ITAT remanded matter to determine taxability of freight income earned by Singaporean co. in India

Summary – The Rajkot ITAT in a recent case of BP Singapore Pte Ltd., (the Assessee) held that In order to invoke article 24 of India - Singapore DTAA, as important aspect to be considered is whether even if income was actually exempt from tax in residence jurisdiction, given unambiguous thrust of treaty on income being subjected to tax in one contracting State to be able to claim treaty protection in other contracting State, and avoidance of double non-taxation being a clear objective of the Indo Singapore tax treaty, such an exempt income would also be eligible to get treaty protection in source State

Facts

- The assessee was a Singapore based company engaged in the business of, *inter alia*, operations of ships in the international traffic. The assessee was freight beneficiary in respect of a vessel, by the name of MT Pacific Rainbow, which sailed from an Indian port. It was in said backdrop that Indian agent of the assessee had filed a return under section 172(4) and claimed exemption, under article 8 of Indo Singapore tax treaty, of income embedded in the relevant freight receipts.
- The said claim did not find favour with the Assessing Officer. He was of the view that there was no evidence to show that the money had been actually remitted to Singapore and suffered the tax.
- The Assessing Officer was of the view that the income generated from freight was outside the purview of chargeability in Singapore and, on said basis and invoking the provisions of article 24 of India Singapore tax treaty, the Assessing Officer declined treaty benefits to the assessee.
- The Commissioner (Appeals) upheld the order passed by the Assessing Officer.
- On second appeal:

Held

- The assessee's first plea is that the provisions of Article 24 of India Singapore tax treaty cannot be invoked on the facts of the present case for the elementary reason that the Indian shipping income of the Singaporean assessee, is "neither exempt from tax in India nor taxed at reduced rate in India".
- The assessee has now accepted that the income in question was, as a result of an incentive provision in Singaporean law, not taxable in Singapore. When assessee himself accepts that the income in question was exempt from tax in Singapore, it cannot be said to be have been subjected to tax in Singapore. These evidences, at the minimum, were misleading and aimed at creating a wrong impression about the Singaporean taxability of income in question. He points out that it is for the first time, and as a result of specific questions by the bench, that the fact of this income being exempt from tax in Singapore has come to the light now. He submits that looking to the scheme of the Indo Singapore tax treaty, which specifically states that only such income can be given treaty benefit in India which has suffered tax in Singapore-as evident from article 24, an income which is not taxed in Singapore cannot be granted tax exemption in India. The revenue relies upon the stand

© 2018, Tenet Tax & Legal Private Limited

of the authorities below, and, submits that article 24 at least makes it clear that what has not actually suffered tax in one country cannot at all be allowed treaty benefit in the other country, and, for this short reason alone, the assessee cannot be allowed treaty benefit in India.

- The certificates obtained by the assessee from KPMG and Inland Revenue Authority of Singapore give an impression that the freight income received from India has been subjected to tax in Singapore. In response to the assessee's request for confirming that 'freight income received from India has been taxed in Singapore', the IRAS has stated that, based on their review of information supplied by the assessee, 'the freight income received from India has been brought to tax in Singapore'. One may consider this in the light of the factual position admitted to the effect that the assessee has availed exemption under section 13F of the Singapore's Income-tax Act, and, to that extent, the income embedded in these receipts has not actually been taxed in Singapore.
- When assessee is confronted with this glaring contradiction, it submits that a mere exemption of income in Singapore does not take that income out of the ambit of income liable to be taxed in Singapore, and it will be eligible for treaty benefits nevertheless. It is not in dispute that the income embedded in the freight receipts from India was not actually subjected to tax in Singapore even though it was liable to be taxed there by the virtue of fiscal domicile of the assessee. KMPG certificate talks about taxation of accrual basis under section 10(1) of the Singapore Income-tax Act, without any firm comments on actual taxability, and IRAs certificate, relying upon the information furnished by the assessee confirms that the said income 'has been brought to tax in Singapore'. 'Bringing an income to tax in Singapore' to a layman, and even to judicial officers suggests an 'income being actually taxed in Singapore', but this is admittedly not the correct position. The said income was never actually taxed in Singapore. What these certificates miss out is the vital fact that the said income was never actually taxable in Singapore-though by the virtue of a specific incentive provision. Undoubtedly, by the virtue of the assessee being fiscally domiciled in Singapore, the said income was 'liable to tax' but then 'liable to tax' is not the same thing as 'subject to tax'.
- As regards the plea that the assessee's income embedded in freight receipts from India is not exempt from tax in India, such a plea is contrary to the scheme of the India Singapore tax treaty. While assigning meaning to a term employed in the tax treaty, one must not lose sight of article 3(2) of treaty which gives primacy to the context in which the term is used.
- The expression 'exempt from tax' is an undefined term in the treaty and the context in which it is used in article 24 is that when an income is granted an exclusion from taxable income in one of the contracting state or taxed at a lower rate in one of the contracting state, such an exclusion must depend on its status of taxability in the other contracting state. The context in which expression 'exempt from tax' is set out in article 24, essentially implies that the treaty benefit of non-taxation of an income, or its being taxed at a lower rate, in a contracting state depends on the status of taxability in another contracting state. In such a situation, to hold that only income covered by article 20, 21 and 22 can be said to be exempt in the source state because the expression 'exempt

© 2018, Tenet Tax & Legal Private Limited

from tax' is used therein, is plainly contrary to the context in which expression 'exempt from tax' is used; it is the net effect not the wording which is relevant in the present context.

- In any case, what is referred to as exemption under article 20, 21 and 22 of Indo Singapore tax treaty in the source country are conditional exemptions subject to the riders, whereas an income exempt under article 8 is plain vanilla provision. Whether an income is taxed only in the residence country or whether an income is exempt from tax in the source country, the effect on exemption of income in the source country is the same particularly in the context of the treaty benefit being dependent on the taxation in the residence country is concerned. The wordings may differ but the impact is the same, and that is all the more clear when seen in the context in which the issue arises. Even if the meaning canvassed by the assessee was to be defined in the statute or the treaty itself, in view of the contextual requirements, such a meaning was to be discarded in the present context.
- The additional evidence submitted by the assessee was admitted and this additional evidence has not been considered by any of the authorities below, and that certain factual aspects of the matter have come to light only as a result of questions put by the bench and the authorities below, therefore, did not have any occasion to deal with these aspects in sufficient detail. As a result of these factual aspects coming to light, there are some interesting legal propositions have also come to the centre stage. It is an aspect to be considered whether even if the income was actually exempt from tax in the residence jurisdiction, given the unambiguous thrust of the treaty on income being subjected to tax in one contracting state to be able to claim treaty protection in the other contracting state, and avoidance of double non-taxation is a clear objective of the Indo Singapore tax treaty, such an exempt income would also be eligible to get treaty protection in the source state.
- In any event, as additional evidence is submitted at the stage of proceedings herein and as the new facts have come to light at the stage of hearing, the parties also should have a full opportunity of presenting their case in the light of these facts, even though this situation has arisen due to their evasive and not so transparent conduct. Let all the relevant aspects be examined afresh in this light and the perspectives of both the parties be taken to the record and be analysed properly, particularly as this issue concerns a large number of Singaporean companies operating India. In view of these discussions and bearing in mind entirety of the case, it is fit and proper to remit the matter to the file of the Commissioner (Appeals) for adjudication *de novo* in the light of the new facts emerging as above.
- In the result, the appeal is allowed for statistical purposes in the terms indicated above.

© 2018, Tenet Tax & Legal Private Limited