No denial of DTAA benefit to owner of ship just because charterer of ship was liable to tax under business agreement

Summary – The Ahmedabad ITAT in a recent case of H.K. Dave Ltd., (the Assessee) held that where assessee rendered services to foreign vessels under agency of a U.K. Company and charterer of ship was of Bahamas, freight beneficiary being a company of U.K., as per DTAA entered into between India and U.K., said income was not taxable in hands of assessee in India

Facts

- The assessee-company was rendering services, in respect of port and income-tax clearances, to its U.K. based company as agent. The charterer of the ship was of Bahamas. The assessee-company had requested the Tax Recovery Officer, for the issuance of income-tax clearance certificate in respect of shipment carrying cement in bulk.
- Tax Recovery Officer had granted a certificate treating the income as exempt under DTAA of Government of India with the United Kingdom. Subsequently, the Tax Recovery Officer opined that the tax liability was of the charterer in Bahamas.
- He held that Tax on freight was payable by the charterer in Bahamas with which no DTAA was in existence and thus relief under section 90 already granted at the time of issuing NOC was withdrawn and tax liability of the assessee was computed under section 172(4).
- The Commissioner (Appeals) upheld said order.
- On appeal :

Held

- It is wholly erroneous on the part of the authorities below to determine the eligibility of treaty benefits on the basis of the domicile of the person liable to pay income tax dues, and, of course, to determine the person liable to pay the income-tax on the basis of an agreement between the owner and the charterer. Article 1 of the India UK Double Taxation Avoidance Agreement 'shall apply to persons who are residents of one or both of the contracting States', and the expression 'resident of a contracting State', under article 4(1), means 'any person who, under the law of that State, is liable to taxation therein by reason of his domicile, residence, place of management or any other criterion of a similar nature'. Clearly, therefore, it is the fact of taxability under a statute, rather than contractual liability under a business agreement, which determines the eligibility for treaty benefits. In any event, it is only elementary that a statutory liability cannot be shifted or avoided on the ground that the person, who has the statutory obligation to make payment of that liability, has assigned this obligation to someone else. It does not, therefore, really matter as to whether, under the charter party agreement, the owner was liable to pay tax or whether the charterer was liable to pay the tax. What really, therefore, matters is as to who was chargeable to tax in respect of such an income.

- As evident from a plain reading of section 172(1), which highlights the fact that the provisions of section 172 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, mail or goods shipped at a port in India', shows that the taxability under section 172 is *qua* a ship and not *qua* the enterprise owning or using it under a charter agreement. Section 172(4) then refers to the payment of the tax liability by the master of the ship which again shows that the taxability under section 172 is *qua* the ship rather than *qua* owner or charterer of the ship. What is thus clear is that the scheme of taxation 172 lays emphasis on the tax object, *i.e.,* the activity which is to be taxed, and not the tax subject, *i.e.,* the person who is to be taxed. Therefore, when a person assumes liability, by filing return under section 172(3) in respect of tax liability under section 172(2), such a liability is *qua* the taxability of income in respect of the amount paid or payable on account of carriage of passengers, livestock, mail or goods on the ship and the scheme of this section, does not allow such a person to choose being accountable in respect of a particular person, in respect of owner of the ship or in respect of charterer of the ship. If a person assumes the liability under section 172(3), it is in respect of the income earned by the activities of the ship. The assessee's claim that he is only responsible for the tax liability of the owner, and not the charterer, is only to be rejected. Having said that, it is also pointed out that the Assessing Officer himself has assessed the UK based company, *i.e.,* owner of the ship and not the charterer of the ship. By implication, thus, he accepts that the income was earned by the UK based company, and, the provisions of article 9(1) unambiguously provides that 'income of an enterprise of a contracting State from the operation of ships in international traffic shall be taxable only in that State (*i.e.* UK)'. In this view of the matter, and in view of the fact that it has not been the case of any of the authorities below that the income belonged to the charterer based in Bahamas and not the owner based in UK, there is no legally sustainable reason to decline the benefit of article 9 to the assessee. The grievance of the assessee must, therefore, be upheld.
- It is pointed by the assessee that the assessment under section 172(4) was framed on 29-3-2005, whereas the ship had left Indian port on 29-10-2001. The assessment was thus framed almost three years after the end of the relevant previous year. Undoubtedly, as at the relevant point of time, there was no time prescribed under the statute for framing the assessment under section 172(4) and the provisions of section 172(4A), which set this time-limit as nine months from the end of the financial year in which return under section 172(3) is filed, came into effect from 1-4-2007, but that does not mean that in the absence of this time-limit under section 172(4A), the assessment under section 172(4) could have been done at any point of time. It is thus clear that even when the statute did not prescribe a time-limit for completing assessment under section 172(4), such assessments could be framed only within a reasonable time and subsequently with effect from 1-4-2007, the statute itself has considered the period of nine months from the end of the financial year, in which return under section 172(3) is filed, as reasonable time-limit within which assessment order under

section 172(4) is to be framed. When this time-limit is statutorily treated as a reasonable time-limit for the returns filed after 1-4-2007, this time-limit can also be treated as a reasonable time-limit for the return filed prior to 1-4-2007 as well. Viewed in this perspective, the impugned order under section 172(4) was indeed barred by limitation. For this reason also, the assessee must succeed in this appeal.