

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

**BEFORE: SHRI M.BALAGANESH, ACCOUNTANT MEMBER
&
SMT KAVITHA RAJAGOPAL, JUDICIAL MEMBER**

**ITA No.2254/Mum/2022
(Assessment Year :2018-19)**

M/s. United Arab Shipping Company Limited (Formerly known as United Arab Shipping Company (SAG)) C/o. Hapag-Lloyd India Pvt. Ltd 501, B Wing, 5 th Floor Satellite Gazebo, Guru Hargovindji Marg Andheri East Mumbai – 400 093	Vs.	Assistant Commissioner of Income Tax (International Taxation) 4(3)(1) Air India Building Nariman Point Mumbai- 400 021
PAN/GIR No.AACU4043J		
(Appellant)	..	(Respondent)

Assessee by	Shri Nikhil Tiwari
Revenue by	Shri Soumendu Kumar Dash
Date of Hearing	16/11/2022
Date of Pronouncement	16/11/2022

आदेश / O R D E R

PER M. BALAGANESH (A.M.):

This appeal in ITA No.2254/Mum/2022 for A.Y.2018-19 preferred by the order against the final assessment order passed by the Assessing Officer u/s.143(3) r.w.s. 144C(13) of the Income Tax Act, hereinafter referred to as Act, pursuant to the directions of the Id. Dispute Resolution

Panel-II, Mumbai (DRP in short) u/s.144C(5) of the Act dated 23/06/2022 for the A.Y.2018-19.

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

“Based on the facts and circumstances of the case, United Arab Shipping Company Limited (Formerly known as United Arab Shipping Company (S.A.G.)1 (the Appellant), respectfully craves to prefer an appeal against the order dated 12 July 2022 passed by the Assistant Commissioner of Income tax, (International Taxation) 4(3)(1), Mumbai, (AO) (received by the Appellant on 12 July 2022) under section 143(3) rw.s. 144C(13) of the Income-tax Act. 1961 (the Act) in pursuance of the directions issued by the Dispute Resolution Panel-1 (D.RP'), Mumbai on the following grounds: On the facts and in the circumstances of the case and in law, the AO, based on the directions of DRP has:

General

1. *erred in assessing the total income of the Appellant at INR 26,61,890/- as against NIL returned income;*

Taxability of Inland Haulage Charges (IHC) of INR 26,61,890/-

2. *erred in holding that 7.5% of IHC of INR 3,54,91,836/- is income taxable in the hands of the Appellant and accordingly brought to tax @ 40% of taxable receipt;*

3. *erred in making an addition on account of IHC by denying the benefit of Article 8 of India - UAE Double Taxation Avoidance Agreement ('India-UAE DTAA') since IHC is directly connected to and ancillary to the transportation of cargo in international traffic;*

4. *the learned AO has erred in not following the binding decision of jurisdictional Bombay High Court (HC) in the case of Safmarine Container Lines N.V. (ITA No. 952 of 2011 and 147 of 2009 dated 17 January 2013) on the ground that said decision is further challenged before the Hon'ble Supreme Court of India (SC) when the SC has dismissed the appeal filed by Income-tax Department and therefore, erred in appreciating that the matter has reached finality.*

United Arab Shipping Agency Company ('UASAC') held to be agency permanent establishment ("PE") of the Appellant in India

5. erred in holding that the UASAC is dependent agent of the Appellant in India and, such dependent agent constitutes a PE of the Appellant in India, without appreciating the facts and circumstance of the case,

6. without prejudice to the above, failed to appreciate that even if it is held that UASAC India constitutes an agency PE of the Appellant in India, no further profits could be attributed to such PE since the Appellant has remunerated UASAC India on an arm's length basis.

Short grant of Tax Deducted at Source (TDS) credit of INR 8,68,889/- appearing in Form 26AS of UASC SAG and UASAC

7. erred in not granting TDS credit of INR 83,345/- comprising of TDS credit short granted though appearing in Form 26AS of UASC SAG:

8. erred in not granting TDS credit of INR 7,85,544/- as claimed in the return of income which was incorrectly deposited by deductors in the PAN No, of our agent ie., United Arab Shipping Agency Company India Private Limited (UASAC) and UASAC has not taken credit for the same;

9. erred in not appreciating the fact that the corresponding receipts on which the aforesaid tax has been deducted has been considered for claim of exemption under section 90(2) read with Article 8 of the India-UAE DTAA and forms a part of the total gross receipts of INR 430,83,35,443/- Interest under section 234D of the Act

10. erred in levying interest under section 234D of INR 1,45,430/-;

Initiation of penalty proceedings under section 270A of the Act

11. erred in initiating penalty proceedings under section 270A of the Act.

The above grounds of appeal are mutually exclusive and without prejudice to one another. The Appellant craves leave to add, alter, vary, omit, substitute or amend the above grounds of appeal, at any time before or at, the time of hearing of the appeal, so as to enable the learned Hon'ble ITAT to decide this appeal according to law.

3. The Ground No.1 raised by the assessee is general in nature and does not require any specific adjudication.

4. The Ground No.2-4 raised by the assessee is with regard to taxability of Inland Haulage Charges (IHC) of Rs.26,61,890/-.

4.1. We have heard rival submissions and perused the materials available on record. The assessee, United Arab Shipping Company.('UASC SAG') is a foreign company. It was a tax resident of Kuwait upto 31.12.2017. Subsequently, due to shift in registered office of the assessee from Kuwait to Dubai, the assessee became a tax resident of United Arab Emirates. It is engaged in the business of operation of ships in International Traffic (the 'Shipping Business') and it has derived income from the shipping business which inter alia includes freight, detention, demurrage, terminal handling charges etc. During the year under consideration the assessee has earned an aggregate income of Rs.4,30,83,35,443/- from shipping business in India, which is claimed exempt from taxation under Article 8 of the India-U.A.E DTAA. It includes Inland Haulage Charges aggregating to Rs. 3,54,91,836/-. The Id. AO has issued the draft assessment order dated 22.09.2021 u/s 144C(1) of the of the Act, and proposed an assessment of the income at Rs. 26,61,888/- by applying profitability rate of 7.5% on Inland Haulage Charges aggregating to Rs. 3,54,91,836/- and held as Business receipt of the assessee from its operation in India as per the provisions of section 9(1)(1) of the Act and as per the Article 7 of the Treaty.

4.2. The assessee preferred objections before the Id. DRP. The relevant objection No.4 raised by the assessee before the Id. DRP is reproduced hereunder:-

“On the facts and circumstances of the case and in law, the learned AO has erred in not following the binding decision of jurisdictional Bombay High Court ('HC') in the case of Safmarine Container Lines N.V. (ITA No. 952 of 2011 and 147 of 2009 dated 17 January 2013) on the ground that said decision is further challenged before the Hon'ble Supreme Court of India ('SC') when the SC has dismissed the appeal filed by Income-tax Department and therefore, erred in appreciating that the matter has reached finality.”

4.3. The Id. DRP had disposed of the objections raised by the assessee by observing as under:-

5.4.1. We have considered the submission of the assessee. The assessee, has submitted that IHC collected by UASC SAG from its customers is directly connected with operation of ships in international traffic and thus, falls under Article 8 of the India-Kuwait/Dubai DTAA, hence, IHC ought not to be taxable in india under section 44B of the Act since the provisions of DTAA are beneficial to UASC SAG, In support of the argument the assessee has primarily placed reliance on the decision of Hon'ble Mumbai Income-tax Appellate Tribunal (ITAT) in the case of Safmarine Container Lines N.V. [(2009) (120 ITD 71)], wherein the Hon'ble ITAT has held that inland transportation of cargo coupled with further shipping of cargo by the Assessee from the Indian port to the foreign country would be construed as directly connected to such transportation of cargo in international traffic. The Hon'ble Bombay HC (ITA No. 952 of 2011 and 147 of 2009 dated 17 January 2013) and the Hon'ble SC [SLP(C) No. 035706/2013] have dismissed the revenue appeal against the aforesaid order. In this regard we have noted that the Department has withdrawn the appeal on account of low tax effect and the Hon'ble Apex Court has dismissed the appeal as withdrawn leaving the question of law open. It clearly emerges from the decision that the issue whether IHC is taxable in India as per Article 8 of India-UAE Double Taxation Avoidance Agreement (India-UAE DTAA) has not yet attained finality.

5.4.2 We may observe here that the process before the DRP is a continuation of assessment proceeding as it is only the draft assessment order which is being challenged before it. The final assessment order is yet to be passed by the assessing officer. This view is fortified by the decision of the division bench of the Hon'ble High Court of Bombay in the Writ Petition No. 1877 of 2013 in the case of Vodafone India Services Pvt. Ltd. vs. Additional Commissioner of Income Tax & Ors. (2014) 264 CTR 0030 (Bom): (2013) 96 DTR 0193 (Bom): (2014) 361 ITR 0531 (Bom): (2014) 221 Taxman 0166 (Bom), wherein it is held that:

"47. However as no final assessment order has yet been passed by the Assessing officer and the issues are still at large before the DRP the same could be urged before the DRP....."

The process before the DRP is a continuation of the assessment proceedings as only thereafter would a final appealable assessment order be passed. Till date there is no appealable assessment order. The proceeding before the DRP is not an appeal proceeding but a correcting mechanism in the nature of a second look at the proposed assessment order by high functionaries of the revenue keeping in mind the interest of the assessee. It is a continuation of the Assessment proceedings till such time a final order of assessment which is appealable is passed by the Assessing Officer. This also finds support from Section 144C(6) which enables the DRP to collect evidence or cause any enquiry to be made before giving directions to the Assessing

Officer under Section 144C(5). The DRP procedure can only be initiated by an assessee objecting to the draft assessment order. This would enable correction in the proposed order (draft assessment order) before a final assessment order is passed. Therefore, we are of the view that in the present facts this issue could be agitated before and rectified by the DRP

5.4.3 As discussed earlier, the above issue has not yet attained the finality and the possibility that the issue is decided in favour of revenue, cannot be ruled out. However, at the stage when the issue attains the finality, it is likely that the remedial measures available to levy and collect tax on account of this issue, may not be available to the Revenue on account of limitation placed by the statute. In this regard, we may refer to the decision of the Hon'ble Supreme Court of India in the case of Malabar Industrial Co. Ltd. vs. Commissioner of Income Tax (2000) 159 CTR 0001 (2000) 243 ITR 0083: (2000) 109 TAXMAN 0066 wherein it is observed that "The scheme of the Act is to levy and collect tax in accordance with the provisions of the Act and this task is entrusted to the Revenue. Therefore, with due respect to the decision of the Hon'ble High Court, in order to protect the interest of the revenue, the DRP is of the considered opinion that the issue has to be kept alive and hence the addition made by the TPO needs to be sustained.

4.4. From the above observations of the Id. DRP, it could be seen that the issue in dispute is squarely covered in favour of the assessee by the decision of the Hon'ble Jurisdictional High Court in the case of Safmarine Container Lines N.V. in ITA No.952 of 2011 and 147 of 2009 dated 17/01/2013. The fact of the issue in dispute covered in favour of the assessee by the decision of the Hon'ble Jurisdictional High Court is not in dispute before us. Hence, respectfully following the decision of the Hon'ble Jurisdictional High Court, the ground Nos. 2-4 raised by the assessee are allowed.

5. The ground Nos.5 and 6 raised by the assessee become academic in nature as it has already been held that income itself is exempt under Article 8 of the India UAE DTAA. Hence, they are allowed.

6. The ground Nos.7 to 9 raised by the assessee are with regard to short grant of TDS credit of Rs.8,68,889/- appearing in form 26AS of

United Arab Shipping Company (UASC SAG) and United Arab Shipping Agency Company India Pvt. Ltd., (UASE India).

6.1. We have heard rival submissions and perused the materials available on record. There was a short grant of TDS credit to the assessee in the draft assessment order passed by the Id. AO, which was objected to by the assessee before the Id. DRP. The assessee made the following submissions before the Id. DRP:-

7.1.1. The assessee has an application for admission of additional evidence under Rule 4(3)(b) of the Income-tax(Disputes Resolution Panel) Rules 2009, on 30.12.2021 wherein the assessee has submitted that United Arab Shipping Agency Company India Private Limited ('UASC India') was an Indian wholly owned subsidiary of UASC SAG, engaged in the business of support services and that UASC India on behalf of UASC SAG carries out the activity of collection of freight and other charges. The assessee has contended that in cases where UASC SAG does not have DIT relief certificates, the customers deduct taxes (TDS) on freight amount paid by them to UASC SAG under the PAN of UASC India. Therefore, though the TDS certificates are issued in the name of UASC India, the same was claimed by UASC SAG in its return of income for AY 2018-19, hence, the direction may be issued to the AO to grant credit for Tax Deducted at Source ('TDS').

6.2. Pursuant to the submissions made together with the additional evidences filed by the assessee before the Id. DRP, the Id. DRP sought for a remand report from the Id. AO. The Id. AO submitted his remand report vide letter dated 23/03/2022 by observing as under:-

"It is further humbly submitted, that as per the extant guidelines of the CBDT, credit for TDS can be allowed only to the extent it reflects in 26AS/ITD System. In the instant case, the TDS reflected in the ITD system is shorter than that claimed by the Assesses. The same may be due to incorrect filing of the return/errors in the TDS deduction statements filed by the deductors. The only course available in this situation, for obtaining short credit of TDS is that the concerned deductors should be approached by the assessee for filing correction statements so as to reflect true TDS credits and the beneficiaries thereof. Therefore, the Assessee should take up the matter with relevant concerned deductors for the necessary correction. The Assessee has failed to submit any material evidences in this

regard on record. Further, documentary evidences regarding any such efforts by the assessee too have not been provided.

If in case the concerned deductors decline to make necessary corrections; the concerned jurisdictional TDS Assessing Officer may be approached by Assessee for getting necessary corrections or revisions done.”

6.3. The Id. DRP directed the Id. AO to follow the CBDT guidelines in this regard while disposing of objections raised by the assessee.

6.4. This issue is no longer res integra in view of the decision of this Tribunal in the case of Hapag Lloyd AG vs. DCIT International Taxation in ITA No.972/Mum/2021 for A.Y.2017-18 dated 31/01/2022 wherein this issue was restored to the Id. AO by observing as under:-

023. Coming to ground number 8 – 11 wherein the claim of the assessee is with respect of tax credit of ₹ 2,506,606 which was directed by the learned dispute resolution panel to the learned assessing officer to verify the submission and then allow the TDS credit where legitimately due to the assessee. This ground was identical to ground number 8 in ITA number 5898/2019 for assessment year 2016 – 17 dated 31/1/ 2020 in assessee’s own case wherein as per paragraph number 16 as Under:-

“16. We find that the assessee has also assailed before asked the failure on the part of the AO grant credit for TDS of ₹ 6,006,811/- for the reason, that the same was wrongly deposited in the PAN number of the agent of the assessee. It was submitted by the learned AR that the AO while concluding as hereinabove had overlooked the fact that the agent had not taken the credit for the said amount. We find that the aforesaid claim of the assessee would require verification of facts as they had been stated by the assessee before us. Accordingly, we restore the matter to the file of the AO for making necessary verification is. In case, the income of the core relating to the TDS of ₹ 6,996,811/- had been assessed in the hence of the assessee and no credit for the same was raised by the agent, then the AO after being satisfied shall allow the necessary credit for the same to the assessee. Needless to say, the AO shall in the course of the set-aside proceedings afford a sufficient opportunity of being heard to the assessee for substantiating its aforesaid claim. The ground of appeal number 8 is allowed for statistical purposes in terms of our aforesaid observations.”

024. Facts related to short grant of TDS credit of ₹26,06,606/- showed that the gross receipt of ₹11,94,94,364/- on which the tax has been deducted has already been considered for claim of exemption under section 90(2) read

with Article 8 of Indo German Double Taxation Avoidance Agreement. The claim of the assessee is that the assessee has wholly owned subsidiary in India Hapag-Lloyd India Pvt. ltd. This company collected the freight from the customers of the assessee and therefore, the customers while making payment to an Indian entity deducts tax at source and certificates are issued in the name of Indian entity. The Indian entity arranges for vendor payments and the balance amount collected is remitted to assessee. The assessee's claim is that the income involved in the TDS certificate does not pertain to Indian entity but to the assessee. The TDS is claimed as credit by the assessee. The Indian entity did not claim any credit of the above TDS. The Tax Deducted At Source (TDS) in form No. 26 AS is shown in the name of the Indian entity. As the assessee has shown the income involved in this TDS certificates and in turn also claimed benefit of Article 8 and the benefit of DTAA, the credit for such tax should be granted to the assessee. The claim of the assessee is that Rule 37BA is required to be complied with. It is also submitted that merely because the deductor does not revise the TDS return, it cannot go against the assessee for the claim of the above refund. The assessee raised this additional ground before the learned Dispute Resolution Panel. The Dispute Resolution Panel admitted the above additional ground along with additional evidences. It also obtained the comments from the Assessing Officer and rejoinder of the assessee thereon. The learned Dispute Resolution Panel directed the learned Assessing Officer to carry out the necessary verification and to grant credit. The assessee was also directed to submit all relevant details and clarification thereon. But AO did not consider and carry out such directions.

025. As the issue identical facts emerged in earlier year, we respectfully following the order of the coordinate bench in assessee's own case for assessment year 2016 – 17 also direct the Assessing Officer similarly. Accordingly, the Assessing Officer may examine the same in accordance with law after granting sufficient opportunity to the assessee. Accordingly, ground Nos. 8 to 11 of the appeal of the assessee is allowed with above directions.

026. Accordingly, the appeal of the assessee is partly allowed.

6.4. The facts prevailing in the instant case are exactly identical to the facts of the aforesaid decision of Mumbai Tribunal. Hence, respectfully following the decision of Mumbai Tribunal referred to supra, the ground Nos.7-9 are restored to the file of the Id. AO with the same directions.

7. The ground No.10 raised by the assessee is challenging the chargeability of interest u/s.234D of the Act which is consequential in nature and does not require any specific adjudication.

8. The ground No.11 raised by the assessee is challenging the initiation of penalty proceedings u/s.270A of the Act which would be premature for adjudication at this stage and hence, dismissed.

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

Order pronounced in open Court on 16/11/2022.

Sd/-
(KAVITHA RAJAGOPAL)
JUDICIAL MEMBER

Mumbai; Dated 16/11/2022
KARUNA, *sr.ps*

Sd/-
(M.BALAGANESH)
ACCOUNTANT MEMBER

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai