

**आयकर अपीलीय अधिकरण, कोलकाता पीठ 'सी', कोलकाता**  
**IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH KOLKATA**

**श्री संजय गर्ग, न्यायिक सदस्य एवं श्री मनीष बोरड, लेखा सदस्य के समक्ष**  
**Before Shri Sanjay Garg, Judicial Member and Dr. Manish Borad, Accountant Member**

I.T.A No.297/Kol/2021  
Assessment year: 2017-18

DCIT, International Taxation, Circle-2(1), Kolkata ..... Revenue  
vs.

M/s Tashi Air Pvt. Ltd..... Assessee  
38, Tivoli Court, 1A,  
Ballygunge Circular Road,  
Beckbagan, Kolkata-700019.  
[PAN: AAECT9735E]

I.T.A No.314/Kol/2022  
Assessment year: 2018-19

M/s Tashi Air Pvt. Ltd..... Assessee  
38, Tivoli Court, 1A,  
Ballygunge Circular Road,  
Beckbagan, Kolkata-700019.  
[PAN: AAECT9735E]

vs.

DCIT, International Taxation, Circle-2(1), Kolkata ..... Revenue

**Appearances by:**

Shri Manish Kanojia, CIT and Smt. Ranu Biswas, Addl. CIT, appeared on behalf of the Revenue.

Shri Dipayan Basu, AR, appeared on behalf of the assessee.

Date of concluding the hearing : September 19, 2022

Date of pronouncing the order : October 12, 2022

**आदेश / ORDER**

**संजय गर्ग, न्यायिक सदस्य द्वारा / Per Sanjay Garg, Judicial Member:**

The captioned are the cross-appeals one filed by the Revenue and the other by the assessee. The appeal filed by the Revenue is directed against the order dated 21.05.2021 of the Commissioner of Income Tax (Appeals)-22, Kolkata [hereinafter referred to as the 'CIT(A)] whereas the appeal filed by the assessee is against the order dated 30.03.2022 of the Assessing Officer pursuant to the directions of the Dispute Resolution Panel (hereinafter referred to as the 'DRP').

2. The assessee is an Airline having its establishment in Bhutan. The issue under consideration in the present appeal is whether the income of the assessee from sale of tickets to air passengers, insurance and fuel charges, etc. in India is to be taxable in India or not. In the Assessment order for AY 2017-18, the ld. Assessing Officer held that as the assessee was having its "Permanent Establishment (PE) in India and hence its income was taxable in India under the provisions of section 9 of the Income Tax Act. The ld. Counsel has further pointed out that in respect of the above issue for A.Y. 2017-18, the ld. 1st Appellate Authority (in short "CIT(A)") has accepted the contention of the assessee that since the 'Place Of Effective Management'( In short "POEM") of the assessee has been in Bhutan, therefore as per Article 8 of the India-Bhutan Double Taxation Avoidance Agreement (in short 'DTAA'), the assessee's income from Air Transport was taxable in Bhutan Only. The Ld. CIT(A) accordingly allowed the appeal of the assessee, for which the revenue is in appeal before this tribunal vide ITA No. 297/Kol/2021.

3. The Ld. Counsel has further submitted that in respect of issue of taxability of the Income of the assessee for AY 2018-19, the Assessing officer in the draft assessment order passed under section 144C of the Act, held that the assessee since having its "Permanent Establishment (PE) in India and hence its income was taxable in India under the provisions of section 9 of the Income Tax Act. The ld. Counsel for the assessee has further pointed out that Dispute Resolution Panel (in short 'DRP'), however, has issued a direction to the ld. Assessing Officer to determine whether Place Of Effective Management( In short "POEM") of the assessee is existing India to decide the place of taxation of the assessee as per Article 8 of the DTAA. Ld. Counsel for the assessee has further contended that these guidelines were not given effect to by the ld. Assessing Officer in right perspective, rather held that assessee is having a "PE" one at Kolkata and another at Delhi, hence its income was taxable in India. The assessee, therefore, has come in appeal before this Tribunal for AY 2018-19, vide ITA No. 314/Kol/2022.

4. Before, proceeding further, it will be relevant to reproduce here the relevant provisions of section 9 and section 90 of the Income Tax Act and also the relevant clauses/articles of the Indo-Bhutan DTAA.

***“Income deemed to accrue or arise in India.***

9. (1) *The following incomes shall be deemed to accrue or arise in India :—*

*(i) all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situate in India.*

*Explanation 1.—For the purposes of this clause—*

*(a) in the case of a business of which all the operations are not carried out in India, the income of the business deemed under this clause to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India ;*

*x-----x-----x-----x-----x-----x-----x-----x-----x-----x*

***Agreement with foreign countries or specified territories.***

90. (1) *The Central Government may enter into an agreement with the Government of any country outside India or specified territory outside India,—*

*(a) for the granting of relief in respect of—*

*(i) income on which have been paid both income-tax under this Act and income-tax in that country or specified territory, as the case may be, or*

*(ii) income-tax chargeable under this Act and under the corresponding law in force in that country or specified territory, as the case may be, to promote mutual economic relations, trade and investment, or*

*(b) for the avoidance of double taxation of income under this Act and under the corresponding law in force in that country or specified territory, as the case may be, or*

*(c) for exchange of information for the prevention of evasion or avoidance of income-tax chargeable under this Act or under the corresponding law in force in that country or specified territory, as the case may be, or investigation of cases of such evasion or avoidance, or*

*(d) for recovery of income-tax under this Act and under the corresponding law in force in that country or specified territory, as the case may be,*

*and may, by notification in the Official Gazette, make such provisions as may be necessary for implementing the agreement.*

*(2) Where the Central Government has entered into an agreement with the Government of any country outside India or specified territory outside India, as the case may be, under sub-section (1) for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee.*

*(emphasis supplied by us)*

Now coming to the relevant provisions of Indo-Bhutan DTAA:

**“ARTICLE 8**

**SHIPPING AND AIR TRANSPORT**

- 1. Profits derived by an enterprise of a Contracting State from the operation of ships or aircraft in international traffic shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.*
- 2. If the place of effective management of a shipping enterprise is aboard a ship, then it shall be deemed to be situated in the Contracting State in which the operator of the ship is a resident.*
- 3. Profits derived by a transportation enterprise in a Contracting State in which the place of effective management of the enterprise is situated, from the use, maintenance, or rental of containers (including trailers and other equipment for the transport of containers) used for the transport of goods or merchandise in international traffic which is supplementary "or incidental to operation of its ship or aircraft in international traffic shall be taxable only in that Contracting State unless the containers are used solely within the other Contracting State.*
- 4. For the purposes of this Article, interest on investments directly connected with the operation of ships or aircraft in international traffic shall be regarded as profits derived from the operation of such ships or aircraft if they are integral to the carrying on of such business, and the provisions of ARTICLE 11 shall not apply in relation to such interest.*
- 5. The provisions of paragraph 1 shall also apply to profits from the participation in a pool, a joint business or an international operating agency.*

Further the term “International Traffic has been defined as under:

- 1. For the purposes of this Agreement, unless the context otherwise requires:*
  - (h) the term "international traffic" means any transport by a ship or aircraft operated by an enterprise that has its place of effective management in a Contracting State, except when the ship or aircraft is operated solely between places in the other Contracting State;*

5. It is pertinent to note here that as per the law laid down by the Hon'ble Supreme Court in the case of "Union of India vs. AzadiBachaoAndolan" (2003) 263 ITR 607, where a specific provision is made in the DTAA, that provision will prevail over the general provisions contained in the Income Tax Act if, the same is more beneficial to the assessee as provided under section 90(2) of the Income tax Act.

6. Since there article 8 of the Indo Bhutan DTAA is more beneficial to the assessee, therefore the profits derived by the assessee from the operation of ships or aircraft in international traffic are liable to be taxed in the contracting state in which its place of effective management of the enterprise is situated, which undisputedly is Bhutan.

7. The Ld. Assessing Officer has rejected the claim of the assessee only on the ground that the term "Profits derived from the operation of ships or aircraft in international traffic" has been more elaborately explained to include the transportation of air passengers.

*"4. For the purposes of this Article, profits from the operation of ships or aircraft in international traffic shall mean profits derived from the transportation by sea or air of passengers, mail, livestock or goods carried on by the owners or lessees or charterers of the ships or aircraft, including profits from :*

*(a)the sale of tickets for such transportation on behalf of other enterprises;*

*(b)the incidental lease of ships or aircraft used in such transportation;*

*(c)the use, maintenance or rental or containers (including trailers and related equipment for the transport of containers) in connection with such transportation; and*

*(d)any other activity directly connected with such transportation."*

8. We find that in the above definition the profit derived "Profits derived from the operation of ships or aircraft in international traffic", in the India- Singapore DTAA is exhaustive enough not only to include the air passengers but also mail, livestock or goods. There is nothing mentioned in the India-Singapore DTAA to make an inference that the profits from transport of air passengers should not be covered under Article 8 of the Indo-Bhutan DTAA.

9. In view of the above observations, the issue is decided in favour of the assessee. The appeal of the assessee is allowed, whereas the appeal of the revenue is hereby dismissed.

**Kolkata, the 12<sup>th</sup> October, 2022.**

Sd/-  
[डॉक्टर मनीष बोरड /Dr. Manish Borad]  
लेखा सदस्य /Accountant Member

Sd/-  
[संजय गर्ग /Sanjay Garg]  
न्यायिक सदस्य /Judicial Member

Dated: 12.10.2022.

RS

*Copy of the order forwarded to:*

1. DCIT, International Taxation, Circle-2(1), Kolkata
2. M/s Tashi Air Pvt. Ltd.
3. CIT(A)-
4. CIT- ,
5. CIT(DR),

//True copy//

By order

Assistant Registrar, Kolkata Benches