

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ, ई, मुंबई ।

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "E", MUMBAI**

**श्री जोगिन्दर सिंह, न्यायिक सदस्य एवं
श्री एन. के. प्रधान, लेखा सदस्य, के समक्ष**

**Before Shri Joginder Singh, Judicial Member, and
Shri N.K. Pradhan, Accountant Member**

**ITA NO.1482/Mum/2016
Assessment Year: 2008-09**

ACIT(IT)-4(2)(2), Scinidia House, Ballard Pier, N. M. Road, Mumbai-400038	बनाम/ Vs.	M/s Superstar Libra Ltd. C/o-Sekhri Kanodia & Associates, Chartered Accountants, G-15 Everest, Tardeo Raod, Mumbai-400034
(राजस्व /Revenue)		(निर्धारिती /Assessee)
P.A. No. AAJCS1630G		

राजस्व की ओर से / Revenue by	Shri V. Justin-DR
निर्धारिती की ओर से / Assessee by	Shri Vipul Joshi

सुनवाई की तारीख / Date of Hearing :	24/05/2018
आदेश की तारीख /Date of Order:	24/05/2018

आदेश / O R D E R

Per Joginder Singh (Judicial Member)

The Revenue is aggrieved by the impugned order dated 30/11/2015 of the Ld. First Appellate Authority, Mumbai, in holding that the assessee is engaged in the business of operation of ships and thus entitled to be assessed u/s 44B of the Income Tax Act, 1961 (hereinafter the Act), without appreciating the fact that the business activity of the assessee was primarily providing hospitality and entertainment on board on cruise ship and not that of mere transportation of passengers.

2. During hearing, at the outset, the Ld. counsel for the assessee, Shri Vipul Joshi, claimed that the issue in hand is covered in favour of the assessee by the decision of the Tribunal for Assessment Year 2006-07, 2007-08 and 2008-09 and also from Hon'ble Bombay High Court in the case of assessee itself (ITA No.451 of 2012), order dated 07/08/2014. This factual matrix was not controverted by the Ld. DR, Shri V. Justin.

2.1. We have considered the rival submissions and perused the material available on record. In view of the above, we are reproducing hereunder the relevant portion from the aforesaid order of the Tribunal dated 22/07/2011 (ITA No.3944/Mum/2010) for Assessment Year 2006-07 for ready reference and analysis:-

"1. By way of this appeal, the Assessing Officer has challenged correctness of CIT(A)'s order dated 24th February 2010, in the matter of assessment under section 143(3) of the Income Tax Act, 1961, for the assessment year 2006-07.

2. Grievance of the Assessing Officer is against CIT(A)'s characterizing the income of the assessee, from operating ship cruise India, as 'shipping business income' for the purposes of Section 44B of the Act, and significance of the income characterization lies in the fact that the shipping business income of a non-resident assessee in India, as is the case before us, is taxable on presumptive basis at the rate of 7.5% on gross basis, as against taxation of business income, on net basis, at the normal tax rates.

3. Briefly stated, relevant material facts are like this. The assessee is a Bermuda based company and is engaged the business of, inter alia, operating ship cruise in India. There is no dispute about taxability of its income from these cruise operations in India. The cruise ships have operated in Indian waters and the related business is conducted in India. The cruise in respect of which this dispute arises are (a) single point cruise to the Mumbai High Sea and back (duration : two days and one night); (b) multi day cruise Mumbai- Goa- Mumbai (duration: three days and two nights); and (c) multi day cruise Mumbai-Lakshadeep-Mumbai (duration five days and four nights). On these facts, the Assessing Officer, relying upon observations made by the Assessing Officer in

proceedings regarding ascertainment of tax withholding liability by India based sales agent of the assessee, held that the provisions of Section 44B of the Act donot apply to the assessee, and tax in to be levied, on normal rates, on net basis. The Assessing Officer was of the view that these cruise ships donot transport people from one place to another, as the cruise is for the purpose of entertainment rather than for the purpose of journey, and the place of disembarkation is the same as the place of embarkation. It was also noted that " even in the case of cruises touching Goa or Lakshdeep, the fare charged is for taking the passengers from and to Mumbai port, even if a person disembarked in between" and "accordingly, it cannot be argued that the ship transport people from one place to another". The Assessing Officer was thus of the view that the cruise is only for the purpose of onboard entertainment. He was also of the view that section 44B of the Act, providing for taxation on gross basis @ 7.5% of receipts, comes into play only when ships are used for carrying passengers, livestock, mail or goods from one port to another. He thus declined the application of Section 44B of the Act to the income from inland cruise operations, and, in the absence of details of expenses having been furnished to the Assessing Officer, concluded that profits of the assessee , in respect of Indian cruise operations, can be estimated @ 25% of gross receipts on which 41.82% tax was applied. Aggrieved, assessee carried the matter in appeal before the CIT(A) who held that the provisions of Section 44 B are applicable on the facts of this case, and, accordingly, tax @ 41.82 is to be levied on 7.5% of the amount received or receivable for such cruise operations. The Assessing Officer is aggrieved of the relief so granted by the CIT(A) and is in appeal before us. As evident from these facts, the short point of dispute is the manner in which the income from these operations is to be taxed – on gross basis under the provisions of Section 44B of the Act, which provides that 7.5% of passage costs are to be treated as income, or on net basis as per the provisions of the Indian Income Tax Act.

4. We have heard the rival contentions, perused the material on record and duly considered factual matrix of the case as also the applicable legal position.

5. The issue in appeal is no longer *res integra*. We find that the Assessing Officer's grievances against the findings of the CIT(A), in the course of ascertainment of tax withholding liability from remittance of cruise package by assessee's India based agent to the assessee, have been rejected by a coordinate bench of this Tribunal. While doing so, the coordinate bench, vide order dated 1st July 2009, has held as follows:

5. On a careful consideration of the facts and circumstances of the case and on perusal of records we hold as follows:

5.1 The first appellate authority after considering the detailed arguments of the assessee, has at paragraph 2.8 on page 7 observed as follows:

“2.8 Pre-requisite conditions for application of section 44B are that the assessee should be a non-resident and should be engaged in the operation of ships. The AR has mentioned that the ‘Superstar Libra’ ship is owned by SSRL and is being operated by them. Accordingly the first two conditions as mentioned in Se.44B(1) are satisfied by SSRL, which are that a non-resident company engaged in the business of operation of ships. The AO has not disputed this fact. Regarding the issue of carriage of passengers, I have examined the argument of the AO. It is incorrect to hold that in case of round trip either by train, ship or airline where the passengers board the train, ship or aircraft at once place and after the journey disembark at the same place, there is no transportation involved. It is therefore incorrect to say that when SSRL carries passengers from Mumbai to Lakshadweep or again bring them back to Mumbai, it is not carrying passengers. On the contrary, the ship is carrying passengers to and from Mumbai to Lakshadweep and return to Mumbai. The AR has explained that besides offering return trip cruises, SSRL is also offering one way cruise from Mumbai to Goa on various dates in the month of December 2006 to May 2007. Further, if at all round trip ship cruise is taken by a passenger such passenger is entitled to disembark from the ship at intervening ports. There is no restriction that such passenger of round trip ship cruise will disembark at Mumbai only. AO is therefore not right in holding that there is no carriage of passengers, merely because as per some of the cruise programmes, passengers are picked up from Mumbai and after the cruise disembark at Mumbai. I agree with the arguments of the AR that in such cases of to and fro journey, two carriages are involved of carrying passengers

from station A to B and from B to A. It is therefore held that the SSRL is engaged in the carriage of passengers. Findings of the AO in this regard are incorrect.

5.2 Later, at paragraph 2.10, the first appellate authority has observed as follows:-

“2.10 I have examined the papers filed by AR. Various international airlines are also offering onboard entertainment and other facilities for the comfort of the passengers. Similarly, SSRL has offered various types of entertainments, meals and other facilities for the use of its passengers to provide them comfortable journey. In my view in the absence of any separate charge for these services, it is to be held that the provision of meal and other entertainment, while on cruise, is only incidental to the main business activity of the cruise.

5.3 Further at paragraph 2.14 he observed as follows:

“2.14 AR has established by the booking slips that SSRL is charging the passengers for the cruise payment in the form of cabin charges and fare charges which are all related with the transportation. There is no separate charge for the meal or entertainment. It is true that some of the entertainment programmes on the board may have to be paid by the passengers. Nevertheless the fact remains that such activities on board are incidental to the business of operation of ships. Accordingly, it is held that the SSRL, a company organized in Bermuda, engaged in the business of operation of ships is entitled to be assessed as per Section 44B. Direction of the AO to estimate the income at 25% is deleted. The AO is directed to estimate the income at 7.5% of the gross cruise fare receipt and deduct tax u/s.195 at the appropriate tax rate on such income. Appeal on ground No.1 to 8 is allowed.

5.4 We fully agree with these findings. The interpretation sought to be placed by the learned AO in his order u/s.195 on the term “carriage” is improper and is against the spirit of the section. To state that the term is not defined by the Act, and that carrying means taking or transporting from one place to another, from one port to another is a very narrow interpretation. The findings of the CIT(A) is in line with the circular of the CBDT No.763 dated 18.2.1996 whereas paragraph 26.1 section 44B is discussed. It has clarified that the amount paid or payable, etc on account of carriage shall include any charges by way of demurrages or handling, etc,

or by whatever name called and any other charges of similar nature and that section 44B applies to the same. Similarly in circular No.169 dt.23.6.1975 at paragraphs 37 and 38, it is provided that new section 44B overrides provisions of section 28 to 43B and it explains that under the existing law, taxable profits on foreign business enterprises are determined by suitably apportioning their global profits between their Indian business and foreign business or on the basis of voyage accounts. As there are certain difficulties and complications in this issue, with a view of simplifying and rationalizing in such cases, the Finance Act has made a special provision in the form of section 44B of the Act for computing profits and gains from shipping business in the case of non-residence. Suitable amendments were also made in section 172 of the Act. A plain reading of section 44B shows that for the section to be attracted, the assessee should be a non-resident and should be in the business of operating of ships. As these essential conditions have to be fulfilled in this case, we are of the humble opinion that the order of the first appellate authority has to be upheld.”

6. The view so taken by the coordinate bench has now been confirmed by Hon'ble Bombay High Court as well. Rejecting the appeal filed by the Commissioner, against the order of the Tribunal, Their Lordships have, vide judgment dated 1st July 2011, inter alia observed as follows:

Perusal of the order passed by the Tribunal shows that in the present case, the cruise conducted by the assessee consists of taking the passengers from Mumbai to various places and back. The Tribunal has recorded a finding of fact that the assessee is also offering one way cruise. There was no restriction that a passenger taking round trip ship cruise should disembark at Mumbai only. The Tribunal has held that merely because some entertainment programmes were made available on the board the cruise and the passengers were required to pay additional amount in respect thereof, it cannot be said that the assessee was not engaged in the shipping business involving carriage of passengers from Mumbai and back. The Tribunal has held that the business carried on by the assessee as agent of the non-resident constitutes shipping business as contemplated under section 44B of the Act.”

7. We are in respectful agreement with the conclusions so arrived at the coordinate bench, which now stand

approved by Hon'ble jurisdictional High Court. Once tax withholding liability in respect of the related remittances to the assessee stands quashed on the ground that such a vicarious liability does not survive because the assessee did not have principal liability to tax in India, this round of proceedings, in assessee's own case, is only a parallel, and somewhat superfluous, exercise, which must meet the same fate. We, therefore, hold that the assessee did not have any tax liability in India.

8. In the result, the appeal filed by the Assessing Officer is dismissed. Pronounced in the open court today on_22nd day of July, 2011."

2.2. We also find that the aforesaid order of the Tribunal was carried in appeal before the Hon'ble High Court, wherein, vide order dated 07/08/2014 (ITA No.451 of 2011), it was held as under:-

"

- 1. We have passed by the ITAT, Mumbai dated 22nd July 2011 in ITA No.3944/Mum/2010 for the A.Y. 2006-07.*
- 2. We find that the Tribunal in this case has considered the assessee's grievance while challenging the order dated 24th February, 2010 passed by the CIT(Appeals). The question projected as substantial question of law at page-6 of the paper book was also raised in the case of Star Cruises (India) Pvt.Ltd. and in relation to that an order has been passed on 1st July 2011 in three Income Tax Appeals bearing Nos.485, 486 and 683 of 2010. These were Appeals brought by the Revenue. The Assessee before us is a Bermuda based Company. It is engaged in the business inter alia of operating ship cruise in India. There is no dispute about the taxability of its income about these cruise operations in India. The cruise ships are operated in Indian waters and the related business is conducted in India. The Assessing Officer relied upon his own observations in proceedings regarding ascertainment of tax liability by the agent of the Assessee and held that*

provisions of section 448 of the Act do not apply to the Assessee. The tax is to be levied on normal rates and on net basis. The Assessing Officer took the view that the cruise ships do not transport people from one place to another but the cruises are meant for entertainment and the journey and the place of disembarkation is the same as the place of embarkation. That is how he proceeded and his order came to be reversed by the CIT (Appeals). The Revenue brought an appeal to the Tribunal head both the sides and concluded that the issue is no longer res integra. The Tribunal's Coordinate Bench decision rendered on 1st July 2009 has been referred extensively in paragraph 5 of the impugned order. Against that view, Appeals were brought to this Court and they have been decided on 1st July 2011 against the Revenue and in favour of the Assessee.

- 3. We do not find that the present Appeal raises any different question other than dealt with by the Tribunal earlier as also this Court. In fact, the Tribunal has followed the view taken by this Court. It has concluded the matter in terms of the judgment of this Court as is clear from paragraph 7 of the impugned order.*
- 4. As a result of the above discussion, the present appeal is nothing but an attempt to seek re-appreciation and reappraisal of the same factual position. The Appeal does not raise any substantial question of law. It is accordingly dismissed. No costs."*

2.3. We find that on the issue in hand a detailed deliberation has already been made by the Tribunal and on appeal by the Revenue, the stand taken by the Tribunal was affirmed. The Hon'ble High Court vide order dated 07/08/2014 approved the decision of the Tribunal and also considered the orders of the Tribunal for different Assessment Years. No contrary decision was brought to our

notice by either side and more specifically the Revenue. It is further noted that order of the Tribunal for Assessment Year 2007-08 was also carried in appeal before the Hon'ble High Court, wherein, vide order in ITA No.1786/2013 dated 10/08/2015 on identical issue, dismissed the appeal of the Revenue. Following the aforesaid decision of the Tribunal and from Hon'ble High Court, we find no infirmity in the order of the Ld. Commissioner of Income Tax (Appeal), it is upheld, resulting into dismissal of appeal of the Revenue.

Finally, the appeal of the Revenue is dismissed.

This Order was pronounced in the open court in the presence of ld. representatives from both sides at the conclusion of the hearing on 24/05/2018.

Sd/-

(N.K. Pradhan)

लेखा सदस्य / ACCOUNTANT MEMBER

Sd/-

(Joginder Singh)

न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 24/05/2018

Shekhar, P.S/निजी सचिव

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

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,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai,