आयकर अपीलीय अधिकरण 'डी' न्यायपीठ चेन्नई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
'D' BENCH, CHENNAI

माननीय श्री महावीर सिंह, उपाध्यक्ष एवं
माननीय श्री मनोज कुमार अग्रवाल ,लेखा सदस्य के समक्ष।
BEFORE HON'BLE SHRI MAHAVIR SINGH, VICE PRESIDENT AND
HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM

Sr. No	Appeal Numbers	Assessment Years	Appellant	Respondent
1	IT(TP)A No.18/Chny/2021	2012-13	**M/s. Bengal Tiger Line Pte. Ltd.,** 200 Cantonment Road, 1301, South Point, Singapore C/o No.6, FF, Indian Chamber Building Annexe, Esplanade, Chennai-600 108 **[PAN: AADCB-6864-F]**	**DCIT** International Taxation-1(1), Chennai.
2	IT(TP)A No.5/Chny/2021	2013-14		
3.	IT(TP)A No.21/Chny/2021	2014-15		
4.	IT(TP)A No.22/Chny/2021	2016-17		
5	IT(TP)A No.19/Chny/2021	2017-18		

&

Sr. No	Appeal Numbers	Assessment Years	Appellant	Respondent
1	S.A No.65/Chny/2022	2012-13	**M/s. Bengal Tiger Line Pte. Ltd.,** 200 Cantonment Road, 1301, South Point, Singapore **[PAN: AADCB-6864-F]**	**DCIT** International Taxation-1(1), Chennai.
2	S.A No.64/Chny/2022	2013-14		
3.	S.A No.67/Chny/2022	2014-15		
4.	S.A No.68/Chny/2022	2016-17		
5.	S.A No.66/Chny/2022	2017-18		

अपीलार्थीकीओरसे/ **Appellant by**	:	Shri S.P. Chidambaram (Advocate), Shri Rajesh Singh (Advocate) & Shri Deepak Bharadwaj (C.A) -Ld. ARs
प्रत्यर्थीकीओरसे/**Respondent by**	:	Dr. S. Palani Kumar (CIT)-Ld. DR

सुनवाईकीतारीख**/Date of Hearing**	:	01-03-2023
घोषणाकीतारीख **/Date of Pronouncement**	:	04-05-2023

आदेश / O R D E R

1. Aforesaid appeals by assessee for various Assessment Years arise out of separate orders of learned first appellate authority. However, the facts as well as issues are identical in all the years. It is admitted position

that the adjudication in any one year would equally apply to all the other years also. The appeal for Assessment Year (AY) 2012-13 arises out of the final assessment order dated 24-02-2021 passed by Ld. Assessing Officer (AO) u/s 143(3) r.w.s. 147 r.w.s 144C(13) of the Act pursuant to the directions dated 22-01-2021 of Ld. Dispute Resolution Panel-2, Bangalore (DRP) u/s 143(3) r.w.s 144C(5) of the Act. The draft assessment order was passed by Ld. AO on 30-12-2019 which was subjected to assessee's objection before Ld. DRP. Pursuant to the directions of Ld. DRP, final assessment order was passed on 24-02-2021 making certain additions in the hands of the assessee. Aggrieved by those additions, the assessee is in further appeal before us with follow grounds of appeal: -

1. The order of the Deputy Commissioner of Income Tax, International Taxation1(1), Chennai ["AO/Assessing Officer"] is contrary to law, facts and circumstances of the case.

2. Reopening of assessment u/s 147 of the Act is invalid

2.1. The AO/DRP erred in reopening the assessment under section 147 of the Act in the absence of essential conditions necessary for reopening the assessment.

2.2. The AO/DRP ought to have appreciated that section 147 of the Act permits reassessment of income, "where AO has reason to believe that any income chargeable to income tax has escaped assessment for any assessment year.

2.3. The AO/DRP ought to have appreciated that "reason to believe constitute a condition precedent to the exercise of jurisdiction under section 147 of the Act.

2.4 The AO/DRP ought to have appreciated that the reasons for reopening of the assessment are unsustainable.

2.5 The AO/DRP ought to have appreciated the fact that the subject income for the reassessment has already suffered tax in India and as such reopening cannot be done for an income, which is already taxed.

2.6 The Assessing Officer ought to have considered that there are no fresh material/evidences made available after the assessment proceedings and hence the reassessment merely based on change of opinion is void ab initio.

2.7. The Assessing Officer having granted certificate under section 172 of the Act cannot take a contrary view in the reassessment proceedings, which amounts to a mere change of opinion.

3. Documentation Charges and Vessel Handling Charges amounting to INR 1,42,94,820 cannot be assessed as income in the hands of the Appellant

3.1 The AO/DRP erred in assessing documentation charges and vessel handling charges as income (i.e., under the head "other income") in the hands of the Appellant.

3.2. The AO /DRP ought to have appreciated that documentation charges and vessel handling charges are not income earned by the Appellant and as such it cannot be taxed in the hands of the Appellant.
3.3 The AO/DRP ought to have appreciated that documentation service and vessel handling services are independent service activity performed by BTL India directly to its customers and as such the Appellant did not have any right to receive the said income.
3.4 The AO/DRP grossly failed to appreciate that the services were rendered by BTL India using its own employees and the same was outside the purview of agency agreement with the Appellant and as such the said income can never be treated as income earned by the Appellant.
3.5. The AO/DRP grossly failed to appreciate that the services were rendered by BTL India to its third-party customers (i.e. Shipping Lines) and remuneration was received from them directly and the Appellant was not privy to such arrangement.
3.6 The AO/DRP ought to have appreciated that merely because an income is earned by the agent (i.e., BTL India), it cannot be automatically concluded that it is an income collected on behalf of the principal.
3.7. Without prejudice to the above and in any event., the documentation charge and vessel handling charges are in the nature of shipping income and therefore not taxable in India as per Article 8 of the DTAA between India -Singapore.
3.8. Without prejudice to the above, the Assessing Officer ought to have appreciated that the said income has already been taxed in the hands of BTL India in India and as such assessing the income once again in the hands of the Appellant has resulted in double taxation of the same income.
3.9. Without prejudice to all the above grounds, the Assessing Officer erred in taxing the gross income without allowing/considering any expense for earning the aforesaid incomes.
3.10. Without prejudice to the aforesaid ground, the Assessing Officer ought to have taxed the documentation charges and vessel handling charges under section44B of the Act.

4. International shipping income from freight operations amounting to INR 10,89,70,019 assessed to tax in India

4.1.The directions of the Dispute Resolution Panel (DRP) – 2, Bengaluru (DRP')and the consequential final assessment order is erroneous in so far as assessing the international shipping income from freight operations as income taxable in India under section 44B of the Act.
4.2 The AO / DRP ought to have appreciated that as per Article 8 of the India - Singapore DTAA, any shipping income of a non-resident is taxable only in the country of residence, i.e., Singapore and as such cannot be assessed to tax in India.
4.3 The AO / DRP ought to have appreciated that the essential conditions for invoking the provisions of Article 24 of the DTAA is not satisfied and therefore it cannot be invoked.
4.4.The AO / DRP erred in imputing conditions for applicability of a tax treaty Which are not present anywhere in the India-Singapore DTAA and therefore the order of the AO read with DRP Directions is ultra vires.
4.5. The AO/DRP ought to have appreciated that merely because international shipping income is exempt in one contracting state (i.e., Singapore), it does not alter the taxing rights of the said income so as to shift the same to the other contracting state (i.e. India).

4.6. The AO / DRP ought to have appreciated that Article 8 of the DTAA is not an exemption provision but only an enabling provision which provides an exclusive right of taxation of income to the residence country and as such the provisions of Article 24 (Limitation of Benefit) will not apply to the income covered under Article 8 of the DTAA.
4.7. The AO / DRP ought to have appreciated that Article & of India – Singapore DTAA is unambiguous and clearly states that only the country of residence has the right of taxation of income earned by an Appellant from the operation of ships in international traffic.
4.8. The AO / DRP erred in disregarding the certificate issued by the Singapore Tax Authorities [i.e., Inland Revenue Authority of Singapore (IRAS)] which clearly states that international shipping income is taxable in Singapore only on accrual basis and not on receipt basis and therefore the provisions of Article 24 of the DTAA would not apply.
4.9 The AO / DRP ought to have appreciated that the provisions of Article 24would apply only to incomes which are exempt from tax under the treaty and not to shipping income under Article 8 which grants a specific right of taxation to the residence country.
4.10. The AO ought not to have taxed the shipping income in India when two sovereign nations have clearly allocated the taxing rights of such income between the countries and as such the impugned order is ultra-vires and without jurisdiction.
4.11. The AO ought to have appreciated that when the income tax department has consistently accepted that shipping income is taxable only in Singapore as per Article 8 of the India-Singapore DTAA which has been adopted in the shipping industry over the last 20 years, the AO is precluded from adopting a contrary view for this AY especially when there is no change in law or facts.
4.12. The DRP ought to have appreciated that the AO has already issued a DIT relief certificate under section 172 of the Act for the subject AY wherein the Revenue has accepted that relief under Article 8 of the India – Singapore treaty is available to the Appellant and as such the AO is precluded from taking a different position while completing the assessment.
4.13 The AO/DRP erred in incorrectly interpreting the Vienna Convention while considering the applicability of the DTAA between India and Singapore.
4.14. The DRP grossly failed in not considering the binding decision of the Hon'ble jurisdictional Tribunal in Appellant's own case in IT(TP)A.No.11/Chny/2020 vide order dated 06.11.2020.
4.15. The DRP grossly erred in not considering the detailed written submissions and the Tribunal order in Assessee's own case and thereby violated the principles of natural justice.
4.16 Without prejudice to the above, the DRP ought to have restricted the amount taxable in India by invoking the provisions of Article 24 of the India Singapore DTAA to the amount of income claimed as exempt in Singapore.

5. Miscellaneous

5.1 The AO erred in levying interest under section 234B of the Act.
5.2 The AO ought to have appreciated that the Appellant who is a non-resident is not liable to pay advance tax and as such interest under section 234B of the Act cannot be levied.
6. The Appellant prays that directions be given to grant all such relief arising from the grounds of appeal mentioned supra as also all consequential relief thereto.

7. The Appellant craves leave to add, alter, amend, substitute and /or modify in any manner whatsoever all or any of the foregoing grounds of appeal at or before the hearing of the appeal.

Ground Nos. 1, 6 & 7 are general is nature which do not require any specific adjudication on our part. Ground Nos.5 and its sub-grounds are merely consequential in nature. In Ground Nos.2 and its sub-grounds, the assessee has challenged the validity of reassessment proceedings. In ground Nos.3 and its sub-grounds, the assessee has submitted that documentation charges and vessel handling charges could not be assessed as the income of the assessee. In Ground Nos.4 and its sub-grounds, the assessee has challenged the assessment of its shipping freight income in India.

Arguments of Ld. AR

2.1 The Ld. AR advanced arguments assailing the reassessment jurisdiction acquired by Ld. AO and submitted that the alleged escaped income i.e., documentation charges and vessel handling charges had already been offered to tax by Indian subsidiary of the assessee and therefore, the primary condition i.e., escapement of income, to reopen the case of the assessee, was not fulfilled. Accordingly, the reassessments proceedings are vitiated in law in terms of binding judicial precedents. The Ld. AR, drawing attention to the reasons recorded for reopening, submitted that the case was reopened on the issue of taxability of documentation / vessel handing charges (DVHC) and the same was not to consider taxability of freight income at all. Even in the sworn statements recorded during survey proceedings, there were no questions in relation to taxability of freight income. The issue of taxability of freight income was never part of initial reasons for reopening of assessment. The Ld. AR further submitted that documentation / vessel

handing charges never belonged to the assessee and it was independently earned in India by its Indian subsidiary i.e., M/s Bengal Tiger India Private Ltd. (BTIPL). These charges were already offered to tax in India by that entity in its return of income filed for all the years. The same was also confirmed in the sworn statements recorded during survey proceedings. Therefore, there was no escapement of income which would enable Ld. AO to acquire jurisdiction u/s 147 of the Act. In such a case, the reassessment proceedings would be bad in law as per the decisions of Hon'ble Bombay High Court in **Techpac Holdings Ltd. vs CIT (67 Taxmann.com 280)** as well as the decision of same court in **The Swastic Safe Deposit and Investments Ltd. (107 Taxmann.com 421)** against which revenue's Special Leave Petition (SLP) was dismissed by Hon'ble Supreme Court which is reported as 118 Taxmann.com 94.

2.2 The Ld. AR further submitted that while recording the reasons for reopening, Ld. AO has relied upon Q. No.19 of the survey proceedings wherein it was stated that on document / vessel handling charges, tax was paid by BTIPL at 30% whereas the tax rate in the hands of the assessee would be 40%. Thus, the reopening is made on the sole premise of differential tax rates on the said income. However, a mere difference in tax rate would not amount to escapement of income and reassessment proceedings are liable to be quashed.

2.3 Another line of argument was that the information collected in the hands of some other assessee could not be a basis for reopening the assessment of the assessee. Even the said information did not indicate that certain income belonged to the assessee and therefore, no opinion of escapement of income could have been formed by Ld. AO. In fact, in

the sworn statements, the parties have specifically confirmed that the services were rendered by the Indian entity, the invoices were raised by the Indian entity and this income was accounted and declared by the Indian entity only. Therefore, there was no question of escapement of income in the hands of the assessee. Reliance has been placed on the decision of Hon'ble Gujarat High Court in the case of **Vinayak Builders (27 Taxmann.com 116)** wherein it has been held that information collected during survey u/s 133A is not per se an information for the purpose of reopening of an assessment and as such this could not be sole basis for reopening without independent application of mind by AO. In the case law of **Surani Steel Tubes Ltd. vs ITO (136 Taxmann.com 139)** rendered by the same court, it has similarly been held that reopening cannot be made solely on the basis of information received from investigation wing and the AO should independently apply his mind to satisfy the test of 'reasons to believe' before assuming jurisdiction u/s 147.

2.4 The Ld. AR further submitted that the reopening has been made on the main premise that the rate of tax is higher for the assessee and therefore, the impugned incomes are now sought to be taxed in the hands of the assessee to apply higher tax rates though it is admitted position that the said very income has already been declared, offered and assessed to tax in the hands of the Indian entity. This fact is also very clear from remand report dated 24-12-2020 of Ld. AO wherein it has been admitted that there is no mention of documentation charges undertaken by the Indian entity on behalf of the assessee in the agency agreement. In the sworn statements also, it has been confirmed that the services were rendered by Indian entity and the assessee had no right to

receive such income. Since the income did not belong to the assessee, there is no question of escapement of income in the hands of the assessee. Accordingly, the primary condition to reopen the case fails and the reassessment proceedings are bad in law. Once the sole reason for reopening of assessment is not sustainable, entire assessment would be void-ab-initio as per the decision of Hon'ble Delhi High Court in **Ranbaxy Laboratories Ltd. (12 Taxmann.com 74)**; the decision of Hon'ble Bombay High Court in **Jet Airways (I) Ltd. (195 Taxman 117)** the decision of Hon'ble Delhi High Court in **Blackstone Capital Partners (Singapore) Vi Fdi Three Pte. Ltd. (146 Taxmann.com 569).**The Ld. AR thus averred that in the absence of any escapement of income, the reopening of assessment is invalid.

2.5 On merits, Ld. AR submitted that even assuming that document / vessel handling charges would be deemed to be the income of the assessee, the same would not be taxable in India by virtue of Article-8 of India-Singapore Double Taxation Avoidance Agreement (DTAA) since it has been admitted by Ld. AO that the said income is part of the business operations being carried on by the assessee and the same are not in the nature of freight income since the same is not included in the invoices raised for freight charges. This being so, this income would also be covered within the scope of Article 8(1) of DTAA and accordingly, not liable to tax in India in the hands of the assessee. The same would also be covered under Article 8(4)(d) of the treaty. Even explanation to Sec.44B was wide enough to cover documentation and vessel handling charges within the ambit of shipping business income.

2.6 The Ld. AR further argued that Ld. AO chose to follow DRP directions and consequential final assessment order for AY 2015-16.

However, the said adjudication has already been reversed by the Tribunal and issue of applicability of Article-8 has been decided in favor of the assessee by Tribunal in AY 2015-16 vide its decision in **IT(TP) No.11/Chny/2020 order dated 06-11-2020** wherein it has been held that freight income attributable to Indian operations is not taxable in India as per Article-8 of India-Singapore DTAA. The bench, in concluding para 20 of the order, held that shipping income would be taxable only in Singapore and Ld. AO was not correct in invoking Article-24 when the conditions as specified therein were not satisfied. Accordingly, the issue of taxability of freight income stood squarely covered in favor of assessee in AY 2015-16. To support the arguments further, Ld. AR relied on the decision of Hon'ble Gujarat High Court in the case of **M.T. Maresk Mikage vs. DIT (72 Taxmann.com 359)** wherein it has been held that shipping income of a Singapore based entity is taxable only in Singapore by virtue of Article-8 of India-Singapore DTAA and as such the provisions of Article-24 of DTAA would not apply. Similar is stated to be the decision of Hon'ble High Court of Madras in **Anand Transport P. Ltd vs ACIT (49 Taxmann.com 477).** Reliance has also been placed on the decision of Rajkot Tribunal in **Maersk Tankers Singapore Pte. Ltd vs ACIT (145 Taxmann.com 260)** which has followed the decision of this Tribunal rendered inassessee's own case for AY 2015-16 IT(TP) No.11/Chny/2020. Similar is stated to be the decision of this Tribunal in **Bengal Tiger Line Ltd. vs. DDIT (33 Taxmann.com 307)** which has held that the shipping income of Cyprus based entity is not taxable in India. The Article-8 of India-Cyprus DTAA and Article-8 of India-Singapore DTAA are stated to be pari-materia the same.

2.7 Lastly, Ld. AR drew our attention to letter issued by Singapore Competent Authority i.e., Inland Revenue Authority of Singapore (IRAS) clarifying that the freight income would be regarded as Singapore sourced income and would be brought to tax on accrual basis and not on remittance basis. Therefore, Article-24 would not apply to shipping income. The Ld. AR submitted that as per Article-8, only contracting state i.e., Singapore has exclusive taxing right on Shipping income. The same is evident from the fact that Ld. AO, after considering the Tax Residency Certificates (TRC) and supporting documents, has issued DIT relief certificates by holding a position that Article-8 of India-Singapore DTAA would apply to the assessee and the income from operation in international traffic will not be taxable in India. This certificate is stated to be issued for multiple assessment years. The CBDT Circular No.30/2016 dated 26-08-2016 clarifies that this certificate is to be issued only after examining the applicability of DTAA to the foreign shipping company. While issuing the certificates, Ld. AO had examined the details / facts and held that Article-8 would apply and therefore, contrary position could not be taken by the revenue in the present proceedings.

2.8 The Ld. AR further submitted that Limitation of Relief (LOR) Article-24 would not apply since first condition is that the income should be sourced in India. This condition is not fulfilled since it has been confirmed by IRAS in letter dated 17-02-2016 that the shipping income is Singapore sourced income. The second condition is that the income should be exempt or taxed at a reduced rate by virtue of any Article under the India-Singapore DTAA. Article-8 does not provide for exemption or reduced rate of taxation of such income but it only contemplates taxation rights and since the assessee is resident of

Singapore, the taxation of shipping income of the Singapore resident vests with Singapore authorities. Accordingly, the shipping income earned from India is neither exempt nor taxed at reduced rates as per Article-8 of DTAA. The third condition is that the income of the non-resident should be subject to tax on receipt basis in Singapore which is also not the case since IRAS has clarified that the income would be taxable in Singapore on accrual basis. Thus, none of the conditions of Article-24 are satisfied and this Article could not be pressed into service to deny the benefit of DTAA. In the written submissions, Ld. AR has distinguished the case laws being relied upon by the revenue. The Ld. AR also sought to demonstrate the fact that the documentation and vessel handling charges as received by the Indian subsidiary are incidental to the shipping business and therefore, the same cannot be taxed in the hands of the assessee.

2.9 On the issue of ‘subject to tax’ and ‘liable to tax’, Ld. AR has filed written submissions as under: -

1) The term 'Subject to tax' and 'liable to tax' is always a test which is applied to evaluate whether the treaty benefit is available. Subject to tax would mean actual payment of tax in the respective jurisdiction. Per contra, liable to tax means the respective country has the right to levy the tax, however, it may choose to provide an exemption for any particular income. The term subject to tax is not defined under the Act. However, the term liable to tax is defined under section 2(29A) of the Act which is as under:
   "2(29A) "liable to tax", in relation to a person and with reference to a country, means that there is an income-tax liability on such person under the law of that country for the time being in force and shall include a person who has subsequently been exempted from such liability under the law of that country; "
2) From the above definition, one can infer that even the Indian Income Tax Act recognizes the fact that a person is considered to be 'liable to tax' even if an exemption is granted. In the instant case, the Singapore Income Tax Act provides exemption of shipping income as per section 13F. However, the Appellant continues to be liable to tax in Singapore by virtue of its residential status. The contention of the income tax department that the Appellant is not paying any tax in Singapore by virtue of the exemption granted in section 13F and that they are not 'subjected to tax' (i.e. actually paid taxes in Singapore) is not a relevant criteria to adjudge whether treaty benefit is available or not.

3) Further, Article 8 uses the words "shall be **taxable"** and not "shall be **taxed".** The phrase taxed implies that the taxes are actually paid in Singapore i.e. subjected to tax in Singapore, whereas, the actual phrase used is "taxable" which does not imply or mandate actual payment of tax, rather it only confers a taxing right to Singapore.

4) Further, the word "only" clearly asserts that it is the resident state alone that can impose tax (i.e. Singapore) and not the other state (i.e. India). Hence, it is absolute exclusion of jurisdiction for the other contracting state and not any kind of exemption provided in the treaty.
5) Further, the DR in Page 4 of his submission has stated that the word "Only" has not only been used in Article 8 but also in other Articles such as 7, 13, 14, 15 and 19. It is pertinent to note that although the word "Only" is used in other Articles, the said other Articles contain additional clauses which enables the other contracting state to tax the income subject to satisfaction of certain conditions. On the contrary, provisions of Article 8 is unique wherein there is no such additional clause which enables the other contracting state to tax the income.
6) The exemption for international shipping income as per section 13F of SITA has been in existence since 1991 and Singapore may choose to withdraw the exemption at any point of time. We submit that India's right of taxation is not dependent on whether Singapore taxes the said income. Merely because an exemption is granted in Singapore it does not mean that the income is not liable to tax in Singapore.
7) In this regard, we rely on the decision of *Authority For Advance Rulings, New Delhi MohsinallyAlimohammed Rafik v. Commissioner of Income-tax (213 ITR 317) (1995)* wherein it is held that though according to strict interpretation of article 4 of DTAA only persons who are actually subjected to tax in UAE could be treated as residents of UAE to qualify for lower rate of tax in India, a liberal interpretation should be adopted according to which persons who could be made liable to tax in UAE though not actually subjected to tax in UAE could be regarded as residents of UAE so as to be eligible for benefit of lower rate of tax in India. Therefore, the applicant though he was not actually subjected to tax in Dubai, could still be regarded as resident of Dubai for purposes of deciding his eligibility for benefit under articles 10, 11 and 13 of DTAA. The Copy of the said ruling is enclosed as ***Annexure – 6***
8) In *a Manual on the OECD Model Tax Convention on Income and on Capital,* at Para 4B.05, while commenting on Article 4 of the OECD Double Tax Convention, Philip Baker points out that the phrase 'liable to tax' used in the first sentence of Article 4.1 of the Model Convention has raised a number of issues, and observes:

> *"It seems clear that a person does not have to be actually paying tax to be "liable to tax" otherwise a person who had deductible losses or allowances, which reduced his tax bill to zero would find himself unable to enjoy the benefits of the convention. It also seems clear that a person who would otherwise be subject to comprehensive taxing but who enjoys a specific exemption from tax is nevertheless liable to tax, if the* exemption were repealed, or the person no longer qualified for the exemption, the person would be liable to comprehensive taxation. "

9) Further, Late Prof. Klaus Vogel in the Bulletin for International Taxation (Volume 60, No. 6 - 2006 at pages 218-219) published by the International Bureau of Fiscal Documentation, Amsterdam. Prof. Dr. Klaus Vogel, after referring to the Tribunal decision in the case of Green Emirate Shipping & Travels, had observed as under:

> *"An unusual case decided by the Dutch Gerechtsh of Amsterdam Court of Appeals on 15-2-2006 confirms this decision. The owners of the Dutch*

company, XBV emigrated from the Netherlands to Greece in 1995 and advised the Dutch tax authorities that they now exercised management and contract from their new location, as a consequence of which the company became a Greek resident. This was not in dispute in May 2000, the taxpayers informed the Dutch authorities that, since their relocation, they had endeavoured to register the company with the Greek Tax authorities, but failed to succeed because of the Greek tax authorities, but failed to succeed because of the Greek bureaucracy the company had not yet been assessed to the Greek corporate income-tax.

These facts were not contested by the Dutch authorities. But in 2004 they assessed the taxpayers for the Dutch corporate income-tax retrospective for the year 1995. The tax inspector argued that, for Applying Article 4(1) of the Netherlands-Greece tax liability is not sufficient rather a factual subjective indebtedness" ("eenfeitelike subjective onderworpnheld") is required The Court, however, refuted this argument it pointed out that the tax treaty did not postulate factual taxation: instead a legal obligation to pay tax on worldwide income was called for, which under Greek law was established "

(Emphasis Supplied)

10) The Hon'ble Supreme Court in the case of *UOI vs Azadi Bachao Andolan (132 Taxman 373)* has reaffirmed the legal principle that no tax can be levied or collected without the authority of law. Whether an assessee has actually paid taxes or not, the said assessee will have the benefit to claim the treaty benefit as long as the assessee is liable to tax in a particular country and this liability to taxation is determined on the basis of the residential status. Once the entity is qualified to be a resident, they are considered to be liable to tax though they have not actually paid the tax. The relevant extracts from the Hon'ble Supreme Court decision are reproduced as under:

"79. We are inclined to agree with the submission of the appellants that, merely because exemption has been granted in respect of taxability of a particular source of income, it cannot be postulated that the entity is not 'liable to tax' as contended by the respondents ....

96. According to Klaus Vogel "Double Taxation Convention establishes an independent mechanism ***to avoid double taxation through restriction of tax claims in areas where overlapping tax-claims are expected, or at least theoretically possible.*** *In other words, the Contracting States mutually bind themselves not to levy taxes or to tax only to a limited extent in cases when the treaty reserves taxation for the other contracting States either entirely or in part.* ***Contracting States are said to 'waive' tax claims or more illustratively to divide 'tax sources', the 'taxable objects', amongst themselves." Double taxation avoidance treaties were in vogue even from the time of the League of Nations.*** *The experts appointed in the early 1920s by the League of Nations describe this method of classification of items and their assignments to the Contracting States. While the English lawyers called it 'classification and assignment rules', the German jurists called it 'the distributive rule' (Verteilungsnorm). To the extent that an exemption is agreed to, its effect is in principle independent of both whether the other contracting State imposes a tax in the situation to which the exemption applies, and of whether that State actually levies the tax. Commenting particularly on German Double Taxation Convention with the United States,* ***Vogel comments: "Titus, it is said that the treaty prevents not only 'current', but also merely 'potential' double taxation".***

Further, according to Vogel, "only in exceptional cases, and only when expressly agreed to by the parties, is exemption in one contracting State dependent upon whether the income or capital is taxable in the other contracting state, or upon whether it is actually taxed there. "

It is, therefore, not possible for us to accept the contentions so strenuously urged on behalf of the respondents that avoidance of double taxation can arise only when tax is actually paid in one of the Contracting States. *" (Emphasis Supplied)*

11) Reliance is also placed on the Madras High Court decision in the case of Lakshmi Textile Exporters Ltd, (115 Taxman 572) wherein it was held that if a particular stream of income is not taxed in the contracting state, then it will not automatically provide the right to tax the said stream of income in the other contracting state. The Madras High Court has relied on the Andhra Pradesh High Court decision in the case of CIT v. Visakhapatnam Port Trust [1983 J 144 !TR 146. Relevant extracts of the rulings are as under:

• CIT v. Visakhapatnam Port Trust [1983 J 144 ITR 146

"where the Government has accepted that an assessee has a permanent establishment in a particular State, that decision will be binding on the other Government. Therefore, the revenue cannot dispute the fact that the assessee had a permanent establishment in Sri Lanka and that the entire income accruing from Pugoda Textile Mills in Sri Lanka arose only in Sri Lanka and could be taxed only in Sri Lanka. The fact that it was exempted by the Sri Lankan Government would not give rise to tax the same under the Indian Income-tax Act, 1922.
(Emphasis supplied)

• CIT v. Lakshmi Textile Exporters Ltd., (115 Taxman 572)

"when income or capital is subject to tax in both Contracting States, relief from double taxation is to be given in accordance with paragraph (2). In the present case, the income arose in Sri Lanka and it is taxable only in Sri Lanka. The fact that it was not taxed in Sri Lanka would not give rise to taxing the same by the Indian Government especially when the Sri Lankan Government itself declared that the assessee is having a permanent residence in that country"
(Emphasis Supplied)

12) The Mumbai Tribunal in the case of ADIT vs Green Emirate Shipping & Travels (100 ITD 203- refer Case Law Compendium Pg Nos. 88 to 93):

"8. 4lthough the Assessing Officer's objection to applicability of India-UAE tax treaty was only on the ground that the provisions of double taxation avoidance agreements do not come into play unless it is established that the assessee is paying tax in both the countries in respect of the same income, in the grounds of appeal before us it is also contended that the assessee-company failed to produce any evidence to the effect that it was 'liable to pay taxes' in UAE. The question then arises whether an existing liability to pay taxes in UAE is a sine qua non to avail the benefit of India-UAE tax treaty in India. On this issue also, we find guidance from the judgment of Hon 'ble Supreme Court in the case of Azadi BachaoAndolan (supra). Referring to the Klaus Vogel's Commentary on Double Taxation Conventions, Their Lordships, inter alia, observed as follows
"In other words, Contracting States mutually bind themselves not to levy taxes or to tax only to a limited extent in cases when the treaty reserves taxation for the

other Contracting State either entirely or in part. Contracting States are said to waive 'tax claims' or more illustratively to divide 'tax sources', 'taxable objects', amongst themselves. Double taxation avoidance treaties were in vogue even from the time of the League of Nations. The experts appointed in the early 1920s by the League of Nations describe this method of classification of items and their assignments to the Contracting States. While the English lawyers called it 'classification and assignment rule ', the German jurists called it 'the distributive rule' (Verteilungsnorm). To the extent that an exemption is agreed to, its effect is in principle independent of both whether the Contracting State imposes a tax in the situation to which the exemption applies, and irrespective of whether the State actually levies the tax. Commenting particularly on the German Double Taxation Convention with the United States, Vogel comments : 'Thus, it is said that the treaty prevents not only 'current' but also merely 'potential' double taxation'. " [Emphasis supplied]

***It is thus clear that a tax treaty not only prevents 'current' but also 'potential' double taxation. Therefore, irrespective of whether or not the** UAE **actually levies taxes on non-corporate entities, once the right to tax** UAE **residents in specified circumstances vests only with the Government of** UAE, **that right, whether exercised or not, continues to remain exclusive right of the Government of** UAE. **As noted above, the exemption agreed to under the assignment' or distributive rule, is independent of whether the Contracting State imposes a tax in the situation to which exemption implies'.** In the case of John N. Gladden v. Her Majesty the Queen 85 TC 5188, which was quoted with approval by the Hon'ble Supreme Court in Azadi Bachao Andolan's case (supra), Federal Court of Canada was observed that **"the non-resident can benefit from the exemption (under the treaty) regardless of whether or not he is taxable on that capital gain in his own country.** If **Canada or the US were to abolish the capital gains tax completely, while the other country did not, a resident of the country which has abolished the capital gains would still be exempt from capital gains in that other country". It is thus clear that taxability in one country is not sine qua non for availing relief under the treaty from taxability in the other country. All that is necessary for this purpose is that the person should be 'liable to tax in the Contracting State by reason of domicile, residence, place of management, place of incorporation or any other criterion of similar nature' which essentially refers to the fiscal domicile of such a person. In other words,** if **fiscal domicile of a person** is **in a Contracting State, irrespective of whether or not that person is actually liable to pay tax in that country, he is to be treated as resident of that Contracting State.** The expression 'liable to tax' is not to read in isolation but in conjunction with the words immediately following it i.e., 'by reason of domicile, residence, place of management, place of incorporation or any other criterion of similar nature'. That would mean that merely a person living in a Contracting State should not be sufficient, that person should also have fiscal domicile in that country. These tests of fiscal domicile which are given by way of examples following the expression 'liable to tax by reason of' i.e., domicile, residence, place of management, place of incorporation etc. are no more than examples of locality related attachments that attract residence type taxation. Therefore, as long as a person has such locality related attachments which attract residence type taxation, that 'person' is to be treated as resident and this status of being a 'resident' of the Contracting State is*

independent of the actual levy of tax on that person. ***Viewed in this perspective, we are of the considered opinion that being 'liable to tax' in the Contracting State does not necessarily imply that the person should actually be liable to tax in that Contracting State by the virtue of an existing legal provision but would also cover the cases where that other Contracting State has the right to tax such persons - irrespective of whether or not such a right is exercised by the Contracting State. In our humble understanding, this is the legal position emerging out of Hon'ble Supreme Court's judgment in Azadi BachaoAndolan's case (supra).*** *The plea taken by the revenue that the assessee was not 'liabile to tax', which was anyway not taken by the Assessing Officer or before the CIT(A), is also not sustainable in law either."*

(Emphasis supplied)

13) Further, the Mumbai Tribunal in the case of Meera Bhatia [2010] (38 SOT 95) (refer Annexure \for the copy of decision) has placed its reliance on Green Emirate shipping & Travels (supra) and held as under:

5. However, we see no reasons to take any other view of the matter than the view so taken by the co-ordinate Bench in the case of Green Emirates Shipping &Travels (supra). It may result in double non-taxation but then we cannot be oblivious to the fact that double non-taxation is also a fact of life, and tax sparings, which find place in several Indian tax treaties, are also a reality in international taxation. To enter or not to enter in a tax treaty which may leave scope for double non-taxation is a conscious decision of the respective Contracting State, but once such a tax treaty, as may leave scope for double non-taxation, is entered into, judicial forums have to interpret the provisions of tax treaty as they exist.

14) Further the point on liable to tax is also addressed in this Tribunal's ruling in the Appellants' own case for AY 2015-16 in IT(TP)A l l/CHNY/2020, the relevant extract from the decision is reproduced as under:

"16.... Here, in this case, the income of assessee company from shipping operations is not taxable on remittance basis under the laws of Singapore, albeit is liable to be taxed in principle on accrual basis by virtue of the fact that this income under the income tax laws of Singapore is regarded as "accruing in or derived from Singapore". A similar view has been expressed by the Hyderabad Bench of the Tribunal in the case of Far Shipping (Singapore) Pte Ltd vs. ITO, 84 taxmann.com 297. Further, the Mumbai Bench of the Tribunal in the case of DCITvs. D.B. International (Asia) Ltd, 96 taxmann.com 75 has dealt with the interplay between the Article 13 and 24 and after considering relevant clauses categorically held that income derived by a resident of a Contracting State shall be taxable only in that state in view of the clear and unambiguous terms of DTAA."

(Emphasis Supplied)

15) Basis the above discussion, it can be concluded that the 'subject to tax' or 'liable to tax' will not have any bearing on the taxability of shipping income in the present case, as the taxing right vests only with the country of residence, in the present case it is Singapore.

16) The DR at Para E of his written submission has mentioned that the core issue on 'subjected to tax' was not adjudicated in the spirit of article 24 in the Appellants' own ITAT order for AY 2015-16. We submit that this is an incorrect statement.

17) It is pertinent to note that **Article 24 has employed the phrase, subject to tax in respect of income which is received in Singapore**. It is crucial to note that in the instant case, shipping income is taxable in Singapore on accrual basis as per Section 10(1) of Singapore Income Tax Act ('SITA') and it is not taxable on receipt basis as per Section 10(1) of SITA. This fact is also confirmed by the IRAS vide

letter dated 17.09.2018. This has been squarely dealt with in *the* above ITAT order in the Appellant's own case for AY 2015-16.

18) Therefore, the subject to tax condition contemplated in Article 24 is not applicable in the instant case.

Overall, it is submitted that the benefit of treaty cannot be denied merely because the income is not subjected to tax in Singapore. Apart from the above, the 'subject to tax condition' in Article 24, being said with reference to receipt based taxation, is not applicable in the Appellant's case as the income of the Appellant is taxable on accrual basis'.

Arguments of Ld. CIT-DR

3.1 The Ld. CIT-DR, on the other hand, vehemently supported the case of the revenue. On the issue of validity of reassessment proceedings, Ld. CIT-DR submitted that that the returns of income as filed by the assessee for all the years were not subjected to scrutiny assessment proceedings. A notice u/s 148 was issued on 28-03-2019 and the assessment was framed. The Ld. CIT-DR has submitted that in none of the assessment years, regular assessment u/s 143(3) was framed. Only during the course of survey, Ld. AO observed that the documentation and vessel handling charges were wrongly admitted by Indian agent whereas such income belonged to principal assessee. Therefore, there is no question of change of opinion or collection of fresh material by Ld. AO. The written submissions filed by Ld. CIT-DR supporting the case of the revenue, on the issue of reassessment jurisdiction, read as under: -

> The appellants in the above cases have challenged the reopening of assessment u/s 147 of the IT Act after survey operation carried out u/s 133A of the IT Act on 07-03-2019 in the case of Bengal Tiger Line India (P) Ltd. The main issue of revenue in this case is that the *documentation charges* and *vessel handling charges* ought to have been admitted in the hands of principal i.e. appellant whereas the same was admitted wrongly by the agent i.e. Bengal Tiger Line India (P) Ltd (BTL-India) in all the above said A Ys. This led to reopening of assessment.
>
> **A. The return filing history and issue of notice and re assessment is as under;**

Table-I

AY	Date of filing of original return	Section	Any assessments
2012-13	13-08-2014	142(1)	No

2013-14	27-05-2014	139(4)	No
2014-15	30-09-2014	139(1)	No
2016-17*	30-09-2016	139(1)	No
2017-18	27-10-2017	139(1)	No
*2 revised returns filed on 07-10-2016 and 06-09-2017			

After survey notices u/s 148 of the IT Act dated 28-03-2019 were issued and served on the assessee. In response to the notice the appellant company filed return on 26-04-2019. After disposal of objection filed by the appellant vide order dated 08-11-2019, the draft assessment orders were passed on 26-11-2019. This was upheld by DRP.

B. The income of documentation chares and vessel handling charges admitted by agent BTL India is as under;

Table-2

AY	Documentation charges (in Rs)	Vessel handling charges (in Rs)
2012-13	1,39,69,520	3,25,300
2013-14	1,77,81,606	0
2014-15	2,25,48,480	5,53,285
2016-17	3,81,24,969	26,08,955
2017-18	2,39,45,249	17,76,548

C. Grounds of appeal of the appellant:

From ground no. 2.1 to 2.7, the appellant had challenged the reopening on the main ground that;

- Reasons to believe was unsustainable.
- The income already suffered tax in India in the hands of agent.
- No fresh material made available and hence it was change of opinion.
- AO having issued certificate u/s 172 cannot take contrary view

From ground no 3.1 to 3.10 the appellant contended that documentation charges and vessel handling charges cannot be assessed in the hands of appellant on the ground that

- It was independent service activity performed by BTL India (agent) directly to the customers.
- BTL India used its own employees and the same was outside the purview of agencyagreement with appellant.
- BTL India rendered the services to third party customers (shipping lines) and the remuneration was received directly and the appellant was not privy to the agreement.
- Income of the agent cannot be automatically concluded that it was an income collected on behalf of principal.
- Taxing the income once again in the hands of appellant resulted in double taxation.
- Without prejudice to the above, the documentation charges and the vessel handling charges are in the nature of shipping income not taxable as per Article 8 ofDTAA.
- Without prejudice to the above these charges have to be taxed u/s 44B of the IT Act.

D. Factual _evidences available on record;

1. Is it a Change of opinion: The return filing history presented in the Table- I above revealed the fact that in none of the assessment years regular assessment u/s 143(3) of the IT Act was carried out. Only during the course of survey, the AO observed that the vessel handling charges and documentation charges wrongly admitted by the Indian agent whereas these two incomes was pertaining to the principal Bengal Tiger Line

PTE Ltd, Singapore. Hence question of change of opinion or collection of fresh material or evidences for the purpose of reopening and the related grounds of appeal cannot survive.

2. Analysis of Financials: Financials of the agent BTL India Ltd. for two assessment years i.e. 2012-13 and 2013-14 is placed in paperbook from page no. 1 to 12. The agent's main source of income was agency commission earned from the principal. The other two incomes of documentation charges and vessel handling charges was booked incorrectly by the agent.

3. Note on business activity of the agents: Note on business activity submitted by the agent BTL India Ltd. to the assessing officer during the course of assessment carried out for the AY 2012-13 and 2013-14 is placed in page no. 13 to 21 of the paperbook. It is clearly declared that BTL India Ltd provides agency support services to the shipping operation carried on by its group companies and it is remunerated by way of agency commission. They were not entitled to carry out any other activities independently other than the activities as per agreement.

4. **Agency agreement**:It is placed in paper book at page nos. 26 and 27. In clause 2 under "General duties of agent" it was clearly mentioned as under:

- ***The Agent, through its own organisation and/or through sub-agents, to be approved by the Principal, will carry out such duties customarily expected of Agents, or performed as the result of specific instructions from the Principal.***
- ***Such duties will inter-alia include, but not be limited to, the marketing and handling of Principal's services, the efficient dispatch of vessels, and the booking, documentation and accounting of containers.***
- ***In all cases, the Agent will carry out duties undertaken "as agents only", for and on behalf of the Principal.***
- ***The Agent will neither directly or indirectly compete with the Principal's services nor represent or participate directly or indirectly with competitive companies of any kind.***

It is evident from the explicit clause that the agent has to perform the functions as per the terms and conditions of the agreement as agent only. It is for this activity service commission is to be paid at 1.5% of all inbound and outbound FIO freight. This agreement was effective from 01-01-2009 and valid for indefinite period.

5.Submission of BTL India to AO: Attention is drawn to another submission dated 11-01-2016 by the agent BTL India Ltd submitted to the AO during the course regular assessment for the AY 2012-13 when the AO proposed to disallow some of the expenditures debited under the head *Dock and logistic expenses.* **It is placed at page no. 22 to 25.** At point no. 2.1 of this submission, nature of business of the company is once again listed out as under;

The Company acts as an agent for the shipping activities undertaken by its group companies in international waters. The Company provides documentation and administration support in relation to vessel traffic, close coordination with various wings of the Government viz. Customs Authorities, Income-tax Authorities, Port Authorities etc. in order to obtain necessary clearances, certificates, approvals etc. in relation to arrival and departure of every vessel to and from the port. These activities are carried on by the Company through its offices in Chennai, Kolkata, Tuticorin and Cochin.

It is evident that all those activities of the agents were carried out on behalf of the principal.

6. Evidences from the objections for reopening filed by the appellant;

6.1 Attention is drawn to objection to reasons for reopening the assessment filed by the appellant on 27-06-2019 to the AO for the AY 2012-13 placed at page no. 28 to

37. At point no. 3 it was clearly declared that in accordance with agency agreement, BTL India wouldinclude handling the principal's service, efficient dispatch of vessels,booking/documentation/accounting of containers on behalf of principal.
6.2 At point no. 4 of the same reply it was submitted that in Kolkata and Cochin port the agent had to take some additional services in the nature of documentation to facilitate efficient dispatch of vessels.
6.3 At point no. 5 of the same reply it was submitted that in Mangalore and Goa port the agent carried out vessel handling charges.
6.4 At point no. 6 of the same reply it was submitted that such documentation and vessel handling charges was mutually agreed between principal and agent and hence it was booked as revenue of agent BTL India Ltd. These incomes cannot be attributed to the appellant BTL Singapore.
It is evident from these points that the agent cannot do such activities independently. They have done all the activities on behalf of principal. There was no separate agreement other than the agency agreement to show that the agents were allowed to carry out such activities independently.
7. Evidences from statement of Sri. B. Sridhar;
7.1 Attention is drawn to reply given by Sri. B Sridhar, director of BTL India Ltd. in the statement recorded on 12-03-2019 at question no. 5. It is placed in **page no. 38 to 43 of the paperbook.** It was admitted that BTL India raised those invoices on behalf of principal and it is the agent's responsibility to prepare monthly statement of revenue and expenditure. In answer to question no.6 he had admitted that the agent is compensated on commission basis.
7.2Attention is drawn to reply to question no. 12 where he has deposed that *"documentation charges are levied for the local work that BTL India performsfor the shipping lines. Much of the documentation work was confined to Kolkata that to for a shorter period of time. Subsequently due to computerization of port clearance process that same services is now not performed.*"
However, this reply is not acceptable on the fact that they have not done this for a short period of time, it has been regularly practiced since AY 2011-12.
7.3 Sri. B. Sridhar, the director of the company subsequently in many of the replies stated that he was of the opinion that those incomes were not pertaining to BTL Singapore. It is pertinent to mention here that he is the signatory of the agency agreement discussed above at point no. 6.
8. Statement of Sri. Ravi, General Manager Finance and Administration:
His statement was also recorded on the date of survey. He was responsible for Finance Operation and Administration of the organization. His statement is placed at **page no.49 to 56 of the paper book.**
8.1 In reply to question No.6, he had admitted that Indian Company engaged in the steamer Agency Services on behalf of the Principal, BTL Singapore to handle their ships in Indian Ports.
8.2 From Q.No.7 to 11, he had explained that each customer enter agreement with the Principal and the rate agreed is updated in the Principals software (SINMAX). For this activity, agency commission of 2% was received from the Principal.
8.3 It is also admitted that agent forecast the fund requirement on a weekly basis and subsequently prepares general statement of account on fortnight basis and submit the same to the Principal through SINMAX software.
8.4 It was also replied that on receipt of the payment from the customers, after meeting out the vessel related expenses by BTL India on behalf of Principal

company, the balance surplus if any, will be repatriated to the Principal company. After 2017, customers made payment directly to Principal.

8.5 Having answered to these questions, the General Manager however replied to question no.23 that documentation charges and vessel handing charges is a local revenue. However, this cannot be acceptable.

8.6 Attention is drawn to answer to Q.no.7 given by Sri C. Ravi. He had admitted that ***"as agent, we ask for pre-funding from the Principal to pay the port cost, terminal cost and any other cost related to the ships along with our agency commission.*** "

- Thus, it is evident from all these documents that BTL India is only an agent entitled for commission income. When the company used the software of the Principal to prepare weekly and fortnightly statements of expenditure and got reimbursed the same from the Principal it cannot be accepted that they have independently carried out the business activities of vessel handling charges and documentation charges. This is what admitted by the appellant to the A.O in way of objection to the reasons recorded for reopening.
- Hence, it can be concluded that the agent used to forecast their expenditure and ask for the pre-funding from the Principal to carry out various activities on behalf of Principal. Under these circumstances, it is evident that the other receipts i.e. ***documentation charges*** and ***vessel handling charges*** were also collected by BTL India (agent) only on behalf of the principal BTL Singapore. It cannot be their independent source of income.

9. Remand report of the AO to DRP; Attention is drawn to a remand report given by the AO to DRP placed in paper book **at page no. 44 to 48** wherein it was clearly listed from page no. 3 to 5 that ***documentation charges*** and ***vessel handling charges*** were undertaken by the Indian entity on behalf of the assessee as per the agency agreement. These incomes were incidental to the business activity of the appellant and it cannot be treated as separate income generated by the agent on its own. The AO also reported that the plain reading of sections and rules of the IT Act mentions all the shipping and ancillary activities and nowhere mentions these charges. Since DTAA and IT Act are silent on the inclusion of this particular charge, one cannot allow to avail the benefit of Article 8 of DTAA. The AO also discussed that the IT Act specifically mentions about demurrage charge but it leaves documentation charges and vessel handling charges as business income. Hence it cannot be taxed u/s 44B of IT Act as business income and rightly taxed as income from other sources.

10.Issue of certificate u/s 172: In one of the grounds the appellant raised an issue that AO having issued certificate u/s 172 cannot take contrary view. In this connection it is submitted that the issue of documentation charges and vessel handling charges was brought on record only after survey. This certificate u/s 172 is a kind of provisional certificate issued to the assessee for port clearance. On this aspect, the A.O submitted a detailed remand report and it is placed in the paper book.

E. Summary and Prayer:

1. It is a clear-cut case that BTL India (P) Limited is only an agent acted on behalf of the principal. The nature of business was explained by the agent at various places of their written submission. They earned commission income from the principal. It was their main source.

2. Agent cannot independently book *Documentation charge* and *vessel handling charges* in their hands. There was no such agreement entered between agent and principal that allows agent to act independently.

3. The entire business activity of the agent was explained in the statement by the General Manager-Finance and Administration that the agent used to ask for pre-funding from the Principal and spent those amounts towards various expenditure. For this purpose, they have used the software of the Principal company by generating weekly and fortnightly statements.
4. Various other activities incidental to earn commission income on freight viz. documentation and vessel handling were also carried out on behalf of Principal without any written agreement. This fact was admitted by the appellant at various instances discussed above.
5. The reply of the Director that this income was shown in agent's books of account for brief period is not correct. In all the relevant AY it was incorrectly shown in the accounts of the agent as against the accounts of the principal.
6. Hence, the reopening the assessment of principal, i.e. the appellant's case to assess the income escaped as ***documentation charges*** and ***vessel handling charges*** was in order. It was not a case of change of opinion.
7. These incomes accrued to appellant in India. The AO in the remand report analysed the relevant provisions of IT Act and concluded that it cannot be considered as business income of the appellant as per section 44B of the IT Act as there is no such provision in IT Act or in DT AA. Hence it was rightly assessed as *income from other sources* by invoking Article-23 of the DTAA.

3.2 The Ld. CIT-DR thus submitted that the agent's main source of income was agency commission earned from the principal and document / vessel handling charges were wrongly booked by agent. The Indian entity was not entitled to carry out any other activities independently other than that as mentioned in the agency agreement. The Indian entity was to perform the functions as per the terms and conditions of the agency agreement as agent only. This agreement was effective from 01-01-2009 and valid for indefinite period. From the terms of the agency agreement and financials of Indian entity, it was evident that all the activities of the agents were carried out on behalf of the principal only. The agent could not do any activity independently. There was no separate agreement to show that the agent was allowed to carry out such activities independently. From the conduct of the assessee as well as replies furnished by the key persons during survey proceedings, it was to be concluded that the agent used to forecast their expenditure

and ask for the pre-funding from the principal to carry out various activities on behalf of the assessee. Therefore, document / vessel handling charges were collected by Indian agent on behalf of the principal assessee only and it could not be its independent source of income. Such income was incidental to the business activity of the assessee and could not be treated as separate income generated by the agent on its own. The agent could not collect these charges independently and there was no such agreement entered between agent and principal that allow the agent to act independently.

3.3 The Ld. CIT-DR also supported the case of the revenue on merits and relied on the decision of Hyderabad Tribunal in **PACC Container Line Pvt. Ltd. vs.ITO (ITA Nos.25/Hyd/2018 & ors. dated 27.04.2022).**The Ld. CIT-DR submitted that the decision of the Tribunal for AY 2015-16 has not considered the applicability of Article-24 and therefore, this decision could not be relied upon in all these years. The Ld. CIT-DR has filed written submissions along with copies of case laws and financial documents etc. to support the case of the revenue.

3.4 The Ld. CIT-DR drew attention to the financials of the Indian agent and submitted that the agent was acting as an exclusive agent for the assessee and the documentation and vessel handling charges received by it would belong to the principal entity only. Therefore, there was escapement of income in the hands of the assessee parent company.

3.5 The Ld. CIT-DR also drew attention to Article-24 of Indian-Singapore DTAA to submit that there is difference between the phrase ‘subject to tax’ and ‘liable to tax’. The submissions were made that the shipping income of the assessee was exempt and not subject to tax under Singapore Taxation laws and therefore, Article-24 will apply to the

case of the assessee. In such a case, the said income would be taxable in the hands of the assessee in India. The Ld. CIT-DR also advanced arguments to submit that documentation and vessel handling charges could not be held to be incidental to the shipping business.

3.6 The written submissions filed by Ld. CIT-DR supporting the case of the revenue, on merits, read as under: -

> A. **Facts from the assessment order;**
> The AO has assessed the shipping income of the appellant accrued in India by invoking Article-24 of the India-Singapore DTAA. The basic facts from the assessment order is as under;
> **1. Intention of any treaty:**
> The A.O analysed the purpose of treaty at paragraph-3 & 4. As per the *ViennaConvention of Law of treaties,* it was stated that a every treaty shall be interpreted in good faith in accordance with ordinary meaning. All the treaties were meant for avoidance of Double Taxation and Prevention of Fiscal Evasion. No treaty between two countries were entered for Double Non-taxation.
> **2. Taxation rights of shipping income:**
> It was contented by the appellant that only the "resident state" i.e. Singapore has the right of taxation of shipping income. As per A.O it is skewed interpretation. This aspect was discussed from paragraph 5 to 8 in the assessment order. The DTAA prevents claim of both the signatories on taxation of same income. It was explained that when both the countries claimed taxation of shipping income, country of residents will have exclusive right and source state will be exempt from taxation. As per AO, if country of resident is exempting the taxation of shipping income, then the question of double taxation will not arise. As Singapore is exempting the shipping income from taxation, AO held that India will have the right to tax the shipping income accrued in India.
> 3. **Examination of provisions of Singapore Income Tax Act:**
> At paragraph 7, 14 and 15, the A.O had examined charging section of 10 and exemption section of 13A and section 13F of Singapore Income Tax Act (SITA). At para 20, the charging section of SITA, i.e. section 10 is also analysed. As per the charging section of 10 of SITA,
> ***"Income Tax** shall, subject to the provisions of this Act, be **payable** at the rate or rates specified herein after for each year of assessment **upon the income of any person accruing in or derived from Singapore** or **received in Singapore from outside Singapore** in respect of…….*
> There are three scenarios of taxation as per section 10 of SITA is:
> (a) When income accrues in Singapore
> (b) When income is derived in Singapore
> ***(c) When income received in Singapore from outside Singapore***
>
> In the present case, the issue is not on first two conditions. The third aspect of income accrued in India and not remitted to Singapore as well as not subject to tax in Singapore is the main focus of the assessment. Singapore has territorial basis of taxation where income accrued outside Singapore will be taxed once it is received in

Singapore. This parameter is very crucial for deciding the issue in hand in line with Article-24 of DTAA. Because, the shipping income earned in India, not remitted to Singapore became the subject matter of assessment.

AO also analysed the exemption provisions of section 13A of SITA and discussed at para-14 that it is not automatic and blanket exemption provided in SITA. The comptroller of SITA can assess the exemption akin to section 10A or 10AA or 80IA or 80IB of Indian Income tax.

4. *Subject to tax* and Article 24 of DTAA;

With this background, the A.O examined Article 24 which deals with **limitation** of relief. The A.O also analysed the concept of *subject to tax* at paragraph 9. He has referred UK's HRMC International manual and concluded that ***subject to tax*** means, relevant income has to be actually taxable. The A.O also reproduced the findings of AAR in *General Electric Pension Trust vs DIT (International Taxation) in 8 ITLR 1053.* He has further examined this Article 24 with section 10 of SITA and came to prima facie conclusion that as the shipping in come arising in India is not subjected to tax in Singapore. Hence the AO was of the view that Article 24 can be invoked.

5. Contradictory report noticed on IRAS letter:

The appellant company placed the letter issued by IRAS Singapore and contended that India do not have right on taxing the shipping income accrued in India. This aspect is critically examined in para 23 to 28 as well as in para-30 of the assessment order. The IRAS claimed that if a Singapore resident company has the source of income outside Singapore or arising outside of Singapore, still Singapore has the right to tax that foreign sourced income. However, AO held that this is against the provisions of Singapore Income Tax Act, particularly, section 10 discussed above.

It is clear from section 10 of SITA that if the source is outside Singapore, income will be taxable when it is received in Singapore. If so, IRAS Singapore cannot claim that income accrued outside Singapore (here India) which is also automatically taxable only by Singapore. This is explained at para 28 and 31 of the assessment order. The contradictory statement between the e-Tax Guide and the letter issued by IRAS is discussed at para 30 of the assessment order. The A.O referred e-Tax Guide and its disclaimer in paragraph 23. It is as under

IRAS shall not be responsible or held accountable in any way for any decision made or action taken by you or any third party in reliance upon the Contents in this e-Tax Guide. This information aims to provide a better general understanding of taxpayers' tax obligations and is not intended to comprehensively address all possible tax issues that may arise. While every effort has been made to ensure that this information is consistent with existing law and practice, should there be any changes, IRAS reserve the right to vary its position accordingly."

Hence, AO was of the view that the IRAS letter is not in line with the SITA and e-Tax Guide as well as DTAA signed by them. In view of the above the AO proceeded to tax the shipping income accrued in India as per the provisions of the Income Tax Act as well as DTAA.

B. Appellant's grounds of appeal before Hon'ble ITAT:

The appellants in the above cases have raised multiple grounds of appeal from 4.1 to 4.16 wherein they sought to rest their case on the decision of this honourable tribunal in the case of ***Ms Bengal Tiger Lines Pte Ltd in ITTPA No.II/CHNY/2020*** passed for the AY 2015-16. With due regards to the said decision of the Hon'ble

members, the submission of the revenue is that the said decision does not espouses the correct position of law, for the elaborate reasons as stated below:
The view expressed in the order of the Hon'ble Tribunal referred supra is that, the Article-8 is only an enabling provision for taxation of shipping income. Now to quote the Article-8 as per India Singapore treaty, the same reads as follows:

ARTICLE 8

SHIPPING AND AIR TRANSPORT

"1. Profits derived by an enterprise of a Contracting State from the operation of ships or aircraft in international traffic shall be taxable only in that State.,

From the above it is seen that the enabling word giving exclusive right of taxation to the resident state viz., Singapore. The word "only" is the position which has been strongly emphasised by the Hon'ble ITAT in its order referred supra.

1. Whether the word "only" is mentioned in article-8 alone:

A reference to the India Singapore treaty will clearly show that the word "only" has not only been used in Article 8 but also in other articles like Article-7 Business profits, Article-13 Capital Gains, Article-14 Independent Personal Services, Article 15 Dependent Personal Services, Article 19 Non-Government pensions and annuities. These articles are reproduced below;

ARTICLE 7

BUSINESS PROFITS

*The profits of an enterprise of a 'Contracting State **shall be taxable only in that State** unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as it directly or indirectly attributable to that permanent establishment.*

ARTICLE 13

CAPITAL GAINS

*[4A. Gains from the alienation of shares acquired before I April 2017 in a company which is a resident of a Contracting State **shall be taxable only in the Contracting State in which the alienator** is **a resident.***

ARTICLE 14

INDEPENDENT PERSONAL SERVICES

*Income derived by an individual who is a resident of a Contracting State from, the performance of professional services or other independent activities of a similar character **shall be taxable only in that State** except in the following circumstances when such income may also be taxed in the other Contracting State:*

ARTICLE 15

DEPENDENT PERSONAL SER VICES

*Subject to the provisions of Articles 16, 18, 19,20 and 21, salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment **shall be taxable only in that State** unless the employment.....*

ARTICLE 19

NON-GOVERNMENT PENSIONS AND ANNUITIES

*Any pension, other than a pension referred to in Article 18, or any annuity derived by a resident of a Contracting State from sources within the other Contracting State **may be taxed only in the first-mentioned State.***

While the above provisions enable the resident state to solely tax said incomes, on the contrary at the same time in the source state exempts such incomes from its rightful claim to taxation. **Hence the conclusion that Article-8 along with all the**

above provisions are both enabling provisions (in respect of resident state) as well exemption provisions (in respect of source state) is not correct.

A plain reading of all the above articles goes on to prove that even though it is *"shall be taxable only in that state"* it can still come with certain riders thereby providing taxation rights to the source state as well. Article 8 being, both an enabling provision in respect of resident state and an exempt provision in respect of source state has a rider enabling the source state to tax shipping income as provided at Article 24

Limitation of Relief:

C. Examination of Article-24 and conditions prescribed:

ARTICLE24

LIMITATION OF RELIEF

Where this Agreement provides (with or without other conditions) that income from sources in a Contracting State shall be exempt from tax, or taxed at a reduced rate in that Contracting State and under the laws in force in the other Contracting State the said income is subject to tax by reference to the amount thereof which is remitted to or received in that other Contracting State and not by reference to the full amount thereof, then the exemption or reduction of tax to be allowed under this Agreement in the first mentioned Contracting State shall apply to so much of the income as is remitted to or received in that other Contracting State.

1. There are 3 main components of this Article, which are listed below:

i. **An income earned from the source state should be exempt from tax, or taxed at a reduced rate in the source state as per the various provision of the articles of the treaty;**
ii. **That income should be subject to tax in the State of Residence.**
iii. **The said income is subject to tax by reference to the amount actually remitted to the state of Residence.**

2. As already mentioned, the income in question is exempt from tax in India i.e. the source state. This income is ***liable to tax/chargeable to tax*** by reference to the sum actually remitted to Singapore by virtue of Section 10 of the SITA.

3.Charging section 10(1) of the Singapore Income Tax Act

"10(1) Income tax *shall, subject to the provisions of this Act, be* ***payable*** *at the rate or rates specified hereinafter for each year of assessment* ***upon the income*** *of any person* ***accruing in*** *or* ***derived from Singapore*** *or* ***received in Singapore from outside Singapore*** *in respect of-*

(a) gains or profits from any trade, business, profession or vocation, for whatever period of time such trade, business, profession or vocation may have been carried on or exercised;
(b) gains or profits from any employment;
(c) [Deleted by Act 29 of65}
(d) dividends, interest or discounts;
(e) any pension, charge or annuity;
(I) rents, royalties, premiums and any other profits arising from property; and
(g) any gains or profits of an income nature not falling within any of the preceding paragraphs."

So as discussed above, there are three scenarios of taxation in Singapore i.e.:

i. When income accrues in Singapore
ii. When income is derived in Singapore
iii. When income received in Singapore from Outside Singapore

4. From the above it is evident that Singapore adopts **a territorial basis of taxation.**

Under section 10(1), income tax is levied only on income *"accruing in or derived from Singapore or received in Singapore from outside Singapore".*

5.However, since Shipping income was exempted by virtue of Section 13F of Singapore Income Tax Act, the second component *"that income should be subject to tax in the state of residence"* as mentioned in **paragraph-C** is not met.

6. Hence India has exclusive right to tax such income under domestic tax laws by virtue of Article 24 of the India Singapore DT AA.

7. India Singapore DTAA is unique for the reason that Article 24 specifically discusses about ***Limitation of Relief*** This article talks about limitation given in the DTAA. This article insists on ***subject to tax*** as against other DTAAs wherein the mandate is only on liable to tax' and therefore there is a clear distinction between ***liable to tax*** and ***subject to tax.***

D.Analysis of Shipping Income in other DTAA:

Government of India had entered into DT AA with nearly 135 countries. Around 20 of such DTAA are analysed and enclosed as **annexure-I.** In all the DTAA, **Article-8** is on taxation of **shipping and air transport income.** This is common in many of the agreements where the right of taxation of shipping income has been given to the resident state. It is applicable to India- Singapore DTAA also.

Article 24 in many of the agreements discussed about Elimination of Double Taxation, Mutual Agreement Procedure (MAP), Capital, Non-discrimination etc. However, in Singapore Treaty, we could find this **Limitation** of **Relief** in Article 24. The spirit of Article-- 24 was that DTAA is meant for avoidance for double taxation but not for Double Non-taxation. Such article could not be found in any other DTAA. This shows significance of Article-24.

It is for this reason, the concept of ***subject to tax*** was emphasised in all the assessment orders passed This fine aspect of significance of Article 24 and the concept of ***subject to tax*** was not rightly appreciated in the earlier decision of Hon'ble ITAT, Chennai in the case of ***Bengal Tiger Lines in IT(TP)A.No.1 1/Chny/2020.***

E.Whether it is a covered issue?

While deciding the appeal for the A.Y.2015-16 in the case of Bengal tigers, the core issue of ***subject to tax*** was not adjudicated in the spirit of Article-24 entered between India and Singapore. The appeal in the case of **Pacific International Lines Pte Ltd and** Advanced Container Lines Pte Ltd, this issue of *subject to tax* and *liable to tax* was argued in length. This was represented on various dates from 2019 to 2021. From December, 2021, this case was heard continuously on different dates, viz. 22.12.2021, 04.01.2022, 06.01.2022 and 09.02.2022. Finally, it was pronounced as **'heard'** on 09.02.2022. However, no order was passed. On 05.05.2022, the Bench had posted this case as **'part-heard',** as certain material aspects are required clarifications from both the sides. The case was accordingly posted to 24.05.2022. On 24.05.2022, the counsel appeared for the appellant sought for adjournment on the ground that he had to obtain additional documents from the instructing Chartered Accountant. Accordingly, the case was again posted as ***part-heard*** on 8.6.2022 at 2.30 p.m. On 8.6.2022, the ITAT with detailed observation **released the appeal** for fresh hearing. The content in the order sheet is reproduced below;

"These appeals were originally heard on 09.02.2022 and when taken up for dictation for clarification, it was posted for part-heard hearing on 24.05.2022. On 24.05.2022, when the appeals were taken up for hearing the ld Counsel for the assessee has sought for adjournment and accordingly adjourned to 08.06.2022 as part-

heard. When these appeals were originally heard, it came to our notice that there are two judgements or this issue viz., one form ITAT Ahmedabad and the other is from ITAT Chennai. The ITAT Chennai has taken a view in favour of the assessee in the light of India-Singapore DTAA and ITAT Ahmedabad, although, in principle agreed that the assessee is entitled for DTAA benefit, but expressed its reservations on subject to tax and liable to tax in the light of Article 25(4) of India-Singapore DTAA. ***Therefore, we are of the considered opinion that these appeals are required detailed hearing on the issue of subjected to tax and liable to tax.*** *Therefore, these appeals are treated as de-heard and released for fresh hearing. The Registry is directed to post the appeal, for hearing on regular course. Both parties informed in the open court. [alw IT(TP)A 1-Chny/2020 & IT (TP) A 59/Chny/2019]"*

The copy of the order sheet is enclosed as **annexure-2.** It is evident from the order sheet of Hon'ble ITAT that the decision of Bengal Tiger rendered for the A.Y.2015-16 did not lay down the position of law correctly.

Exactly this is what Hon'ble Madras High court observed when it was deciding the case of *CIT Vs Hi tech Arai Limited in Tax Case (Appeal) Nos.670 and 671 of 2009.* Hon'ble High court observed that tribunal need not follow its own earlier decision if such earlier decision did not reflect the correct position of the law. The relevant para in the Hon'ble HC order is as under;

"3. We are not in a position to appreciate either of the contentions of the learned counsel for the petitioner. As far as the first contention is concerned, when the Tribunal by the impugned order has applied Section 32(1)(iia) of the Act, to the facts involved in the case of the asses see and has found that the assessee is entitled for the additional depreciation claimed under the said provision, it cannot be held that simply because a Co-ordinate Bench of the Tribunal had earlier taken a different view, the Tribunal on this occasion also ought to have followed the same. When we find that the Tribunal has applied the law correctly in the impugned order, there is no gain saying that there was an earlier order by the Co-ordinate Bench and therefore, for that reason, this time also the Tribunal should have blindly followed its own earlier decision even if such earlier decision did not reflect the correct position of the law.

In view of the above, it is not a covered issue at all. Hon'ble ITAT Chennai has rightly released these appeals of Pacific International Pte Ltd and Advance containers Pte Ltd for fresh hearing as the law laid down in ***Bengal Tiger Lines in IT(TP) A.No.11/Chny/2020*** did not reach its finality.

E-1: Decision of Hyderabad ITAT on this subject:

In the case of ***M/s PACC Container Limited rep. by J.M. Baxi and Co, Muthukur, Nellore Vs ITO (International taxation) in ITA No.25,26,27/14yd/2018 and in*** *ITA* ***No.550/551/2021*** analysed this issue and held that if the shipping income is accrued in India and not remitted to Singapore, it is taxable by virtue of article-24 of India-Singapore DTAA. The operative part of this decision starts from para-15 and the scope of taxation of this income by virtue of article-24 was explained in detail by Hon'ble ITAT, Hyderabad.

E-2: **Decision of *Maersk tankers Singapore Pte limited*:**

Hon'ble Rajkot bench's decision has been relied upon by the appellant's counsel. It is humbly submitted that Hon'ble ITAT has rested its finding on the basis of ***Bengal Tiger Lines in IT(TP)A.No.11/Chny/2020*** of Chennai ITAT. As Chennai ITAT itself later accepted that the ***liable to tax*** and ***subject to tax*** was not examined in the earlier decision and released the appeal of other cases namely ***Pacific***

International Lines Pte Ltd and Advanced Container Lines Pte Ltd for fresh hearing, the decision of Maersk tankers is not acceptable.

Summary and Prayer:

1. In the earlier decision of Bengal tiger lines in ***IT(TP)A No:11/CHNY/2020, Hon'ble ITAT, Chennai*** has not appreciated the fine issue of ***Subject to tax*** as provided in Article-24. While releasing the appeals of **Pacific International Lines Pte Ltd and Advanced Container Lines Pte Ltd,** this fact was duly recorded by Hon'ble ITAT vide order sheet dated 08-06-2022.
2. Article-8 is not a special article only to Singapore DTAA. It is common in all the DTAA. It talks about taxation of ***shipping income and air transport income.*** As per this article, the resident country has exclusive right of taxation ***(liable to tax).*** Whatever income arise or accrue in Singapore, then it is liable to be taxed in Singapore and subsequently exempt from taxation as per section 13A or F of SITA.
3. Singapore follows territorial basis of taxation as it is evident from section 10 of SITA. Income accrued outside Singapore is taxable on receipt basis. However, the shipping income even if it is received in Singapore, it is not subject to tax.
4. Article-24, **Limitation of Relief,** is unique to India- Singapore DTAA where the issue of ***"subject to tax"*** came into picture. As the shipping income in this case accrued from India and it is not subject to tax in Singapore and the income was not remitted to Singapore, India has the right to tax the same by virtue of this article. It is to be mentioned here that that ***Limitation of relief*** is not found in other DTAA.
5. Since the shipping income of the assessee accrued in India is **not subject to tax in Singapore,** the AO has rightly taxed said income in India under domestic tax laws by virtue of Article 24 of India Singapore DTAA. This has been elaborately discussed in the assessment order by the AO.
6. Hence, the AO had rightly invoked Article 24 that deals with
   - **An income earned from the source state should be exempt from tax,** or **taxed at a reduced rate in the source state as per the various provision of the articles of the treaty;**
   - **That income should be subject to tax in the State of Residence.**
   - **The said income is subject to tax by reference to the amount** actually **remitted to the state of Residence.**

   It is prayed that the assessment orders passed in the above said cases may be upheld as the facts and correct position of law has been elaborately discussed by the AO and that was upheld by DRP.

4. We have carefully heard the rival submissions and gone through the written submissions filed before us. We have also considered the case laws cited before us. Having considered the same and upon perusal of case records, our adjudication would be as under. The assessee being non-resident corporate assessee is stated to be engaged in shipping business. The assessee is engaged in providing feedership services to various main line operators operating across

group. The assessee group has been carrying on the shipping business in international waters connecting the transshipment ports of Singapore and Colombo with Indian hub ports over the last 30 years. The assessee is Singapore based entity and subject to taxation under Singapore Taxation laws which is an undisputed position.

Assessment Proceedings

5.1 The facts on record would reveal that the assessee-company is engaged in shipping business. The assessee is incorporated in Singapore and filed its return of income on 13-08-2014 declaring 'Nil' income after claiming benefit of Article-8 of the India-Singapore DTAA. However, a survey u/s.133A(2A) of the Act was carried out at the premises of its Indian subsidiary entity i.e., M/s. Bengal Tiger India Pvt. Ltd. (BTIPL) on 07-03-2019.

5.2 Based on the findings of survey operations, the assessee's case was reopened u/s. 147 of the Act with due approvals and notice u/s 148 was issued on 28-03-2019. The assessee sought reasons for reopening which were duly communicated to the assessee. The assessee's objections thereto were also disposed-off by Ld. AO. The copy of the reasons recorded has already been placed on record and we have gone through the same. Subsequently, notices u/s. 143(2) and 142(1) were issued calling for requisite details from the assessee. Based on assessee's submissions, the assessment was framed by Ld. AO.

5.3 The survey proceedings revealed that M/s. BTIPL was the agent of the assessee in India. It was collecting documentation and vessel handling charges (DVHC) allegedly on behalf of the assessee. During the course of survey proceedings on BTIPL, sworn statements of its key employees were recorded which include the statement of Shri B. Sridhar,

Director and Shri C. Ravi, Finance Manager. It transpired that the assessee was principal company and M/s. BTIPL worked as an agent for the assessee against 2% agency commission from the assessee on the freight income collected from Indian operations. The agent was also separately collecting documentation charges and vessel handling charges (DVHC) from the customers. These charges were recorded in the books of accounts of the agent and offered to tax as such in its return of income. These charges were collected by BTIPL from its customers for issuing no-objection certificates for clearing containers out of Kolkata Docks and late gate-in permission extended to customers at Cochin Terminal. Though all these charges were offered to tax by the agent, the revenue alleged that these charges were collected on behalf of the principal only and accordingly, chargeable to tax in the hands of the assessee entity.

5.4 It was noted that M/s BTIPL was entitled for agency commission of 2% only and it was collecting document / vessel handling charges in the capacity of an agent only and paying lesser tax rate of 30% as against tax rate of 40% as applicable to the assessee. Therefore, to pay lesser taxes, the income accruing to the assessee was accounted for in the books of the agent which was not acceptable. Accordingly, Ld. AO held an opinion that the aforesaid income would be chargeable to tax in the hands of the assessee and there was an escapement of income.

5.5 Proceeding further, Ld. AO noted that the assessee was claiming shipping income to be exempt. However, this claim was not accepted by the department in assessment order for AY 2015-16 wherein it was held that the shipping income was taxable in India both as per the provisions of Income Tax Act as well as per India-Singapore DTAA. The Ld. DRP

confirmed the draft assessment order. Since the same facts continued for this year also, same view was to be taken in this year.

5.6 The Ld. AO, rejecting assessee's submissions, proceeded to take the same view in this year. The Ld. AO held that the Article-8 of DTAA provide that the profits derived by an enterprise of a contracting state from the operations of ships or aircrafts in international traffic shall be taxable only in that state. Since the assessee was resident of Singapore, it took a view that the entire income from its shipping business would be taxable only in Singapore. However, the purpose of DTAA was to avoid double taxation of the income. The assessee argued that only Singapore would have a right to tax the shipping income. The country of residence of a shipping company would have exclusive right to tax the income from shipping operation. The DTAA seek to prevent a situation where both the signatory countries lay claim to taxation rights on the same income. In such a scenario, DTAA would come into picture only to clarify as to which country would have first right of taxation. In other words, in a situation where both India and Singapore are laying claim to taxation rights on the shipping income of the assessee company, then in that case the country of residence will have the exclusive right of taxation and the shipping income in the source state would be exempt from taxation. However, in a situation where the country of residence i.e., Singapore itself was not taxing the income then the question of double taxation would not arise in the first place and the other country i.e., source country would get a right of taxation. The intention was never been to allow or enable double non-taxation.

5.7 In the present case, the country of residence i.e., Singapore was not laying any claim of taxation at all on the shipping income of the

assessee since the assessee was claiming its entire shipping income as exempt u/s 13A (Income derived from the operation of Singapore Ships) and u/s 13F (Income derived from the operation of foreign ships) under taxation laws of Singapore. In such a case, this Article would become redundant and the source company would acquire right to levy tax on the same. A coherent reading of other Articles of India-Singapore DTAA viz. Article 7 (Business Profits) or Article 14 (Independent Services) while citing "shall be taxable only in that state" also provide for certain exception clauses. This exception for Article-8 is provided by Article-24 which states that where this agreement provides that the income from sources in a contracting state shall be exempt from tax or taxed at a reduced rate in that state, the said income is subject to tax by reference to the amount thereof which is remitted to or received in that other contracting state and not by reference to the full amount thereof, then the exemption or reduction of tax to be allowed under this agreement in the first mentioned contracting state shall apply to so much of the income as is remitted to or received in that other contracting state. The benefit under Article-8 was tied up to the income actually being subject to tax i.e., actually taxed in Singapore. The term ‘subject to tax’ would be different from ‘liable to tax’. A person not paying tax due to an allowance or relief is different from a person not paying tax due to an exemption. The person would not be regarded as ‘subject to tax’ if the income is exempt.

5.8 Proceeding further, Ld. AO noted that Sec.13A of Singapore Act does give the assessee an option of subjecting its shipping income to tax in Singapore. However, this option was not exercised by the assessee resulting in its shipping income not being subject to tax in Singapore and

therefore, Article-24 would apply. Accordingly, entire income earned by the assessee would be liable to tax in India and the same would be taxable in terms of Sec.44B except document / vessel handling charges since these charges are not covered under Explanation to Sec.44B and would be chargeable to tax separately. These charges were for payment of custom clearances and declaring the vessels at port and were being collected as per trade practices. The charges were for handling, facilitating port clearances and to assist in local marketing activities and nothing to do with the shipping activity. The same were separately billed and considered as distinct and could not be considered as ancillary activities.

5.9 The Ld. AO also held that even if the benefit of Article-8 was to be allowed, the same would be restricted by the clauses enumerated in Article-24. M/s BTIPL was remitting only the balance amount to its principal. It was receiving freight and related charges on behalf of the assessee and it was debiting vessel and cargo related expenses including commission. It was remitting only the balance amount. The amount which is not remitted would not get benefit of Article-8 and accordingly, to be taxed u/s 44B.

5.10 Finally, the income on freight revenue earned by the assessee in India was computed u/s 44B at Rs.1089.70 Lacs and added to its income. The assessee received documentation charges of Rs.139.69 Lacs and vessel handling charges for Rs.3.25 Lacs. As per agreement, the Indian subsidiary was entitled for commission of 2% on freight charges. However, there was no mention of documentation charges undertaken by the Indian entity on behalf of the assessee in the commission agency agreement. The Indian entity has accounted the

same in its books of accounts though it was collected in the course of its agency services rendered to the assessee. The charges so collected were incidental to the business carried out by the assessee in India and it could not be treated as separate income generated by the agent on its own. It was nothing but part of business operations being carried out by the assessee in India. The agent undertake this work as incidental to the main shipping business and raises separate bills on the customers and collects the same on behalf of the assessee. Therefore, these charges were to be considered as other income earned and accruing in India for the assessee which would be taxable as 'other income'. The same would not be entitled for benefit of Article-8 and accordingly, the amount of Rs.142.94 Lacs was also brought to tax as income from other sources.

Proceedings before Ld. DRP

6.1 Aggrieved, as aforesaid, the assessee raised its objection before Ld. DRP and directions were issued by Ld. DRP u/s 144C(5) on 22-01-2021. The assessee assailed the validity of reassessment proceedings, inter-alia, on the ground that the subject income had already suffered tax in India and as such, reopening could not be done for an income which is already taxed. However, Ld. DRP dismissed the same on the ground that Ld. AO had reasonable belief of escapement of income and sufficiency of the reasons was not to be gone into at the stage of reopening the assessment.

6.2 On merits, the assessee reiterated that only the country of residence would have right to tax the income earned by the assessee and invocation of Article-24 was erroneous. The provisions of Article-24 would apply only for income which are exempt from tax under the India-Singapore DTAA and would not cover shipping income as specified in

Article-8. When the treaty contains specific provisions dealing with a taxability of a particular income, AO is precluded from imputing any other conditions which are not contemplated explicitly in DTAA. The assessee also relied on letter dated 17-09-2018 issued by The Singapore Tax Authority i.e., Inland Revenue Authority of Singapore (IRAS) clarifying that the shipping income for a Singaporean company is taxable in Singapore on accrual basis and not on receipt basis and therefore, one of the conditions of Article-24 that the income in that other contracting state should be taxable on receipt basis was not fulfilled. Further, the provisions of Sec.13F of Singapore Income Tax were already in existence since the year 1991 i.e., much before signing of DTAA. The competent authorities were fully aware of such a provision and still chose to grant the taxing right only to the country of residence. The assessee also furnished additional evidences which were in the shape of DIT relief certificates issued u/s 172, Tax Residency Certificates (TRC) issued by IRAS, return of income filed by the assessee in Singapore and break up of freight income earned in India. The assessee also relied on various judicial pronouncements to support its case.

6.3 However, Ld. DRP maintained that the term ‘exempt from tax’ was not defined in tax treaty. The purpose of Limitation of Benefit Article-24 was to limit the abuse of treaty benefits. If an income is to be granted an exclusion from taxable income in one of the contracting states then such exclusion must depend on its status of taxability in the other contracting state. The aim was to prevent double non-taxation of any income. This Article make it clear that what has actually not suffered tax in one contracting state then treaty benefit could not be allowed in other contracting state. The Article-24 was an anti-abuse provision to curb

abuse of tax treatise in such situation only. The assessee availed exemption u/s 13F of the Singapore Income Tax and to that extent, freight income had not actually been taxed in Singapore even though as per Article-8 of DTAA, shipping income are liable to tax in the state of tax residency. The assessee being fiscally domiciled in Singapore, the same income was liable to be taxed in the state of tax residency. However, the term 'liable to tax' is not the same thing as 'subject to tax'. The provision of Sec.10 would show that Singapore has territorial system of taxation under which resident is not subject to tax on offshore income unless it is remitted into Singapore. Therefore, the stand of Ld. AO was correct.

6.4 Pursuant to the directions of Ld. DRP, final assessment order was passed determining assessee's income at Rs.1232.64 Lacs which would be subject to tax rate of 40% along with surcharge, education cess and interest u/s 234B. Similar view was taken in all the other years. Aggrieved as aforesaid, the assessee is in further appeal before us.

Our findings and Adjudication

7. From the facts, it emerges that the assessee is a Singapore based shipping entity and is governed by India-Singapore DTAA. The assessee claim that shipping income thus earned by the assessee is covered by Article-8 of DTAA which provide that only the resident country would have taxation right to tax the same. Accordingly, the assessee has availed the benefit of Article-8 and filed its return of income by taking benefit of DTAA on freight income.

8. To carry out its shipping operations, the assessee has appointed M/s BTIPL as its agent in India who collects freight income on behalf of the assessee. For the same, the assessee has entered into an agency agreement with BTIPL. The copy of the same is placed on Page No.113

of the paper-book. As per the terms of the agreement, the agent would work on behalf of the principal assessee to carry out shipping activities against specified percentage of commission on all inbound and outbound FIO freight. The agent was to carry out such duties customarily expected of Agents or perform under specific instructions from the Principal. Such duties include marketing and handling of Principal's services, the efficient dispatch of vessels, and the booking, documentation and accounting of containers. The agent performs feeder agency functions in India in accordance with the instructions of the principal. All expenses relating to the agency function, including local taxes, are to be borne by the agent only. The agent was to carry out the functions as an agent only and was not to compete with the Principal's services nor represent or participate directly or indirectly with competitive companies of any kind. For these services, the agent was to be remunerated at certain percentage of FIO freight. Further, the assessee was required to place the funds in advance with the agent to meet all expenses relating to the vessels and to carry out their operations and to meet related expenditure. It could thus be seen that the agent act to facilitate shipping operation of the assessee principal in India. For the said purpose, the agent was to incur expenses relating to agency function and it was entitled for fixed rate of commission. From the perusal of agreement, it could be seen that the commission is based on quantum of FIO freight and there is no bar on the agent to collect documentation / vessel handling charges separately. In fact, all the expenses relating to agency function are to be borne by the agent only and the same are not reimbursable by the principal. It could also be seen that there is no clause to reimburse these charges to the agent by the principal. There is

nothing in the agreement to show that such charges were being collected by the agent on behalf of the principal assessee. The same is also evident from the fact that these charges are not part of the freight invoices raised by the agent on behalf of the principal but the same are collected by the agent independently and accounted for in the books of the agent and offered to tax in the return of income filed by the agent. The same has been subjected to tax in the hands of the agent. These charges, undisputedly, form part of agent's financial statements and the same has been credited to Profit & Loss Account which is evident from the financials of M/s BTIPL as placed on record. This position is not under dispute. The fact that these charges are not mentioned in the agency agreement has been accepted by Ld. AO in the remand report also. Thus, all these facts would lead to inevitable conclusion that these charges were being collected by the agent in independent capacity to facilitate shipping operation and the same were not part of the contractual terms between the principal and the agent. The plea raised by the revenue that these charges would belong to the assessee principal could not be accepted in the light of documentary evidences on record.

9. We find that the whole dispute stem from the fact that the agent was subjected to survey action u/s 133(2A) wherein statement of key persons was recorded. The main issue emerged out of document / vessel handling charges stated to the received by the agent independently. The copies of statement taken during survey proceedings are on record and we have perused the same. The same has also been extracted in the reasons recorded by Ld. AO to reopen the case of the assessee.

A statement was taken from Shri B.Sridhar, director of BTIPL. In reply to question no.5, it was submitted that the agent perform vessel handling facilitates port clearance and assists in local marketing activities, raises invoices on behalf of the principal and ensure collection of freight. The agent is responsible for submission of accounts regarding expenses of principal and balancing the same with freight and direct remittances. In reply to question nos.12 & 13, it was confirmed that the documentation charges were levied for the local work undertaken by BTIPL for shipping lines. These functions were stated to be performed completely by the agent and not performed on behalf of the principal. The same was stated to be performed as per local trade requirements. The charges were stated to be treated as income of the agent and considering the same to be the income of principal would amount to double taxation. In reply to question nos.15 & 16, it was similarly confirmed that stevedore was appointed by the agent for handling of vessels which was charged and offered to tax by the agent. The service was stated to be local value-added service being provided to stevedore and the income thus arising from such activity was said to be belonging to agent only and not an activity connected to principal assessee. In reply to question no.17, it was confirmed that documentation and vessel handling charges were purely an activity warranted by local trade / shipping company. The principal assessee was not connected to this activity and the same was offered to tax by the agent in its books of account.

Another statement was recorded from Shri C. Ravi, General Manager (Finance & Admin). In reply to question no.18, it was similarly been confirmed by him that the documentation charges were collected as trade practices. In reply to question no.19, it was confirmed that the

agent was remunerated commission as per the agency agreement. The agent was authorized to issue no objection and gate in permission at Kolkata and Cochin. In reply to question no.22, it was confirmed that the agent was authorized to appoint stevedors for loading and discharging containers from principal vessel at Mangalore and Goa port. Therefore, the agent was allowed to claim rebate from stevedore. In reply to question no.23, it was confirmed that documentation and vessel handling charges was local revenue generated as agent which is normal practice prevailing in the industry. It was also confirmed that the agent had accounted these charges in its books of account.

Thus, the common facts in both the statements were that the impugned charges were levied for the local work undertaken by BTIPL for shipping lines. These functions were performed completely by the agent independently and not performed on behalf of the principal. The same was stated to be performed as per local trade requirements. Another undisputed fact was that the impugned charges were offered to tax by the agent as an independent entity in its books of accounts and treating the same as the income of the principal would amount to double taxation. The impugned services being offered by the agent was local value-added services warranted by local trade / shipping company requirements. The principal assessee was not connected to this activity and the same were not covered under the contractual terms also.

10. A copy of the reason recorded by Ld. AO to reopen the case of the assessee has been placed before us. Upon perusal of the same, we find that the above two statements forms the very basis of reopening the case of the assessee. The Ld. AO has referred to the above statements and formed the reasons of escapement of income as under: -

From the above invoices and sworn statements recorded from relevant personnel regarding the documentation charges, it is found that the above said charges was collected by M/s. Bengal Tiger Line India Private Limited for issuing No Objection Certificate, for clearing containers out of Kolkata docks and late gate-in permission extended to customers at Cochin terminal. Since, the said documentation charge was collected by M/s. Bengal Tiger Line India Private Limited on behalf of Bengal Tiger Line Pte Singapore, the income collected out of documentation charge should be taxed in the hands of M/s. Bengal Tiger Line Pte Ltd at the rate of 40 percent as income accrued / arised in India, though the income earned from the documentation charges is declared in the financials of M/s. Bengal tiger India Private Limited. From the available records, it is believed that the income earned out of documentation charge of Rs.1,39,69,520/- which was chargeable to tax has escaped the assessment for the relevant AY 2012-13.

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B. Vessel handling Charges:

From the above invoices and sworn statements recorded from relevant personnel regarding the documentation charges, it is found that the above said charges was collected by M/s. Bengal Tiger Line India Private Limited for appointing of Stevedore in places like Mangalore and Goa for handling of vessels. Since, the said vessel handling charges was collected by M/s. Bengal Tiger Line India Private Limited on behalf of Bengal Tiger Line Pte Singapore, the income collected out of vessel handling charges should be taxed in the hands of M/s. Bengal Tiger Line Pte Ltd at the rate of 40 percent as income accrued/arised in India, though the income earned from the documentation charges is declared in the financials of M/s. Bengal tiger India Private Limited. From the available records, it is believed that the income earned out of vessel handling charges of Rs.3,25,300/- which was chargeable to tax has escaped the assessment for the relevant AY 2012-13.

4. Based on the above reasons, I have a reason to believe that income chargeable for taxation out of the transactions as detailed above, has escaped from the assessment. In view of the same, I'm satisfied that this is a fit case for issue of notice under section 148 of the Income tax Act.

It could thus be seen that the two statements forms the very basis of formation of belief that certain income escaped assessment in the hands of the principal assessee and the same led to reopening the assessment of the assessee. However, as already noted by us, in both the statements, it has been confirmed that the documentation and vessel handling charges were collected as per local trade practices and these charges did not belong to the principal assessee. The same was accounted for in the books of accounts and offered to tax as such by the

agent. Taxing the same in the hands of the assessee would amount to double taxation. The collection of impugned charges was not part of contractual terms. However, Ld. AO held an opinion that these charges would be taxable in the hands of the principal assessee which is subjected to higher tax rate of 40% as against agent who is chargeable at lower tax rate of 30% though Ld. AO has admitted the fact that these charges have already been offered to tax by the agent. Upon perusal of the two statements, we conclude that there was no material before Ld. AO to reach a conclusion that the said income belonged to the assessee and the same was taxable in the hands of the assessee. In fact, there is no tangible material before Ld. AO to reach such a conclusion and the conclusion is merely based on the opinion of the AO that certain income should be taxable in the hands of one person instead of another person.

11. In our considered opinion, one of the primary essential conditions to reopen the assessment are that Ld. AO has reasons to believe that certain income has escaped assessment in the hands of the assessee. The fact of escapement of income is *sine qua non* to acquire this jurisdiction. Until and unless there is escapement of income, the reopening could not be resorted to under law. We find that in the present case, there are no reasons before Ld. AO to reach such a belief that documentation / vessel handling charges belonged to the assessee and the agent wrongly offered the same to tax. Secondly, there is no escapement of income since the income has already been offered to tax by the agent. Merely because tax rate was higher for principal, the same could not lead to a conclusion that there was escapement of income unless it was conclusively shown that the income of the principal was

erroneously offered to tax by the agent. We find that there is no such material before Ld. AO to reach such a conclusion.

The Explanation-2 to Section 147 provide for cases wherein it is deemed that income chargeable to tax has escaped assessment. The clause (c) of this explanation, inter-alia, provides that where an assessment has been made, but – (i) income chargeable to tax has been under assessed; or (ii) such income has been assessed at too low a rate then it shall be deemed case of escapement of income. However, none of the cases apply to the facts of the present case since the income has already been offered to tax in the hands of the agent at applicable rate of tax. Secondly, there is no material to reach a conclusion that the aforesaid income belonged to the assessee. This being the case, reassessment jurisdiction, as acquired by Ld. AO, could not be said to be valid in the eyes of law and the same is, therefore, liable to be termed as bad-in-law. The fulfilment of primary conditions viz. reasons to believe and escapement of income is *sine qua non* to acquire the reassessment jurisdiction. If the same are not fulfilled, no valid jurisdiction could be said to have been acquired by Ld. AO. Simply because tax rate was higher for principal assessee, the same could not be a ground to tax the same in the hands of the assessee unless it was demonstrated that the said income was collected by the agent on behalf of the principal and this income belonged to principal only. We find that there is no material before Ld. AO to reach the said conclusion. Therefore, the assessment framed by Ld. AO is liable to be quashed on this score only. We order so.

12. Our view is duly supported by the cited decision of Hon'ble Bombay High Court in **Techpac Holdings Ltd. vs CIT (67 Taxmann.com 280)**

wherein it was, inter-alia, held that unless certain income escaped assessment in the hands of the assessee, reassessment proceedings were unsustainable. Similar is the ratio of decision of same court in **The Swastic Safe Deposit and Investments Ltd. (107 Taxmann.com 421)** wherein it was held that it was incumbent for Ld. AO to prima-facie show that income had escaped assessment. The Assessing Officer's attempt of further verification would amount to rowing inquiry. The Hon'ble Gujarat High Court in the case of **Vinayak Builders (27 Taxmann.com 116)** held that there should be independent application of mind by Ld. AO to reach a conclusion of escapement of income. All these case laws support the case of the assessee. Considering the same, we would hold that the reassessment proceedings, for all the years, are bad-in-law and thus, liable to be quashed.

13. Since the reasons of formation of belief of escapement of income fails, consequently, the assessment of Shipping freight income, as done by Ld. AO, would be unsustainable in terms of the decision of Hon'ble Delhi High Court in **Ranbaxy Laboratories Ltd. (12 Taxmann.com 74)**; the decision of Hon'ble Bombay High Court in **Jet Airways (I) Ltd. (195 Taxman 117);** the decision of Hon'ble Delhi High Court in **Blackstone Capital Partners (Singapore) Vi Fdi Three Pte. Ltd. (146 Taxmann.com 569).** In the case law of **Ranbaxy Laboratories Ltd. (supra),** it was held that the legislature could not be presumed to have intended to give blanket powers to Assessing Officer that on assuming jurisdiction u/s 147 regarding assessment or reassessment of escaped income, he would keep on making roving inquiry and thereby including different items of income not connected or related with reasons to believe, on the basis of which he assumed jurisdiction. Therefore, for

every new issue coming before Assessing Officer during course of proceedings of assessment or reassessment of escaped income and which he intends to take into account, he would be required to issue a fresh notice under section 148. If no disallowance was made for items which led to formation of belief of escapement of income then the reasons for initiation of reassessment proceedings would cease to survive and therefore, there was no justification to make addition on other account. This decision follows the ratio of decision of Hon'ble Bombay High Court in **Jet Airways (I) Ltd. (195 Taxman 117).** These case laws are binding on us. Therefore, in the absence of any contrary decision shown to us, it was to be held that since the reassessment fails on recorded reasons, the assessment of shipping freight income would be out of reassessment jurisdiction of Ld. AO and therefore, liable to be deleted. We order so.

14. In the written submissions, Ld. CIT-DR has submitted that the no scrutiny assessment was framed in the hands of the assessee in earlier years and therefore, there was no question of change of opinion. However, the case of the assessee is not change of opinion but the case of the assessee rest on the reasoning that there was no enough material before Ld. AO for formation of belief of escapement of income. The Ld. CIT-DR has also referred to agency agreement, the financials of the agent, note on business activity and submissions made by the agent before Ld. AO to support the argument that the agent was to perform the functions as per the terms and agreement as agent only and therefore, any revenue earned would necessarily belong to principal only. The Ld. CIT-DR has also referred to the submissions made by agent to Ld. AO on 11.01.2016 during the course of regular assessment

proceedings which would support the fact that all the activities including impugned activities were carried out by the agent on behalf of the principal only. The agent could not do any such activities independently but the same were on behalf of the principal. However, we have already negated this conclusion since there is nothing to support that argument in the recorded statement. The same is not backed by the terms of the agency agreement.

15. The Ld. CIT-DR has also averred that the certificate issued u/s 172 was kind of provisional certificate issued to the assessee for port clearance. However, this argument run contrary to CBDT Circular No.30/2016 dated 26-08-2016 which clarifies that this certificate is to be issued only after examining the applicability of DTAA to the foreign shipping company. Therefore, this argument cannot be accepted. The relevant extract of the circular is as under: -

> 6. Circular No.732 dt. 20.12.1995 provides for issue of Annual NOC (i.e., DIT relief certificate) by AO after carefully verifying the applicability of the DTAA. Annual NOC is to be issued in cases where no tax is leviable on foreign shipping company due to the DTAA. The AO before whom the request for Annual NOC is filed by the foreign shipping company should accordingly examine the applicability of DTAA to the foreign shipping company before issue of annual NOC.

In the light of clear instructions by the Board, the certificate as issued to the assessee could not be considered to be a mere provisional certificate.

16. Finally, in the backdrop of our aforesaid findings and conclusions, it was to be held that the reassessment proceedings as well as consequential assessment framed therein are unsustainable in law and accordingly, liable to be quashed. We order so. The corresponding legal grounds raised by the assessee stand allowed.

Adjudication on Merits

17. Though we have quashed the assessment order, delving into the merits of the case has been rendered infructuous. However, since the issue on merits has been dealt with in an elaborate manner in the impugned orders and lengthy arguments have also been made before us by way of oral submissions as well as written submissions, we deal with the issue on merits also.

18. We find that India has entered into Double Taxation Avoidance Agreement (DTAA) with Singapore which is effective from 27.05.1994 for avoidance of double taxation and for prevention of fiscal evasion with respect to taxes on income. As per Article 7, business profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. Similarly, in terms of Article 13, gains from the alienation of shares acquired before 1st April 2017 in a company which is a resident of a Contracting State shall be taxable only in the Contracting State in which the alienator is a resident. In terms of Article 14, Income derived by an individual, who is a resident of a Contracting State, from the performance of professional services or other independent activities of a similar character shall be taxable only in that State except in certain circumstances as enumerated wherein such income may also be taxed in the other Contracting State. In terms of Article 15, subject to the provisions of Articles 16, 18, 19, 20 and 21, salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State except in certain situations. Similarly, in terms of Article 19, any pension, other than a pension referred to in Article 18 or any annuity

derived by a resident of a Contracting State from sources within the other Contracting State may be taxed only in the first-mentioned State. Thus, different expression has been used in these articles. Some of the articles provide that certain income would be taxable only in certain jurisdiction (subject to certain exceptions) whereas some of the articles provide that the said income may be taxable in any of the state. The different Articles provide different taxation rights of different sources of income as agreed upon by both the countries. However, it is nowhere a condition that such income should necessarily be taxed in the state having jurisdiction to tax such an income. These articles merely allocate taxing rights between the two countries. The income may or may not be actually taxed by that jurisdiction.

19. The relevant Article 8, which is the subject matter of present appeals, read as under: -

ARTICLE 8
SHIPPING AND AIR TRANSPORT

"1. Profits derived by an enterprise of a Contracting State from the operation of ships or aircraft in international traffic shall be taxable only in that State.,

A bare reading of the above Article would show that the exclusive right of taxation of profits derived by an enterprise of a contracting state from the operation of ships and aircraft in international traffic has been given to the contracting state only. In other words, in the present case, profit of Singapore Entity operating the shipping activities would be taxable only in Singapore to the exclusion of India. Conversely, profit of Indian entity operating the stated activities in international traffic would be taxable in India only. Thus, the taxation rights of these activities vest with the contracting state to the exclusion of the other. The said Article, in our considered opinion, does not grant any exemption of income and the

same is not in the nature of exemption provision. The same merely allocates the taxation rights of shipping income. We are unable to interpret the stated article in any other manner as urged by Ld. CIT-DR. Therefore, corresponding pleas of revenue, in this regard, stand rejected.

20. The whole case of the revenue draws strength from the argument that exception to Article 8 has been provided in Article 24 which read as under: -

ARTICLE 24
LIMITATION OF RELIEF

Where this Agreement provides (with or without other conditions) that income from sources in a Contracting State shall be exempt from tax, or taxed at a reduced rate in that Contracting State and under the laws in force in the other Contracting State the said income is subject to tax by reference to the amount thereof which is remitted to or received in that other Contracting State and not by reference to the full amount thereof, then the exemption or reduction of tax to be allowed under this Agreement in the first mentioned Contracting State shall apply to so much of the income as is remitted to or received in that other Contracting State.

The primary condition for application of this Article is that where this agreement i.e., DTAA provides that the income from sources in a contracting state shall be exempt from tax or taxed at reduced rate in that contracting state and under the laws in force in the other contracting state, the said income is subject to tax by reference to the amount thereof which is remitted to or received in that other Contracting State and not by reference to the full amount thereof, then the exemption or reduction of tax to be allowed under this Agreement in the first mentioned Contracting State shall apply to so much of the income as is remitted to or received in that other Contracting State. The first condition, therefore, is that the income should be sourced in India. The second condition is that the income should be exempt or taxed at a reduced rate by virtue of any article under the India-Singapore DTAA and lastly, the

income should be taxed on receipt basis in Singapore. If all the conditions are cumulatively satisfied, only then this Article could be invoked against the assessee. As already noted, Article 8 vests taxation right of shipping income to the Singapore Authority and the same do not provide for any exemption or reduced rate of taxation to the assessee. Therefore, the second condition is not satisfied in the present case. The third condition is that the income of non-resident should be taxed on receipt basis in Singapore.

21. During the course of proceedings before lower authorities, the assessee placed on record the letter dated 17.02.2016 issued by The Inland Revenue Authority of Singapore (IRAS) which has clarified that the income of a Singaporean Company from the operation of ships in international traffic would be taxable in Singapore on accrual basis. The same has been placed on page nos. 54 to 56 of the paper book. In letter dated 17.02.2016, it has been stated as under: -

> Based on the information available, we confirm that the freight income will be regarded as Singapore Sourced income and will be brought to tax on accrual basis (i.e., not remittance basis)

The same has further been clarified in letter dated 17.09.2018 as under:

> 5. We regard shipping enterprises operating in Singapore as carrying on business operations substantively in Singapore, managing its fleet of vessels to provide international transport services to its customers around the world. While their vessels may be plying in international water or other coastal waters, the shipping income earned by these shipping enterprises from providing the international transport services is taxable in Singapore in full regardless of whether the income is received in or remitted to Singapore. Hence, we hold the position that Article 24(1) does not apply to the shipping income received by a Singapore shipping enterprise from Indian customers as the shipping income is taxable in Singapore on an arising basis when the income is earned by the shipping enterprise regardless of whether the shipping income is received in or remitted to Singapore
> 6. Since Article 24(1) is not applicable, the provisions of Article 8(1) would apply without any limitation. Article 8 of the DTA states that profits derived by an enterprise of a contracting state from the operation of ships or aircrafts in international traffic shall be taxable only in that state. As such, the shipping profits

> derived by a Singapore resident shipping enterprise from the operation of ships in international traffic shall be taxable only in Singapore in accordance with Article 8(1). Article 8(1) of the DTA does not confer India the right to tax such profits.

Though the revenue has disputed this position and submitted that this certificate could not be relied upon and the same run contrary to statutory provisions of Singapore Income Tax Act. This position could be accepted only if the any evidence controverting the same was brought on record by revenue to support the same. We do not find any such evidence on record. Therefore, in the absence of any such evidences controverting the certificates issued by IRAS, this plea could not be accepted.

22. In the light of the above stated facts, we would hold that Article 24 would have no application in the case of the present assessee but Article 8 would apply and the assessee would be eligible to claim the benefit of the same since it is more beneficial vis-à-vis statutory provisions of Income Tax Act, 1961. The conditions of Article 24, in our considered opinion, have not been fulfilled in the present case and therefore, the invocation of the same against the assessee could not be held to be justified.

23. Another line of agreement was that DTAA do not provide for double non-taxation of the income. However, we find that the provisions of Sec. 13F of the Singapore Income Tax Act were already in existence since 01-04-1991 whereas DTAA between the two countries has been signed subsequently on 27-5-1994. Despite that, both the authorities chose not to alter the taxation right of shipping income which is generally available to the country of residence. The DTAA is in the nature of bilateral agreement wherein the two countries have specifically agreed on the

taxing rights of particular streams of income. The same has to be given effect to in full, whatever the consequences may be.

24. At this juncture, it would be useful to quote the decision of Hon'ble Gujarat High Court in the case of **M.T. Maresk Mikage vs. DIT (72 Taxmann.com 359)** as referred to by Ld. AR. Upon study, we find that this decision has been rendered on similar factual matrix. In this case, one Singapore based entity by the name ST Shipping and Transport Private Limited undertook voyages from various Indian ports and earned income which was claimed exempt in terms of Article 8 of Double Taxation Avoidance Agreement ('DTAA' for short) between India and Singapore. According to ST Shipping, such income was taxable only in Singapore and therefore, exempt from tax regime under the Indian Income Tax Act. However, Ld. AO denied the same by virtue of the provisions contained in Article 24 therein. He noted that the fright receipts were remitted to London and not to Singapore. In his opinion, as per Article 24 of DTAA, the funds had to be remitted where the residents of the country is claiming benefit of the agreement, which conditions in the present case was not satisfied. Resultantly, the income was computed at 7.5% of freight income. The assessee filed a petition u/s 264 and produced letter dated 09.01.2013 issued by Inland Revenue Authority of Singapore wherein it was stated that the income in question derived by the ST Shipping would be considered to be income accruing in or derived from a business carried on in Singapore and the income would therefore be assessable to tax in Singapore on accrual basis. This was in response to the petitioner's letter to the said Revenue authority of Singapore concerning the applicability of Article 24 of the DTAA.

However, the Commissioner rejected the petition on the ground that the income was not remitted to Singapore.

25. The Hon'ble Court, after considering rival arguments and after considering various judicial pronouncements, quashed the assessment order as under: -

> 11. In the background of such facts and the DTAA, learned counsel Shri Bandish Soparkar for the petitioner raised following contentions:—
> I. The ST Shipping is a company liable to be taxed in Singapore according to the local laws. The income earned by the company in its shipping operations in India would also be accordingly taxed. In terms of Article 8 of the DTAA therefore, the same could not be taxed in India.
> II. The interpretation adopted by the Revenue authorities to Article 24 of DTAA is wholly erroneous. Clause (1) of Article 24 would apply only in a case where such income is to be taxed in Singapore only on remittance basis, a condition not fulfilled in the present case. In this context, counsel placed heavy reliance on the certificate dated 09.01.2013 issued by the Inland Revenue Authority of Singapore. Counsel submitted that with respect to other assessments, the assessee had first filed appeal before the Commissioner and after rejection of such appeal carried the matter before the Tribunal. The Tribunal allowed the appeal on the ground that Article 24 of DTAA was wrongly applied by the Revenue authorities. Department has not filed appeal against such judgment of the Tribunal.
> III. Counsel submitted that even if such income is exempt from tax under the income-tax law in Singapore, the same cannot be taxed in India. In this context, counsel relied on the decision of Division Bench of Delhi High Court in case of Emirates Shipping Line, FZE v. Asstt. DIT [2012] 349 ITR 493/211 Taxman 82/23 taxmann.com 400 (Delhi) and of the Supreme Court in case of Union of India v. Azadi Bachao Andolan [2003] 263 ITR 706/132 Taxman 373.
> 12. On the other hand, learned counsel Shri Nitin Mehta for the department opposed the petition contending;
> I. The revision petition before the Commissioner was not maintainable. The petitioner having first filed appeal before the appellate Commissioner, could not have thereafter filed the revision petition.
> II. The Department's interpretation of Clause-24 of the DTAA is correct. In the present case, admittedly, the income had not been remitted to Singapore. By virtue of Clause (1) of Article 24 therefore, Article 8 of DTAA became inapplicable.
> III. He contended that the certificate dated 09.01.2013 issued by inland Revenue authority of Singapore is contrary to section 10 of the Singapore Income Tax Act, which would make it clear that unless income of any person accrues in or is derived from Singapore, the same would be taxed only on the basis of actual receipt.
> IV. Even otherwise, there is no evidence to show that the assessee had offered such income to tax in Singapore and that the assessee was actually taxed on such income. If for any reason, the income was exempt from payment of tax, Indian Revenue authorities would be entitled to charge the tax on such income.
> 13. Having thus heard learned counsel for the parties and having perused documents on record, we may first dispose of the Revenue's objection to the maintainability of the revision petition.

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15. This brings us to the core issue strenuously debated by both sides viz. that of applicability of Article 8 vis-a-vis Article 24 of DTAA. We may quickly refresh the facts. ST Shipping is a company based in Singapore. Through the shipping business carried out at Indian ports, ST Shipping earned income, on which, it claims immunity from Indian income tax. The Revenue contends that the remittance of such accrued income not having taken place at Singapore, Article 24 will apply and consequently Article 8 providing for avoidance of table taxation would not apply.

16. The fact, that the income in question which arises out of shipping operations by virtue of Clause (1) of Article 8 of the DTAA would be taxable only in Singapore, is not in serious dispute. The moot question therefore is whether operation of Article 8 is ousted by virtue of Clause (1) of Article 24. As noted, Article (24) of DTAA pertains to limitation of relief. Under clause (1) thereof where the agreement provides that the income from sources in contracting states (in the present case, India) shall be exempt from tax or tax at a reduced rate and under the laws in force in other contracting states (i.e. Singapore), such income is subject to tax by reference to the amount thereof which is remitted or received in that State and not by reference to the full amount thereof then the exemption or reduction of tax under the agreement would be limited to so much of the income as is remitted to or received in that contracting State. In plain terms therefore, if the income in question was taxable in Singapore on the basis of receipt or remission and not by reference to the full amount of income accruing, clause (1) of Article 24 would apply and dependent on the facts of the case, exemption as per Article 8 either in whole or in part would be excluded.

17. It is, in this context, that the certificate dated 09.01.2013 issued by the Inland Revenue Authority of Singapore assumes significance. In the said certificate, as noted, it was certified that the income in question derived by ST Shipping would be considered as income accruing in or derived from the business carried on in Singapore and such income therefore, would be assessable in Singapore on accrual basis. It was elaborated that the full amount of income would be assessable to tax in Singapore not by reference to the amount remitted to or received in Singapore. In fact, the certifying authority went on to opine that in view of such facts, Article 24(1) of the DTAA would not be applicable and consequently, Article 8 would apply.

18. To this later opinion of the Revenue authority of Singapore, we may not be fully guided since it falls within the realm of interpretation of the relevant clauses of DTAA. However, in absence of any rebuttal material produced by the Revenue, we would certainly be guided by the factual declaration made by the said authority in the said certificate and this declaration is that the income would be charged at Singapore considering it as an income accruing or derived from business carried on in Singapore. In other words, the full income would be assessable to tax on the basis of accrual and not on the basis of remittance. This certificate was before the Commissioner while he passed the impugned order. The contents of this certificate were not doubted. If that be so, what emerges from the record is that the income in question would be assessable to tax at Singapore on the basis of accrual and not remittance. This would knock out the very basis of the Assessing Officer and Commissioner for invoking clause (1) of Article 24 of DTAA. Both the authorities considered the question of remittance of income as the sole requirement for invoking Article 24(1) of DTAA an interpretation which according to us does not flow from the language used. As noted the essence of Article 24(1) is that in case certain

income is taxed by a contracting State not on the basis of accrual, but on the basis of remittance, applicability of Article 8 would be ousted to the extent such income is not remitted. This clause does not provide that in every case of non-remittance of income to the contracting state, Article 8 would not apply irrespective of tax treatment such income is given. When in the present case, we hold that the income in question was not taxable at Singapore on the basis of remittance but on the basis of accrual, the very basis for applying clause (1) of Article 24 would not survive. The contention of Shri Mehta for revenue that the certificate of the Singapore revenue authorities is opposed to provisions of section 10 of the Singapore Income Tax Act also cannot be accepted. The Revenue does not question genuineness of the certificate. It cannot dispute the contention on the ground that the same are opposed to the statutory provision.

19. By way of a reference, we may notice that the Tribunal also in case of this very assessee in case of Alabra Shipping Pte Ltd. v. ITO, International Taxation [2015] 62 taxmann.com 185 (Rjk. - Trib.) has taken a somewhat similar view by observing as under:—

> "6. As a plain reading of Article 24(1) would show, this LOB clauses comes into play when (i) income sourced in a contracting state is exempt from tax in that source state or is subject to tax at a reduced rate in that source state, (ii) the said income (i.e. income sourced in the contracting state) is subject to tax by reference to the amount remitted to, or received in, the other contracting state, rather than with reference to full amount of such income; and (iii) in such a situation, the treaty protection will be restricted to the amount which is taxed in that other contracting state. In simple words, the benefit of treaty protection is restricted to the amount of income which is eventually subject matter of taxation in the source country. This is all the more relevant for the reason that in a situation in which territorial method of taxation is followed by a tax jurisdiction and the taxability for income from activities carried out outside the home jurisdiction is restricted to the income repatriated to such tax jurisdiction, as in the case of Singapore, the treaty protection must remain confined to the amount which is actually subjected to tax. Any other approach could result in a situation in which an income, which is not subject matter of taxation in the residence jurisdiction, will anyway be available for treaty protection in the source country. It is in this background that the scope of LOB provision in Article 24 needs to be appreciated."

20. Under the circumstances, in our opinion, Assessing Officer and the Commissioner committed serious error in passing the impugned orders. Before closing, we may briefly touch on one more aspect sought to be raised by the Revenue viz. of the actual tax being paid by the assessee on such income at Singapore. On the ground that such income is exempt from payment of tax, the Revenue desired to impose tax in India. In this context, the petitioner has relied on the decision of Delhi High Court in case of Emirates Shipping Line, FZE (supra), in which it was held that the assessee, a UAE based shipping company, whose income from such business was exempt from tax in such country, would still not be liable to pay tax in India by virtue of Article 8 of the DTAA between the said two countries. It was held that a person does not have to actually pay taxes in other country to be entitled to benefit of DTAA.

21. We may notice that a somewhat similar issue came up before this Court in case of DIT (International Taxation) v. Venkatesh Karrier Ltd. [2012] 349 ITR 124/206 Taxman 488/19 taxmann.com 291 (Guj.) , in which the Court observed as under:—

> "10. After taking into consideration the above circulars issued by the Board and also the provisions contained in Article 8 of the DTAA, we find that both the Tribunal below and the CIT (Appeals) rightly held that in such a situation, the owner of the ship being admittedly a resident of UAE, there was no scope of taxing the income of the ship in any of the ports in India. The agreement between the two countries has ousted the jurisdiction of the taxing officers in India to tax the profits derived by the enterprise once it is found that the ship belongs to a resident of the other contracting country and such position has also been clarified by the Circulars issued by the Board as indicated above."
>
> 22. In the present case, however, we are not inclined to conclude this issue since this was not even a ground on which either the Assessing Officer or the Commissioner has refused to grant the benefit to the petitioner. It is a ground sought to be raised for the first time before us by the Revenue, for which, neither full factual evidence, nor legal foundation is laid. We leave such an issue open to be decided in the appropriate case.
>
> 23. In the result, petition is allowed. Impugned order dated 25.03.2014 passed by the Commissioner is set aside. Resultantly, order of assessment dated 26.12.2011 is also quashed. Petition disposed of accordingly.

We find that the aforesaid decision squarely applies to the fact of the present case. The Hon'ble Court, relying upon certificate of Revenue Authority of Singapore, noted that full income would be assessable in Singapore on accrual basis. In the absence of any rebuttal material produced by the Revenue, the factual declaration made by the said authority was to be accepted. Further, the genuineness of the certificate was not doubted. We find that similar facts exist before us and the ratio of this case law squarely applies to the facts of present case. The revenue's argument that the certificate was opposed to the provisions of Section 10 of the Singapore Income Tax Act was not accepted by Hon'ble Court. The Hon'ble Court also referred to the decision of Hon'ble Delhi High Court in Emirates Shipping Line, FZE wherein it was held that the assessee, a UAE based shipping company, whose income from such business was exempt from tax in such country, would still not be liable to pay tax in India by virtue of Article 8 of the DTAA between the said two countries. It was held that a person does not have to actually pay taxes

in other country to be entitled to benefit of DTAA. The Hon'ble Court also noted the decision in DIT (International Taxation) v. Venkatesh Karrier Ltd. [2012] 349 ITR 124 wherein it was held that the owner of the ship being admittedly a resident of UAE, there was no scope of taxing the income of the ship in any of the ports in India. The agreement between the two countries has ousted the jurisdiction of the taxing officers in India to tax the profits derived by the enterprise once it is found that the ship belongs to a resident of the other contracting country and such position has also been clarified by the Circulars issued by the Board as indicated above. This case law clearly supports the case of the assessee, on merits. The same being binding judicial precedent, we are bound to follow the same.

26. We find that Ld. AO, taking similar view as taken in AY 2015-16, brought to tax the impugned income in the hands of the assessee. We find that the assessee's appeal for AY 2015-16 has already been adjudicated by Tribunal in assessee's favor in IT (TP) No.11/Chny/2020 order dated 06-11-2020 as under: -

> **13.** As regards the main issue before us, we have considered arguments of counsels for both sides and perused materials on record along with relevant case laws cited before us. There is no dispute to the fact that the assessee is a tax resident of Singapore. Even the factual finding recorded by the ld. DRP was that the assessee is a tax resident and does not have a PE in India. Undisputedly, the activities carried out by the assessee in India are covered under Article 8 of India-Singapore DTAA. As per Article 8 of India-Singapore DTAA, the profits derived by an enterprise of a Contracting State from the operation of ships or aircraft in international traffic shall be taxable only in that State. Therefore, by virtue of Article 8 of India-Singapore DTAA, the international shipping income of a resident of a Contracting State is taxable only in that State *i.e.,* the shipping income of a Singaporean resident by the operations of ships in international waters is taxable only in Singapore on accrual basis. Similarly, Article 24 of India-Singapore DTAA limits the relief on the basis of income from sources in a Contracting State is exempt from tax or taxed at a reduced rate in that Contracting State and under the laws in force in the other Contracting State, the said income is subject to tax by reference to the amount thereof which is remitted to or received in that other Contracting State and not by reference to the full amount thereof, then the exemption or reduction of

tax to be allowed under this agreement in the first-mentioned Contracting State shall apply to so much of the income as is remitted to or received in that other Contracting State. From the combined reading of Articles 8 and 24 of India-Singapore DTAA, it is very clear that article 8 provides exclusive right of taxation to country of residence, *i.e.* Singapore on accrual basis. Similarly, article 24 limits the exemption, in case income is exempt or taxed at reduced rate in source country, *i.e.* in India and further such income is taxable in country of residence on receipt basis. The AO, referring to Article 24 of the tax treaty, was of the opinion that although global shipping income of a Singapore tax resident is taxable only at resident State, but by virtue of Article 24 exemption would apply only to the extent of the amount repatriated/remitted to Singapore. In our view, the above conclusion of the AO is under the misconception of the provisions of India-Singapore tax treaty, because as per Article 8 of India-Singapore tax treaty, it was clearly specified that only the resident country has the right of taxation of freight income earned from operation of ships in international traffic. As may be seen from the provisions of Article 8(1), we are of the considered view that it is not an exemption provision but an enabling provision which provides an exclusive right of taxation of income to the residence country. Further, by entering into treaty with Singapore, India has given up its right to tax shipping income of a non-resident in India. Therefore, any income of a non-resident shipping company which is a tax resident of Singapore is liable to tax only in Singapore but not in India.

14. The provision of Article 24 of India-Singapore DTAA is applicable for income which is exempt from tax as per the tax treaty. As has been clarified above, it may be noted that Article 8 is unambiguously not an exemption provision but only a provision which provides a taxation right to the country of residence. Therefore, the international shipping income earned by the assessee is not exempted in India, whereas it is taxable only in the country of residence *i.e.,* Singapore. From the above, it is very clear that exclusive right of taxation in one Contracting State is not the same as the specific exemption being available in other Contracting State. Further, shipping income dealt with in Article 8 states that profits derived by an enterprise of a Contracting State by operation of ships in international traffic shall be taxable only in the State of residence. The word 'only' debars the other Contracting State to tax the shipping income; *i.e.* India is precluded from taxing the shipping income even if it is sourced from India. When India does not have any taxation right on a shipping income of non-resident entity, exemption or reduced rate of taxation in the source state is of no relevance because once the taxing right has been given off, the other conditions like exemption or reduced rate of tax has no bearing on the taxability of particular income in other Contracting State. From the reading of Article 8, which clearly envisages derivable or jurisdictional rights for taxing the income and as per which India has no jurisdiction for taxing any income which are covered by Article 8. Therefore, we are of the considered view that international shipping income of a non-resident of a Contracting State is taxable only in that state and in this case, the assessee being tax resident of Singapore, shipping income earned from India on international waters is taxable only at Singapore on accrual basis.

15. Having said so, let us examine the applicability of Article 24 of India-Singapore DTAA. Article 24 of India-Singapore DTAA contemplates twin conditions for its applicability. The first condition is that income sourced in a Contracting State and such income should be exempt or taxed at a reduced rate by virtue of any article under the India-Singapore DTAA. As we noted earlier Article 8 of India-Singapore DTAA does not provide for exemption or reduced rate of taxation of such income. It

is crucial to note that Article 8 of India-Singapore DTAA contemplates the taxation rights of a particular income in particular State. As per said article, the country of residence is having exclusive right over taxation of shipping income and that being the case, the assessee being resident of Singapore vest with right to tax such income under the Singapore Income Tax laws. Accordingly, the shipping income earned in India is neither exempt nor taxed at reduced rate as per Article 8 of DTAA which is a condition precedent for applicability of Article 24. This fact has been clarified by the IRAS *vide* its letter dated 17-9-2018, where it was specifically stated that provisions of Article 24 of India-Singapore DTAA would not be applicable to the shipping income. The second condition that is required to be looked into before applying Article 24 of DTAA is income of the non-resident should be taxable on "receipt" basis in Singapore. As we have already noted in earlier para of this order, under Article 8 of India-Singapore DTAA, global shipping income of a tax resident of Singapore is only taxable in the country of residence. Once the income is taxable in the country of residence on "accrual" basis, the second condition prescribed under Article 24 of India-Singapore DTAA is not satisfied. This fact is further strengthened by the letter of the Inland Revenue Authority Singapore (IRAS) letter 17-9-2018, where it was clarified that the income of a Singaporean company from the operation of ships in international traffic is taxable in Singapore on "accrual" basis. Thus, both the conditions of Article 24 is not satisfied in the present case. We, therefore are of the considered view that the AO was erred in invoking Article 24 of India-Singapore DTAA to tax the income earned by the assessee from shipping operations in India.

16. The interplay between Articles 8 and 24 of India-Singapore DTAA has been considered by various Tribunals and Courts. As per the settled position of law, the Article 24 Limitation of Benefit is not applicable once shipping income of a non-resident is taxable on "accrual" basis in the country of residence. This principle is well settled by the decision of the Hon'ble Gujarat High Court in the case of *M.T. Maersk Mikage* (*supra*), where the Hon'ble court clearly held that where income earned by Singapore based shipping company through shipping business carried out at Indian Ports, was not taxable at Singapore on basis of remittance but on basis of accrual, clause (1) of Article 24 of Indo-Singapore DTAA would not apply to deny benefit of Article 8 of Indo-Singapore DTAA to said company. The Hon'ble High Court while considering the issue has analyzed the provisions of Article 8 *vis-a-vis* Article 24 of DTAA and after considering relevant facts, the court held that in case certain income is taxed by a Contracting State not on the basis of accrual but on the basis of remittance, applicability of Article 8 would be ousted to the extent such income is not remitted. The court further held that this clause does not provide that in every case of non-remittance of income to the Contracting State, Article 8 would not apply irrespective of tax treatment such income is given. The Hon'ble court while arriving at the above conclusion has taken support from the letter issued by Singapore Revenue Authority clarifying the taxation position of global shipping income of tax resident of Singapore and held that when shipping income of a tax resident of Singapore was taxable at Singapore on the basis of accrual, the very basis of applying Article 24 would not survive. This issue was further considered by the Mumbai Bench of ITAT in the case of *APL Co. Pte Ltd.* (*supra*), where it was held that in order to invoke provisions of Article 24, two conditions need to be fulfilled. Firstly, income earned from source State (India) is exempt from tax or is taxed at a reduced rate in source State (India) as per DTAA; and secondly as per the laws in force of resident state (Singapore), such income is subject to tax by reference to amount thereof which is remitted to or received in resident State and

not by reference to full amount thereof. The Tribunal further noted that the key phrases which need to be borne in mind while understanding Article 24 is "under the laws in force in other contracting state" (Singapore). Here, in this case, the income of assessee company from shipping operations is not taxable on remittance basis under the laws of Singapore, albeit is liable to be taxed in principle on accrual basis by virtue of the fact that this income under the income tax laws of Singapore is regarded as "accruing in or derived from Singapore". A similar view has been expressed by the Hyderabad Bench of the Tribunal in the case of *Far Shipping (Singapore) Pte Ltd.* (*supra*). Further, the Mumbai Bench of the Tribunal in the case of *D.B. International (Asia) Ltd.* (*supra*) has dealt with the interplay between the Articles 13 and 24 and after considering relevant clauses categorically held that income derived by a resident of a Contracting State shall be taxable only in that state in view of the clear and unambiguous terms of DTAA. Therefore, we are of the considered view that in terms of Article 8 of India-Singapore DTAA, global income of a tax resident of Singapore from shipping operations, even though which is earned outside Singapore is taxable only in Singapore on accrual basis and consequently Article 24 of India-Singapore DTAA cannot be invoked to deny the benefit of exemption merely for the simple reason that the said income was not taxed in Singapore by virtue of separate exemptions provided under Singapore Income Tax Act.

17. In this case, the Assessing Officer has attempted to deny the exemption claimed by the assessee under Article 8 by invoking Article 24 of India-Singapore tax treaty on a misconception of two clauses of India-Singapore DTAA by referring to the provisions of Section 13F of the Singapore Income Tax Act, ignoring the fact that Section 13F of the Singapore Income Tax Act was already in existence since 1-4-1991 and as such the articles provided in India-Singapore DTAA which was came into existence from 27-5-1994 was inserted by the Competent Authorities of both the Contracting States after thoroughly considering the provisions of Section 13F of Singapore Income Tax Act and further choose not to alter the taxation right of shipping income which is generally available to the country of residence. We further noted that two sovereign nations have entered into a bilateral agreement and specifically agreed on the taxing rights of particular streams of income, the provisions of such agreement should be merely given effect to and as such the action of the AO to claim taxing right over the said income which is not provided in the treaty is *ultra vires* the power of the AO and will amount to dishonouring the bilateral agreement between two sovereign nations. We further noted that the AO has taken support from 10(1) of Singapore Income Tax Act to argue that any income of a Singaporean resident that is accrued or received in Singapore is chargeable to tax in Singapore at the specified income tax rates. But, fact remains is that although profits derived by an international shipping enterprise is exempted from taxation as per Section 13F of Singapore Income Tax Act, but such income is always liable to tax in Singapore. The exemption provided u/s.13F of the Singapore Income Tax Act is only on a case to case basis for a limited period of time and it is subject to certain conditions. Therefore, we are of the considered view that the liability to taxation is not dependent on whether taxes are actually paid in the said jurisdiction. This fact is strengthened by the decision of the Hon'ble Supreme Court in the case of *Azadi BachaoAndolan* (*supra*) where the Hon'ble Supreme Court in para 79 of the order has states that "merely because exemption has been granted in respect of taxability of a particular source of income, it cannot be postulated that the entity is not 'liable to tax' as contended by the respondents." The ITAT, Mumbai Bench in the case

of *Bhagwan T. Shivlani* (*supra*) has considered an identical issue and by following the decision of Hon'ble Supreme Court in the case of *Union of India* v. *Azadi BachaoAndolan* (*supra*) has held that the expression 'liable to tax' in Contracting State as used in Article 4(1) of Indo-UAE DTAA does not necessarily imply that person should actually be liable to tax in that contracting State. It is enough if other contracting State has right to tax such person, whether or not such a right is exercised. This fact is further strengthened by Article 31(1) of Vienna Convention where it was stated that as per the general rule of interpretation, ordinary meaning is to be given to the terms of the treaty in the context and in the light of its object and purpose. The object and purpose of having Article 8 in the India-Singapore DTAA is to clearly allocate the taxing rights of international shipping income to the residence country *i.e.,* Singapore in the present assessee case. Therefore, as per sub-clause (2) of Article 31 of the Vienna Convention, the 'context' for the purpose of interpretation of a treaty would primarily include the text, preamble and annexure to the treaty. Therefore, in order to give the ordinary meanings to the terms in their 'context' the whole treaty should be read as it is without giving any meaning which is not the purpose intended by the Articles. In this case, the AO has stated that the preamble should be read to understand the object and purpose. However it may be noted that Article 31(2) of Vienna Convention does not cover object and purpose. Therefore, we are of the considered view that AO has misunderstood the general rules of interpretation in the Vienna Convention. Even assuming without conceding that the preamble should be referred to understand the object and purpose, the stated objective of the treaty is "avoidance of double taxation". This object can be achieved in two ways, which one way by credit mechanism when both the countries tax the same income and the second way is providing 'exclusive right of taxation' to one country and thereby double taxation can be avoided. In the present case, Article 8 provides exclusive right of taxation of shipping income to Singapore in order to avoid double taxation method where India has given up its right of taxation of international shipping income of a Singaporean resident and as such Singapore has reserved its exclusive right to tax the same. Once the country of resident is having exclusive rights to tax a particular income by way of separate Article, then limiting or denying such benefit by interpreting the other Articles which are provided for limiting the benefit in case such income is exempt or taxed at reduced rate of tax in other Contracting State is contrary to the purpose and object of DTAA.

18. In this case, the Assessing Officer has denied the benefit only on the simple ground that the income of the assessee received in India is exempt by virtue of separate provisions of Singapore Income Tax Act and on the misconception of law to come to the conclusion that once a country of residence has exempts particular income from tax, the other Contracting State (source country) can levy tax on such income without understanding the true meaning of Article 8 of India-Singapore DTAA. The AO has also ignored the arguments taken by the assessee in the light of DIT relief certificate issued by the Department for the subject assessment year, where the AO after considering the TRC and supporting documents issued DIT Relief Certificate dated 25-6-2014 and 14-8-2014 by holding that Article 8 of India-Singapore DTAA is applicable to the assessee and income from operation in international traffic will not be taxable in India. No doubt, the certificate is issued for the purpose of non-deduction of tax at source as argued by the ld.DR, but fact remains is that unless the AO has bring on record any change in fact or law which was prevalent at the time of issuing DIT Relief Certificate and at the time of framing assessment, no contrary view can be taken in violation of Doctrine of Promissory

Estoppel. No doubt, the fundamental principles of *res judicata* will not be applicable to income tax proceedings, but the rule of consistency needs to be followed unless there is change in fact or law while taking a different view. This view is supported by the decision of the Hon'ble Supreme Court in the case of *Radhasoami Satsang* (*supra*).

19. We further noted that this issue is considered by the Tribunal in the assessee own group company case in Bengal Tiger *Line Ltd.* (*supra*), where the Tribunal has considered the India-Cyprus DTAA and has clearly held that where assessee, a non-resident company registered in Cyprus, was in shipping business and it had effective management of enterprise in Cyprus, income earned by assessee from shipping business was not taxable in India. The Tribunal while arriving at above conclusion has taken support from the decision of Hon'ble Gujarat High Court in the case of Arabian Express Line Ltd of United Kingdom and also considered Circular No. 333 issued by CBDT and held that in the DTAA between India and Cyprus and India and U.K the provisions relating to taxation of shipping business are *parimateria*. Therefore, the income earned by the assessee from shipping operations in India is taxable only at Contracting State (country of residence). The relevant findings of the Tribunal are as under:—

> "7. We have heard the submissions made by both the parties. We have perused the order of the Assessing Officer and the directions of the DRP and also the judgmnts relied on by the AR. In the present case it is not in dispute that the assessee/appellant is a foreign company and has its effective management in Cyprus. The AR has placed on record a copy of DTAA between India and Cyprus. A perusal of Article 7 of the DTAA shows that Article 7 relates to business profits of an enterprise having permanent establishment in India. Article 7 specifically states that such profits shall be taxable only in that State unless the enterprise carries on business in other contracting State through a permanent establishment situated therein. The Article 8 of DTAA deals with shipping and air-transport business. Article 8 provides that profits derived by enterprise registered and having headquarters (*i.e.* effective management) in a Contracting State from the operation by that enterprise of ships or aircraft in international traffic shall be taxable only in that State *i.e.* profits from operation of ships or aircrafts in international traffic shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated, which in the present case is Cyprus.
>
> 8. In view of specific clause in DTAA dealing with shipping business, we are of considered opinion that income of the assessee in the present case is not taxable in India. The Hon'ble Gujarat High Court in the case of Arabian Express Line Ltd of United Kingdom (*supra*) after taking into consideration the DTAA between India and UK has held that the ITO had no authority or jurisdiction to levy tax on the petitioner company. The DTAA between India and UK have similar provisions *i.e.* Article regarding taxation of enterprise having shipping business. The Hon'ble Gujarat High Court in the case of *Venkatesh Karrier Ltd.* (*supra*) has reiterated the same view and held that the agreement between two countries has ousted the jurisdiction of the taxing officer in India to tax the profits derived by the enterprise once it is found that the ship belongs to a resident of the other contracting country and such position has also been clarified by the circulars issued by the Board. The Honble Gujarat High Court referred to Circular Nos.333 dated 2-2-1982 and

> 732 dated 20th December, 1995. Circular No. 333 states that the provisions made in DTAA would prevail over the general provisions of the Act and Circular No. 732 clarifies that if ships are owned by an enterprise belonging to a country with which India has entered into an agreement of avoidance of double taxation and the agreement provides for taxation of shipping profits only in the country of which the enterprise is a resident, no tax is payable by such ships at the Indian ports. In the DTAA between India and Cyprus and India and U.K. the provisions relating to taxation of shipping business are *parimateria*. Therefore, the income earned by the assessee is not taxable in India. Rather the Assessing Officer had no jurisdiction to levy tax on the appellant/assessee."
>
> **20.** In this view of the matter and considering facts and circumstances of this case, we are of the considered view that Article 8 of India-Singapore DTAA is applicable and as per which shipping income of a resident of Singapore is taxable only in Singapore but not in India. The AO has made an attempt to deny the benefit of exemption claimed by the assessee by invoking Article 24 of India-Singapore DTAA, even though, the conditions stipulated under Article 24 are not satisfied. We, therefore are of the considered view that the AO as well as the Ld.DRP were erred in coming to the conclusion that income earned by the assessee from shipping operations in India is taxable in India by virtue of Article 24 of India-Singapore DTAA. Hence, we direct the Assessing Officer to delete the additions made towards shipping income of assessee earned in India.
>
> **21.** In the result, the appeal of the assessee is allowed.

In the aforesaid decision, the bench has observed that the assessee is tax resident of Singapore and do not have any permanent establishment (PE) in India. As per Article-8 of India-Singapore DTAA, the profits derived by an enterprise of a Contracting State from the operation of ships or aircraft in international traffic, shall be taxable only in that State. Therefore, by virtue of Article-8 of India-Singapore DTAA, the international shipping income of a resident of a Contracting State is taxable only in that State. The Article-24 of India-Singapore DTAA limits the relief. Upon combined reading of Article-8 and 24 of India-Singapore DTAA, it is very clear that Article 8 provides exclusive right of taxation to country of residence i.e., Singapore on accrual basis. Similarly, Article 24 limits the exemption, in case income is exempt or taxed at reduced rate in source country i.e., in India and further such income is taxable in country of residence on receipt basis. However, the provisions of Article-

8(1) are not an exemption provision but an enabling provision which provides an exclusive right of taxation of income to the residence country. Further, by entering into treaty with Singapore, India has given up its right to tax shipping income of a non-resident in India. Therefore, any income of a non-resident shipping company which is a tax resident of Singapore is liable to be taxed only in Singapore but not in India. The provision of Article-24 would apply to income which is exempt from tax as per the tax treaty which is not the case since the international shipping income earned by the assessee is not exempted in India. Therefore, the exclusive right of taxation in one contracting state is not the same as the specific exemption being available in other contracting state. Further, shipping income as dealt by Article-8 states that profits derived by an enterprise of a contracting state by operation of ships in international traffic shall be taxable only in the State of residence. The word 'only' debars the other contracting state to tax the shipping income so earned by the assessee even if it is sourced from India. When India does not have any taxation right on a shipping income of non-resident entity, exemption or reduced rate of taxation in the source state is of no relevance because once the taxing right has been given-off, the other conditions like exemption or reduced rate of tax has no bearing on the taxability of particular income in other contracting state. Therefore, the assessee being tax resident of Singapore, shipping income so earned from India on international waters is taxable only in Singapore on accrual basis.

The bench, in para-15, further analyzed the applicability of Article-24 and also considered the communication received from IRAS and finally held that Article-24 would not apply. To support the same, the decision of

Hon'ble Gujarat High Court in M.T. Maersk Mikage (supra) was also considered wherein the Hon'ble court held that where income earned by Singapore based shipping company through shipping business carried out at Indian Ports was not taxable at Singapore on the basis of remittance but on basis of accrual then clause (1) of Article 24 of India-Singapore DTAA would not apply to deny benefit of Article-8. Similar was stated to be the decision of Mumbai Tribunal in APL Co. Pte. Ltd. (supra) as well as the decision of Hyderabad Tribunal in Far Shipping (Singapore) Pte. Ltd. (supra).

The bench further observed that the provisions of Section 13F of the Singapore Income Tax Act was already in existence since 1-4-1991 and as such the articles provided in India-Singapore DTAA which came into existence from 27-5-1994 was inserted by the Competent Authorities of both the Contracting States after thoroughly considering the provisions of Section 13F of Singapore Income Tax Act and further choose not to alter the taxation right of shipping income which is generally available to the country of residence. The exemption provided u/s.13F of the Singapore Income Tax Act is only on a case-to-case basis for a limited period of time and it is subject to certain conditions. Therefore, the liability to taxation would not be dependent on whether taxes are actually paid in the said jurisdiction or not.

27. Before us, Ld. CIT-DR has averred that the aforesaid decision has not considered various perspective of the case and therefore, the same could not be relied upon. However, we are not inclined to accept this proposition. We find that the facts are pari-materia the same in all these years before us. The co-ordinate bench, after considering the rival arguments, arrived at a conclusion that the Article-8 would apply and

Article-24 would have no application as the conditions as specified in Article-24 were not fulfilled. This decision has been rendered after considering various judicial precedents as cited before us also. There is nothing on record to show that the aforesaid adjudication has been reversed by any higher judicial authority in any manner. In our considered opinion, all the aspects have duly been considered by the bench while rendering the adjudication for AY 2015-16 in assessee's own case. Therefore, we do not have any valid reason to deviate from the same. The argument of Ld. CIT-DR that this decision could not be applied or the said decision is incorrect since it fail to address the impugned issues, could not be accepted.

28. The Ld. CIT-DR has cited the decision of Hyderabad Tribunal in M/s PACC Container Line Pvt. Ltd. (supra). Having gone through the same, we find this case law deal with a situation wherein the authorities have granted the benefit of DTAA to the assessee but restricted the same to the extent of amount remitted by the assessee. This decision does not consider any of the decision as cited before us including the cited decision of Hon'ble Gujarat High Court in M.T. Maersk Mikage (supra). As against this, we have decision of coordinate bench in assessee's own case on similar facts. In fact, the impugned additions stem from the view taken by revenue in AY 2015-16 and this view has already been negated by the coordinate bench. Therefore, this case law renders no assistance to the case of the revenue.

29. Finally, considering the facts and circumstances of the case, we would hold that reassessment proceedings, for all the years, fail on legal grounds as well as on merits. It is undisputed position that the case of all the years has been reopened on identical reasons by Ld. AO. Therefore,

the assessee succeeds in all the appeals. Consequently, the connected stay applications filed by the assessee has been rendered infructuous.

30. All the appeal stands partly allowed in terms of our above order. The connected stay applications stand dismissed as infructuous.

Order pronounced on 4th May, 2023

Sd/-	Sd/-
(MAHAVIR SINGH)	**(MANOJ KUMAR AGGARWAL)**
उपाध्यक्ष /VICE PRESIDENT	**लेखा सदस्य /ACCOUNTANT MEMBER**

चेन्नई/ Chennai; दिनांक/ Dated : 04-05-2023
EDN/-

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/Appellant2. प्रत्यर्थी/Respondent 3.आयकरआयुक्त/CIT 4. विभागीयप्रतिनिधि/DR
5. गार्डफाईल/GF