IN THE INCOME TAX APPELLATE TRIBULAL: RAJKOT BENCH: RAJKOT
Before Shri T. K. Sharma, JM and Shri D. K. Srivastava, AM

ITA No. 61/Raj/2012
(Assessment Year 2010-2011)

Income-tax Officer International Taxation Plot No.20A, Sector 8 Gandhidham, Kutch	v.	M/s Marine Containers Services (India) Pvt. Ltd. (Agent of M/s Yang Ming (UK) Ltd. 106, Mani Chamber, Plot No.84, Sec-8, Gandhidham PAN: AAACY1664M

CO No.21/Rjt/2012
in
ITA No. 61/Raj/2012

M/s Marine Containers Services India) Pvt. Ltd.	v.	Income-tax Officer International Taxation

Appellant by: Shri Avinash Kumar
Respondent by: Shri J.C.Ranpura

Date of Hearing: 1.11.2012
Date of Pronouncement: 1.11.2012

आदेश / Order

टी.के. शर्मा, न्यायिक सदस्य / T. K. Sharma, J. M. This appeal by the Revenue is against the order dated 30.11.2011 of CIT(A) Gandhinagar for the assessment year 2010-11. The assessee also filed Cross-objection thereto. For the sake of convenience these were heard together and are being disposed by this common order for the sake of convenience.

ITA No. 61/Raj/2012 (by Revenue)

2. Grounds taken in this appeal read as under:

"(i) The ld. CIT(A) has erred in law and on facts in holding that

the order of the AO is null and void.

(ii) The Ld. CIT(A) has erred in law and on facts in allowing the benefit of DTAA between India and Singapore to the assessee.

(iii) On facts and circumstances of the case, the ld.CIT(A) ought to have upheld the order of the AO. It is, therefore, prayed that the order of the ld. CIT(A) may be cancelled and that of AO may be restored to the above extent.

(iv) The appellant craves leave to add/alter/modify/delete any of the ground of appeal at the time of hearing."

3. Facts of the case, in brief, in so far as they are relevant for disposal of the present appeal are that the Respondent-company, namely, M/s Marine Containers Services (India) Pvt. Ltd., acts as agent for the freight beneficiary, namely, M/s Yang Ming (UK) Ltd. In the assessment year under appeal also, it acted as agent of the said freight beneficiary. The freight beneficiary, i.e., M/s Yang Ming (UK) Ltd, is engaged in the business of transportation of goods by sea. The principal company, i.e., freight beneficiary, is registered in UK and resident of UK. In the year under appeal, the principal company operated 45 voyages arriving at Mundra Port. The respondent-company, acting as agent of the freight beneficiary, filed voyage returns in respect of the aforesaid 45 voyages before the Assessing Officer at Gandhidham as required by section 172(3) of the Income-tax Act. Instead of passing 45 orders u/s 172(4) separately to dispose of each of the aforesaid 45 voyage returns filed by the Respondent u/s 172(3) before him, the Assessing Officer passed, for the sake of convenience, a composite order u/s 172(4) on 6.12.2010 disposing of all the 45 voyage returns filed by the Respondent-company for the assessment year under appeal as the factual matrix and the issues in all of

them were identical. He has worked out taxable income in respect of each voyage covered by each return filed by the respondent-company u/s 172(3) separately in the order passed by him u/s 172(4). Perusal of assessment order shows that the AO has assessed the taxable income u/s 172(4) in respect of all the 45 voyages at Rs.68,15,515/-, being 7.5% of total amount of freight (Rs.9,08,73,535/-). The benefit of DTAA between India and UK, as claimed by the respondent-company, was denied by the AO on the ground that the freight beneficiary was only a slot charterer and not owner or charterer of the ship.

4. Aggrieved by the composite order passed by the AO u/s 172(4), the respondent-company filed appeal before the CIT(A). The ld. CIT(A) has quashed the composite order passed by the AO u/s 172(4) with the following, amongst others, observations:

> "….I have perused the submission made by the appellant and am of the opinion that the appellant is in regular shipping business and not in occasional shipping business. I have considered the judgments cited. Once a person claims that it is not engaged in occasional shipping business and wants to go out of the ambit of section 172; the recourse is provided in section 172 (7) only and for that it has to opt for filling return u/s 139 (1). Since, the appellant has opted for the option to be assessed u/s 172(7) by filing return of income u/s 139(1) and also the fact that they are filing return of income for the past many years, it is established that the appellant is in

regular shipping business and liable to be assessed under other provisions of the Act including 44B; and not u/s 172(4). It is also applying to its regular jurisdiction for NOC after giving all relevant details. The fact was brought to the notice of the AO also (refer page 8 paragraph 11 of the order). There was 45 voyages at Mundra Port itself as per the order of the AO during the year in respect of slot chartering (as per AO)/pool arrangement (as per Appellant) alone. Thus, the order passed u/s 172(4) by the Income Tax Officer is null and void as assessee's claim that it is not engaged in occasional shipping business is backed by its taking the alternate recourse provided in section 172(7) itself.

Thus, the combined order passed u/s 172(4) by the Income Tax Officer is null and void as assessee's claim that it is not engaged in occasional shipping business is backed by its taking the alternate recourse provided in section 172(7) itself. It is liable to be assessed on the basis of return filed u/s 139(1) for its entire income.

One more issue is the AO's reasoning that the appellant is not owner/charter of the vessels. Once the AO says that the appellant is not owner/charter of the vessel; then he could not have taken recourse to section 172 itself as the section applied to owner/charter only. The subsection (1) reads as under :

"172. (1) The provisions of this section shall, notwithstanding anything contained in the other provisions of this Act, apply

for the purpose of the levy and recovery of tax in the case of any ship, belonging to or chartered by a non-resident, which carries passengers, livestock, main or goods shipped at a port in India"

However, this sub-issue is not adjudicated since I have already held earlier that the order passed by the AO u/s 172(4) is null and void and this issue becomes academic. Further, the slot charterer not being charterer requires to be deleted, which is not required in this case, in view of the earlier finding."

5. Aggrieved by the order passed by the CIT(A), the Department is now in appeal before this Tribunal.

6. As regards the issues taken by the Department in its Grounds of appeal, the ld. DR submitted that the ld. CIT(A) has brought no foundational fact on record to support his view that the respondent-company has already filed its return of income u/s 139(1) and therefore the ld. CIT(A) was not justified in invoking the provisions of section 172(7) for quashing the order passed by the AO u/s 172(4). He submitted that the ld. CIT(A) ought to have confirmed the action of the AO unless there was material on record to indicate that the Respondent-company had exercised its option in terms of section 172(7). According to him, the ld. CIT(A) ought to have verified as to whether the respondent-company had included the income from 40 voyages which was taxed by the AO in the order under appeal, in its return of income filed u/ 139(1). He urged that the order

passed by the CIT(A) should therefore be vacated or alternatively the AO be given the option to verify the facts and thereafter tax the income from 40 voyages in accordance with law.

7. In reply, the ld. ld. authorized representative for the Respondent-company supported the order passed by the CIT(A). His submissions were three-fold: One, the appellant and the freight beneficiary are engaged in regular shipping business and not in occasional shipping business and therefore the provisions of section 172 are inapplicable to them. In this connection, he referred to the finding recorded by the CIT(A) and submitted that the Department has placed no material on record to rebut the finding recorded by the CIT(A) in this behalf. Two, the fact that the freight beneficiary was engaged in regular shipping business was also apparent from the fact that the respondent has regularly, as observed by the CIT(A), been filing its return of income on behalf of the freight beneficiary at Mumbai. In support of his submissions, he filed a copy of acknowledgment of return, which shows that the Respondent had filed return of income in ITR-VI before the ADIT (Int.Tax)(2) at Mumbai on 30.9.2010. Three, the Income-tax Act does not stipulate multiple assessments against the same assessee simultaneously u/s 172(4) and also under the normal provisions of the said Act. He contended that the ld. CIT(A) has therefore rightly quashed the order passed by the AO u/s 172(4).

8. We shall now turn to the issues raised in the grounds of appeal taken by the Department. The issue before us is not about the assessability

or determination of income from the aforesaid 45 voyages but about the procedure to be adopted for assessment of income from those voyages. The Assessing Officer has invoked section 172(4) to tax the income in a summary manner from 45 voyages operated by the freight beneficiary in the year under appeal on the basis of the returns filed u/s 172(3) before him. The respondent-company, on the other hand, claims that the procedure outlined in section 172(4) is not applicable to it as it has already filed its return of income u/s 139(1) before the expiry of the assessment year under appeal and therefore it ought to have been assessed in respect of income from 45 voyages under the normal provisions of the I-T Act in view of the provisions of section 172(7).

9. On appeal by the assessee, the ld. CIT(A) has quashed the order passed by the AO u/s 172(4) for four principal reasons. One, the shipping business being carried on by the freight beneficiary is not occasional shipping business but regular shipping business and hence the income there-from is liable to be assessed under the normal provisions of the I-T Act and not u/s 172(4) thereof. Two, the respondent-company is filing its return of income u/s 139 and is being assessed as such in respect of income from shipping business and hence the provisions of section 172(4) are inapplicable to it. Three, the respondent-company has already filed its return of income u/s 139 at Mumbai and thus exercised its option in terms of section 172(7) for being assessed under the normal provisions of the I-T Act. Four, the I-T Act does not contemplate multiple assessments in the

case of the same person and/or in respect of the same income in the hands of the same person.

10. Before proceeding further, it is considered useful to refer to the scheme of taxation u/s 172, which falls under Chapter XV of the Income-tax Act 1961. Chapter XV deals with "Liability in Special Cases". Part "H" of Chapter XV contains only one section, i.e., section 172. It deals with "Profits of non-residents from occasional shipping business". It therefore follows that the persons covered by section 172 are only those who are in occasional shipping business and not in the regular shipping business. Those who are in the regular shipping business are clearly outside the scope of section 172. They are covered by section 44B which contains "Special provision for computing profits and gains of shipping business in the case of non-residents". While section 172 seeks to tax profits of non-residents from occasional shipping business, section 44B seeks to tax their profits from regular shipping business. Sub-section (1) section 172 empowers the Assessing Officer to levy and recover tax in the case of any ship belonging to or chartered by a non-resident in a summary manner notwithstanding anything contained in any other provisions of the I-T Act. Sub-section (2) of section 172 contains summary procedure for computing the income of non-residents from such ships @ 7.5% of the amount paid or payable on carriage of passengers, livestock, mail or goods to the owner or charterer of such ships or to any person on his behalf. Sub-section (3) of section 172 requires the master of the ship to prepare and furnish, before the departure of any such ship, to the Assessing Officer a return of the full

amount paid or payable to the owner or charterer or any person on his behalf on carriage of all passengers, livestock, mail or goods shipped at that port since the last arrival of the ship thereat. Sub-section (4) requires the AO to assess income referred to in sub-section (2) and determine the sum payable thereon. The procedure of assessment contemplated by sub-sections (2) and (4) is summary in nature in that it neither allows the non-residents to claim any deduction including the benefits otherwise admissible under the Double Taxation Avoidance Agreements nor requires the AO to follow any elaborate procedure for making the assessment. The AO has to simply assess the income at the rate of 7.5% of the freight paid or payable to the owner or charterer of the ship or any person on his behalf. And that is the end of the matter as far as assessment of income from such ships is concerned. Sub-section (7) of section 172 confers a right on the owner or charterer of a ship to claim before the AO before the expiry of the relevant assessment year that an assessment be made of his total income in accordance with the normal provisions of the I-T Act, and if he so claims, any payment made by him u/s 172 shall be treated as payment in advance of the tax leviable for that assessment year, and the difference between the sum so paid and the amount of tax found payable by him on such assessment shall be paid by him or refunded to him, as the case may be.

11. The scheme of taxation u/s 172 has been explained by the Hon'ble jurisdictional High Court in Arabian Express Line Ltd. of United Kingdom v. Union of India, 120 CTR (Guj.) 377 as under:

"..... It is to be noted that section 172 of the Income-tax Act occurs in Chapter XV which provides for liability in various special cases. The sub-heading of section 172 is "Profits of non-residents from occasional shipping business". This section provides that the profits made by non-residents from occasional shipping shall be taxed by adopting the summary method of assessment by holding that 7 ½ per cent. of the amount paid or payable on account of such carriage to the owner or the charterer is deemed to be income accruing in India to the owner or charterer on account of such carriage. It also provides that before departure of the ship, the master of the ship has to furnish to the Assessing Officer a return of the full amount paid or payable to the owner or charterer on account of the carriage of all passengers shipped at that port since the last arrival of the ship thereat. Sub-section (3) provides that if the master is unable to do so, he has to make satisfactory arrangement for the filing of the return and payment of the tax by any other person on his behalf. Sub-section (6) provides that a port clearance certificate shall not be granted to the ship until the Collector of Customs is satisfied that the tax assessable under this section has been duly paid or that satisfactory arrangements have been made for the payment thereof. In our view, the aforesaid procedure of assessing the income of a non-resident Indian because of his occasional activity in shipping business in India would not be applicable in a case where there is a convention between the

Government of India and the foreign countries as provided under section 90 of the Income-tax Act. In the case of such agreement, section 90 would have overriding effect."

12. It is thus quite evident that the summary procedure contemplated by section 172 would not be applicable to (i) assess the profits of non-residents from regular shipping business; (ii) the cases covered by sub-section (7) of section 172, i.e., where the owner or charterer claims that his total income should be assessed in accordance with the normal provisions of the Income-tax Act; and (iii) cases where there is a convention between the Government of India and the foreign countries as provided under section 90 of the Income-tax Act. The summary procedure of assessment contemplated by section 172 cannot be mixed up with a regular assessment especially when option is exercised by the owner or charterer of the ship u/s 172(7). By the same analogy, there cannot be multiple assessments of profits from the same voyages, i.e., one u/s 172(4) on the basis of returns filed u/s 172(3) and the other under the normal provisions of the Income-tax Act on the basis of the return filed u/s 139.

13. Looking to the magnitude of the voyages undertaken by the freight beneficiary and the fact that the respondent-company has been, as observed by the ld. CIT(A), regularly filing its return of income at Mumbai and being assessed to tax at Mumbai, the finding of the CIT(A) that the freight beneficiary is not engaged in occasional shipping business but in regular shipping business and hence would be outside the scope of section

172 cannot be said to be untenable on facts and in law. His finding in this behalf is therefore confirmed. Similarly, the Department has not placed any material on record to rebut the finding recorded by the CIT(A) that the respondent-company has already filed its return of income at Mumbai. That being the position, the provisions of section 172(7) would apply to the respondent-company. Besides, as rightly observed by the CIT(A), the Income-tax Act does not permit multiple assessments in the hands of the same taxable entity and that too in respect of income from the same business. On these facts, we are unable to disturb the finding recorded by the CIT(A). The order of the CIT(A) that the respondent-company is liable to be assessed on the basis of return filed u/s 139(1) for its entire income is therefore confirmed. His further order quashing the order passed by the AO u/s 172(4) is also resultantly confirmed.

14. As stated earlier, the Hon'ble jurisdictional High Court has held in Arabian Express Line Ltd. of United Kingdom v. Union of India, 120 CTR (Guj.) 377 that the procedure contemplated by section 172 for "assessing the income of a non-resident Indian because of his occasional activity in shipping business in India would not be applicable in a case where there is a convention between the Government of India and the foreign countries as provided under section 90 of the Income-tax Act". The reason for such a view is obvious. Section 172(2)/(4) provides for summary assessment @ 7.5% of the freight paid or payable. By the very nature of assessment contemplated by section 172, it is not possible to deal with the cases covered by Double Taxation Avoidance Agreement. In the matters before

us, the AO has rejected the claim of the respondent-company that its case falls under DTAA. Such an examination, in our view, cannot be undertaken in the proceedings u/s 172 as the AO has no discretion u/s 172(2)/(4) except to compute the income @ 7.5% of freight paid or payable. It is perhaps for this reason that section 172(7) gives an option to the owners/charterers of ships to seek assessment of their income in accordance with the normal provisions of the Income-tax Act. Once a return is filed by a non-resident u/s 139 claiming the benefit of DTAA, his assessment would need to be completed under the normal provisions of the Income-tax Act. The ld. DR vehemently contented that the jurisdictional Assessing Officer should be directed to verify the position and tax the income of the freight beneficiary (represented by the respondent-company) from the business of handling cargo transportation (including slot chartering business) as per normal provisions of the Act. It is the case of the respondent-company that its income including the income from 45 voyages covered by the impugned order passed by the AO u/s 172(4) should be taxed in accordance with the normal provisions of the Income-tax Act on the basis of the return filed by it u/s 139 at Mumbai. Perusal of the order passed by the CIT(A) shows that he has taken a view that the case of the respondent falls u/s 172(7) and not u/s 172(4). The respondent-company has also accepted the liability to be dealt with u/s 172(7). The jurisdictional AO may therefore verify the position and take such action as may be warranted in law in terms of section 172(7) to ensure that the income of the assessee from the aforesaid 45 voyages does not escape assessment as per the normal provisions of the I-T Act.

15. In view of the foregoing, the appeal filed by the Revenue is dismissed subject to the observations made above.

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16. Ground taken by the assessee in the cross-objection are as under :

"1. On the facts and in the circumstances of the case, the learned CIT(A) has erred in not giving any finding that the respondent Company is not the owner/charterer of the vessels, even when the respondent Company had placed before the Ld. CIT(A), certificates issued by the Assistant Director [International Taxation], Mumbai, after examining the Chartering Agreements and the Pooling Line Agreements entered by it.

2. On the facts and in the circumstances of the case, the learned CIT(A) erred in not giving any finding in respect of the following Grounds of Appeal raised before him:-

2.1 The Ld. A.O. failed to appreciate Article 9 of India UK Tax Treaty for pool arrangement and erroneously considered the said arrangements as slot chartering arrangement. The freight income earned by the tax payer on account of transportation of cargo in the international traffic by ships operated under poor arrangements would not be taxable in India under article 9 of the DT AA between India and UK. The relevant portion of article 9 is reproduced as under:-

Article 9 :- SHIPPING

1. Income of an enterprise of a contracting state from the operation of ships in international traffic shall be taxable only in that state.

5. The provisions of this article shall apply also to income derived from participation in a pool. a joint business or an international operating agency.

2.2 The Ld. A.O. has ignored the recent judgement pronounced by ITAT, Mumbai in case of DOIT v. Balaji Shipping (2009) 121 ITD 61 (Mum) wherein it was held that the freight income earned by the respondent on account of transportation of cargo in the international traffic by ships operated by other enterprises even under slot chartering arrangement would be taxable only in the state of residence and consequently, such income would be exempt from taxation under the Indian Income Tax law.

2.3 The ld. A.O. failed to take cognizance of the documents filed for the pool Agreement by and between M/s Yang Ming {UK} Ltd. and Orient Overseas container Line Ltd. [OOCL], the pooling partner of M/s Yang Ming {UK} Ltd. for the CPX service, for which, the Port of Mundra is a port of call while making an observation in the letter dated 22-10-2010:- *"Your Company cannot be treated as shipping business as slot chartered vessel cannot avail of the benefits of DTAA between India and UK and hence, freight income earned should be taxable in India."*

2.4 The ld. A.O. failed to appreciate that the pooling agreement would clearly prove to the AO that the principal i.e. respondent company has a well defined service operating out of the port of Mundra in partnership with its pooling partner OOCL and that there is every reason for the rational interpretation that the voyages of the respondent company in pursuit of the pooling agreement is in the regular course of carrying out regular shipping operations and not as a slot arrangement.

2.5 The ld.AO failed to appreciate that the respondent Company has obtained 100% DIT relief certificate and hence, the earnings made under the said vessels are rightfully covered under the said DIT certificate and exempt from tax. Inspite of DIT relief certificate certain vessels are not considered for relief.

3. On the facts and in the circumstances of the case, the Ld AO has erred in treating the appellant as agent of MIs Yang Ming {UK} Ltd without giving notice u/s 163 of the IT Act.

4. The respondent craves leave to add, alter, amend *and/or* withdraw any ground or grounds of appeal either before or during the course of hearing of the appeal. "

17. At the time of hearing of the cross-objection, the ld.Counsel did not press the cross-objection filed by the assessee. Therefore, we dismiss it as not pressed.

18. In the result, the appeal of the Revenue as well as the cross-objection filed by the assessee are dismissed.

Order pronounced on 1.11.2012

Sd	sd
(D. K. Srivastava)	(T. K. Sharma)
Accountant Member	Judicial Member

Rajkot: 1.11.2012

SRL
Copy of Order Forwarded to:-
1. Appellant
2. Respondent
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Rajkot
6. Guard file

By order

True copy

Senior Private Secretary, ITAT, Rajkot Bench