ला, न्यायिक सदस्य **एवं**

श्री अश्वनी तनेजा, लेखा सदस्य**,** के समक्ष

Before Shri Amit Shukla, Judicial Member, and
Shri Ashwani Taneja, Accountant Member

ITA No.4122/Mum/2013
Assessment Year: 2007-08

Orient Shipping Services LLC 1406/107 Technopolis Knowledge Park, 1st Floor, Mahakali Caves Rd, Chakala Andheri(E) Mumbai-400015	बनाम/ Vs.	Addl. DIT (IT) RG 4 Scindia House, Ballard Estate, Mumbai-400038
(Appellant)		(Respondent)
P.A. No.AAACO3855C		

Appellant by	Shri Jitendra Jain (AR)
Revenue by	Shri Jasbir Chauhan (CIT-DR)
सुनवाई की तारीख/**Date of Hearing:**	**07/11/2016**
आदेश की तारीख /**Date of Order:**	**18/11/2016**

आदेश / O R D E R

Per Ashwani Taneja (Accountant Member):

This appeal has been filed by the assessee against the order of Dispute Resolution Panel (DRP)-II, Mumbai passed u/s 144C(v) of the Act, as well as final assessment order passed by the AO dated 26.04.2013 passed u/s 143(3)/144C(13) of the on the following Grounds:

"The Joint Director of Income Tax (International Taxation), Range-4. Mumbai (hereinafter referred to as the AO) erred in holding that freight income of Rs. 1,68,39,328 (USS 3,66,070) earned by the Appellants from slots taken on hire ("slot hire charges") during the year were not covered by the advance ruling dated 29.10.1997 obtained by the Appellants. The AO further erred in holding that the slot hire charges are not covered under Article 8 of the Double Taxation Avoidance Agreement between India and UAE (DTAA) and accordingly taxed 7.5% thereof amounting to Rs.12,62,942 as the Appellants business income for the above year by treating the Appellants agents M/s. Samsara Shipping Private Limited as their Permanent Establishment (PE). The Appellants submit as under:
i) that "slot hire charges" being covered by Article 8 of the DTAA, are not liable for tax in India as per ruling of the Authority of Advance Ruling (AAR) in the Appellants own case (Order dated 29.10.1997 in AAR no.356 of 1997).
ii) that "slot hire charges" received by the Appellants during the year are in the nature of income earned from the operation of ships in international traffic and is accordingly covered by Article-8 of the DTAA.
iii) that without prejudice to the above, even assuming that the said income from "slot hire charges" is not covered by Article 8 and is in the nature of business profits covered by Article 7 of the DTAA, the same cannot be brought to tax in India as the Appellants do not have a PE in India.
iv) that, M/s. Samsara Shipping Private Limited, are the independent agents of the Appellant in India and do not constitute a PE of the Appellants under the DTAA as held by the AO as none of the conditions in Article 5 is satisfied.

2. During the course of hearing, arguments were made by Shri Jitendra Jain, Authorised Representatives (AR) on behalf of the Assessee and by Shri Jasbir Chauhan, Departmental Representative (CIT-DR) on behalf of the Revenue.

3. The main thrust of the arguments made by the Ld. Counsel during the course of hearing was same as has been taken in

the grounds of appeal reproduced above i.e. "slot hire charges" received by the assessee was covered by Article 8 of the Indo UAE DTAA, and thus not liable to tax in India as per ruling of the Authority of Advance Ruling (AAR) in the assessee's own case given vide order dated 29.10.1997 in AAR No.356 of 1997. But the DRP as well as AO wrongly observed that no ruling was given by the AAR with respect to the aforesaid income and wrongly held that the aforesaid income was not covered by Article 8 and wrongly taxed the same @ 7.5 % by treating the same as business income by treating assessee's agent namely M/s. Samsara Shipping Private Limited as its Permanent Establishment (PE).

3.1. It was further stated that this is second round of litigation and in the first round same grievance was raised before the Tribunal. The Tribunal vide its order dated 27th June, 2012 in ITA No.7307/Mum/2010 concurred with the submissions of the assessee and found that DRP was not correct in disregarding the order of AAR on this issue and therefore, matter was sent back to the file of DRP for passing a reasoned and speaking order after properly considering the order of AAR. Subsequently, the DRP passed fresh order to again commit the same mistake, as was done in the order passed in the first round, in reading the order of AAR. It was submitted that the Tribunal has already explained the scope of order of AAR in its earlier order. Therefore, impugned order of DRP is erroneous on facts. Ld. Counsel also read before us the order of AAR to impress upon the point that the impugned income has been already covered by the AAR in its order, and

therefore, this issue was no more open before the AO or DRP and their orders being illegal should be quashed.

3.2. Per contra, Ld. DR relied upon the orders of the lower authorities.

3.3. We have gone through the orders passed by the lower authorities, order passed by the Tribunal in the first round as well as order of the AAR. The brief background is that assessee is a limited company, incorporated in UAE and engaged in the business of shipping operations of running feeder line between India and Dubai. The assessee operates the feeder services using their own vessels as well as vessels taken on charter. During the year, the assessee had received "slot hire charges" of US $ 366070, which in terms of INR comes to Rs.1,68,39,220/-. The assessee's case before the AO was that its "slot hire charges" was from shipping operations and thus covered by Article 8 of the DTAA between India and UAE, and therefore, the same is not taxable in India. It was further brought on the record that in assessee's own case, the Authority of Advance Ruling (in short 'AAR') vide order dated 29-10-1987 has held that the assessee's business is from shipping operations and benefit of Article 8 of India and UAE DTAA is available to the assessee. Relying on the said decision of AAR, the assessee submitted before the AO that its freight receipts are not taxable in India. Alternatively, it was also submitted that it is not covered under Article 7 of DTAA as there is no PE in India and therefore, business income cannot be computed under Section 44B. The assessee referred the Draft Assessment Order proposing to tax the assessee in India,

under Section 144C(1) to the DRP. Before the DRP, the assessee submitted detailed objections on various aspects. The sum and substance of said objections was that:-

i) its case is squarely covered by the decision of AAR (AAR No.350/1957), order dated 29-10-1997, wherein the AAR has given a categorical ruling that the assessee is engaged in shipping operation and is covered under Article 8 of DTAA and, therefore, being a resident of UAE, no tax is payable in India from its shipping business. In this regard, various submissions and findings given by the AAR were referred to.

ii) The assessee's receipts from "slot hire charges" cannot be taxed as business income under Article 7 as it did not have any PE in India.

iii) Various decision were relied upon in support of the contention that "slot hire charges" received from charter of ships which in the nature of income derived from the operation of ships only.

iv) The assessee's shipping agent, namely, M/s Samsara Shipping Pvt. Ltd, is a completely independent agent within the meaning of Article 5, para 5 of the DTAA, hence, Article 7 read with Article 5 is not applicable in case of assessee.

4. The DRP vide its direction dated 16-8-2010 rejected the assessee's contention in a very brief manner, firstly, on the ground that "slot hire charges" has not been considered by the AAR in its ruling, and secondly, business income of the assessee earned through PE was a legal issue. Therefore, it did not find any reason to interfere with the AO's action, and lastly, rate of 15% under Section 44B as applied by the

Assessing Officer was correct. Following the directions of the DRP, the Assessing Officer, thus, treated the receipts of Rs.1,68,39,200/- as 'business income' to be computed under Section 44B and worked out the taxable income of Rs.25,25,883/- by applying the rate of 15%.

3.3. The assessee was not satisfied with the directions of DRP and accordingly it approached the Tribunal and submitted during the course of hearing that the DRP has not properly understood and applied the order of AAR and wrongly taxed the impugned income. The Tribunal, vide its order dated 27th June 2012, accepted the submissions of the assessee principally, but sent the matter back to DRP for passing a speaking order afresh and observed as under:

> *"We have carefully considered the rival submissions and also perused the material placed on record. From the perusal of the DRP's direction, it is seen that the assessee's objection and submissions on various aspects have not been properly considered and have been summarily rejected. The assessee's main contention that its case is covered by AAR ruling, has not been analyzed at all. As pointed out by the learned AR, in para 3 of the AAR ruling there is a categorical averment that the assessee would operate services using its own vessels or vessels on charter and it would also resort to "slot hire charges" on vessels owned by it or operated by others. At several places, it has been noted by the AAR that the assessee will not only operate ships owned by it but also do business as an agent and other incidental business relating to shipping operations. Based on these facts, the AAR has given a categorical finding, firstly, that the assessee is a resident of UAE and its taxation of income in India would be governed by DTAA between India and UAE and secondly, the income derived by the assessee by operations of ships in international traffic would be governed by Article 8 of the DTAA and thirdly, the income*

of the assessee by operation of ships would include income derived by it on account of charter higher charges, rental of containers and related equipments derived by it from operation of ships in international traffic and gains derived from alienation of ships, containers and related equipments. All these vital aspects of AAR ruling have not been discussed by the DRP, which it was required to do so, when the assessee is heavily relying upon the decision of AAR which is binding upon the Assessing Officer. It is further noticed that the second aspect that the income would not be taxable in India due to absence of PE and also the agent in India is not a dependent agent as per para 5 of Article 5, has not been discussed at all.

8. From the perusal of the entire DRP's order, it is evident that the assessee's submissions and objections have been brushed aside without giving any proper reasons and sufficient consideration. The relevant and important points raised on behalf of the assessee and as noted by us, do not find any mention or proper discussion in DRP's direction, which it was obliged to do so. The DRP is a quasi-judicial authority and when dealing with a litigation before it, it is obligatory on its part to ascribe cogent and detail reasons as to why the assessee's contention is not accepted. This casual attitude of the DRP leads to harassment of the assessee and drag them to protracted litigation. This casual nature of DRP has been frowned upon in several cases not only by Tribunal but also by Hon'ble High Courts. In the case of Gap International Sourcing India (P) Ltd. Vs. DCIT 113 TTJ (Del.) 627, the coordinate bench of this Tribunal came across a similar situation wherein voluminous submissions made by the assessee were found to be brushed aside by the DRP without even a whisper in the order. The order passed by the DRP, therefore, was held to be laconic by the Tribunal and the matter was remitted back to the DRP to consider the same again and to pass a proper and speaking order. A similar situation arose in the case of Vodafone Essar Ltd. Vs. DRP 196 Taxman 423 (Del.) wherein the order passed by the DRP was quashed by the Hon'ble Delhi High Court and the matter was remanded for fresh adjudication observing that when a quasi judicial authority deals with a lis, it is obligatory on its part to

ascribe cogent and germane reasons as the same is the heart and soul of the matter. The Hon'ble Delhi High Court further observed that a well reasoned and well discussed order also facilitates appreciation when the same is called in question before the superior forum. Keeping in view the decision of the Hon'ble Delhi High Court in the case of Vodafone Essar Ltd. (supra) as well as that of the coordinate bench of this Tribunal in the case of Gap International Sourcing India (P) Ltd. (supra) and having regard to the fact that the DRP has passed the order giving directions to the AO u/s 144C without giving proper consideration to elaborate submissions made on behalf of the assessee, on this main preliminary issue, we set aside the order and remit the matter to the file of the DRP with a direction to consider the objections of the assessee on this issue as well as the other issues once again and pass a proper and speaking order giving direction u/s 144C. Accordingly, the appeal filed by the assessee is allowed for statistical purposes.

9. In the result, the appeal of the assessee is allowed for statistical purposes."

3.4. Thus, in pursuance to the above order of the Tribunal, the DRP again passed its order dated 28.03.2013 wherein the stand taken by the DRP in its earlier order was repeated and it was *inter alia* observed that the impugned income earned by the assessee in the form of slot hire charges was not covered by the AAR in its ruling.

3.5. Being aggrieved, the assessee again approached the Tribunal. We have gone through the order of the Tribunal as well as order of the AAR. It is primarily noted by us that Tribunal had clearly observed in its order that income derived by the assessee by operations of ships in international traffic would be governed by Article 8 of DTAA, and that the income of assessee by operations of ships would include income derived by it on account of charter hire charges, rental of

containers and related equipments derived by it from operation of ships in international traffic and gains derived from alienation of ships, containers and related equipments. It appears that the DRP has again omitted to properly read order of the Tribunal as well as order of the AAR.

3.6. With the assistance of both the parties we again perused the order of AAR. Perusal of the order of AAR reveals that at many places in the order the AAR has made reference to income from 'Slot Hire Charges' also. Para 10 of the order of AAR reads as under:

> *"……..10. The present activities of the Orient shipping are limited to shipping agency and are restricted to the Gulf Region mainly in the Emirate of Dubai. It is observed from a letter addressed by the applicant to its representative M/s. Ratan S. Mama & Co. In India and placed on record with the Authority and it has no intention of extending the ship agency business to India and that the company was contemplating to set up a separate division for engaging in the business of operation of ships which would include Indian ports such as Mumbai, cochin etc. This in turn would result in generation of income from India relating to the shipping activity in the form of freight earnings, rental of containers and related income,* ***income by way of hire of slots etc.*** *Item 10 of the notes to the Financial statements for the year ended 31.12.1996, indicates the gross operating and other income of the applicant which includes "shipping agency and related income" the break-up of the kind of services rendered under this head is not given……."*

3.7. After hearing both the parties in detail and after analysing the facts of the case the AAR held as under:

> *"On a careful perusal of Article 8 of the DTAA, the Authority does not find much merit in the Department's view and accepts the interpretation given by Shri Dinesh*

Kanabar that article 8 of DTAA is clearly applicable to the applicant's case."

3.8. Para 17 of the order of AAR is also relevant as under:

"17. Given thus the aforesaid background and wide range of shipping services which Article 8(2) of the DTAA between India and UAE is capable of encompassing within its purview, it is clear that applicants proposed shipping activities would fall under that provision. As such under Article 8(1), the applicant, being a resident of UAE, will not be liable to income tax in India on the ***income from the proposed shipping operations****. The provisions of the DTAA, being more beneficial to the applicant, would prevail over section 44B of the Income tax Act, 1961."*

3.9. While answering all the questions raised before the AAR, it was clearly answered as yes with respect to all the following questions:

" Question	*Answer*
1. Whether, the applicant company Orient Shipping Services LLC, UAE is a resident of UAE and taxation of its income in India would be governed by the agreement for Avoidance of Double Taxation between India and UAE.	*Yes*
2. Whether the income derived by the applicant by operations of ships in international traffic including between Indian and UAE would be taxable only in UAE in terms of Article 8 of the tax treaty between India and UAE.	*Yes*
3. Whether the income of the applicant Company by operation of ships in international traffic, which is liable to tax in UAE, would include income derived by applicant company on account of :	
a) Charter hire charges and rental of ships related to operations of ships in international traffic.	*Yes*

b) Rental of containers and related equipments which is derived from operation of ships in international traffic. *Yes*
c) Gains derived by it from alienation of ships and containers and related equipments. *Yes*

3.10. Thus, from the perusal of the above, it is clearly evident that reading of order of AAR in its entirety makes it clear that AAR had decided in clear words that the impugned income i.e. income from slot hire charges shall be part of income from shipping operations and would be eligible for the benefit of Article 8 of DTAA between India and UAE. The DRP has grossly erred in not reading the order of AAR properly which has caused undue hardship of the assessee. The order of the AAR had attained finality. Thus, this issue was no more open to be decided in any other manner by the AO or DRP. Under these circumstances, we decide this issue in favour of the assessee.

3.11. Since primary issue has been decided in favour by the assessee, we do not find it necessary to adjudicate other issues at this stage.

3.12. As a result, applying the order of AAR, it is held that income from 'slot hire charges' received by the assessee during the year is covered under Article 8 of DTAA and thus not liable for tax in India.

4. In the result, the appeal filed the assessee is allowed subject to the directions given above.

Order was pronounced in the open court at the conclusion of the hearing.

Sd/-	Sd/-
(Amit Shukla)	(Ashwani Taneja)
न्यायिक सदस्य / JUDICIAL MEMBER	**लेखा सदस्य** / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 18/11/2016

Patel, P.S./नि.स.

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**