

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI I BENCH, MUMBAI**

[Coram: Pramod Kumar VP and Ravish Sood JM]

ITA Nos. 2496/Mum/2009, 8423/Mum/2010
Assessment years: 2005-06 and 2007-08

OT Africa Line Limited

(now known as Delmas UK Limited)

c/o CMA CGM Agencies India Pvt Ltd

India Bulls Finance Centre, Tower 3, 8th floor,

Senapati Bapat Marg, Elphinstone (W),

Mumbai 400 013 [PAN:MAAACO4453G]

.....Appellant

Vs

Deputy Director of Income Tax - International Taxation

Circle 4(2), Mumbai

.....Respondent

Appearances by

M P Lohia, along-with **Nikhil Tiwari** for the appellant

Avneesh Tiwari for the respondent

Dates of hearing of the appeal : January 15th, 2020

Date of pronouncing this order : May 27th, 2020

O R D E R

Per Pramod Kumar, VP:

1. These two appeals pertain to the same assessee, involve some common issues, and were heard together. As a matter of convenience, therefore, both of these appeals are being disposed of by this consolidated order.

2. We will first take up the ITA No. 2496/Mum/09.

3. This appeal, filed by the assessee, is directed against the order dated 5th January 2009 passed by the CIT(A) in the matter of assessment under section 143(3) of the Income Tax Act, 1961, for the assessment year 2005-06.

4. In ground nos. 1 to 3, which we shall take up together, the assessee appellant has raised the following grievances:

1. The Hon'ble CIT(A) erred in confirming the action of the Assessing Officer by holding the appellant was not entitled to the beneficial provisions of Article 9 (Shipping) of the Double Taxation Avoidance Agreement between India and the United Kingdom (India UK DTAA) since the appellant did not own or hire any ships and the income was not derived from the use or hire of the containers in international traffic.

2. Without prejudice to the foregoing ground, the Hon'ble CIT(A) erred in confirming the action of the learned Assessing Officer in holding that the agent in India was a 'Dependent Agent' of the appellant, constituting a permanent establishment (PE) within the meaning of Article 5 of India UK DTS, and the appellant was, therefore, liable to be taxed under Article 7 of India UK DTAA.

3. Without prejudice to the above grounds of appeal of the appellant, that it is entitled to the benefits of Article 9 of India UK DTAA, even assuming- though not conceding that the appellant has a PE in India as per Article 5 of India UK DTAA, the Hon'ble CIT(A) erred in confirming the action of the learned AO in estimating the profits of the appellant, in accordance with rule 10 of the Income Tax Rules 1962, by relying upon section 44B of the Income Tax Act, 1961, thereby disregarding the profits actually earned by the appellant from its India operations, which were to be computed in accordance with the provisions of the Act.

5. To adjudicate upon the above grounds of appeal, only a few material facts need to be taken not of. The assessee before us is a company, incorporated and fiscally domiciled in the United Kingdom, and is said to be engaged in the business of shipping. During the course of

scrutiny assessment proceedings, the Assessing Officer noticed that the assessee had earned freight income of Rs 5,48,42,133, which was claimed to be exempt under article 9 of the Indo UK Double Taxation Avoidance Agreement. The Assessing Officer did not accept the claim. He was of the view that the provisions of Article 9 do not apply to the facts of this case, but, for the reasons we will set out in a short while, it is not really necessary to examine that aspect of the matter in detail. Suffice to say that having rejected the claim as such, the Assessing Officer proceeded to hold that the assessee had a Dependent Agency Permanent Establishment (DAPE) in India, inasmuch as the assessee had a dependent agent in India by way of Freight Connections India Pvt Ltd, and, in support of this conclusion, the Assessing Officer highlighted certain parts of the agency agreement between the assessee and Freight Connections India Pvt Ltd. The Assessing Officer then proceeded to attribute 10% of the freight income as income attributable to the DAPE. The income of the assessee was, accordingly, assessed at Rs 54,84,213. Aggrieved, assessee carried the matter in appeal before the CIT(A) but without any success. Learned CIT(A) confirmed the action of the Assessing Officer and declined to interfere in the matter. The assessee is not satisfied and is in further appeal before us.

6. We have heard the rival contentions, perused the material on record, and duly considered facts of the case in the light of the applicable legal position.

7. When this called out for hearing and it was noticed that it is admittedly a case of dependent agent permanent establishment (DAPE), it was put, as a proposition, to the parties that in view of Hon'ble jurisdictional High Court's judgment in the case of **Set Satellite (Singapore) Pte Ltd v. DDIT [(2008) 307 ITR 205 (Bom.)]** the controversy regarding existence of permanent establishment could perhaps be a wholly academic issue inasmuch as once the agent is paid an arm's length remuneration for the services rendered, as is not even in dispute in the present case, no further profit can be attributed to the PE. In other words, the proposition was that, as the law stands now, existence of a DAPE is tax neutral except in a situation in which agent is not paid an arm's length remuneration for services rendered, and since it is nobody's case that agent has not been paid arm's remuneration, nothing turns on existence of PE because, even if there is a PE, no further profits can be attributed to the DAPE. None of the parties objected to this proposition, even though learned Departmental Representative dutifully relied upon the stand of the authorities below and submitted that the

matter is in appeal before the Hon'ble Supreme Court. Learned counsel for the assessee, however, has subsequently filed a written note justifying the claim of treaty protection under article 9 and dealing with other arguments which were not subject matter of consideration in the open court proceedings before us. In the case of Set Satellite (*supra*), Hon'ble jurisdictional High Court has, after taking note of Hon'ble Supreme Court's judgment in the case of **CIT Vs Morgan Stanley & Co Inc [(2007) 292 ITR 416 (SC)]**, held that, "**In our opinion considering the judgment, if the correct arm's length price is applied and paid then nothing further would be left to be taxed in the hands of the Foreign Enterprise.**". Viewed thus, and having regard to the fact that the payment of arm's length remuneration to the agent, and taxability of income embedded in such payment in India, is not even in dispute before us, the stand of the authorities below cannot be approved. Given this finding, it is immaterial as to whether the DAPE existed or not, for the simple reason that, as the binding legal position is, the existence of DAPE is wholly tax neutral. We are aware that on a conceptual note, a PE, whether a fixed base PE, DAPE or any other type of PE, provides for threshold limits to trigger taxation in the source state, but then if as a result of a DAPE, no additional profits, other than agent's remuneration in the source country - which is taxable in the source state anyway *de hors* the existence of PE, become taxable in the source state, the very approach to the DAPE profit attribution may indeed seem incompatible with the above legal position. It may sound incongruous from an academic point of view but then that's what the law is. Respectfully following the esteemed views of Hon'ble jurisdictional High Court, we hold that once an agent has been paid arm's length remuneration, and the income embedded in such remuneration has been taxed in India, no further profits can be taxed in the hands of the DAPE. Accordingly, the action of the authorities below, in bringing income of the DAPE- independent of the agency remuneration received by the agent of the assessee, is unsustainable in law. We, therefore, uphold the plea of the assessee and delete the impugned addition of Rs 54,84,213 in the hands of the assessee. Learned representatives fairly agree that in the event of this core issue being decided in favour of the assessee, all other grievances will be rendered academic.

8. Ground nos. 1, 2 and 3 are allowed in the terms indicated above.
9. In the result, the appeal is allowed as above.

10. Learned representatives fairly agree that whatever we decide in ITA No. 2496/Mum/09 will also apply in ITA No. 8423/Mum/2010 as well. It is pointed out that all the material facts and circumstances are similar and the difference is only in respect of the income assessed- Rs 40,82,990 in this year. In view of this agreed position, and respectfully following our decision in the ITA no, 2496/Mum/2009 above, we uphold the plea of the assessee that as the consideration paid to the agent was an arm's length remuneration and as the same has been subjected to tax in India, no further profits can be brought to tax in the hands of the assessee. The impugned addition of Rs 40,82,990 is thus deleted. Learned representatives fairly agree that once this core issue is decided in favour of the assessee, all other grievances will be rendered academic.

11. However, before we part with the matter, we must deal with one procedural issue as well. While hearing of these appeals was concluded on 15th January 2020, this order is being pronounced today on th day of May, 2020, much after the expiry of 90 days from the date of conclusion of hearing. We are also alive to the fact that rule 34(5) of the Income Tax Appellate Tribunal Rules 1963, which deals with pronouncement of orders, provides as follows:

(5) The pronouncement may be in any of the following manners :—

(a) The Bench may pronounce the order immediately upon the conclusion of the hearing.

(b) In case where the order is not pronounced immediately on the conclusion of the hearing, the Bench shall give a date for pronouncement.

(c) In a case where no date of pronouncement is given by the Bench, every endeavour shall be made by the Bench to pronounce the order within 60 days from the date on which the hearing of the case was concluded but, where it is not practicable so to do on the ground of exceptional and extraordinary circumstances of the case, the Bench shall fix a future day for pronouncement of the order, and such date shall not

ordinarily (*emphasis supplied by us now*) **be a day beyond a further period of 30 days and due notice of the day so fixed shall be given on the notice board.**

12. Quite clearly, “ordinarily” the order on an appeal should be pronounced by the bench within no more than 90 days from the date of concluding the hearing. It is, however, important to note that the expression “ordinarily” has been used in the said rule itself. This rule was inserted as a result of directions of Hon’ble jurisdictional High Court in the case of **Shivsagar Veg Restaurant Vs ACIT [(2009) 317 ITR 433 (Bom)]** wherein Their Lordships had, inter alia, directed that **“We, therefore, direct the President of the Appellate Tribunal to frame and lay down the guidelines in the similar lines as are laid down by the Apex Court in the case of Anil Rai (supra) and to issue appropriate administrative directions to all the benches of the Tribunal in that behalf. We hope and trust that suitable guidelines shall be framed and issued by the President of the Appellate Tribunal within shortest reasonable time and followed strictly by all the Benches of the Tribunal. In the meanwhile** (*emphasis, by underlining, supplied by us now*), **all the revisional and appellate authorities under the Income-tax Act are directed to decide matters heard by them within a period of three months from the date case is closed for judgment”**. In the ruled so framed, as a result of these directions, the expression “ordinarily” has been inserted in the requirement to pronounce the order within a period of 90 days. The question then arises whether the passing of this order, beyond ninety days, was necessitated by any “extraordinary” circumstances.

13. Let us in this light revert to the prevailing situation in the country. On 24th March, 2020, Hon’ble Prime Minister of India took the bold step of imposing a nationwide lockdown, for 21 days, to prevent the spread of Covid 19 epidemic, and this lockdown was extended from time to time. As a matter of fact, even before this formal nationwide lockdown, the functioning of the Income Tax Appellate Tribunal at Mumbai was severely restricted on account of lockdown by the Maharashtra Government, and on account of strict enforcement of health advisories with a view of checking spread of Covid 19. The epidemic situation in Mumbai being grave, there was not much of a relaxation in subsequent lockdowns also. In any case, there was unprecedented disruption of judicial wok all over the country. As a matter of fact, it has been such an unprecedented situation, causing disruption in the functioning of judicial

machinery, that Hon'ble Supreme Court of India, in an unprecedented order in the history of India and vide order dated 6.5.2020 read with order dated 23.3.2020, extended the limitation to exclude not only this lockdown period but also a few more days prior to, and after, the lockdown by observing that **"In case the limitation has expired after 15.03.2020 then the period from 15.03.2020 till the date on which the lockdown is lifted in the jurisdictional area where the dispute lies or where the cause of action arises shall be extended for a period of 15 days after the lifting of lockdown"**. Hon'ble Bombay High Court, in an order dated 15th April 2020, has, besides extending the validity of all interim orders, has also observed that, **"It is also clarified that while calculating time for disposal of matters made time-bound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly"**, and also observed that **"arrangement continued by an order dated 26th March 2020 till 30th April 2020 shall continue further till 15th June 2020"**. It has been an unprecedented situation not only in India but all over the world. Government of India has, vide notification dated 19th February 2020, taken the stand that, the coronavirus "should be considered a case of natural calamity and FMC (*i.e. force majeure clause*) maybe invoked, wherever considered appropriate, following the due procedure...". The term '*force majeure*' has been defined in Black's Law Dictionary, as **'an event or effect that can be neither anticipated nor controlled'** When such is the position, and it is officially so notified by the Government of India and the Covid-19 epidemic has been notified as a disaster under the National Disaster Management Act, 2005, and also in the light of the discussions above, the period during which lockdown was in force can be anything but an "ordinary" period.

14. In the light of the above discussions, we are of the considered view that rather than taking a pedantic view of the rule requiring pronouncement of orders within 90 days, disregarding the important fact that the entire country was in lockdown, we should compute the period of 90 days by excluding at least the period during which the lockdown was in force. We must factor ground realities in mind while interpreting the time limit for the pronouncement of the order. Law is not brooding omnipotence in the sky. It is a pragmatic tool of the social order. The tenets of law being enacted on the basis of pragmatism, and that is how the law is required to interpreted. The interpretation so assigned by us is not only in consonance with the

letter and spirit of rule 34(5) but is also a pragmatic approach at a time when a disaster, notified under the Disaster Management Act 2005, is causing unprecedented disruption in the functioning of our justice delivery system. Undoubtedly, in the case of **Otters Club Vs DIT [(2017) 392 ITR 244 (Bom)]**, Hon'ble Bombay High Court did not approve an order being passed by the Tribunal beyond a period of 90 days, but then in the present situation Hon'ble Bombay High Court itself has, vide judgment dated 15th April 2020, held that directed "**while calculating the time for disposal of matters made time-bound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly**". The extraordinary steps taken *suo motu* by Hon'ble jurisdictional High Court and Hon'ble Supreme Court also indicate that this period of lockdown cannot be treated as an ordinary period during which the normal time limits are to remain in force. In our considered view, even without the words "ordinarily", in the light of the above analysis of the legal position, the period during which lockdown was in force is to be excluded for the purpose of time limits set out in rule 34(5) of the Appellate Tribunal Rules, 1963. Viewed thus, the exception, to 90-day time-limit for pronouncement of orders, inherent in rule 34(5)(c), with respect to the pronouncement of orders within ninety days, clearly comes into play in the present case. Of course, there is no, and there cannot be any, bar on the discretion of the benches to refix the matters for clarifications because of considerable time lag between the point of time when the hearing is concluded and the point of time when the order thereon is being finalized, but then, in our considered view, no such exercise was required to be carried out on the facts of this case.

15. In the result, ITA No, 8423/Mum/10 is also allowed in the above terms. To sum up, both the appeals are allowed as above. Order pronounced under rule 34(4) of the Income Tax (Appellate Tribunal) Rules, 1962, by placing the details on the notice board.

Sd/-
Ravish Sood
(Judicial Member)

Sd/-
Pramod Kumar
(Vice President)

Mumbai, dated the 27th day of May, 2020

Copies to:

(1)	<i>The appellant</i>	(2)	<i>The respondent</i>
(3)	<i>CIT</i>	(4)	<i>CIT(A)</i>
(5)	<i>DR</i>	(6)	<i>Guard File</i>

By order

*Assistant Registrar
Income Tax Appellate Tribunal
Mumbai benches, Mumbai*