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

BEFORE MS PADMAVATHY S, AM &
SHRI SUNIL KUMAR SINGH, JM

I.T.A. No.235/Mum/2022
(Assessment Year: 2018-19)

Delta Air Lines, Inc., Ground Floor, Podar House, Sitaram D Marg, Marine Drive, Mumbai-400021. **PAN : AAACD4092N**	Vs.	**ACIT (International Taxation)-2(1)(2),** Room No. 1713, 17th Floor, Air India Building, Nariman Point, Mumbai-400021.
Appellant)	:	**Respondent**)

Appellant /Assessee by	:	Shri Sriram Seshdri / Ms. Amulya K.
Revenue / Respondent by	:	Shri Anil Sant, Addl. CIT DR
Date of Hearing	:	05.09.2024
Date of Pronouncement	:	07.11.2024

O R D E R

Per Padmavathy S, AM:

This appeal by the assessee is against the final order of assessment passed by the Assistant Commissioner of Income Tax, Int.Tax Circle 2(1)(2), Mumbai, (the "AO" in short) under section 143(3) r.w.s.144C(13) of the Income Tax Act 1961 (the Act) dated 16.12.2021 for assessment year (AY) 2018-19. The assessee raised various grounds pertaining to the following issues –

1. *Denial of benefit of exemption under Article 8 of the India-USA Tax Treaty ('Treaty') –* ***Ground No.1 (1.1, 1.2, 1.3, 1.4 & 1.5)***
2. *Disregarding alternative methodology for computing taxable income submitted by the Appellant –* ***Ground No.2 (2.1, 2.2, 2.3, & 2.4.)***
3. *Enhancing the Global Profitability Rate on a pro-rata basis –* ***Ground No.3 (3.1)***
4. *Levy of interest under Section 234A and Section 234B of the Act –* ***Ground No.4 (4.1)***
5. *Initiation of penalty proceedings –* ***Ground No.5 (5.1)***

2. The assessee also raised the following additional grounds

"Disregarding the evidence establishing linkage for the purpose of Article 8 of the India-US Tax Treaty

1. The Lower Authorities erred in disregarding the evidence submitted by the Appellant. establishing transportation linkage between India and an interim destination, followed by transportation to a final destination outside India through a combination of third-party carrier and aircrafts owned/leased/chartered by the Appellant, and consequently, erred in not granting the exemption under Article 8 of the India-US Tax Treaty.

Erroneous determination of taxable Income under Article 7 of the India-US Tax Treaty

2. Without prejudice to the Cost-Plus Method being the Most Appropriate Method, if profits attributable to the PE are to be computed in accordance with Rule 10 of the Income-Tax Rules, 1962, the Lower Authorities failed to appreciate that the Appellant's revenue in relation to the transportation through third-party carriers is only an agreed percentage (not more than nine percent) of the total value of the tickets booked by it, and consequently erred in applying the global profitability rate to the entire value of such tickets booked by the Appellant."

3. The additional grounds raised are pure legal issue, which does not require investigation of new facts. Hence, placing reliance on the judgment of the Hon'ble Apex Court in the case of National Thermal Power Co. Ltd. v. CIT (1998) 229 ITR 383 (SC), we admit the additional grounds for adjudication.

4. The assessee is a foreign airline company and a tax-resident of USA and is engaged in the business of operation of aircrafts in the international traffic. The assessee obtained an approval from the Director General of Civil Aviation ("DGCA") to undertake scheduled air services in India on the routes specified under the India-US Air Transport Agreement ("ATA"). The Assessee established a branch office in India, to undertake activities related to the booking of air passenger tickets and air freight in India, with the approval of the Reserve Bank of India ("RBI"), which is an admitted Permanent Establishment ("PE") in India. The income of the assessee consists of -

(i) Where the transportation is undertaken entirely through the Assessee's own aircrafts.

(ii) Where transportation is undertaken through the Assessee's own aircraft, along with the usage of third-party carriers under code-sharing arrangement for one or more part(s) of the journey in international traffic. Here, the entire journey is undertaken by the Assessee under a single ticket issued by it

(iii) Where transportation is undertaken entirely through third-party carriers under code-sharing arrangement

5. A code-share arrangement is an arrangement in which one air carrier (i.e., marketing airline") puts its designator code on the flight of another carrier("operating airline"), thereby allowing the first carrier, i.e., the marketing carrier, to hold itself out as providing service in markets where it does not otherwise operate or in segments where it operates infrequently. During the year under consideration, the assessee filed a return of income declaring 'nil' income towards profits derived from operation of aircrafts in international traffic

claiming benefit under Article 8 of the DTAA between India and USA which reads as under –

"ARTICLE 8

Shipping and air transport

1. Profits derived by an enterprise of a Contracting State from the operation by that enterprise of ships or aircraft in international traffic shall be taxable only in that State.

2. For the purposes of this Article, profits from the operation of ships or aircraft in international traffic shall mean profits derived by an enterprise described in paragraph 1 ***from the transportation by sea or air respectively of passengers, mail, livestock or goods carried on by the owners or lessees or charterers of ships or aircraft*** *including —*

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

(b) other activity directly connected with such transportation; and

(c) the rental of ships or aircraft incidental to any activity directly connected with such transportation.

3. Profits of an enterprise of a Contracting State described in paragraph 1 the use, maintenance, or rental of containers (including trailers, barges, and related equipment for the transport of containers) used in connection with the operation of ships or aircraft in international traffic shall be taxable only in that State.

4. The provisions of paragraphs 1 and 3 shall also apply to profits from participation in a pool, a joint business, or an international operating agency."

6. The AO during the assessment proceedings allowed the benefit under Article 8 to the income from the transportation undertaken entirely through the Assessee's own aircrafts. However the AO denied the said benefit with respect to receipts under code sharing agreement (receipts from (ii) & (iii) above). The AO was of the view that the receipts under the code sharing arrangements with the third parties where the assessee has only booked the tickets and the actual transportation has been done by third parties that such receipts cannot be said to be the profits 'derived' from international voyage carried by assessee.

Accordingly the AO held that to the extent of such receipts, the basic condition of Article 8(1) are not satisfied because there is no operation of aircraft in International traffic by assessee relevant to such receipt which has resulted in profits and therefore the assessee fails to satisfy the crucial test for being eligible under Article 8(1) r/w Article 8(2) in respect of the voyages which have not been operated by assessee either by owned/leased/chartered aircrafts. The AO also did not accept the alternate plea of the assessee that the impugned income is covered under Article 8(2)(a)&(b) or under Article 8(4). The AO computed the income chargeable to tax by applying the assessee's Global Profitability Rate ("GPR") as adjusted to the Code-share Revenue, in terms of 'Rule 10' of the Income Tax Rules, 1962 ("the Rules"). The DRP upheld the view of the AO. The assessee is in appeal against the final order of assessment passed by the AO pursuant to the directions of the DRP.

7. The ld AR presented various arguments on merits with regard to the issue under consideration. With regard to issue being covered against the assessee by the decision of the coordinate bench in assessee's own case the ld AR argued that

i. the decision of the coordinate bench has not considered some of the critical ratios laid down in decision of the jurisdictional High Court in the case of Balaji Shipping UK Ltd vs ACIT [2012] 24 taxmann.com 229 (Bombay)
ii. the coordinate bench has decided against the assessee mainly by distinguishing the decision of the coordinate in the case of MISC Berhad vs ACIT [2014] 47 taxmann.com 50 (Mumbai - Trib.) relied on by the assessee stating that the said decision is rendered in the context of India-UK DTAA

iii. the link between the goods transported in other ships under slot sharing with the operation of ships owned by the assessee in the case of MISC Berhad (supra) was not called for by the AO in assessee's case and therefore deciding against the assessee on that ground is not tenable.

iv. the contention that the profits attributable to the usage of third-party carriers under a code-sharing arrangement are not profits derived from operation in international traffic, under Art. 8(1) read with Art. 8(2) is against the decision of ratio laid down by the Hon'ble Bombay High Court.

8. The ld AR submitted that for the year under consideration, the assessee has submitted the details establishing the link between the flights of other airlines used for transporting passengers under code sharing arrangement with the operations of the assessee. The ld AR brought to attention that the application made by the assessee for invoking Mutual Agreement Procedures("MAP") is rejected by the US authorities and while doing so they have expressed a view that the entire receipts of the assessee from its India Operations (including code-share arrangements) are exempt under Art. 8 of the India-US DTAA and no part of it shall be taxed in India. The ld AR further brought to our attention that post the decision of the Jurisdictional High Court in the case of Balaji Shipping (supra), there are decisions on the issue of slot sharing arrangement of a shipping enterprise have been held in favour of the assessee. The ld AR also brought to our attention the below list of case law where it has held that income from slot sharing arrangement / other ancillary services of a shipping enterprise is not taxable in India in the context of DTAAs which are similarly worded like India-US DTAA.

(i) DIT(IT) vs APL Co. Pte Ltd.- 75 taxmann.com 32 (Bombay)
(ii) CIT vs APL Co Pte Ltd - 156 taxmann.com 530 (Bombay) -
(iii) Safmarine Container Lines NV - 48 taxmann.com 238 (Bombay)
(iv) K. Cargo Global Agencies, Indonesia – ITA No.306/Ahd/2016

9. The primary argument of the ld DR is that the issue is covered by the decision of the coordinate bench in assessee's own case. The ld DR further argued that the Miscellaneous Application raised by the assessee against the said order has also been rejected and therefore the decision is binding on the assessee. The ld DR submitted that the facts pertaining to the year under consideration are identical and therefore the decision of the coordinate bench in earlier years is applicable to the year under consideration also. The ld DR also submitted a detailed written submission with regard to the issue on merits which has been taken on record.

10. On the contention of the ld DR that the coordinate bench has rejected even the MA filed by the assessee whereby the view expressed has reached finality, the ld AR submitted that the MA filed requesting to rectify the finding given by the Tribunal that the assessee failed to establish the link that it is the assessee's aircrafts used for transporting the final leg of travels in cases where the passengers transported using third party airlines. The assessee had pleaded that the said linkage was never asked for by the revenue and hence such a finding was a mistake apparent on record. The MA was rejected stating that the contention of the assessee is not a mistake apparent on record. Therefore the ld AR submitted that the issue of applicability of Article 8 for the receipts under code-sharing arrangement was not raised in the MA and hence the argument of the ld DR is not correct.

11. We heard the parties and perused the material on record. From the perusal of the facts as enumerated herein above it is clear that the limited issue for our consideration in this appeal is **whether the receipts of the assessee under code sharing arrangements are covered by Article 8 of the DTAA between India**

and USA and accordingly not taxable in India. It is relevant to note that in assessee's own case for AY 2010-11 ([2015] 57 taxmann.com 1 (Mumbai - Trib.)), the coordinate bench has considered the same issue and held that the receipts under code sharing arrangements cannot avail the benefit of Article 8 of India-US DTAA and accordingly taxable in India. The relevant observations of the coordinate bench in assessee's own case for AY 2010-11 is extracted below –

> *31. It is clear from the provisions of Article 8 (1) that it is the substantive provisions granting the exemption to an enterprise of a contracting state from the operation by that enterprise of ships or aircraft in international traffic. Article 8(2) clarifies that the operation of ships or aircraft in international traffic shall mean profits derived by an enterprise from the transportation by sea or air respectively of passengers, mail, livestock or goods carried on by the owners or lessees or charterers of ships or aircraft. Thus the meaning of "profit derived from operation of ship or aircraft in international traffic" as owner/lessor/charterer is a condition precedent for claim of exemption under Article 8. Hence the first and crucial test for eligibility under Article 8(1) is that such profit should be derived from operation of aircraft in international traffic by the ship or aircraft owned/leased/chartered by the assessee. There is no dispute in respect of profit derived by assessee by transportation by its owned/leased/chartered aircrafts. It is only the receipts under code sharing agreements with the third parties where the assessee has only booked the tickets and the actual transportation is done by third parties ship or aircraft that such receipts cannot be said to be the profits "derived" from international voyage carried by the assessee by entering into code sharing agreements. The receipts for activities under Article 8(2)(a)(b)(c) are only for enlarging the scope of profits from other related activities but the qualifying condition of such transportation through ship or aircraft owned/leased or chartered by assessee have to be still independently fulfilled under Article 8(1) & (2) to claim the benefit of receipts falling under Article 8. In assessee's own case the Tribunal held that the receipts from other activities connected to such transport falling under Article 8(2)(b) without having any receipts which qualify under Article 8(1) & 8(2) are not eligible for benefit of Article 8. The Tribunal in assessee's own case in Delta Airlines Inc. (supra) observed at para 13 that Article 8(2)(b) makes it clear that the activity carried on by the assessee must be directly connected with such transportation. The words "such transportation" refers to the transportation prescribed in the main body of para 2 i.e. transportation by sea or air of passengers, mail, livestock or goods carried by the owner or lessee or the charter of the aircraft. It was also*

observed that only that activity which is directly related to the transportation of passengers by the assessee as owner/lessee/charterer of the aircraft would fall within the ambit of para 2(b) of Article 8 and consequently the activity relatable to the transportation of passengers by other airlines would be outside the scope of such provisions. It was further held that the activity of third party charter handling and maintenance would also be outside the ambit of para 2(b) of Article 8. Similar view has been taken by the co-ordinate Bench in the case of British Airways Plc. wherein expression under Article 8 of Indo-UK Treaty (which is similarly worded) was denied in respect of the various services provided through other airlines. The contention of the ld. AR was that since the assessee is an airline, admittedly operating in international traffic, therefore income from cargo/passengers through third airlines is also covered under Article 8 of DTAA. Heavy reliance was placed by the ld. AR on the decision of Tribunal in the case of MISC Berhard (supra) wherein the assessee used the services of feeder vessels operated by third parties by using space charter/slot charter from Indian Port to Hub Port only and from where the cargo were transferred to the mother vessels i.e. the ships owned by the assessee for being transported to final destination port. The Revenue's case was that since the feeder vessel is not owned/leased/chartered by the assessee, therefore, the benefit of Article 8 cannot be given. After considering the entire facts, the Tribunal had recorded its finding to the effect that since the entire voyage from Indian Port to Hub Port and from there to final destination port was inextricably linked and could not be segregated and hence the carriage of goods from the feeder vessel was nothing but a charter only and therefore the receipts in respect of voyage from Indian Port to Hub port were also held to be exempt under Article 8. However, in the instant case there is no situation like transportation to Hub Port and from there to final destination port nor there is any inextricable link between such transportation, therefore, the principle laid down in the case of MISC Berhad (supra) cannot be applied to the facts of the instant case.

32. There is nothing on record to suggest that assessee had entered into agreement with the third party in the nature of slot charter/space charter so as to qualify under Article 8(2). The right of the assessee to book flights under code sharing agreements with other third parties is not exclusive unlike the charter agreement. The assessee has no fixed space/slot for which the booking rights are exclusively with assessee only. The number of seats/space which can be booked by assessee is also not fixed under the code sharing agreement. The role of the assessee in respect of bookings so made under code sharing agreement is essentially in the nature of booking agent and not as a charterer. Nothing was placed on record in support of ld. AR's contention that the cargo/passengers carried under code sharing arrangement was up to intermediary destinations only and thereafter assessee had transported further

by its owned airlines from such intermediary destinations to final destinations. In terms of the facts recorded by A.O./DRP, we found that complete transportation under code sharing arrangement took place from origin to final destination in single stretch and nothing is placed on record to show that such destinations were only interim destinations. Thus the proposition laid down in the case of MISC Berhard (supra) is not applicable to the facts of the present case. However, nothing has been produced before the A.O./DRP/ITAT to show that destinations to which all passengers/cargo were carried from India under code sharing were further transported to final destination by assessee's airlines. Merely the fact that assessee in some instances operating its airline from such intermediary destinations will not automatically prove that passengers/cargo which were carried from India under code sharing to intermediary destinations were transported to final destinations by assessee's airline only. Nothing was brought on record to support the contention that there was inextricable link between voyage from India to interim destination by third parties under code sharing agreement and from interim destination to final destination by assessee's owned/chartered/leased aircraft. In this regard, it is important to bring on record the relevant observation by the ITAT in the case of MISC Berhard (supra) vide para No. 29, page 36 of its order:—

> *"From the above observations, it can be understood that the facility of slot hire agreement with the feeder vessels to complete the voyage is not merely an auxiliary or incidental activity to the operation of ships, but inextricably linked. If the transportation of cargo by feeder vessels belonging to other enterprise is only a part of main voyage by the mother ship i.e., owned or leased by the assessee enterprise, then it has to be taken as a part and parcel of the operation, which is inextricably linked with the completion of the entire voyage. The linkage between the transportation by feeder vessels, mother vessels of the ship owned by the assessee has to be established. Hence in absence of any link qua each voyage from India to interim destination under code sharing and interim destination to final destination by assessee, and also in absence of any evidence that even the second leg of same voyage which started from India was carried by assessee, the code sharing arrangement cannot be said to be in nature of space/slot charter."*

*33.*****

*34.*****

35. Now coming to the alternative contention of the ld. A.R. that the profits are eligible for exemption under Article 8(4) insofar as profits were derived from "pool" arrangement.

36. We have considered the rival contentions. Arrangement of "pool" requires several persons coming together to contribute and combine their resources for a large business and then share the resources amongst them. However in the present case the arrangement was only bilateral arrangements and not several persons have come together. Nothing was brought on record to indicate that the common funds and resources were brought together in a pool which is shared by members of the pool. However, the assessee has only entered into code sharing arrangement, it is also not a case that assessee and third party both are contributing the air craft in a pool which are shared by both. However in the instant case third party is contributing its aircraft and the assessee is only using the resources of third party by booking seats in the aircraft. Thus the arrangement does not meet principle of pool arrangement.

37. In view of the above, we can conclude that income derived by the assessee by booking of seat/space under code sharing agreement cannot be said to be income derived from operation of aircraft/ship in international traffic through owned/leased/chartered aircraft/ship. Furthermore the code sharing agreement cannot be held as space/slot charter in absence of inextricate linkage of both legs of journeys. In the result, the receipts to the extent of code sharing arrangement cannot be said to be profits derived from operation in international traffic under Article 8-(1) read with Article 8-(2). The decision in the case of MISC Berhard (supra) is distinguishable on facts, therefore, cannot be applied to the present case.

12. On perusal of the above findings of the Tribunal, it is observed that the key principles on the basis of which the coordinate bench has decided the issue against the assessee are –

a. The Assessee's income derived by booking of seat/space under a code-sharing agreement is not income derived from operation of aircraft in international traffic through an owned/ leased/ chartered aircraft.

b. Code-sharing agreements are not in the nature of space/slot charter, in absence of an inextricable linkage of both legs of journey.

c. In result, the profits attributable to the usage of third-party carriers under a code-sharing arrangement are not profits derived from operation in international traffic, under Art. 8(1) read with Art. 8(2).

13. The coordinate bench further held that the code-sharing arrangement will not get covered under Article 2(a),(b) or (c) for the reason that the basis condition of income being derived from operation of aircraft in international traffic through an owned/ leased/ chartered aircraft is not fulfilled by the assessee.

14. In assessee's case for AY 2010-11, the assessee placed heavy reliance on the decision of coordinate bench in the case of MISC Bernard (supra) to submit that code-sharing arrangement which is similar to slot chartering will fall within the definition of "chartering" and therefore the benefit under Article 8 should be applied for receipts from code sharing also. The coordinate bench in the case MISC Bernard (supra) relied on the decision of Hon'ble High Court in the case of Balaji Shipping (supra) to the limited extent of whether slot chartering arrangement would amount to "chartering" and would fall within the definition of profits from operation of Ship or Aircrafts in international traffic under India-US DTAA. The relevant observations of the coordinate bench is extracted below –

25. From the above discussion, the following inferences can be deduced:—

(i) Firstly, the operation of a ship can be done as charterer which does not mean to own or control the ship either as an owner or as a lessee;

(ii) Secondly, charterer is a hirer of a ship under an agreement or arrangement to acquire the right to use a vessel or a ship for the transportation of a goods on a determined voyage, either the whole of the ship or part of the ship or some space of the ship in a charter party agreement; and

(iii) Thirdly, the word "charterer" includes a voyage charter of a part of a ship or a slot, as it is also arrangement or agreement to hire a space in a ship owned and leased by other persons.

Thus, in our opinion, the word "charterer" should not be confused from the word "owner" or "lessee" or having control of the ship or as an operator of the ship. The operation of ship can be done as a charterer, which includes part of a ship or particular space in a ship.

*26. to 27.****

28. Another very important observation made by the High Court which is quite relevant to note is, how the slot charterer agreements or space charterer agreement are inextricably linked with the shipping business in the present day shipping business. The said observations are as under:—

> *"26. An enterprise may not ply the ships owned or chartered or otherwise controlled or managed by it in respect of certain routes. It would however, on account of the business exigencies, be required to carry cargo on such routes. Business expediency could arise on account of a number of reasons and different situations such as obliging regular clients, or cultivating new ones. If it were not to do so, it may well loose clientele. Ships owned or chartered or otherwise controlled or managed by an enterprise may not be available on the particular route on a given day or for a particular period. The enterprise may already have entered into contracts or may even be required to enter into contracts for the carriage of goods on that route on that day or during that period. The trade would expect, the enterprise to perform its contracts and/or ensure there is no break in its services. This it can do by availing slot hire agreements. Their refusal or failure to do so, may well affect their business and reputation adversely.*
>
> *27. By availing the facility of slot hire agreements, the enterprise does not arrange the shipment on behalf of the owner of the said vessel, but does so on its own account on a principal to principal basis with its clients. Such cases also have a nexus to the main business of the enterprise of the operation of ships. They are ancillary to and complement the operation of ships by the enterprise. If they are not merely ancillary to the main business of operation of ships but constitute the primary and main activities of the enterprise, it may be a different matter, which we are not called upon to consider in the facts and circumstances of the present case."*

29. From the above observations, it can be understood that the facility of slot hire agreement with the feeder vessels to complete the voyage is not merely an auxiliary or incidental activity to the operation of ships, but inextricably linked. If the transportation of cargo by feeder vessels belonging to other enterprise is only a part of main voyage by the mother ship i.e., owned or leased by the assessee enterprise, then it has to be taken as a part and parcel of the operation, which is inextricably linked with the completion of the entire voyage. The linkage between the transportation by feeder vessels, mother vessels of the ship owned by the assessee has to be established. In the present case, insofar as the issue of linkage between the voyage performed between the feeder vessels and mother vessels, the assessee has been able to establish before the A.O. which is evident from the observations of the A.O. in Paras-7 & 8, wherein he held that the freight earned from carriage of goods in international traffic by

operation of ships including feeder vessels operated by 3rd party operator, the assessee has furnished documentary proof to substantiate the linkage between the voyage performed on feeder vessels and mother vessels. The Assessing Officer's case rests upon the premise that voyage carried on by the feeder vessels has to be segregated for the purpose of allowing benefit under Article-8, because chartering of some space i.e., slot chartering, feeder vessels cannot be equated with chartering of complete ship. By this, the Assessing Officer means that the assessee must have complete control of such ships even under the charter agreement. Thus, the view taken by the Assessing Officer for denying the benefit under the present Article-8 is not tenable as per our discussion in the forgoing paragraphs, that chartering of some space or slot charterer in a ship is actually a part and parcel of charter of a ship. Under the charterer agreement, there is no ownership or control of entire ship because the risk under the charter party agreement or arrangement is upon the owner of the ship who generally assumes an operational risk for transporting the cargo of the person who has hired the ship and the hirer agrees to pay for conveyance of goods on a determined voyage. The risk of the assessee is towards its customers from whom he has agreed to transport the cargo/goods from the destination port of booking to the final destination port. Thus, in our opinion, such a strict interpretation of the word "charterer" as adopted by the Department cannot be sustained.
*30.****

31. Thus, in our conclusion, we hold that transportation of cargo in the container belonging to the assessee from Indian Port i.e., Port of booking to the Hub Port through feeder vessel by way of space charter/slot charter arrangement, falls within the ambit of the word "charterer" and, therefore, it cannot be segregated from the scope of "operation of ships" as defined in Article-8(2) of the Indo-Malaysian treaty. In the present case, the voyage between the Indian Port to the Hub Port through feeder vessel and from Hub Port to final destination port through mother vessel owned/leased by the assessee are inextricably linked and there is complete linkage of the voyage and, therefore, the entire profits derived from the transportation of goods carried on by the assessee is to be treated as profits from operation of ships and, therefore, the benefit of Article-8, cannot be denied to the assessee on the part of the freight from voyage by the feeder vessels. Thus, ground No.2, raised by the assessee in all the years under appeal is allowed.

15. In assessee's case for AY 2010-11 the applicability of the above decision was rejected for the reason that the linkage between transporting passengers in third party aircraft to an intermediary location and from there to ultimate location

in assessee's own aircraft is not established. The plea of the assessee was also rejected for the reason that the decision of the jurisdictional High Court in the case of Balaji Shipping (supra) which was relied on in the case of MISC Bernard (supra) was rendered in the context of India-UK DTAA and not India-US DTAA.

16. We notice that though there are no other judgements on the issue of code-sharing arrangement in the case of Airlines at the Tribunal or High Court level, there are many decisions by the Tribunal / High Court on the applicability of Article 8 under various DTAAs to the slot sharing arrangement by shipping companies including the decision of Hon'ble Bombay High Court in the case of Balaji Shipping. Before proceeding further it is relevant to mention that slot chartering by Shipping Companies is an arrangement where agreements are entered into with third party operators of the ship to rent one or more container slots on the said ship. The Hon'ble Bombay High Court in the case of Balaji Shipping (supra) while considering the applicability of Article 9 of India-UK DTAA to the receipts from slot chartering arrangement has held that the slot chartering arrangement would fall within the ambit of Article 9 for the reason that by availing the facility of slot hire agreements, the enterprise engaged in shipping business does not arrange the shipment on behalf of the owner of the said vessel, but does so, on its own account on a principal to principal basis with its clients and that they have a nexus to the main business of the enterprise of the operation of ships. While holding so, the Hon'ble High Court has included both the scenarios

> (i) where the goods are transported by an enterprise by availing of the slot hire facility obtained by it on the ship of another from a port in India upto a hub port abroad and from there transporting the goods further to their final destination upon a ship owned or chartered or otherwise controlled by it and

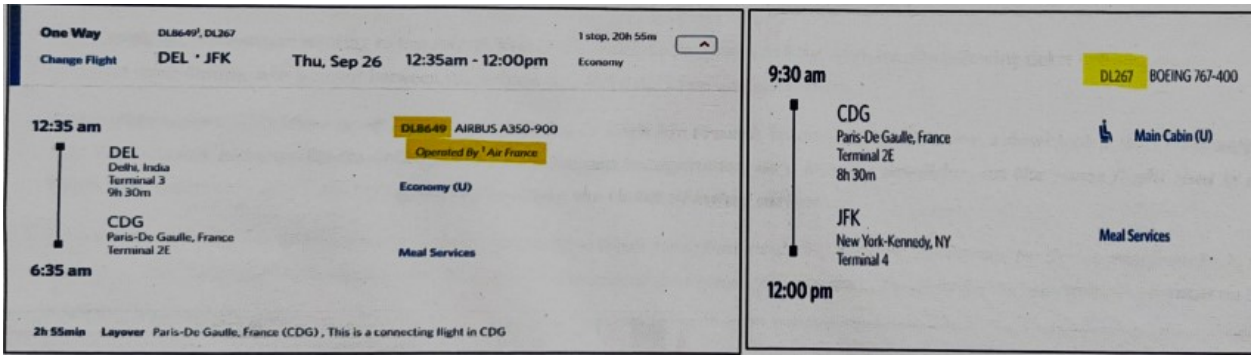
(ii) where the goods are transported by the assessee from a port in India directly to their final destination to a port abroad by availing a slot hire facility obtained by it on the ship of another.

17. It is also relevant to mention here that Article 9 of India-UK DTAA does not define the "profits from operation of Ship or Aircrafts in international traffic" whereas Article 8 of India-US DTAA defines the same as "profits derived from the transportation by sea or air respectively of passengers, mail, livestock or goods carried on by the owners or lessees or charterers of ships or aircraft". Therefore the revenue in assessee's case contended that the decision of the Bombay High Court in Balaji Shipping's case is not applicable to assessee. However the Hon'ble Bombay High Court in the case ***DIT(IT) vs APL Co. Pte. Ltd [2016] 75 taxmann.com 32 (Bombay)*** while considering similar issue under India-Singapore DTAA has followed its own decision in the case of Balaji Shipping (supra) and held no substantial question of law arose. The Article 8 of India-Singapore DTAA is similarly worded as India-US DTAA with respect to the definition of profits from operation of Ship or Aircrafts in international traffic and that the decision is rendered post the decision of the coordinate bench in assessee's own case. Therefore in our view, the decision of the jurisdictional High Court in the case of APL Co. Pte. Ltd (supra) will have a binding precedence while considering assessee's case. Further it is noticed that the coordinate bench in various other cases including those rendered in the context of DTAAs which are similarly worded as India-US DTAA have followed the ratio laid down by the Hon'ble Bombay High Court in the decision of Balaji Shipping (supra).

18. In view of the legal position with regard to slot-chartering arrangement in shipping business it becomes necessary for us to analyse the applicability of the

ratio laid down in the above decisions to the code-sharing arrangement in airline business which is similar to slot chartering. Though, the decision of the coordinate bench in assessee's own case has a binding precedence, given evolution in the juridical status post the decision in assessee's case for AY 2010-11 and given that in the decision for AY 2010-11, the coordinate bench has considered only the decision of MISC Bernard (supra), we are inclined to analyse assessee's case afresh for the year under consideration. While doing so we are conscious that there is no change to the assessee's facts pertaining to the impugned issue between AY 2010-11 and the year under consideration.

19. We notice that the ratio laid down by the jurisdictional High Courts in the case of APL Co. Pte. Ltd (supra) and Balaji Shipping (supra) with regard to interpreting "chartering" is that the receipts under slot chartering agreements has a direct nexus/inextricably linked to the main business of the enterprise of the operation of ships and therefore eligible for benefit under Article 9. The assessee under code sharing arrangements, books tickets in other airlines under a designated code specific to the assessee, so that the assessee holds itself out as providing service to destinations where it does not otherwise operate or in segments where it operates infrequently. The typical way in which the tickets are booked under code sharing arrangement is explained as below –



20. From the above it is clear that though the passengers are transported through airlines not operated by the assessee, the tickets until the final destination are issued by the assessee (bearing specific codes). The journey can happen entirely in the third party airline or a part of the journey by third party airline and the rest by the assessee. The code sharing arrangements allow airlines to offer service to the segments where they do not operate their own flights thereby without additional equipment, resources, and costs the airlines can increase their revenue. Under code sharing arrangements, the passengers are provided with wide range of choices though the tickets are booked through single airline therefore the customer base of the airline increases. Therefore in our considered view, the revenue earned through transporting passengers using third party airlines either entirely or part of the journey under the code sharing arrangement, has a direct nexus / inextricably linked to the main business of the assessee of operation of aircrafts. When we consider these facts and apply the ratio laid down by the jurisdictional High Court there is merit in the submission that the receipts of the assessee through code sharing arrangements are eligible for the benefit under Article 8 of India US DTAA.

21. The ld DR during the course hearing vehemently argued that receipts under code sharing arrangement does not fall within the definition of "profits from operation of Ship or Aircrafts in international traffic" since under the said agreement the assessee neither owns / leases / charters the aircrafts. In this regard we notice from the relevant observations of the coordinate bench in the case of MISC Bernard (supra) as extracted in the earlier part of this order that the coordinate bench has given a categorical finding that the operation of ship can be done as a charterer, which includes part of a ship or particular space in a ship and that even a part of a space in the vessels for a particular journey is also considered

as "charter of ship" or "charterer". The coordinate bench further observed that in the decision of Balaji Shipping U.K. Ltd. (supra), while referring to the judgment of Tychy (supra), the High Court have noted that a "slot charter" and a "voyage charter" of a part of a ship are in a sense charterers of a space in a ship. This findings of the coordinate bench and the Hon'ble High Court, leads to the interpretation that when an assessee blocks a space in a third party airline in a particular journey, by booking tickets under a code sharing arrangement then the same would amount to the assessee chartering the third party aircraft i.e. assessee is the charterer of the space in the aircraft. In other words, for the assessee to be a charterer of an aircraft there is no requirement that the entire aircraft should be chartered and that the assessee would become a charterer even if a space is booked in the aircraft. One more contention of the revenue in this regard is that the there is no specific number of tickets or seats blocked for the assessee in the third party aircrafts under code sharing arrangement and therefore it cannot be considered as chartering. However it is relevant to note that under code sharing arrangement when tickets are booked, the third party airlines takes the responsibility of ensuring that the passengers of the assessee are transported to the destination which would mean that the those number of tickets / passengers are blocked by the assessee in the third party airlines. Accordingly we unable agree with this contention of the revenue.

22. One more contention of the revenue is that under code sharing arrangement, the aircrafts are operated by third parties and therefore it would not fall under Article 8(1) where the assessee is required to be in the operation of aircraft in international traffic. In this regard we notice that the Hon'ble Bombay High Court in the case of Balaji Shipping (supra) has held that slot chartering agreement would amount to operation of ship. When we applying the said ratio to the similar

arrangement of code sharing it would amount to operations of aircraft in international traffic by the assessee and accordingly would be covered under Article 8(1) of India-US DTAA. Further the Hon'ble Bombay High Court in the case of Balaji Shipping (supra) also held that under slot chartering the arrangement is on a principle to principle basis i.e. the transportation of goods by third party vessels is done on behalf of operator of the ship. In assessee's case under the code sharing arrangements, the tickets are issued by the assessee for the entire journey including journey through third party airlines and accordingly the passengers are carried in third party aircrafts on behalf of the assessee. Therefore on this count also it is to be held that the operation of aircrafts in international traffic by the assessee would include code sharing arrangements.

23. We notice that the coordinate bench for AY 2010-11 has rejected the reliance placed by the assessee in the case of MISC Bernard mainly for the reason that the link is not established between the transportation by third party aircrafts and assessee's own aircraft (though the assessee through MA contended that the AO did not call for the same). However for the year under consideration the assessee submitted paper books containing the details (page 198 to 443) submitted before the lower authorities where in the entire journey whether by own or third party aircrafts is linked through using specific codes for the entire journey. From the perusal of the details submitted we notice that the codes used by the assessee are unique to the assessee which is used even in the tickets issued for the airlines operated by third party which is establishes the link. We further notice that this unique code is used for the entire journey whether fully or partly carried out using third party airlines. We also notice that the coordinate bench in the case of APL Co. & Pte Ltd [2017] 185 TTJ 305 (Mumbai) has given that finding that once it is held that chartering includes slot charter/ space charter and it falls within the ambit

of 'operation of ships', then the benefit of Article 8 cannot be denied simply on the ground that the transportation has been done either partly or fully through slot charter arrangement or joint charter arrangement. In other words it is held that that 'linkage is not a pre-requisite' for availing benefit of Article 8 of the India-Singapore DTAA (which is similarly worded as India-US DTAA). Therefore in our considered view, rejecting the plea of the assessee on the ground that the link is not established between the transportation by third party aircrafts and assessee's own aircraft is not tenable.

24. We notice that the facts pertaining to AY 2008-09 in assessee's own case the coordinate bench held that the benefit under Article 8(2)(b) of India US DTAA cannot be claimed unless the ancillary services have a direct nexus to the operation of aircraft in international traffic. The said decision was rendered in the context of receipts towards services rendered by the assessee such as screening, security, charter handling etc., to other airline operators. Therefore the same is distinguishable from the issue under consideration here i.e. receipts from code sharing arrangement whether can be considered to be part of the operation of aircraft in international traffic. Accordingly with due respect we are unable to agree with the reliance placed by the coordinate bench in assessee's case for AY 2010-11 in this regard.

25. During the course of hearing the ld AR argued that the OECD Model Convention specifically mentions that the receipts from slot chartering and code sharing would be covered under Article 8 and drew our attention to the relevant clauses of the said model. It is relevant to mention here that the DTAA between US and other countries follow the US Model of DTA conventions. Therefore in our considered view it is essential to examine if what is stated in the OECD Model

Convention commentaries can be applied to assessee's case. In this regard we notice that the India-US Treaty is not entirely following the US Model of DTA conventions but also has incorporated certain specific items (refer Para 6, & 8 of the OECD model commentary) in to Article 8(2) of India US DTAA. In other words definition of profits from the operation of ships or aircraft in international traffic is an inclusive definition as per US Model whereas it is not so in Article 8(2) of India US DTAA. For reference Article 8 under US Model is extracted below

Article 8
SHIPPING AND AIR TRANSPORT

1. Profits of an enterprise of a Contracting State from the operation of ships or aircraft in international traffic shall be taxable only in that Contracting State.
2. For purposes of this Article, profits from the operation of ships or aircraft include, but are not limited to:
a) profits from the rental of ships or aircraft on a full (time or voyage) basis;
b) profits from the rental on a bareboat basis of ships or aircraft if the rental income is incidental to profits from the operation of ships or aircraft in international traffic; and
c) profits from the rental on a bareboat basis of ships or aircraft if such ships or aircraft are operated in international traffic by the lessee.
Profits derived by an enterprise from the inland transport of property or passengers within either Contracting State shall be treated as profits from the operation of ships or aircraft in international traffic if such transport is undertaken as part of international traffic.
3. Profits of an enterprise of a Contracting State from the use, maintenance, or rental of containers (including trailers, barges, and related equipment for the transport of containers) shall be taxable only in that Contracting State, except to the extent that those containers are used for transport solely between places within the other Contracting State.
4. The provisions of paragraphs 1 and 3 of this Article shall also apply to profits from participation in a pool, a joint business, or an international operating agency.

26. In this regard we notice that the OECD commentaries specifically mention slot chartering / code sharing arrangement as an activity directly connected with international traffic wherein it is stated that –

> *6. Profits derived by an enterprise from the transportation of passengers or cargo otherwise than by ships or aircraft that it operates in international traffic are covered by the paragraph to the extent that such transportation is directly connected with the operation, by that enterprise, of ships or aircraft in international traffic or is an ancillary activity.* ***One example would be that of an enterprise engaged in international transport that would have some of its passengers or cargo transported internationally by ships or aircraft operated by other enterprises, e.g. under code-sharing or slot-chartering arrangements or to take advantage of an earlier sailing.*** *Another example would be that of an airline company that operates a bus service connecting a town with its airport primarily to provide access to and from that airport to the passengers of its international flights.*

27. We also notice that Model Technical Explanation Accompanying the US Model mentions that when negotiations happen between other countries and US while entering into Treaty, the Model Tax Convention on Income and on Capital, published by the Organisation for Economic Cooperation and Development (the "OECD Model"), and recent tax treaties concluded by both countries would be taken into account. Since the terms of Treaty are negotiated between the two countries it is clear that the terms agreed between India and US while entering into the agreement, that India-US DTAA, generally follows the pattern of the US model tax convention but is different in a number of respects to reflect India's status as a developing country. This is supported by the fact that a combined reading of the above Article 8 as per US Model and Article 8 of India US DTAA, and accordingly leads to us to see the merit in the argument that the OECD commentaries have to be read into Article 8 while considering the applicability of the same to code-sharing arrangement.

28. One of the reasons for the coordinate bench to decide the issue against the assessee in AY 2010-11, is that there is no agreement to substantiate the terms under which code-sharing arrangement have been entered into by the assessee. For the year under consideration the assessee during the course of hearing provided a

sample copy of the agreement entered into with Air France and submitted that similar agreements are available for all code-sharing arrangements with third party airlines. Therefore, the contention of the revenue that the receipts from code sharing agreement are not substantiated by any underlying agreements is not tenable for the year under consideration.

29. On perusal of records we notice that the assessee had filed an application with the Competent Authority ("CA") under Art.27 of the India-US DTAA requesting that the authorities invoke Mutual Agreement Procedures("MAP") for resolving the impugned issue for the year under consideration along with the earlier years. We further notice that the US authorities have responded stating that despite prolonged efforts, a consensus could not be reached with the Indian authorities and that the US authorities are in agreement with the view that all of assessee's profits including revenue associated with interline and code sharing arrangement are to be exempt from Indian Taxation.

30. In view of the above discussion and placing reliance on the ratio laid down by the Hon'ble Bombay High Court and the coordinate bench of the Tribunal, we hold that the profits derived from the transportation of passengers under code sharing arrangement by the assessee is to be treated as profits from operation of aircrafts for the reason that –

i. *the transportation of passengers either fully or party in third party aircrafts in a specific journey by way of a code sharing arrangement, would fall within the ambit of the word "charterer" and, accordingly would be within the scope of "operation of aircrafts " as defined in Article-8(2) of the India US DTAA.*
ii. *The passengers under code sharing arrangements are transported on behalf of the assessee by the third party airlines under the code sharing arrangement on a principal to principal basis where the ticket for the entire journey is issued by the*

assessee bearing specific code. Hence the same would fall within the scope of "operation of aircrafts"

iii. *The transportation of passengers by the assessee under code sharing arrangement either fully or partly in a third party aircrafts is inextricably linked which is established in assessee's case here*

Accordingly the receipts of the assessee under code sharing arrangement are covered under Article-8, of India US DTAA and cannot be taxed in India. The grounds including the additional ground raised by the assessee in this regard are allowed.

31. During the course of hearing the ld AR presented arguments with regard to applicability of Article 8(2)(a) in assessee's case. The ld. AR also presented arguments on the method adopted by the AO while computing the taxable income of the assessee. In view of our decision with regard to applicability of benefit under Article 8 of India US DTAA to the receipts under code sharing arrangements, the above arguments of the ld AR have become academic not warranting any adjudication.

32. Ground No.4 with regard to interest under section 234A & 234B is consequential and Ground No.5 with regard to penalty is premature. These grounds do not warrant separate adjudication.

33. In result the appeal of the assessee is allowed.

Order pronounced in the open court on 07-11-2024.

Sd/-	***Sd/-***
(SUNIL KUMAR SINGH)	**(PADMAVATHY S)**
Judicial Member	**Accountant Member**

**SK, Sr. PS*

Copy of the Order forwarded to :

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

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai