Taxability of Shipping Business of Non Resident in India

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1. **Introduction**

Maritime industry & logistics is an important component of the Indian economy. It accounts for 95% of export - import trade by volume and 65% by value. The total traffic handled at Indian Ports has risen steadily from 885 MTPA in FY 2010-11 to 1,307 MTPA in FY 2019-20. India's Major Ports have witnessed ~4% CAGR growth over the last 5 years and handled ~54% of the country's total cargo in FY 2019-20. Further, about 90% of India's sea-bound cargo is handled by foreign carriers. With India being the undisputed leading emerging economy, its attractiveness to international businesses is bound to result in enhanced participation by foreign shipping companies.

Hence, shipping income provisions under the Income-Tax Act, 1961 ('ITA') and the various Indian Double tax avoidance treaties ('DTAA') have gained significant importance in recent years. The inter-play between domestic law and DTAA and the complications arising from the complex nature of shipping & air transport business creates unique challenges in determining the jurisdiction and allocation of taxation by the Contracting states involved in the international carriage of cargo and passengers

2. Nature of activities in international transportation and their providers

2.1 The following table gives a list of typical nature & range of activities that are involved in international transportation:

Location	Description
In Source Country	Booking of cargo / passengers
	Movement from factory to intermediate port and to container depot
	Transport of passengers from smaller cities or feeder routes to main airport
	Lodging / Boarding of passengers at intermediate / final city of embarkation
	Demurrage
	Services at port of shipment / airport
	Other incidental services / activities viz. container leasing, port handling, selling tickets for other shipping co.s, Hotel services, Shipyard services

	International high Seas / airspace from port in source country to other country
In Destination Country	Services at port of destination / disembarkation
	Movement from port to container depot and finally to customer
	Transport of passengers from main airport to smaller cities
	Lodging / Boarding of passengers at intermediate / final city of disembarkation
	Other incidental services / activities

2.2 As can be observed, there are a number of activities that are directly arising out of transportation and there are indirect activities, including incidental activities. These activities of carriage can either be provided by Owner / Charterer or the Lessee of the ship or aircraft. Thus evolved the concept of 'Charter' such as Time Charter, Voyage Charter and Bare-boat Charter. The following summarizes the providers of various activities:

- Operating company viz. Ship chartering company / Aircraft lessee company engaged in Shipping & Airline operation
- Ship / Aircraft owner company – Time Charters & Voyage Charters
- Booking Agents
- Ground handling & Engineering Services company in case of airlines
- Other companies providing incidental services

3. Implications under domestic tax law for shipping business

3.1 We now consider the domestic tax law provisions in India, scope of total income of non-residents in general and their shipping income in particular. The broad provisions relating to taxation of non-residents i.e. rule of accrual is provided under Section 5(2) of the I.T. Act that a non–resident is taxable in India on the following income:

– Income received in India
– Income deemed to be received in India
– Income accruing/ arising in India
– Income deemed to accrue or arise in India

In the context of international transportation of goods, one can consider a general principle that in case of cargo exported from India, freight income wherever received accrues in India and is therefore taxable in India. Conversely, in case of cargo imported into India, freight income accrues outside India and hence is not taxable in India unless it is received or deemed to be received in India.

3.2 Specific provisions in ITA relating to taxation of profits from international transportation business are:

- Section 44B - *taxation of shipping business in the case of non-residents*
- Section 172 - *profit of non-resident from occasional shipping business and levy & recovery of tax in respect of a ship belonging to a non-resident*
- Chapter XII-G - *special provisions relating to the income of resident shipping companies popularly known as "tonnage tax"*
- Section 44BBA - *profits and gains arising to a non-resident engaged in the business of operation of aircraft*.

3.3 Section 44B - *taxation of shipping business in the case of non-residents*

3.3.1 Section 44B of the Act applies to non-resident engaged in the business of shipping in India. It starts with a non-obstante clause which overrides sections 28 to section 43A (dealing with deductions from business income) of the ITA. It is a deeming provision whereby 7.5% of the following amounts shall be deemed to be the profits and gains of the said business chargeable to tax in India on a gross basis of charging tax on non-resident:

(i) amounts paid or payable (whether in or out of India) to the assessee (Tax payer) or to any person on his behalf on account of the carriage of passengers, livestock, mail or goods shipped at any port in India;

(ii) amounts received or deemed to be received in India by or on behalf of the assessee on account of the carriage of passengers, livestock, mail or goods shipped at any port outside India.

The Explanation to the section provides that the aforesaid amounts shall include demurrage charges or handling charges or any other amounts of a similar nature.
It does not specify whether cargo is exported outside India when it is shipped at any port in India or imported into India whether shipped at any port outside India.

Section 44B is thus a computational mechanism for non-residents engaged in shipping business, profits of which are determined on presumptive basis as deduction for expenses is not allowable. Further, hire charges is not the subject matter of this section as it is applicable only in case of carriage of goods & passengers.

Thus, freight earned on cargo shipped from India is taxed wherever received whether in India or outside India whereas freight for import of cargo is taxed only if it is received in India by the tax payer.

Also, language of Section 44B suggests that cargo movement between two ports within India is covered when exported outside India. It is therefore obvious to presume that non-resident may not engage into these services unless it relates to export cargo or import cargo into India where freight is received outside India.

3.3.2 It should be noted that there is no reference to “international traffic” in the section and the amounts are chargeable to tax irrespective of the places between which the transportation takes place as long as the assesse is non-resident, is engaged in business of shipping in India and derives income of the nature discussed in Paragraph 3.3.1 above.

3.3.3 There have been judicial rulings relating to nature of income that is taxable under Section 44B. The Mumbai Tribunal ruled[1] that inland haulage charges are charges paid for loading, unloading, stacking of containers whereas demurrage charges are in the nature of penalty for non-removal of cargo in time; hence inland haulage charges are basically inland transportation from the exporter’s place to the port which separates it from demurrage charges and hence cannot fall within the ambit of the Explanation to section 44B.

3.4 **Section 172 - *Profits of Non-Resident from Occasional Shipping Business***

3.4.1 Section 172 of the Act falls under the Chapter heading “Profits of Non-Resident from Occasional Shipping Business”. Accordingly, a ship owned / chartered by a non-resident which only casually visits the Indian port and leaves the Indian port is covered by Section 172 whereas non-residents who do regular shipping business are covered by the provisions of Section 44B.

3.4.2 <u>Key features of Section 172 are</u>:

- It starts with a non-obstante clause which overrides all the other provisions of ITA.

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[1] *DDIT v. Safmarine Container Lines N.V. (120 ITD 71) (Mum)*

- It is a complete code which provides for charging, computation, levy and recovery of tax from the owner /charterer of the ship in connection with the profits made from the transportation of passengers, livestock, mail or goods shipped at a port in India.
- It provides that each time a ship belonging to or chartered by a non-resident carries passengers, livestock, mail or goods is shipped at a port in India, an amount equivalent to 7.5% of the amount paid or payable on account of such carriage shall be deemed to be the income of the owner or the charterer.
- The above amount shall include the amount paid or payable by way of demurrage charge or handling charge or any other amount of similar nature.
- The section also provides for furnishing of a return by the master of the ship before departure of the ship (or within 30 days of the departure if the Assessing Officer is satisfied that it is not so possible and that satisfactory arrangements for the filing of the return and payment of the tax by any other person on his behalf has been made) and for a summary assessment of payment of tax before the ship departs from India. The provisions are introduced as there could be challenges in recovery of tax after the ship departs from India. A time limit is specified for completing the assessment within 9 months from the end of the financial year in which return is furnished.
- Port clearance certificate will not be issued by the Collector of Customs / officer till such time the tax assessable has been paid or satisfactory arrangements for payment of tax have been made.
- An option is given to a non-resident to claim an assessment of its income as per the provisions of the ITA. If such an option is made, any payment of tax made under Section 172 shall be treated as payment of advance tax and shall be adjusted against total tax payable as per the provisions of the ITA. The CBDT has clarified[2] that in the case of a regular assessment under section 172(7), the non-resident assessee is liable to pay interest under sections 234B and 234C and also entitled to receive interest under section 244A of the ITA.

3.4.3 <u>Section 172 and Deduction of Tax at Source</u>:

There can be cases where payments are made to shipping agents of non-resident ship owners or charterers for carriage of passengers etc., shipped at a port in India. Section 172 starts with a non-obstante clause and prevails over all other provisions of the ITA. Therefore, in such cases, the provisions of sections 194C and 195 relating to tax deduction at source are not applicable. There would, however, be cases where payments are made to shipping agents of non-resident ship-owners or charterers for carriage of passengers

[2] Circular No. 9/2001 dated 9 July 2001

etc., shipped at a port in India. The CBDT has issued a Circular[3] to the effect that since the agent acts on behalf of the non-resident ship owner or charterer, he steps into the shoes of the principal. Accordingly, the provisions of section 172 shall apply and those of sections 194C and 195 in respect of withholding obligations of the tax payer will not apply.

3.4.4 Annual No Objection Certificate and Port Clearance procedure:

- The port clearance is granted only after the return of the full amount to be paid is filed, evidence of payment of tax on such income is produced before the Customs authorities, or satisfactory arrangements are made to file the return and pay the tax within thirty days of departure of the ship.
- In cases where such ships are owned by an enterprise belonging to a country with which India has entered into an agreement on avoidance of double taxation, which provides for taxation of shipping profits only in the country of which the enterprise is a resident, no tax is payable by such ships at the Indian ports. Under such circumstances, a 'No Objection Certificate' is to be obtained by the master of the ship from the concerned income-tax authority. The CBDT has issued a Circular[4] that in such cases, the Assessing Officer shall be competent to issue an annual NOC, valid for a year, in respect of taxation of shipping profits under section 172 of the Income-tax Act, 1961 after carefully verifying the applicability of the relevant provisions concerning taxation of shipping profits in the DTAA with the country of which the owner or the charterer is a resident.
- The CBDT has issued a Circular[5] that in cases where a foreign shipping company eligible for full treaty relief prefers to be assessed on a voyage-wise basis i.e., on a ship basis, the Port Assessing Officer before whom such a voyage return has been filed shall give due credit to the annual NOC issued by the AO.
- The Port Clearance Procedure can be summarized as under:
  - Obtain DIT Exemption Certificate, wherever foreign shipping company ('FSC') is entitled to DTAA benefits, along with Annual NOC from the jurisdictional AO
  - File undertaking with AO at the concerned port (guaranteeing to file voyage return and make arrangement for payment of taxes) before arrival of the ship and obtain Voyage- wise NOC, if annual NOC is not available
  - Obtain Port Clearance Certificate ('PCC') from Customs Authorities on the basis of Annual NOC / Voyage - wise NOC
  - Ship is allowed to leave India on the basis of PCC from Customs Authorities
  - File Voyage Return u/s 172(3) within 30 days of the departure of the ship along with challans for the taxes paid, or file DIT Relief Certificate, if no tax is payable

[3] Circular No. 723 dated 19 September 1995
[4] Circular No. 732 dated 20 December 1995
[5] Circular No. 30 dated 26 August 2016

- Time-limit for passing voyage assessment order u/s 172(4A) – 9 (nine) months from end of the financial year in which Voyage Return filed – Inserted vide Finance Act 2007 w.e.f. April 1, 2007
- Option u/s 172(7) to be taxed under other provisions of the Act to be exercised before end of the assessment year.

3.4.5 Section 172 and Section 44B of the ITA - differences / comparison:

	Section 172	**Section 44B**
1.	Overrides all other provisions of the ITA.	Overrides sections 28 to 43A of the ITA only.
2.	Applies to freight income in relation to a ship	Applies to the aggregate income of the non-resident
3.	Applies to occasional shipping activities (Each ship touching Indian port)	Applies to regular shipping activities (shipping business)
4.	It is a machinery provision for timely levy and collection of tax (Each ship a tax event)	It is a presumptive provision. Option of normal provisions does not apply
5.	Covers only export freight	Covers export freight and other freight received in India
6.	Procedure for assessment and collection of tax is provided.	No such procedure for collection of tax is provided. General provisions apply
7.	Return to be filed within 30 days of the departure of the ship.	Return to be filed in accordance with the due date specified under section 139 of the ITA dealing with the time and person responsible for filing the Return of Income and its Form.
8.	The time limit for completion of assessment is governed by section 172(4A) of the ITA.	The time limit for completion of assessment is governed by section 153 of the ITA i.e. general provisions of the ITA.

3.5 **Chapter XII-G - special provisions relating to the income of resident shipping companies**

Chapter XII-G of the ITA deals with special provisions relating to the income of resident shipping companies popularly known as “tonnage tax”. Though the provisions are not applicable to non-residents, they have been briefly summarized below for academic purposes as more than 90% of the shipping income is taxed on a tonnage basis internationally:

a. The scheme is optional and is applicable only if the shipping company opts to be taxed under the scheme, else it can opt to be taxed as per the general provisions of the Act in accordance with financial statements drawn on the basis of the net freight income earned.
b. To be able to opt for Tonnage Tax Scheme ('TTS'), a company is required to be a qualifying company which is defined to mean:
    i. an Indian company;
    ii. which has its place of effective management in India;
    iii. owns at least one 'qualifying ship'; and
    iv. its main object is to carry on the 'business of operating ships'.
c. A company registered under TTS is required to pay taxes on the basis of tonnage of ships operated during the year, irrespective of income earned or expenses incurred. Thus, all expenses are deemed to be allowed.
d. A company registered under TTS needs to pay tax on its tonnage income, even if the company has incurred losses from operation of ships. Further, such losses are not allowed to be carried forward and set off against future income.
e. Minimum Alternate Tax is not applicable on activities of a Tonnage Tax Company
f. The approval granted by revenue authorities is valid for a period of 10 years subject to the satisfaction of certain conditions such as creation and utilization of reserves; minimum training requirements and limit for chartering in (49% of total tonnage)

3.6 Section 44BBA - *taxation of business of operation of aircraft in the case of non-residents*

The key features of section 44BBA of the Act are as under:

a. Income is deemed at the rate of 5 percent of the following:
    i. Export receipts (wherever received) on account of carriage of passengers, livestock, mail or goods from any place in India; and
    ii. Import receipts (only if received/ deemed to be received in India) on account of the carriage of passengers, livestock, mail or goods from any place outside India.

Section 44BBA starts with a non-obstante clause and overrides sections 28 to section 43A of the Act.

There are no parallel self-contained code provisions similar to section 172 of the Act applicable to air transport.

4. Implications under DTAAs, OECD & UN Model Conventions (Article 8)

4.1 Model DTAAs have historically dealt with income arising out of carriage in a special Article dealing with taxation of profits from shipping, inland waterways transport and air transport. There is a distinction drawn in the model conventions between business profits (typically covered under Article 7) and profits from shipping, inland waterways transport and air transport (typically covered under Article 8).

4.2 Typically, Article 7 of DTAAs deal with ascertainment of taxability of business income in a Contracting State. It incorporates the basic principle that in order to have the business profits taxed in the Contracting State other than the State of which a person is resident, it is essential to prove a permanent establishment ('PE'). There are various criteria prescribed for ascertainment of PE. The model conventions have elaborated and commented on the definition of PE. However, this may result in shipping/ airline enterprises being exposed to the tax laws of numerous countries to which their operations extend. For example, a ship carrying cargo between two Contracting States (say UK and India) would often involve halts in more than one country. As a result, there would be complexity in determining the profits to be attributed to each of the countries. In order to avoid such fragmented taxation of income of shipping/ airline enterprises operating through their PEs in various countries, various DTAAs prescribe that the taxation right of shipping/ airline enterprises be given to the country where the residence of the shipping/ airline company is based.

4.3 Article 8 of the OECD Model Convention deals with income from the operation of ships in international traffic. This Article provides that the profits arising from operation of ships in international traffic will be taxed only in the State where the residence of the enterprise is situated although it may be carrying on the shipping business through a permanent establishment (PE) in other tax jurisdictions. Prior to the amendment of 2017, the right to taxation was given to the state in which the place of effective management ('PoEM') was situated. Nevertheless, in cases where issues exist of dual resident-ship, PoEM would again come into play as provided under Article 4(2)

4.4 Analysis of Article 8 of OECD Model Convention (before and after amendment of 2017 which is shown below by way of '*strikethrough*')

Article 8 as per the OECD & UN (Alternative A) Model convention is reproduced below:

~~*(1)*~~ ***Profits from operation of ships or aircraft in international traffic shall be taxable only in*** ~~*the Contracting State in which the place of effective management of the enterprise is situated*~~ ***that state***

~~*(2) Profit from operation of boats engaged in inland water ways transport shall be taxable only in the Contracting State in which the place of effective management is situated.*~~

~~*(3) If the place of effective management of a shipping enterprises or of an inland waterways transport is aboard a ship or a boat, then it shall be deemed to be situated in the Contracting State in which the home harbor of the ship or boat is situated, or if there is no such home harbor, in the contracting state of which the operator of the ship is the resident.*~~

(4) The provisions of paragraph 1 shall also apply to profits from the participation in a pool, a joint business or an international operating agency.

i. Until 2017 paragraph 1 provided the taxing rights would be left to the contracting state in which the place of effective management of the enterprise was situated. However a review of the treaty practices of OECD and non OECD countries revealed that majority of these states preferred assigning the taxing rights to the state of the enterprise. However some states prefer to continue to use the previous formulation and confer the exclusive right on the State on which the Place of Effective Management of the enterprise is situated. Such countries are free to substitute the rule on the basis of the framework given in the OECD commentary

ii. As per the OECD commentary on Article 8, the object of paragraph 1 is to ensure that profits from operation of ships/ aircraft in international traffic are taxed in one State alone. The paragraph’s effect is that these profits are wholly exempt from tax at source and are taxed exclusively in the Contracting State of the enterprise engaged in international traffic. It provides an independent operative rule for these activities and is not qualified by Articles 5 and 7 relating to business profits governed by the permanent establishment rule.

iii. The OECD commentary states that profits covered under Article 8 consist in the first place of the profits directly obtained by the enterprise from the carriage of passengers or cargo by ships or aircraft (whether owned, leased or otherwise at the disposal of the enterprise) that it operates in international traffic. However, as international transport has evolved, shipping and air transport enterprises invariably carry on a large variety of activities to permit, facilitate or support their international traffic operations. The second category covers profits from activities which are not directly connected with the operation of the enterprise's ships or aircraft in international traffic as long as they are ancillary to such operation.

iv. Activities which an enterprise does not need to carry for the purpose of its own operation of ships or aircrafts in international traffic but which may make a minor contribution relative to such operation and such activity cannot be regarded as a separate business or source of income of the enterprise, such activity should be considered to be ancillary to the operation of Ships and Aircrafts in International traffic. The Commentary to the OECD MC lists cases where it could be said that the operations are directly connected or are ancillary to the operation of ships in international traffic some of which are:
   - sale of passenger tickets on behalf of the other enterprises;
   - the operation of bus service connecting a town with its airport (to complete the journey;
   - advertising on behalf of other enterprises;
   - transportation of goods by truck connecting a depot with a port or airport;
   - interest income directly connected with shipping (income from bonds kept as security for shipping business);
   - profit from lease of containers which is supplementary or incidental to international operation of ships or aircraft;
   - arrangements in the nature of code sharing/ slot chartering;
   - income from activities which are ancillary to the business of operation of ships/ aircraft in international traffic.

v. Various forms of international co-operation exist in shipping and air transport business. In this field international co-operation is secured through pooling agreements or other conventions of a similar kind. Paragraph 4 covers profit from participation in a pool, a joint business or an international operating agency.

4.4.1. The term 'International traffic' is defined in Article 3 of the Model (both OECD and UN Model) as under:

"The term 'International traffic' means any transport by a ship or aircraft except when the ship or aircraft is operated solely between places in a Contracting State and the Enterprise that operates the ship or aircraft is not an enterprise of the State"

4.5 Article 8 of UN Model Convention and comparison with OECD Model Convention

4.5.1 A comparison of the OECD Model Convention and the UN Model Convention reveals that the UN Model Convention recognizes two alternatives which can be adopted by the member countries viz. Alternatives 'A' and 'B'. Alternative A resembles the OECD MC while Alternative B deviates from the OECD MC. A comparison is provided below:

OECD Model	UN Alternative B (Alternative A is same as OECD model)
➢ Paragraph 1: Rules of taxability in State of Residence of Enterprise	➢ Paragraph 1: Rules of taxability in State of Residence of Enterprise for air transport only ➢ Paragraph 2: Taxation is also allowed in the State of source in case operation of shipping is more than casual in another State. Taxation on the basis of allocation of profits of the enterprise. Tax rate may be reduced by ________ percentage as per the treaty.
➢ Paragraph 2: Paragraph 1 applies in case pooling and other similar arrangements	➢ Same, but provided as paragraph (3)

4.5.2 The deviation arises on account of divergent views between developed and developing countries. Developed countries prefer to tax the profits only in the State where the residence is situated while developing countries felt that this would deprive them of their lawful revenue. In view of this divergence the UN Model Convention had to provide for an alternative. Alternative B of the UN MC therefore provides that where operations in that country are 'more than casual' (meaning a scheduled or planned visit of a ship to a particular country to pick up freight or passengers), tax has to be distributed on the basis of proper allocation of profits. Each country is entitled to tax such allocated income at an agreed rate to be established through bilateral negotiations.

In the case of *James Mackintosh & Co*[6], the Hon'ble Mumbai tax tribunal held that the expression 'more than casual' means scheduled or planned visits to a particular country and it includes 'regular and frequent' shipping visits as also 'irregular and isolated visits', as long as the same are planned and not merely fortuitous or something happening completely by chance.

4.6 Indian approach

4.6.1 Generally, India tends to follow Alternative A of the UN Model on Article 8 which is similar to the OECD model on Article 8. However, in certain DTAAs taxation right is given to the source state as well based on allocation parameters (viz DTAA with Greece, Ireland, Norway, etc). Thus, each DTAA would have to be read independently to understand the language used therein which could be unique to a particular DTAA.

4.6.2 We have analyzed below the unique features of India's DTAAs as under:

Distinguishing feature	**DTAA with Country**
Place of Effective Management as Connecting factor	Brazil, Canada, Cyprus, Germany, Libya, Mauritius, Mongolia, Namibia, Netherlands, Sri Lanka, Syria, Tanzania (air transport) & Zambia
State of Residence as Connecting factor	Australia, Austria, Belarus, Belgium, Bulgaria, China, Czech Republic, Denmark, Egypt, Finland, France, Greece, Hungary, Indonesia, Ireland, Israel, Italy, Japan, Jordan, Kazakhstan, Kenya, Korea, Kyrgyzstan, Malaysia, Malta, Morocco, Nepal, New Zealand, Norway, Oman, Philippines, Poland, Portugal, Qatar, Romania, Russia, Singapore, South Africa, Spain, Sweden, Switzerland, Tanzania (shipping), Thailand, Trinidad & Tobago, Turkey, Turkmenistan, Ukraine, UAE, UK, USA (Reciprocity), Uzbekistan & Vietnam

[6] (2005) 92 TTJ 388

Alternative B, modified form	Bangladesh, Bulgaria, Finland, Greece, Ireland, Jordan, Kenya, Korea, New Zealand, Norway, Philippines, Poland, Romania, Russia, Sri Lanka, Tanzania (shipping), Thailand, Uzbekistan (source taxation as per domestic law)
Interest income connected to operations	Australia, Czech Republic, Denmark, Finland, France, Germany, Hungary, Indonesia, Ireland, Israel, Japan, Italy, Jordan, Kazakhstan, Kenya, Korea, Malta, Mauritius, Mongolia, Morocco, Namibia, Netherlands, Poland, Qatar, Romania, Russia, Singapore, South Africa, Spain, Sri Lanka, Syria, Tanzania (air transport), Thailand, Trinidad & Tobago, Turkey, Ukraine, UAE, USA, UK, Uzbekistan, Vietnam & Zambia
Capital Gains	Malaysia, UAE & UK
No provision on shipping	Kyrgyzstan, Nepal, Switzerland & Zambia
No air transport	UAE (separate agreement)

5. **Important Jurisprudence relating to scope of income from shipping activities**

5.1 Time Charter: The issue whether hire charges for charter of ship constitutes royalty income (and therefore taxable under section 9(1)(vi) and subject to TDS under section 195 of the ITA) has been the subject matter in many cases with differing rulings.

The Chennai Tribunal, in *Poompuhar Shipping Corporation Ltd v. ADIT*[7], has held that payment of hire charges to non-resident shipping companies under a time charter arrangement is not "royalty" under section 9(1)(vi) of the ITA as it was not for the use of industrial, commercial or scientific equipment and the charter does not create any right of property or any interest in a ship but payment was towards contractual rights for services of ship provided by the non-resident ship owner. The Tribunal further concluded that income of the ship owner would be liable to tax in India under the deeming provisions of section 172

[7] ITA Nos. 145 to 148/Mds/2012) (Chennai)

of the Act dealing with taxation of non-resident shipping companies. It further observed that the assessee did not place on record any document to show that ship owner was exempted by tax treaties from payment of tax and accordingly, the assessee was held liable to deduct tax under the provision of section 195 of the Act.

While the above decision holds that the income is covered under Section 172 of the IT Act, it is useful to point out here that in case of a tax treaty situation, the provisions of Article 8 should be considered if the payment is to a foreign shipping company which is resident of a country with which India has a tax treaty. Under Article 8 (dealing with taxability of shipping income of foreign shipping companies), right of taxation is generally given to the country of residence of the foreign shipping company and, hence, not liable to tax in India.

5.2 Bare-boat Charter: In West Asia Maritime Ltd. vs ITO[8], the Tribunal held that Bare-boat charter charges paid to non-resident is not treated as operation of ship in international traffic and is to be treated as Equipment Royalty as payment was for use or hire of Equipment / Vessel and not for services.

5.3 Inland haulage charges (cost of moving container to inland destination):
Inland transportation and haulage charges was held as covered within the definition of "international traffic" –

- ADIT vs Safmarine Container Lines, NV[9]
- DDIT vs Delmas Shipping South Africa (Pty) Ltd.[10]
- ADIT vs Federal Express ITAT Mumbai[11]

5.4 Slot Charter: Income from 'Slot Charter' was ruled to be exempt under Article 9 of the India-UK DTAA as it is income from 'operation of ships'. The Bombay High Court held that Article 9 does not require the ships to be owned by the enterprise. Slot hire agreements have a nexus to the main business of operation of ships of the enterprise and are an integral part of the enterprise's business of operating ships. They are ancillary to and complement the operation of ships by the enterprise. The High Court dealt with two situations. Under the first situation, the goods were transported from a port in India to an intermediary port outside India (hub port) by availing slot hire facilities on ships belonging to another enterprise (typically known as a feeder vessel). Thereafter, transhipment would take place at the hub port where the goods would be offloaded from the feeder vessel and

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8 109 TTJ 617 ITAT (Chennai)
9 24 SOT 211 ITAT (Mum)
10 2008-TIOL-547-ITAT (Mum)
11 2009-TIOL-179-ITAT (Mum)

loaded onto a vessel which would be owned/chartered by the enterprise (typically known as a mother vessel) for transportation to its ultimate destination. Under the second situation, the goods would be transported from a port in India directly to its ultimate destination to a port abroad by availing of the slot hire facility on ships operated by another enterprise. The High Court held that both the situations will be covered by Article 9 of the India-UK DTAA if the enterprise is otherwise engaged in the business of operation of ships.

- DIT vs Balaji Shipping UK Ltd.[12]
- DIT vs Balaji Shipping UK Ltd.[13]

5.6 Lease of aircraft:

- In Caribjet Inc.[14], Mumbai Tribunal held that it is outside the scope of Section 44BBA hence chargeable to tax under normal provisions of ITA. Further, if fully equipped with crew, then it is covered by Article 8. Ground operations & Engg. services are not covered by Section 44BBA.
- Pool of resources for ground services & engg. was ruled upon in Lufthansa German Airlines vs DCIT[15] where ITAT held that the amount received from various IATP pool members airlines for services rendered in India was not taxable in India under Article 8
- In the case of British Airways PLC vs DCIT[16], ITAT held that the amount for services rendered unilaterally to various airlines without availing reciprocation of services could not be treated as having rendered under pooling arrangement and hence cannot be brought under Article 8 of the India-UK Treaty

6. Conclusion

- Section 172 is a complete code which provides for charging, computation, levy and recovery of tax from the owner /charterer of the ship in connection with the profits made from the occasional transportation of passengers, livestock, mail or goods shipped at a port in India. Accordingly, normal TDS provisions under Section 194C and 195 do not apply. Return has to be filed within 30 days of the departure of the ship. However, in general practice, assessment is usually done similar to Section 44B. Tax is payable at the rate applicable to foreign companies on 7.5% of its income as discussed in Paragraph 3.4.2 above

[12] Mum. High Court decided on 23/8/2012
[13] [2009] 121 ITD 61 (Mum.)
[14]
[15] 90 ITA 310 ITAT (Delhi)
[16] 73 TTJ 519 ITAT (Delhi)

- Unlike provisions of Section 172, the provisions of Section 44B applies to aggregate income of non-resident from its regular shipping activities. Normal TDS provisions under 194C and 195 apply and Return has to be filed as per the provisions of Section 139. Tax is payable at the rate applicable to foreign companies on 7.5% of its income as discussed in Paragraph 3.3.1 above.