IN THE ITAT, MUMBAI BENCH

PRAMOD KUMAR, V.P. & VIKAS AWASTHY, J.M.

Interworld Shipping Agency LLC v. Dy. CIT

ITA No. 7805/Mum/19

30 April, 2021

Appellant by: Nitesh Joshi

Respondent by: S.S. Iyengar

ORDER

Pramod Kumar, V.P.

By way of this appeal, the assessee appellant has challenged the correctness of the *Order, dt. 17-10-2019*, passed by the assessing officer under section 143(3) read with section 144C (13) of the Income Tax Act, 1961, for the assessment year 2016-17.

2. The short issue that we are actually required to adjudicate, in this appeal, is whether or not the authorities below were justified in declining the benefits of India UAE Double Taxation Avoidance Agreement [(1995) 205 ITR Stat 49; Indo-UAE tax treaty, in short] to the assessee appellant, and that is the issue on which we have heard the parties at length. What are termed as grounds of appeal, as learned representatives fairly agree, are only arguments in support of this grievance.

3. To adjudicate on this issue, only a few material facts are required to be taken note of. The assessee before us is said to be a limited company incorporated in the UAE, a tax resident of the UAE and engaged in the business of services like ship chartering, freight forwarding, sea cargo services, shipping line agents. The uncontroverted stand of the assessee, as noted by the assessing officer, is that the assessee charters the ships for use in transportation of goods and containers in international waters, including to Kandla and Mundra ports as indeed other ports in India and elsewhere. During the relevant previous year, the assessee had received Rs. 64,41,25,715 on account of total freight collection, including prepaid collections, which, under section 44B read with section 172, result in a taxable income, computed @ 7.5%, of Rs. 4,83,09,429. The assessee, however, claimed that as the assessee is a tax resident of the UAE and as, under the Indo UAE tax treaty, the profits derived by an enterprise of a UAE or India from the operation by that enterprise of ships in international traffic shall be taxable only in the respective jurisdiction, the assessee is not to pay any tax in India. The relief was thus sought under section 90 read with the Indo UAE tax treaty.

4. This claim of the assessee, however, did not find favour with the assessing officer. The assessing officer did take note of the fact that the assessee had taken vessels on the time charter, for transportation of good by ship in the international traffic, as also the assessee s filing of the commercial licence issued by the Department of Economic Development, Government of Dubai, and tax residency certificate. He, however, noted that as much as 80% of the profits of the assessee entity were to go to one Dimosthenis Lalagiannis, a Greek national. The assessing officer was of the view that since this person was a Greek national, it could be safely concluded that the business was not managed or controlled wholly from the UAE. It was also noted that the assessee entity is a partnership firm and not a company. As

regards the tax residency certificate, and no objection certificates issued by the Indian income tax authorities in the past, the assessing officer was of the view that nothing turns on these certificates as these certificates are obtained on the basis of misrepresentation of facts. It was also noted that, in terms of the amendments brought about by the Finance Act 2012, the tax residency certificate of a non-resident entity is a necessary but not sufficient condition for the grant of treaty benefits, and, therefore, treaty protection cannot be granted merely on the basis of a tax residency certificate. Rejecting assessee s reliance on Hon ble Supreme Court s judgment in the case of *Union of India v. Azadi Bachao Andolan (2003) 263 ITR 706 (SC)*, the assessing officer referred to, and emphatically relied upon, a subsequent judgment of Hon ble Supreme Court in the case of *Vodafone International Holdings BV v. Union of India (2012) 341 ITR 1 (SC)*. He was of the view that the only purpose of the assessee company was to avail of the benefits of the Indo UAE tax treaty. He then referred to look at principle in the Vodafone judgment, and noted that even the tax residency certificates of the partners were not provided to the assessing officer. He further noted that it was a clear case of abuse of organization as the owner of the entity is a Greek national. He was also of the view that the assessee company is a colourable device for the avoidance of taxes. It was also observed that as the assessee has not given details of the actual beneficiaries of TRCs of the partners, such a non-furnishing of details is to escape from expositing the true structure and taking undue benefit of the Indo UAE tax treaty. The assessing officer thus concluded that the assessee is not entitled to the benefits of the Indo UAE tax treaty, and, accordingly, issued a draft assessment order holding that the income of Rs. 4,83,09,430 is taxable in India. Aggrieved, the assessee raised objections before the Dispute Resolution Panel, but without any success. The assessee had also filed additional detailed evidences before the DRP in support of its various submissions, including the submission that the assessee is a company and not a partnership firm, and a remand report from the assessing officer was also called on the additional evidence. The learned DRP nevertheless confirmed the action of the assessing officer and observed as follows:

> It is noted that the appellant company is in shipping business since year 2000. The appellant expanded its shipping business operations in June, 2013. Before 2013, the appellant was a shipping agent. The assessee company commenced shipping business in India only from March, 2015.
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> It is noted from the order/report of the assessing officer that:
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> > (a) There is no taxation in the UAE except for assessees engaged in oil extraction or banking. Therefore, there is no double taxation of the appellant s shipping income. This provides an opportunity to do treaty shopping.
> >
> > (b) The appellant is managed and controlled by one Mr. Dimosthnis Lalgiannis, a Greek national. The view of the assessing officer is that this indicates that the appellant is not managed card, controlled, from UAE. Before the DRP also except for filing a copy of residency card, no details have been filed by the assessee to show that Mr. Dimosthnis Lalgiannis was in UAE for over 183 days since he is the sole effective manager and controller of the assessee.
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> > (c) The assessing officer has pointed out that the assessee has not provided several crucial documents including the minutes of Board s Resolutions; the assessee now claims that several documents are not available and the UAE Law does not mandate

keeping Board of Directors Resolutions. This argument of the assessee precludes any inquiry into the manner of management and control over the assessee.

(d) The assessing officer has also mentioned in his remand report as under:-

> The Director(s) are not allowed to vote on resolutions related in their discharge of their responsibility for management as per Para 12.8 of Page 46 of additional evidence. Meaning thereby, the decision taken by Manager Mr. Dimosthenis Lolagiannis, who is of Greek nationality is the sole decision maker of the affairs Further, it is pertinent to note that as per combined financial statements and Auditors Report for The year ended December 31, 2005, and for the year ended December 31, 2004 (in para 13) (copy enclosed) It is clearly mentioned in the Accounting Policies and Explanatory Notes that as per clause 10.7 of the Memorandum of Association doted 16-4-2001 of Interworld Shipping Agent L.L.C., each director is entitled for remuneration as a percentage of turnover and monthly salaries and benefits as decided by the Board of Directors. However, these types of notes are not reflected in the Auditor s Report for the year ended 31 December 2015 and 31 December 2014. Therefore, there is a variation in the date of Memorandum of Association (one date is mentioned as undt. and mentioning year 2000 and other date mentioned in Auditors Report 16-4-2001) and misguide the department.
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> This clearly indicates that the company was controlled only by the Greek National Mr. Dimosthensis Lalagiannis. In the rejoinder also, the assessee has not rebutted this finding of the assessing officer.

(e) It is claimed by the assessee that during the year under consideration, Mr. Dimosthenis Lalagiannis, a Greek national who is based in UAE, was the designated Manager, managing the affairs of the Company. Mr. Dimosthensis Lalagiannis holds 25% of the share capital of the LLC. However, the assessing officer has brought enough arguments and facts to hold that there was no other manager or controller of the assessee. There is no evidence that this person was in UAE for a period in excess of 183 days.

(f) It is also claimed that all the employees of the assessee company have been issued work permits by the Ministry of Labour, UAE. This claim of the assessee is false. The assessee had not given any details of its employees to the assessing officer pertaining to year under discussion. Further, the assessee did not file any details during the remand proceedings also. The assessee tried to surreptitiously claim that all its employees were resident of UAE in its rejoinder to the remand report but documents filed by the assessee related to financial year 2017-18 and later. Hence this claim of the assessee is also not proved.

(g) Section 90 has been amended by Finance Act, 2012 to the effect that TRC would be a necessary but not sufficient condition for availing the benefit of Double Taxation Avoidance Agreements entered into by India. Even earlier it was only the FRC under India-Mauritius DTAA which had enjoyed overriding power.

(h) The TRC produced by the appellant needs to be ignored. It is clear that the TRC in conditional. The essence has to demonstrate that the company is controlled wholly from UAE. There is no evidence that Mr. Dimosthenis Lalagiannis has operated the company wholly and exclusively from UAE. The assessing officer has correctly relied

on Article 29 Limitation of Benefits of the India - UAE Treaty. The assessing officer has also relied upon the decision of the Supreme Court in the case of *Vodafone International Holdings BV v. U01 (2012) 341 ITR 1 (SC)*. The DRP is in argument with the assessing officer.

(i) The mere fact that the assessee had obtained a favourable order for tax deduction earlier is no reason enough to hold that the assessee claims are accepted.

(j) In view of the above, it is held that the assess has failed to establish that the management and control of the assessee was in UAE during the year under consideration. The DRP finds that even though the appellant is a company incorporated in the UAE, the assessee has failed to establish that the place of effective management (POEM) is in UAE.

In view of the above discussion, the DRP upholds the action of the assessing officer in holding that the income of the assessee from international shipping operations of his assessee is taxable in India. The grounds of objection number 1 to 7 of the assessee are dismissed.

5. Accordingly, the final assessment order was passed by the assessing officer on the same lines. The assessee is aggrieved and is in appeal before us.

6. We have heard the rival contentions at length, carefully perused the material on record and duly considered facts of the case in the light of the applicable legal position. The assessee has filed certain additional evidence, which, upon careful consideration, have been admitted by us.

7. The first and fundamental issue that we must address ourselves to is whether the assessee appellant can be said to be a resident of the UAE, treaty partner jurisdiction, which is a foundational requirement for availing the treaty benefits in question. Article 4(1) defines a resident, *inter alia*, in the case of the United Arab Emirates: ..a company which is incorporated in the UAE and which is managed and controlled wholly in UAE . While at the stage of initial proceedings before the assessing officer, it was AO s observation that the assessee entity is a partnership firm, we have noted that at the stage of proceedings before the Dispute Resolution Panel, it was pointed out by the assessee that the assessee is a limited liability company under the UAE laws, that it has duly obtained the requisite licence from the Department of Economic Development, that its annual accounts and audits are in accordance with the UAE laws and that its memorandum of association and articles of association were also placed on record. The details of the company incorporation are on record, including in the paper-book, and the learned Departmental Representative did not even dispute these pieces of evidence. There is nothing now, or even at the assessment stage, to controvert these pieces of evidence and submissions, and, therefore, the status as a company is now beyond any dispute or controversy. The main objection taken by the authorities below, as the extracts reproduced above would also show, is that the company is managed by a Greek national, namely Dimosthenis Lalagiannis, that there is nothing to show that he was resident in UAE for more than 183 days, and that it is thus reasonable to infer that the company was not managed or controlled from the UAE. The assessee company had fourteen expatriate employees who were issued work permits by the UAE Government for working in the assessee company. These details and copies of work permits are placed before us at pages 19 to 40 of the second paper-book. Clearly, thus, the company was being run from UAE itself. It is also important to note that, as per evidence on record on pages 1-18 of the second

paper-book, Dimosthenis Lalagiannis was in UAE for 300 days during the relevant previous year. The copies of the passport and relevant pages with clear entry and exit stamps of the immigration authorities are on record, and no doubts are raised about the genuineness of these copies. As for this gentleman being a non-UAE national, nothing really turns on his being a national of a country other than UAE, because UAE is a major financial center in which not only a large number of foreigners work but also from where a large number of foreigners conduct their business. When a person lives in a country for 300 days, it would be reasonable to assume that he would be running a business from that country. In any case, his residential permit for resident status in UAE was all along before the lower authorities, and no defects have been pointed out in the same. When a person has a resident permit for UAE and his company in question is incorporated in, and doing business from, the UAE, there is no reason to doubt the position that business is being controlled and managed from the UAE. Even if we are to keep aside his actual stay in UAE for 300 days aside for a minute, whether the main director of a UAE stays in UAE for 180 days or even less, it is immaterial as long as there is nothing to show, or even indicate, that business was not carried from UAE. The requirement for presence in UAE for 183 days, for residence status under the Indo UK tax treaty, is for the individual and not the directors of the companies which claim such a residence status. As for the companies, the only test for a company being termed as resident of UAE is that it should be incorporated in UAE and wholly managed and controlled in the UAE. The assessee company has its office in UAE, it is in business there since 2000, it has expatriate employees who have been given a work permit to work in UAE for the assessee company, the main driving force of the company and its director is an expatriate resident in the UAE.

8. Under these circumstances, there seems to be no basis, except for surmises and conjectures, to suggest that the company is not wholly managed or controlled from the UAE . As for the inconsistencies pointed out by the assessing officer in the financial statement disclosures, even if in one statement an accounting disclosure about director s remuneration is given and in another statement for another year such an accounting disclosure is left out, that would not mean that the company was not managed from the UAE. The assessee has provided reasonable evidence in support of the stand that the business was wholly and mainly controlled from the UAE. The fact that the assessee could not give the documents, which he was not required to maintain statutorily anyway, cannot be put against the assessee. The assessee cannot be asked to prove a negative, as is the settled position in law in the light of Hon ble Supreme Court s judgment in the case of *K.P. Varghese v. ITO (1981) 131 ITR 587 (SC)* wherein Their Lordships have, *inter alia*, observed that to throw the burden of showing that there is no understatement of the consideration on the assessee would be to cast an almost impossible burden upon him to establish a negative, namely, that he did not receive any consideration beyond that declared by him . Therefore, the assessee company cannot be asked to prove that the assessee company was not managed from outside UAE . In our considered view, on the facts of the present case, the inferences drawn by the authorities below are unsustainable in law, as there is reasonable material on record to substantiate the stand of the assessee that the assessee company was incorporated in UAE, and was managed and controlled wholly in the UAE.

9. Let us now revert to article 29 of Indo UAE tax treaty, which states that An entity which is a resident of a Contracting State shall not be entitled to the benefits of this Agreement if the main purpose or one of the main purposes of the creation of such entity was to obtain the benefits of this Agreement that would not be otherwise available. The cases of entities not

having *bona fide* business activities shall be covered by this Article . It is an undisputed position that the company is in business since 2000, and the operations of ships for transportation of goods to and from India has started much later in 2015. It cannot, therefore, be said that the assessee company was formed for the purpose of availing India UAE tax treaty, which came into play only in 2015. When an entity is established in 2000, and the relevance of the Indo-UAE tax treaty comes into play only in 2015, it cannot be said that the main purpose of creation of such an entity was to obtain the benefits of the Indo UAE tax treaty. Unless the purpose of creating the entity in question is to avail the Indo UAE tax treaty benefits, the LOB clause in article 29 cannot come into play. Such a possibility is simply ruled out on the facts of this case. In any event, it is specifically added in the said LOB clause, that the cases of entities not having *bona fide* business activities shall be covered by this article . In the present case, there is nothing to even suggest that the business activities of the assessee company were not *bona fide*. There is reasonable evidence before us, and was all along available before the authorities below, that the assessee was having *bona fide* business in the UAE, and, as such, the lack of *bona fide*s could not be inferred. Once assessee submits reasonable evidence, including the evidence in support of the existence of an office, and dedicated employees, in UAE and the business being carried on from there- as also the financial statements showing the business being carried on from the UAE on a regular and commercial basis, unless the revenue authorities bring on record some material to dispute this position, one cannot proceed to conclude, as the assessing officer did, that the business activities of the assessee lacked *bona fide*s. The authorities below were thus clearly in error in holding that the LOB clause was applicable on the facts of this case.

10. In view of the above discussions, as also bearing in mind the entirety of the case, we are of the considered opinion that the assessee company is a resident of the UAE, in terms of requirements of article 4(1)(b) of the Indo-UAE tax treaty, that the limitation of benefits provisions of article 29 of the Indo-UAE tax treaty cannot be pressed into service in this case, and that the assessee is eligible for treaty protection, in respect of its income earned in India, under the Indo UAE tax treaty. It is not even in dispute, and rightly so, that under the provisions of article 8(1) of the Indo UAE tax treaty, which provides that profits derived by an enterprise of a Contracting State from the operation by that enterprise of ships in international traffic shall be taxable only in that State , the assessee company is protected from taxation of the income in question in India. The assessing officer will give relief accordingly.

11. In the result, the appeal is allowed.