

Even prior to 2013 India-UK protocol benefit of DTAA was allowed to fiscally transparent firm established in UK

Summary – The High Court of Calcutta in a recent case of P & O Nedlloyd Ltd., (the Assessee) held that where non-resident partnership was a firm under section 2(23)(i) and therefore it was a 'person' under section 2(31)(iv) and attracted operation of paragraph 2 of article 3 of Indo-UK treaty, revenue's view that said partnership was not covered by said convention failed

Facts

- The petitioners formed a partnership firm under the provisions of law relating to partnership of England and Wales, having its office in the UK to carry on the business of shipping in international waters. It was the petitioner's case in their pleadings the first assessment year subsequent to the formation of the partnership was assessment year 1997-98. Since an incomplete return was originally filed, the petitioner No. 1 filed a revised return.
- The returns filed resulted in assessment order and demand notice was issued under section 148 on ground that P & O Nedlloyd Partnership, UK (PONP) filed its return of Income arising out of shipping business in India, for the assessment year 2002-03 as 'New case - 1st year'. Meanwhile, information had been received that PONP's Indian income from shipping business in earlier years was not disclosed to the department. It was noted that the PONP was actually carrying on the shipping business in India. It had realised gross freight from vessels shipped at Indian port during the period relevant to assessment year 1997-98. This resulted in profit being 7.5 per cent of gross freight under section 172(2). But the same was not offered for taxation by the PONP. Instead this was wrongly shown as income of P & O Nedlloyd Ltd. which was merely a partner of the PONP, to fraudulently avail of relief under Indo-UK treaty. Since partnership was not liable to Income-tax in UK, the same was not a 'person' resident in UK who was entitled to get relief under Indo-UK treaty. In view of this income chargeable to tax for the assessment year 1997-98 had escaped assessment due to non-filing of return by the PONP.
- On writ petition:

Held

- The effect of the relevant provisions of the India-UK treaty is the convention applies to persons who are residents of one or both the contracting States by operation of clauses 1(f) and 2 of Article 3 of the convention. It is found the said partnership, partners of which are registered in the UK is not a person treated as a taxable unit under the taxation laws in force in the UK. Under section 2(31)(iv) person includes a firm. Under section 2(23)(i) thereof a firm shall have the meaning assigned to it in the Indian Partnership Act, 1932 and shall include a limited liability partnership as defined in the Limited Liability Partnership Act, 2008. The provisions of the Indian Partnership Act, 1932 in

particular sections 4 and 69 when applied for the purpose of determining whether the said partnership is a firm within the meaning of the said Act, leads this Court to conclude in the affirmative. That obviates the necessity of applicability of the provisions of the Limited Liability Partnership Act, 2008. Once it is found the said partnership is a firm under section 2(23)(i), it becomes a person under section 2(31)(iv), attracting the operation of paragraph 2 of article 3 of the said convention. Such conclusion is inescapable as the revenue must bring a charge of Income-tax against a person under section 4 of the Income-tax Act, 1961. The revenue in treating the said partnership as an assessee and seeking to assessee income of it which had escaped assessment is for the purpose of charging tax on the income of the said partnership, treating it as a person liable to be charged with the levy of Income-tax under the said section. In doing so the revenue has to treat the said partnerships as a person within the definition provided under section 2(31)(iv). Thus, the revenue's case the said partnership is not covered by the said convention fails.

- Inasmuch as in the facts and circumstances aforesaid it would be unjust to compel the said partnership or the petitioners to submit themselves to the assessment sought by the impugned notice, the writ petition succeeds. The impugned notice issued under section 148 to P & O Nedlloyd (partnership) is set aside and quashed.