IN THE INCOME TAX APPELLATE TRIBUNAL

"I" BENCH, MUMBAI

BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA no.4535/Mum./2023
(Assessment Year : 2021–22)

Hapag-Llyod Aktiengesellschaft
C/o Hapag-Lloyd India Pvt. Ltd,
501 Satellite Gazebo, B Wing,
5th Floor, Guru Hargovindji Marg,
Andheri East, Mumbai-400993
PAN – AAACH0979G

……. Appellant

v/s

The Deputy Commissioner of Income Tax International Tax Circle-2(2)(2)
Room No.1606, 16th Floor, Air India Building, Nariman Point,
Mumbai-400021

……. Respondent

Assessee by :Shri Niranjan Govindekar
Ms Deepika Dingreja
Revenue by :Shri Anil Sant

Date of Hearing – 01/05/2024	Date of Order – 04/06/2024

O R D E R

PER SANDEEP SINGH KARHAIL, J.M.

The present appeal has been filed by the assessee challenging the impugned final assessment order dated 16/10/2023, passed under section 143(3) r/w section 144C(13) of the Income Tax Act, 1961 ("*the Act*"), pursuant to the directions issued by the learned Dispute Resolution Panel-1, Mumbai-1, ["*learned DRP*"], under section 144C(5) of the Act, for the assessment year 2021-22.

2. In its appeal, the assessee has raised the following grounds:–

"1. Non-Grant of Relief under Article 8 of the India - Germany Double Taxation Avoidance Agreement ['India Germany DTAA']

1.1 The learned Assessing Officer / Dispute Resolution Panel ['DRP'] has erred in not appreciating the facts in the case of the appellant and therefore appellant prays that the impugned order be treated as void ab initio.

1.2 On the facts and circumstances of the case and in law, the learned Assessing Officer / DRP erred in rejecting the appellant's claim for relief under Article 8 of the DTAA entered into and subsisting between India - Germany in respect of its freight earnings of Rs. 38,81,04,429 on the premise that the earnings attributable to the carriage on feeder vessels were not eligible for the relief.

1.3 On the facts and circumstances of the case and in law, the learned Assessing Officer / ORP erred in refusing to follow the binding decision of jurisdictional Bombay High Court (HC) / Income Tax Appellate Tribunal (Hon'ble 'ITAT) in the Appellant's own case for AY 2005-06 to AY 201112, AY 2013-14, AY 2014-15, AY 2015-16, AY 2016-17, AY 2017-18 and AY 2018-19 wherein the Hon'ble HC/ Hon'ble ITAT has consistently held that freight income from transportation of cargo through feeder vessels is also eligible for benefit under Article 8 of the India-Germany DTAA.

The appellant prays that the learned Assessing Officer / DRP be directed to allow relief of Rs. 38,81,04,429 under Article 8 of the India Germany DTAA.

1. 4 Without prejudice to the above, on the facts and circumstances of the case and in law, the learned Assessing Officer / DRP erred in holding that income from feeder vessels/slot arrangement would fall within the ambit of section 44B of the Act. The learned Assessing Officer / DRP erred in not applying the same rationale to hold that the said income falls under the ambit of Article 8 of the India Germany DTAA.

1.5 On the facts and circumstances of the case and in law, the learned Assessing Officer erred in not realizing that as per the provisions of Article 3(2) read with Article 24 of India-Germany DTAA, any term covered under any definition in the Act ought to be covered under the DTAA. Thus, where 'slot chartering' is covered under 'operation of ships' under the Act, the same ought to be covered under 'operation of ships' under the DTAA.

2. Existence of a Permanent Establishment ('PE')

2.1 On the facts and circumstances of the case and in law, the learned Assessing Officer / DRP erred in holding that the Appellant has a Permanent Establishment ('PE') in India in terms of Article 5 of the India-Germany DTAA.

The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject, it has no PE in India and hence, the stand taken by the Assessing Officer / DRP that Hapag-Llyod India Private Limited ('HLIPL') is a dependent agent of the appellant in terms of Article 5(5) of the DTAA is erroneous, misconceived and not in accordance with law.

2.2 On the facts and circumstances of the case and in law, the learned Assessing Officer / DRP have failed to appreciate that HLIPL is an independent agent in terms of Article 5(6) of the DTAA and hence cannot be held to be a PE of the Appellant in India.

The Appellant submits that stand taken by the learned Assessing Officer / DRP in holding that the Appellant has a PE in India ought to be struck down.

2.3 without prejudice to the above, on the facts and circumstances of the case and in law, the learned Assessing Officer / DRP failed to appreciate that even ff ft held that HLIPL constitutes an agency PE of the appellant in India, no profits could be attributed to the agency PE in India since the appellant has remunerated HLIPL on an arm's length basis in terms of Article 5(6) of the DTAA.

3 Non-granting of credit for Taxes Deducted at Source ('TDS') amounting to Rs, 46,87,726

3.1 On the facts and circumstances of the case and in law, the learned Assessing Officer / DRP has erred in not granting credit for TDS to the extent of Rs. 16,87,726.

The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject it is entitled to a credit of Rs. 16,87,726 being the TDS on income charged to tax in AY 2021-22.

3.2 On the facts and circumstances of the case and in law, the learned Assessing Officer ought to have considered the fact that of the above amount of Rs. 16,87,726, the amount of TDS of Rs. 15,01,818 is even appearing in the Form 26AS of the appellant for AY 2021-22.

3.3 On the facts and circumstances of the case and in law, the learned Assessing Officer failed to appreciate that though the TDS of Rs. 1,85,907 is appearing in the Form 26AS of HLIPL, the same is claimed by the appellant since the corresponding income was offered and charged to tax in the hands of the appellant for AY 2021-22 and on which it claimed treaty benefit.

3.4 The learned Assessing Officer failed to appreciate that the similar issue of grant of TDS appearing in the Form 26AS of HLIPL is covered by the order of Hon'ble 'ITAT in the Appellant's own case for AY 2016-17, AY 2017-18 and AY 2018-19.

The Appellant submits that the learned Assessing Officer be directed to grant full credit for TDS and to re-compute its tax liability accordingly.

4. Levy of Interest under section 234A & 234B of the Act

4.1 On the facts and circumstances of the case and in law, the learned Assessing Officer erred in levying interest of Rs. 1,43,775 under section 234A of the Act.

The learned Assessing Officer failed to appreciate that interest under section 234A of the Act is not applicable in the given case since return was filed within the due date Prescribed under section 139(1) of the Act for filing the return of income for the AY 2021-22.

4.2 On the facts and circumstances of the case and in law, the learned Assessing Officer erred in levying interest of Rs.8,91,405/- under section 234B of the Act."

3. The issue arising in grounds no.1.1 to 1.5, raised in assessee's appeal, pertains to the applicability of Article 8 of the India-Germany Double Taxation Avoidance Agreement ("*DTAA*") to the freight earnings from feeder vessels.

4. The brief facts of the case pertaining to this issue, as emanating from the record, are: The assessee, a limited liability company, is incorporated and a tax resident of Germany. The assessee is engaged in the transportation of cargo and India. It also transports cargo on vessels owned/chartered/pooled by it as well as on slot arrangement. For the year under consideration, the assessee filed its return of income on 07/03/2022 declaring a total income of Rs.74,34,44,140. The assessee has claimed that its income is not chargeable to tax as per the provisions of the India-Germany DTAA. The return filed by the assessee was selected for scrutiny and statutory notices under section 143(2) as well as section 142(1) of the Act were issued and served on the assessee. During the assessment proceedings, the assessee was asked to show cause as to how its income is exempt as per Article 8 of the India-Germany DTAA and as to why the same should not be treated as income in respect of freight from feeder vessels. In response thereto, the assessee submitted that it is in the business of shipping and carries cargo between ports in India and ports outside India. The assessee submitted that in the course of its shipping business, it transports cargo on vessels owned/leased/chartered/pooled by it. It was further submitted that its vessels do not call at the Indian ports on account of various reasons, such as the size

of the vessels being too large to enter the Indian ports which have shallow drafts or the depth of the Indian ports is not enough for the vessels to be anchored, etc. Therefore, the assessee books space/buy slots on feeder vessels and transports cargo through such vessels. The assessee further submitted that the companies engaged in the business of operation of ships generally transport cargo by availing the slot hire facility and the slot hire agreements are directly connected and interlinked with and are an integral part of the enterprise's business of operating ships. The assessee also submitted that without availing slot hire/feeder facilities, the shipping enterprises would be unable to carry on the business of operating ships in international traffic at all in many cases. Thus, it was submitted that if the DTAA is construed to include activities directly or indirectly connected to the operation of ships, it would include slot hire/feeder vessels. The assessee placed reliance upon the decision of the Hon'ble jurisdictional High Court in CIT v/s Balaji Shipping (UK) Ltd., [2012] 24 taxmann.com 229 (Bom.). The assessee also submitted that an identical issue has been decided in favour of the assessee in assessee's own case by the coordinate bench of the Tribunal for the assessment year 2007-08, which has been confirmed by the Hon'ble High Court.

5. The Assessing Officer ("*AO*") vide draft assessment order dated 19/12/2022 passed under section 144C(1) of the Act did not agree with the submissions of the assessee and held that the decision of the Hon'ble jurisdictional High Court in Balaji Shipping (UK) Ltd (supra) is not applicable to the facts of the present case, as in that case the India-UK DTAA was involved,

which specifically provides that the income from the operation of the ships includes the income derived from the rental on a bareboat basis of ships, if such a rental income is incidental to the income described in paragraph 1 of the Article. However, this is not the case of the assessee as no such provision existed in Article 8 of the India-Germany DTAA. The AO further held that the Revenue has not accepted the decision of the Hon'ble jurisdictional High Court in Balaji Shipping (UK) Ltd (supra) and in assessee's own case and has filed Special Leave Petition before the Hon'ble Supreme Court, which is pending consideration. The AO further placed reliance upon the assessment order passed in assessee's own case for the assessment year 2007-08. The AO further held that the assessee is carrying out its business of operation of ships in India through its agent M/s Hapag Lloyd India Ltd, which is concluding the contract of cargo transported by issuing the bill of lading, which is legally binding on the assessee. Accordingly, the AO concluded that M/s Hapag Lloyd India Ltd is a Permanent Establishment of the assessee in India as per Article 5 of the India-Germany DTAA. Without prejudice, the AO held that even otherwise since the assessee is earning income from the business of shipping and is not eligible for benefit under Article 8 of the India-Germany DTAA, therefore its income is taxable under section 44B of the Act. After analysing the breakup of freight charges earned by the assessee during the year, the AO noted that the freight earned from feeder to feeder vessels and freight earned from the entire journey of feeder vessels is Rs.38,81,04,429, on which relief as per Article 8 of the India-Germany DTAA is not available. Accordingly, the AO proposed to tax the aforesaid freight charges under section 44B of the Act @7.5% and add the same total income of the assessee.

6. The assessee filed detailed objections before the learned DRP against the addition made by the AO. Vide directions dated 26/09/2023, issued under section 144C(5) of the Act, the learned DRP placing reliance on the findings of the learned DRP rendered in the assessment years 2016-17, 2017-18, 2018-19 and 2020-21 on a similar issue, rejected the objections filed by the assessee on this issue, after noting that there is no substantial change in the material facts and circumstances and the submission of the assessee is also largely the same as in the preceding years. In conformity with the directions issued by the learned DRP, the AO passed the impugned final assessment order taxing the freight earned from feeder to feeder vessels and freight earned from the entire journey of feeder vessels amounting to Rs.38,81,04,429 under section 44B of the Act @7.5% and added the same total income of the assessee. Being aggrieved, the assessee is in appeal before us.

7. During the hearing, the learned Authorised Representative (*"learned AR"*) submitted that this issue has been decided in favour of the assessee by the decisions of the coordinate bench of the Tribunal in assessee's own case for preceding assessment years, which have also been confirmed by the Hon'ble High Court. The learned AR further submitted that even lower authorities have accepted that facts for the year under consideration are similar to the facts of the preceding assessment years, wherein this issue has been decided in favour of the assessee.

8. On the other hand, the learned Departmental Representative (*"learned DR"*) vehemently relied upon the order of the authorities below and submitted that the Department's appeals against the decisions of the Hon'ble High Court are currently pending before the Hon'ble Supreme Court.

9. We have considered the rival submissions and perused the material available on record. We find that the coordinate bench of the Tribunal in assessee's own case in Hapag Lloyd AG v/s DCIT, in ITA No. 972/Mum./2021, for the assessment year 2017-18, vide order dated 31/01/2022 after considering the decision of the coordinate bench rendered in assessee's own case for the assessment year 2007-08, which has been affirmed by the Hon'ble jurisdictional High Court, observed as under:-

> *"018. The above order of the coordinate bench was subject matter of challenge before the honourable Bombay High Court in Income Tax Appeal number 602 of 2014, (which is reproduced at paragraph number 5 of the order of the honourable High Court in Income Tax Appeal number 1362 of 2017 for assessment year 2009 – 10 which is decided on 6 January 2020, placed at paper book page number 4 – 6). The honourable High Court held that the impugned order of the coordinate bench has allowed the appeal of the assessee by following the decision of honourable High Court in Director Of Income Tax, International taxation versus Balaji shipping UK Ltd (2012) 211 taxman 535 and further the learned counsel appearing for the revenue in that case stated that the issue stands concluded in the favour of the respondent assessee by the decision of honourable Bombay High Court in Balaji shipping UK (supra). Based on this the honourable High Court held that no substantial question of law arises and the appeal of the revenue was dismissed.*
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> *019. Further as the fact shows that for assessment year 2009 – 10 also the honourable High Court following its own order for assessment year 2007 – 08 and also on the submission made by the learned counsel for the revenue that the issue stands covered, the appeal filed by the learned assessing officer was not admitted by order dated 7 January 2020.*
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> *020. Further the coordinate bench for assessment year 2006 – 07 to assessment year 2011 – 12 (except assessment year 2007 – 08) as per order dated 22/7/2016, following the order of the coordinate bench for assessment year 2007 – 08 dated 14/8/2013 allowed the claim of the assessee and dismissed appeals of the revenue. Further, for assessment year 2005 – 06 in ITA number 1776/2014 the coordinate bench wide order dated 21/9/2016 wherein the appeal was filed by the assessee was allowed as per paragraph number 7 holding that*

slot hire charges income is eligible for benefit as per article 8 of the treaty. Subsequently also for assessment year 2013 – 14 per order dated 31/10/2017, for assessment year 2014 – 15 per order dated 28/6/2019, for assessment year 2015 – 16 per order Dated 16/12/2019 and for assessment year 2016 – 17 per order dated 31/1/2020, the claim of the assessee for the benefit to the slot hire income Under article 8 of the treaty was allowed.

021. As per chart submitted by the learned authorised representative the percentage of income from feeder vessels to the total freight income for the impugned assessment year is merely 0.69%. All the arguments raised before us by the learned departmental representative has been considered in the decision of the coordinate benches as well as in the decision of the honourable High Court holding in favour of the assessee. Therefore, respectfully following the decisions of the honourable High Court and coordinate benches in assessee's own case, we allow ground number 2 – 4 of the appeal holding that freight charges of ₹ 172,195,959/– earned by assessee from transportation of cargo through feeder vessels is also eligible for benefit of Article 8 of the Double Taxation Avoidance Treaty between India and Germany.

022. In view of our decision in ground number 2 – 4 of the appeal, no adjudication is required on ground number 5 – 7 and 12 – 14 of the appeal of the assessee, hence those grounds become infructuous and hence dismissed."

10. We find that the Hon'ble jurisdictional High Court, following its decision rendered in assessee's own case for the assessment year 2007-08 in ITA No. 602 of 2014, dismissed the appeal filed by the Revenue in the assessment years 2009-10 and 2011-12 vide orders dated 06/01/2020 and 07/01/2020 passed in ITA No. 1362 of 2017 and 1376 of 2017, respectively. The learned DR could not show us any reason to deviate from the aforesaid decisions rendered in assessee's own case and no change in facts and law was alleged in the relevant assessment year. The issue arising in the present appeal is recurring in nature and has been decided by the coordinate bench of the Tribunal and upheld by the Hon'ble jurisdictional High Court for the preceding assessment years. Thus, respectfully following the orders passed by the coordinate bench of the Tribunal as well as the decisions of the Hon'ble jurisdictional High Court in assessee's own case cited supra, we are of the considered view that the freight charges of Rs.38,81,04,429 earned by the

assessee from the transportation of cargo through feeder vessels is also eligible for the benefit under Article 8 of the India-Germany DTAA. As a result, grounds no.1.1 to 1.5 raised in assessee's appeal are allowed.

11. In view of our aforesaid findings, grounds no.2.1 to 2.3 raised in assessee's appeal are rendered academic and hence require no separate adjudication.

12. Grounds no.3.1 to 3.4, raised in assessee's appeal pertain to the non-grant of credit of TDS. This issue is restored to the file of the jurisdictional AO with the direction to grant TDS credit, in accordance with the law, after conducting the necessary verification. As a result, grounds no. 3.1 to 3.4 raised in assessee's appeal are allowed for statistical purposes.

13. Insofar as grounds no.4.1 and 4.2, raised in assessee's appeal are concerned, the same relates to the charging of interest under section 234A and section 234B of the Act, which is consequential in nature. Therefore, grounds no.4.1 and 4.2 need no separate adjudication.

14. In the result, the appeal by the assessee is allowed for statistical purposes.

Order pronounced in the open Court on 04/06/2024

Sd/-	**Sd/-**
PRASHANT MAHARISHI	**SANDEEP SINGH KARHAIL**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

MUMBAI, DATED: 04/06/2024

Vijay Pal Singh, (Sr. PS)

<u>Copy of the order forwarded to</u>:

(1) The Assessee;

(2) The Revenue;

(3) The PCIT / CIT (Judicial);

(4) The DR, ITAT, Mumbai; and

(5) Guard file.

True Copy

By Order

Assistant Registrar
ITAT, Mumbai