

IN THE INCOME TAX APPELLATE TRIBUNAL “I” BENCH, MUMBAI

**BEFORE SHRI PRASHANT MAHARISHI, AM
AND
SHRI RAJ KUMAR CHAUHAN, JM**

ITA No.587/Mum/2016

(Assessment Year: 2012-13)

International Air Transport
Association (Canada)
SRBC & Associates LLP,
14th Floor, The Ruby,
29, Senapati Bapat Marg,
Dadar (West), Mumbai-400
048

(Appellant)

The Dy. Commissioner of
Income Tax, (International
Taxation)-2(2)(1)
Room No. 136, 1st Floor,
Scindia House, Ballard Pier,
Mumbai-400 038

Vs.

(Respondent)

PAN No. AACCI4659N

Assessee by : Shri Porus Kaka Sr Adv. &
Shri Divesh Chawla, Ars
Revenue by : Shri Soumendu Kumar Dash, DR

Date of hearing: 17.04.2024
Date of pronouncement : 10.07.2024

ORDER

PER PRASHANT MAHARISHI, AM:

01. ITA No. 587/Mum/2016, is a recalled matter, wherein ITAT vide Miscellaneous Application no.474/Mum/2023, dated 23rdFebruary 2024, has recalled the order of the Tribunal dated 9thMarch 2023, for A.Y. 2012-13, for adjudication of ground no.6 of this appeal only.
02. Ground no.6 of the appeal is as under:-

“Ground No.6- Collection of membership fees, BSPL ink charges and fees for IATA clearing House facility’ (ICH facility).

In relation to collection of membership fees.



- a. Erred in taxing the membership fees as 'business profits' under Article 7 of the India- Canada tax treaty, by treating the Indian branch office of the Appellant as a PE of the Appellant under Article 5 of the India - Canada tax treaty, without appreciating the fact that the membership fees collected by the Appellant is independent and not related to the BSP activities undertaken by the Indian branch office.
- b. Erred in failing to provide any reason or basis for deeming the contribution/ membership fees received from the members, by which they obtain membership with the Appellant and get access to information pertaining to the various services provided by the Appellant, as being related to IATA branch office which is specifically involved in providing BSP services only as per the approval of the RBI.
- c. Without prejudice to the above, erred in not appreciating the contention of the Appellant that it qualifies as a mutual association and hence, the membership fees received from the members should not be liable to tax having regard to the principle of mutuality under the Act.”

In relation to BSPLink charges from airlines and IATA branch for onward remittances to Accelya World SLU, Spain (Accelya Spain) (categorized as Provision of E-Services)

- d. Erred in considering the incorrect amount of Rs 2,81,04,800 as being the BSPLink charges collected by the Appellant for onward payment to Accelya Spain, instead of the correct amount of Rs 2,29,29,020.
- e. Erred in not accepting the contentions of the Appellant that the BSPLink charges collected by the Appellant for onward payment to Accelya Spain are in the nature of reimbursement of expenses/ cost, without any mark up, and hence, in the absence of any income element in respect of such charges, the same cannot be taxed as 'business profits' under Article 7 of the India Canada tax treaty.

In relation to fees for ICH facility

- f. Erred in treating the Indian branch office of the Appellant as being the PE of the Appellant in India as per Article 5 of the India - Canada tax treaty, without appreciating the fact that the activity of provision of ICH facility is completely independent and separate from the BSP services provided by the Indian branch office and accordingly, taxing the said receipts as 'business profits' under Article 7 of the India - Canada tax treaty.
- g. Erred in not accepting the contentions of the Appellant that as the ICH facility is provided by the Appellant outside India and the income is also received by the Appellant in a bank account maintained outside India,

the revenues pertaining to the said ICH facility cannot be taxed as business profits in India under Article 7 of the India - Canada tax treaty.

- h. Erred in failing to provide any reason or basis for deeming that the receipts in relation to the ICH facility provided by the Appellant outside India are related to the IATA branch office in India which is specifically involved in providing BSP services as per the approval of the RBI.*

In relation to attribution of profits

- i. Erred in estimating 40% of the gross receipts of the Appellant as being the income attributable to the PE (i.e., the Indian branch office) in India, on an arbitrary and ad-hoc basis; and*
- j. Erred in estimating 90% of the gross receipts attributed to the PE of the Appellant in India, as being the profits attributable to such PE in India, on an arbitrary and ad-hoc basis.*

03. As per ground no. 6 (c), it was the claim that assessee qualifies as the mutual association and hence, the membership fees received from the members should not be chargeable to tax having regard to the principle of mutuality under the Act.
04. The brief fact of the case shows that assessee is a corporation incorporated under the Special Act of Parliament of Canada and is a tax resident of Canada. The assessee holds a valid tax residency

certificate. It is stated that it is a non-profit organization carrying out its activity for the benefit of all stakeholders of the World's Commercial Aviation Industry. Assessee has a branch office in India approved by the Reserve Bank of India.

05. Assessee filed its original return of income on 31st March 2014, at a total income of ₹4,26,07,201/-. The assessment order under Section 143(3) read with section 144C(13) of the Act pursuant to the direction of the learned Dispute Resolution Panel was passed on 30th December 2015. The appeal of the assessee in ITA No. 587/Mum/2016 and appeal of the learned Assessing Officer in ITA No.964/Mum/2016, travelled to the co-ordinate Bench. It passed an order on 18th January 2021, wherein the appeal of the assessee was partly allowed while appeal of the learned Assessing Officer was also partly allowed for statistical purposes.
06. Subsequently, a Miscellaneous Application No.131/Mum/2021 in ITA No.587/Mum/2016 was filed and disposed of vide MA order dated 24th August, 2021, wherein at page no.12, the original order passed dated 8th January, 2021, was recalled for the limited purpose of disposal of ground no.6 of the appeal wherein the assessee has claimed that the collection of membership fees, BSPI ink charges and fees for IATA clearing house facility (ICH facility) are not taxable in India. The registry was directed to fix the hearing of the appeal on 30th September 2021. On that date this appeal was heard by the ITAT and vide Para no.7 the co-ordinate Bench held as under:-

"7. In principle we concur with the submissions of learned Counsel for the assessee. We find that the directions of Dispute Resolution Panel in assessee's

India branch is for anterior Assessment Year 2014-15 and are subsequent in time i.e., dated 22/09/2017, whereas, in assessee's case for AY 2012-13, the directions are dated 17/11/2015. Taking into consideration entire facts, we deem it appropriate to restore this issue to the file of Assessing Officer for denovo examination in the light of aforementioned DRP directions in the case of assessee's India branch with respect to collection of membership fee only. In addition, the Assessing Officer shall also examine if the transaction (i.e., of membership fee) in the case of assessee is similar to that of Indian Branch in AY 2014-15; one to one nexus is established between collection of membership fee by the India Branch and transmission of same to the assessee; and the transaction is without any commercial element. If all the conditions are satisfied, no addition is warranted. The ground No. 6(c) is allowed for statistical purpose."

07. Looking carefully at Para no.7, ground no. 6(c), was allowed for statistical purposes.
08. Subsequently, the assessee filed a second Miscellaneous Application in MA No.474/Mum/2023 which came to be decided on 23rd February 2024. In this Miscellaneous Application, it was claimed that the Tribunal had failed to record the correct submission of the assessee on the principle of mutuality and BSP Link charges. Vide paragraph no.5 of the order, the co-ordinate Bench held that certain mistakes have been crept in the order of the Tribunal while recording the facts are in turn has led to aberration in the decision making

process. Thus, it recalled order passed dated 9th March 2023, in response to original first miscellaneous application.

09. So, there were two Miscellaneous applications in the same ITA on the same issues and now ITAT has recalled orders on both occasions to decide the same issue. We are not here to adjudicate whether an MA on MA is possible or not because rightly or wrongly it has been recalled by ITAT already. Now our job is to decide what is recalled.
010. Thus, now the issue is with respect to the decision in ground no.6 of the appeal to be decided afresh.
011. Before us, the assessee submitted that assessee qualifies as mutual association hence, the membership fees received from the members should not be allowable to tax having regard to the principles of mutuality under the Act. The learned Authorized Representative, after discussing the concept of mutuality held that the learned Dispute Resolution Panel for A.Y. 2014-15, in assessee's own case has accepted that assessee is a mutual concern. Therefore, the Revenue has accepted ground no.6(c). The direction of the learned Dispute panel-1, Mumbai in objection no.157, dated 22nd September 2017, was produced before us, wherein this issue was decided as per paragraph no.7 at page no.20-25 of the direction. The learned Authorized Representative has categorically argued that assessee is a mutual concern.
012. The learned Departmental Representative vehemently opposed and stated that the surplus arising in the hands of the assessee cannot be considered as not taxable in India on the principle of mutuality.



013. We have carefully considered the rival contentions and perused the orders of the lower authorities. The only dispute is whether surplus arising to the assessee is chargeable to tax in India based on the principle of mutuality or not. We find that the Dispute Resolution Panel in its direction for A.Y. 2014-15 dated 29thFebruary 2017, in paragraph no.7 has considered all the issues and in paragraph no.7.4 has held that assessee qualifies as mutual concern having regard to the tests laid down by various courts. In view of the above finding of the learned Dispute Resolution Panel, which is not under challenge, there is no need for us to express any opinion on this aspect as revenue itself has accepted that assessee is a mutual concern.

014. In the result, ground no.6(c) of the appeal is allowed.

Order pronounced in the open court on 10.07.2024.

Sd/-
(RAJ KUMAR CHAUHAN)
(JUDICIAL MEMBER)

Sd/-
(PRASHANT MAHARISHI)
(ACCOUNTANT MEMBER)

Mumbai, Dated: 10.07.2024

Sudip Sarkar, Sr.PS

Copy of the Order forwarded to:

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

BY ORDER,

True Copy//

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai