Income arising from container services is not taxable under Section 44B of the Income-tax Act. In the absence of a PE under the India-Singapore tax treaty, the business income is not taxable in India

Background

Recently, the Mumbai Bench of the Income-tax Appellate Tribunal (the Tribunal) in the case of Forbes Container Line Pte. Ltd. (the taxpayer) held that income arising from container services cannot be treated as income arising from shipping business since the taxpayer did not own or charter or take on lease any vessel or ship. The taxpayer was only providing container services to various clients and hence the provisions of Section 44B of the Income-tax Act, 1961 (the Act) were not applicable. The income was taxable as business income, however; in the absence of a Permanent Establishment (PE), no income was taxable in India.

Facts of the case

- The taxpayer, a Singapore-based company, engaged in the business of operating ships in international traffic across Asia and the Middle East. It is a wholly owned subsidiary of Forbes and Co. Ltd. (FCL), a company incorporated in India.

- FCL had entered into an agency agreement with Volkart Flemming Co. and Services Ltd. (VFSSL). VFSSL is a wholly owned subsidiary of FCL. VFSSL had demerged its shipping agency division into FCL with effect from 1 April 2008.

- The Assessing Officer (AO) held that income of the taxpayer was arising out of the operation of ships in international traffic, and it was taxable in India as per the provisions of Section 5(2) of the Act read with the provisions of Section 44B of the Act. The taxpayer had real and intimate connection because the holding company secured the business from India for the taxpayer, the principal and agent had common control mechanism, the promoters of the holding company, created the taxpayer as a 100 per cent subsidiary in Singapore, one of the directors of the company was also a director of the Indian parent company, he was permanently residing in India and was looking after the policy matters of the taxpayer and control mechanism of both the entities were in India. Therefore, the taxpayer had business connections in India. Further, the taxpayer had a PE in India under Article 5 of the India-Singapore tax treaty (tax treaty), the income was taxable under Article 7 of the tax treaty.

1 Forbes Container Line Pte. Ltd. v. ADIT (ITA No.1607/Mum/2014) – Taxsutra.com
• The Commissioner of Income-tax (Appeals) [CIT(A)] upheld the order of the AO.

**Tribunal’s ruling**

• The taxpayer had proved that its books of accounts were maintained in Singapore. It was also proved that it was maintaining a bank account in Singapore, and all banking transactions were made from that account only.

• The lower authorities were not able to establish that effective management and control of affairs of the company as it was in India. On a reference to the e-mails placed by the taxpayer, it indicates that business activities were carried out by the Singapore office.

• Factors like staying off one of the directors in India or holding of only one meeting during the year under consideration or the location of the parent company in India in themselves would not decide the residential status of the taxpayer.

• The taxpayer had received a substantial portion of its income from the operation carried out in the Middle East and other countries. It was handling its business from Singapore. On a perusal of details of income of the parent company, it indicates that the claim made by the taxpayer about earning substantial income from the entities other than the holding company was factually correct.

• The taxpayer had not claimed exemption under Article 8 of the tax treaty as it was not engaged in the shipping business. Therefore, the income of the taxpayer had to be assessed under the provisions of the tax treaty which deals with business income (Article 7).

• The taxpayer did not own or charter or take on lease any vessel or ship for the year under consideration; it was only providing container services to various clients. Therefore, provisions of Section 44B of the Act were not applicable to the facts of the present case.

• The income of the taxpayer was liable to be taxed as business income and in the absence of a PE, no income was taxable in India.

**Our comments**

In the present case, the Mumbai Tribunal held that the taxpayer did not own or charter or take on lease any vessel or ship, it was only providing container services to various clients. Therefore, provisions of Section 44B of the Act were not applicable. The income of the taxpayer was taxable as business income. However, in the absence of a PE under the India-Singapore tax treaty, the business income was not taxable in India.

The Mumbai Tribunal in the case of WSA Shipping (Bombay) (P.) Ltd. held that in the absence of a PE under Article 5 of the India-Singapore tax treaty, business income accrued to it could not be brought to tax in India. The Mumbai Tribunal in the case of Mediterranean Shipping Co., S.A. held that international shipping profits earned by the taxpayer could not be taxed in India as ships from which such profits were derived were not effectively connected with a PE of the taxpayer in India.

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2 WSA Shipping (Bombay) (P.) Ltd. v. ADIT [2011] 16 taxmann.com 65 (Mum)
3 ADIT v. Mediterranean Shipping Co., S.A. [2013] 21 ITR(T) 300 (Mum)
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