

IN THE INCOME TAX APPELLATE TRIBUNAL  
RAJKOT BENCH, RAJKOT

**Before: Shri Mahavir Prasad, Judicial Member  
and Shri Amarjit Singh, Accountant Member**

**[Conducted through E-Court at Ahmedabad]**

**ITA Nos. 572 & 573/Rjt/2012  
Assessment Year 2010-11**

Shri Prashant Trivedi, Prop. of Kudos Shipping Corporation, M.V.Lucky Arrow-Name of Vessel, Nr. Ambaji Vad Temple, Railways Station Road, Bhavnagar-364001 PAN: ADIPT7909A (Appellant)	Vs	The ITO, International Taxation, Gandhidham (Respondent)
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**Revenue by: Shri Anil Kumar Das, D.R.  
Assessee by: Shri Kalpesh Doshi, A.R.**

Date of hearing : 07-01-2020  
Date of pronouncement : 20-01-2020

**आदेश/ORDER**

**PER : AMARJIT SINGH, ACCOUNTANT MEMBER:-**

Both these appeals filed by the assessee are directed against the order passed by CIT(A), Gandinagar, on 2<sup>nd</sup> July 2012. Since the common issue on identical facts are involved in both the appeals, therefore, for the sake of convenience, both the these appeals are adjudicated together by taking the

facts of ITA No. 572/Rjt/2012 as lead case and its findings will be applicable to ITA No. 573/Rjt/2012.

572/Rjt/2012 ASSESSMENT YEAR 2010-11

2. The assessee has raised following grounds of appeal:-

*“1. The Id. CIT(A) has erred both in law and on facts in holding I that as per the provisions of S.172 of the Act, the entire tax burden and payment of tax is on the master of ship, and therefore, the person with whom arrangement is made by the master of ship to file return of income and payment of the tax, will become automatically an assessee for the purpose of making an assessment on freight income earned by the non-resident in his hands.*

*2. The Id. CIT(A) has erred both in law and on the facts of the case in not appreciating that as per the first proviso to subsection (3) of Section 172 of the Act, the arrangement made by the master of ship with the person is only to file return of income and pay income tax for the master of ship on behalf of the non-resident, and in doing so, the person do not become agent of the non-resident mechanically so as to be saddled with the burden of income-tax on freight income earned by the non-resident, except treating him as an agent of non-resident after providing an opportunity of being heard as per Section 163(2) of the Act.*

*3. The Id. CIT (A) has accordingly erred in law and on the facts of the case in confirming the action of Id. AO in treating the Appellant as an agent of the shipping company without according an opportunity of being heard to the Appellant, as to his liability to be treated as such, as provided under subsection (2) of S. 163 of the Act.*

*4. Ld. CIT (A) has further erred both in law and on facts of the case in confirming the action of Id. AO in holding that the CIT Group, Inc. from Jordan is the freight beneficiary so as to attract provisions of S.172 of the Act, and accordingly in the absence of Double Taxation Avoidance Agreement with Jordan, the said income is taxable in the hands of the Appellant.*

*5. Both the lower authorities have failed to appreciate that the CTI Group, Inc. from Jordan has entered into contract to purchase cements on Free On Board basis with Saurashtra Cement Ltd., and contract being in the nature of FOB basis, question of freight income accruing in India does not arise at all, and consequently provisions of S.172 of the Act are also not applicable at all.*

*6. Ld. CIT(A) has accordingly erred both in law and on facts in confirming the action of Id. AO in making an addition of Rs.5,41,807/- being 7.5% of Rs.72,24,100/- in the hands of the Appellant.*

*7. Both the lower authorities have further erred both in law and on the facts of the case in not appreciating that the income earned by the non-resident i.e Faber Shipbroker from Denmark, is not in the nature of income so as to attract provisions of S.172 of the Act, and therefore, no addition on account of freight income could have been added in the hands of the Appellant.*

*8. Alternatively and without prejudice to above, even if it is held that income earned by Faber Shipbroker from Denmark is in the nature of freight income, then also, as per the DTAA as entered into between India and Denmark, said income is not taxable in India and consequently, the same could not have been added in the hands of the Appellant.*

*9. Both the lower authorities have passed the orders without properly appreciating the fact and that they further erred in grossly ignoring various submissions, explanations and information submitted by the appellant from time to time which ought to have been considered before passing the impugned order. This action of the lower authorities is in clear breach of law and Principles of Natural Justice and therefore deserves to be quashed.*

*10. The Id. CIT(A) has erred in law and on facts in confirming the action of Id. AO in charging interest u/s 234B/C/D of the Act.*

*11. The Id. CIT(A) has erred in law and on facts in confirming the action of Id. AO in initiating penalty proceedings u/s 271(1)(c) of the Act.”*

3. The fact in brief is that the assessee on behalf of M/s. Faber Ship Brokers APS, Denmark has filed a provisional and final return of income on

13<sup>th</sup> May, 2009 without paying freight tax claiming the benefit of double taxation avoidance agreement entered into between Government of Republic of India and the Kingdom of Denmark. Under the provision of section 172(3), the most of the ship shall be required to prepare and furnish the return before the departure of the ship. M/s Kudos Shipping Corporation took the responsibility and filed bonds on stamp paper. The assessing officer has not accepted the explanation of the assessee briefly on the following reasons:-

- “• *There is no reliable proof that Faber Ship Brokers APS has chartered the ship; no charter party agreement has been submitted.*
- *There is no evidence to show that Faber Ship Brokers APS was earning income 'derived' from operation of ship in international traffic.*
- *The freight beneficiary and charterer is CTI Group Inc., Jordan. There is no DTA Agreement between India and Jordan*
- *The effective control and management of Faber Ship Brokers APS has not been proved to be in Denmark.*
- *The AO also disbelieved the documents filed in support of the claim*

Therefore benefits of DTAA claimed in provisional and final return u/s. 172(3) of the act was withdrawn.

4. Aggrieved assessee has filed appeal before the Id. CIT(A). The Id. CIT(A) has dismissed the appeal of the assessee. The relevant part of the decision is reproduced as under:-

*“7.3 I have considered the facts of the case, the evidences submitted, the submissions of the appellant and the assessment order. Before proceeding further, i would like to discuss the scheme of taxation u/s 172. The section 172 of the IT Act is a Code in itself. The section starts as follows:*

*172. (1) The provisions of this section shall, notwithstanding anything contained in the other provisions of this Act, apply for the purpose of the lev and recovery of tax in the case of any ship, belonging to or chartered by a nonresident, which carries passengers, livestock, mail or goods shipped at a port in India.*

*It has to be noticed that the language of section 172 is very 'unambiguous'. There can be no dispute that the whole section is a 'complete code in itself and provides as to what would be the procedure for 'the provisional assessment'. The whole section starts from the point of who and what income is covered and after providing for the determination of freight income and tax thereon, the passing of the order in that behalf and also ensures recovery of the same. Thus, the whole assessment process would be exclusively governed by section 172 itself because of the non obstante clause in that section.*

*Another aspect is that the master of the ship is responsible for entire taxation burden and payment of the tax under the Provisions of section 172. It does not matter, whether A or B is the nonresident owner/charterer of the ship, whose freight income from transportation of goods is to be brought under taxation; and the master of the ship is solely responsible.*

*The income that is taxable u/s 172 is defined in section 172(2). The income is to be taken at 7.5% of the amount paid or payable on account of such carriage (carriage of passenger, live stock, mail or goods etc. in the case of the ship) to the owner or the charterer or to any person on his behalf, whether that amount is paid or payable in or out of India, shall be deemed to be income accruing in India to the owner or charterer on account of such carriage.*

*It is the responsibility of the master of the ship to file the return and pay taxes on the entire income in respect of the ship as discussed above. It is this responsibility of the master of the ship which the agent M/s. Kudos Shipping Corporation, Prop. Shri Prashant Y. Trivedi has undertaken upon itself and filed an affidavit/bond to the revenue authorities to this effect. The scheme of the section does not allow escapement from this responsibility, undertaken by the person itself under the proviso to section 172J3).*

*7.3.1 Now we have to decide who is the owner /charterer to whom the amount is payable or paid on account of carriage of goods etc by the ship. The following pertinent facts / observations are made on the issue:*

*a) Though the appellant is claiming that the freight income is that of Faber Ship Brokers APS, Denmark, it is clear from the Bill of Lading / Loading agreement itself that the Charterers of the ship were finally CTI Group Inc., Jordan. Admittedly, the goods carried on the ship belong to Saurashtra Cement Ltd. Apparently, the ship has been hired / chartered to the Jordan Company and it is the Jordan Company to whom the amount is payable or paid on account of carriage of goods etc by the ship. If this income which is taxable u/s 172 (2), as discussed above. If it is not proved exempt then the Master of the Ship and subsequently, the Agent u/s 172(3) are liable to taxation. No claim has even been made to show that the Jordan Company is not taxable in India.*

*b) Without prejudice to the above, even after specific show-cause notice (as reproduced in para. 7.1, earlier) no satisfactory evidence has been submitted to prove its claim that Faber Ship Brokers APS, Denmark was indeed disponent owner of the ship. Only copy of self-declaration in this regard has been filed without filing the ownership documents or even charter party agreement. Even when it was pointed out to the appellant (through show cause, referred in para.7.1) that there are reasons to doubt the facts of the case as claimed by the appellant, as both the ships are shown under the head 'Our Fleet' as cement carriers on the website of CTI Group at www.sekurship.com/inner/ trader arrow. htm (copy was enclosed); no substantial evidence was filed.*

*In the light of the above, it is held that the CTI Group, Jordan who has chartered the ship as per the documents filed by the appellant itself; and has transported goods of shipper M/s Saurashtra Cement Ltd, Ahmedabad has earned freight by transported cargo not on its own ships or ships operated by it. Neither there is any DTAA between India & Jordan nor the Jordan company has earned income from operation of ships. The income from transportation of goods on these ships was taxable in India and the AO has correctly brought the freight income to taxation under the provisions of section 172, which is the complete code in itself.*

*The grounds of appeal are dismissed and it is held that the income has been correctly brought to tax u/s 172(4), and the benefit of DTAA is not available for different reasons, as discussed above.*

*8. The ground no.7 is against charging of interest u/s 234B & 234C. The ground does not arise from the order appealed against as no interest has been charged. The ground being infructuous is dismissed.*

*9. Next ground of appeal against initiation of penalty u/s of the Act being premature is dismissed.*

*10. In the result, both the appeals are dismissed.”*

5. During the course of appellate proceedings before us, the Id. counsel has contended that M/s. Faber Ship Brokers APS was the sole proprietor and also resident of Denmark and as per article 9 of the treaty the freight income is not taxable in India. The Id. counsel has also submitted that as per para 14 it can be seen that freight is payable by CIT Group Inc. Jordan to M/s. Faber Shipbroker, Denmark. The Id. counsel has also contended that identical issue on similar facts has been adjudicated in favour of the assessee by the ITAT Rajkot in the case of M/s. Pearl Logistics & Ex-IM Corporation (Rajkot Trib.) ITA No. 313/Rjt/2013 & others. On the other hand, the Id. departmental representative has supported the order of CIT(A).

6. We have heard both the sides and perused the material on record. In this case, M/s. Kudos Shipping Corporation has filed provisional and final return on 13<sup>th</sup> May, 2009 for being freight beneficiary of M/s Faber Ship Brokers APS Denmark without paying freight tax. During the course of assessment, u/s. 172(4) of the act, the assessing officer has called various details and documents and the assessee has furnished the documents as elaborated at page no. 3 & 4 of the assessment order. The assessing officer has disbelieved the documents/information furnished by the assessee and rejected the benefits claimed under the DTAA. We have gone through the decision of Co-ordinate Bench of the ITAT Rajkot referred by the Id. counsel in the case of Pearl (supra) pertaining to the similar issue on identical fact wherein the issue was decided in favour of the assessee. The relevant part of the decision is reproduced as under:-

*“11. We have heard both the parties and gone through the impugned order, in this case ship M/s. Faber Shipbrokers, Denmark is the desponent owner and ship was chartered by CIT Group Inc., Jordan for shipment of 10,160 M.T. of cement purchased from M/s. Saurashtra Cement Pvt. Ltd.*

12. Ship arrived on Porbandar port on 16/01/2011 & 11/02/2011 and return u/s. 172(3) was filed on 02/02/2011 and 17/02/2011 for freight amount of Rs. 27,52,344/- and Rs. 27,71,307/- and amount chargeable to income tax u/s. 172(3) @ 7.5% is Rs.87,174/- and 87,774/- totaling to Rs.1,74,948/-.

13. Freight was payable by CTI Group Inc., Jordan to Faber Shipbrokers, Denmark (kindly refer clause no. 13 and 14 of charter party agreement at Page No.36 of Paper Book.)

14. Faber is owner and CTI Group Jordan is charterer (Refer para 3 & 4 of Charter Party agreement). As per Charter Party agreement - CTI Group Inc., Jordan is charterer and Faber Shipbroker, Denmark is the owner. (This can be verified from the signatories to Charter party agreement). Therefore, the agreement sought by CIT(A) about agreement between CTI Group Inc., Jordan and Faber Shipbrokers, Denmark is Charter Party agreement was submitted before AO and CIT(A).

15. According to Section 172 of the Act, income of owner or charter who receives freight is chargeable to tax. In this case, freight is received by Faber Shipbrokers, Denmark and has earned the freight, so, the income of Faber Shipbroker, Denmark is chargeable to tax in India. Faber Shipbrokers is resident of Denmark and tax residency certificate of which is available on record. (Refer Page No.35 of paper book). So as per decision of Honorable SC in case of Azadi Bachao Andolan 132 taxman 373 (SC) the benefit of DTAA between India and Denmark shall be available to the Denmark resident.

16. Further, as per Article 9 of Indo Denmark DTAA, profits derived from the operation of ships in International Traffic shall be taxable only in the state where place of effective management of the enterprise is situated. In this ease the 'POEM' of Denmark entity is situated in Denmark as

- registration certificate
- residence of shareholder
- passport of owner

All shows that Faber Ship Broker is resident of Denmark and its 'POEM' is in Denmark. Therefore 'head and brain' of Faber Ship Broker is situated in Denmark. Reliance placed on -

- > Radha Rani Holdings Pvt. Ltd.( 110 TTJ 920)
- > Saraswati Holding Corp. Int. Vs. DDIT (16 SOT 535) (D)
- > De Beers Cons. Mines Ltd. (1906 AC 455) (HL)

Arabian Express Line Ltd. (212ITR 31)

17. It is noteworthy that in that case of same assessee and on identical facts CIT(A) has allowed the benefit of DTAA to the assessee (Page No.53 to 84). However revenue has filed appeal against those orders in ITA No. 499/RJT/2014 and 517/RJT/2014.

18. Ld. CIT (A) has raised contention that Income of CTI Group Inc. Jordan is chargeable to tax is erroneous as it has neither an income accrued and arised u/s.5(2) read with section 9(l)(i) of the Income Tax Act. Therefore, nothing is chargeable to tax in the hands of Jordan Co. In fact, freight is received by Faber Shipbrokers Denmark. So it is Faber who is responsible for paying tax in India as per section 5(2) of the Income Tax Act.

19. In the entirety of facts and circumstances of the case, in our considered opinion appellant has proved the place of effective control and management of the appellant by furnishing several documents including declaration by director of company that it is completely 100% owned by Mr. Jens Faber Anderson, Copy of Passport of Director to prove that the nationality of director and company has been operating from Denmark. It can be concluded that the Director Mr. Jens Faber Anderson resides in Denmark is resident'of Denmark and have been operating business wholly from Denmark, all the important decisions are taken from Denmark in the form of meeting and therefore, the place of effective management and control is Denmark only. The principal company is also engaged in international traffic and residence is Denmark. Article 9 of the treaty between India and Denmark read as under -

Profits derived from the operation of ships in international traffic shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.

*Therefore, on the basis of Article 9 of the DTAA between India and Denmark, the income on account of operation of ship in International Traffic shall be taxable in the state in which the place of effective management is situated i.e. in this case Denmark.*

*Therefore, in view of the above discussion and considering Article-9 of the Treaty between India and Denmark and also the decision taken by the Department in earlier cases of the assessee, we hold that the ships operated in International Traffic and therefore, the income from ship shall not be taxed in India as per Article 9 of the Treaty. Therefore, on account of foregoing observation, appeal of the assessee/appellant is allowed."*

We consider that identical issue on similar facts has been adjudicated by the Co-ordinate Bench of the ITAT as supra in favour of the assessee. Respectfully following the decision of the Co-ordinate Bench on similar fact and identical issue as stated above, the appeal of the assessee is allowed.

ITA No. 573/Ahd/2012

7. Since the issues and facts in appeal ITA No. 573/Rjt/2012 is the same as in appeal ITA 572/Rjt/2012, so, after applying the finding of Appeal ITA 572/Ahd/2012 in appeal ITA 573/Ahd/2012, this appeal is allowed.

8. In the result, both the appeals of the assessee are allowed.

Order pronounced in the open court on 20-01-2020

Sd/-  
(MAHAVIR PRASAD)  
JUDICIAL MEMBER  
Ahmedabad : Dated 20/01/2020

Sd/-  
(AMARJIT SINGH)  
ACCOUNTANT MEMBER

आदेश का प्रतिलिपि अर्पण / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order,

Assistant Registrar,  
Income Tax Appellate Tribunal,  
Rajkot