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ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

SHIPPING AND AIRCRAFT IN INTERNATIONAL TAXATION

AUTHORED BY: DIVYA BHARATHI¹ AND MUHAMMED AMEEN²

INTRODUCTION

Shipping is overcomes the problems arising in respect of provisions for deferred taxation, which may be encountered by companies taxed under the normal corporation tax rules. The introduction of tonnage tax offers shipping companies an alternative method of taxing their profits, however, it is not obligatory. If a shipping company wishes to remain subject to the normal corporation tax rules in order to calculate its profits³

A company's tax position will now be more readily understood, consequently the company may become more attractive to investors and potential business partners. Finally, compatibility and competitiveness with the fiscal regimes of other countries. This is particularly important from the point of view of maintaining and developing our indigenous shipping industry.

Shipping activities are subject to tax at 12.5% tax based on actual profits or gains of the period, and is calculated under the normal rules of corporation tax. The tonnage tax method allows shipping companies to calculate their profits on the basis of a specified notional profit per day depending on the tonnage of the ship concerned. The standard corporation tax rate for qualifying shipping activities is then applied to the amount of profit earned i.e. 12.5%.⁴

The objective of a ship industry may be to operate his fleet as profitably as possible, including through maximisation of capacity use and productive time. This will often boil down to competition for volume (cf. the market share objective). As regards the available tools, besides the freight rates (which are often determined by exogenous factors) there is cost control. Shipping companies are constantly striving towards operational efficiency, including by deploying larger vessels (cf. economies of scale), by limiting the number of ports of call, by

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³ Available at: <https://www.shopify.in/guides/shipping-and-fulfillment-101/introduction>

⁴ Available at: <https://woocommerce.com/2015/07/ecommerce-shipping-options>

increasing productive time at sea, and by looking out for possibilities to co-operate (among other things, through vessel-sharing agreements). The consequences are clear to see: increasing ship size is causing problems for certain ports in terms of accessibility (including with regard to post-panamax vessels); sailing schedules are being rationalised, including through the reduction of the number of ports of call; the setting up of alliances and consortia that offer greater negotiating power; forms of ruinous competition between shipping companies on certain trades; a striving towards acquiring so called dedicated terminals.

This has a direct impact on other market players, including port authorities, who, regardless of their management tradition (Hanseatic, Latin, Anglo-Saxon), will try to minimise costs associated with goods handling and delays. It remains a problem though that, while port authorities are able to determine the port dues, they have only partial control over a much more significant cost factor, i.e. time: they have an impact on the maritime accessibility, but usually not on the turn-aroundtime.

However, port authorities do have two other important tools at their disposal. First, they are a privileged partner in guaranteeing socio-economic stability (e.g. strike action, work-to-rule). However, each player is also confronted with other tools and other impacts on port activities, eg. the striving among terminal operators towards economies of scale, the fierce competition in hinterland transportation, the dependency of forwarders and shipping agents on a limited number of customers³. Forwarding agencies in particular serve a specific purpose in certain ports. They act as middlemen between the owners of the goods that need transporting on the one hand and the carriers that are responsible for the actual shipment on the other

CONCEPTS RELATING TO WITHHOLDING TAX ON SHIPPING

DEFINITION SECTION (115 V):

- (a) "bareboat charter" means hiring of a ship for a stipulated period on terms which give the charterer possession and control of the ship⁵, including the right to appoint the master and crew;
- (b) "bareboat charter-cum-demise" means a bareboat charter where the ownership of the ship is intended to be transferred after a specified period to the company to whom it has been chartered;

⁵ Definition of tax on shipping [Section 115V of Income Tax Act: Definitions – AUBSP](#) last accessed on 11 june2022

- (c) "Director-General of Shipping" means the Director-General of Shipping appointed by the Central Government under sub-section (1) of section 7 of the Merchant Shipping Act, 1958 (44 of 1958);
- (d) "factory ship" includes a vessel providing processing services in respect of processing of the fishing produce;
- (e) "fishing vessel" shall have the meaning assigned to it in clause 12 of section 3 of the Merchant Shipping Act, 1958 (44 of 1958); "pleasure craft" means a ship of a kind whose primary use is for the purposes of sport or recreation;
- (g) "qualifying company" means a company referred to in section 115VC; (h) "qualifying ship" means a ship referred to in section 115VD⁵;
- (i) "seagoing ship" means a ship if it is certified as such by the competent authority of any country;⁶
- (j) "tonnage income" means the income of a tonnage tax company computed in accordance with the provisions of this Chapter;
- (k) "tonnage tax activities" means the activities referred to in sub-section (1) of section 115V
- (l) "tonnage tax company" means a qualifying company in relation to which tonnage tax option is in force;
- (m) "tonnage tax scheme" means a scheme for computation of profits and gains of business of operating qualifying ships under the provisions of this chapter

COMPUTATION SECTION:115VA

Computation of profits and gains from the business of operating qualifying ships, Notwithstanding anything to the contrary contained in sections 28 to 43C⁷, in the case of a company, the income from the business of operating qualifying ships, may, at its option, be computed in accordance with the provisions of this Chapter and such income shall be deemed to be the profits and gains of such business chargeable to tax under the head "Profits and gains of business or profession"⁷.

⁶ definition+of+shipping+under+income+tax+ act&og
definition+of+shipping+under+income+tax+act&gs_l=psy By Suresh Prasad in [Section 115V of Income Tax Act: Definitions – AUBSP](#) on 13 january 2021 Accessed on 11 june 2022

⁷ www.lakshmisri.com/insights/articles/taxation-of-income-from-shipping-business by: Mahendra singh
Published on 29 November 2019, Accessed June 10,2022

QUALIFYING COMPANY:SECTION:115VC

A company is a qualifying company⁸if:

- (a) it is an Indian company;
- (b) the place of effective management of the company is in India;
- (c) it owns at least one qualifying ship; and
- (d) the main object of the company is to carry on the business of operating ships.

MANNER OF COMPUTATION OF INCOME UNDER SHIPPING TAX SCHEME:

SECTION: 115VE

- (1) A tonnage tax company engaged in the business of operating qualifying ships shall compute the profits from such business under the tonnage tax scheme.
- (2) The amount of withholding tax is often based on an estimate of the employee's final tax liability, determined either by the employee or by the government⁸.

PRESUMPTIVE TAXATION:

Computation of income of specified business Applicable to

1. Individual
2. HUF
3. Firm(Not for limited liability partnership)
4. Who has not claimed deduction under section 10AA or income based deduction All small business with total turnover or gross receipts

Rate of tax would be 8% of the total turnover or gross receipts. Some of the Persons are specifically excluded from applicability of this presumptive provision. A person carrying on profession as specified under section 44A(1) namely, legal, medical, architectural, accountancy, technical consultancy, interior decorator and any professions as notified by board⁹ (or)

A person earning income in the nature of commiddion or brokerage (or)

A person carrying on any agency business

No deduction under section 30 to 38 available. In case of firm is applicable under 40 (b)

SECTION 44 AA & 44AB:

MAINTENCE OF BOOKS OF ACCOUNTS AND TAX AUDIT:

⁸ [Section 115VC of the Income Tax Act - Taxway Global](#) by C.A.Neeraj jawla on September 18,2021 accessed on 11 june 2022

⁹ www.incometaxindia.gov.in/layouts/15/dit/mobile/faqs/fag

Mandatory if income exceeds specified limit (100 Lakhs). Mandatory if income does not exceed specified limit but he intends to claim his income lower than income prescribed under section 44Ad (8% of total turnover or gross receipts) and his income exceeds the maximum amount not chargeable to tax.

EXEMPTION ARE AVAILABLE UNDER SECTION 10AA

1. Requirement of advance tax payments is not applicable
2. The written down value of any asset of such business shall be deemed to have been calculated."¹⁰

HISTORICAL BACKGROUND OF SHIPPING

Maritime historian Villiers is of the view that the Indian ocean "was the birthplace of the art of sailing". It was the great sea way of the spice trade, the sea route for china silk, and the ocean that Sinbad roamed. Its waters "washed the very cradle of mankind and its blue bosom bore the first sea going ship". It is the fascinating ocean rich in history and second to none in the story of the great lands. According to Villiers, the Indian ocean includes the entire area from the cape agulhas, on 20 degree east, down to the Antarctic, eastwards as far as Australia and Tasmania, and northwards to the east of Asia. The erythraean sea of periplus included Indian ocean as he knew it and its adjuncts, the red sea and the Persian gulf. Villiers view of the Indian ocean is more authentic and embraces all the water on the west up to the cape of good hope covering the total area of about 27000000 sq miles making it the third largest ocean after the pacific and the Atlantic ¹¹.

The oceans and seas cover seven-tenths of the globe. Most of the land in that early stage had very dense forest cover infested with wild beasts, some of them now extinct. Seeing a piece of wood or a log floating on water, the natural desire of the early man would have been to take to water with the help of a log. Wells have come into use some 25-30,000 years ago. With so much of water around, therefore seems justified in his surmise that the earliest boats and ships must be a raft, a boat or an inflated skin must have preceded the wheel. Indian ocean having thickly populated littoral countries must have been among all others, the busiest ocean from the most ancient times. Of the six pristine civilizations, Indian ocean region accounts for half in chronological order

¹⁰ Research on Dry Bulk Market, Deniz Taşımacılığı ve Lojistiği Dergisi, 10.52602/mtl.1051408, (2022), Accessed on 10 June 2022

¹¹ [ei=xZvhWtiBAYnLvGSBt/WoCg&q=historical+background+of+shipping+business](https://www.whiteblacklegal.co.in/research-on-dry-bulk-market)

mesotamina, Egypt and the Indus valley¹¹. There were ships upon the red sea and there were ship on the Mediterranean and Persian gulf by 7000 BC" then why not on the Indian ocean the deffusionists claim that the Indus civilization is derivative from Mesopotamia, but some scholar are of the view that it was the other way round. It was because of the flourishing of search ancient civilization, and the unique features of the monsoon in the Indian ocean and bay of bangal, that the sailing tradition did develop in this region " before anyother part of the world" Villiers changes the alleged development of deep sea sailing among the ancient Egyptians. But rowing a boat along the coasts of the red sea though arduous for theorsmen,¹² is scarcely ocean going". He reiterates, "it is, I think, probable that real ships originated elsewhere along the shores of the Indian ocean." He dismisses as conjectures" that boats made of reeds skins or wicker-work as in ancient Egypt of the gerzean period, could evermuster strength to venture into the seas. Villiers regards it as "one of the few certainties that "long before the period when any reconstruction can be based on written or sculptured records, there were seagoing ships, and some of them at least were plying for passengers and cargo in the monsoonal waters of the Indian ocean." So the taxing system evolves.

TYPES OF RESIDENTIAL STATUS

(a) RESIDENT:

A person would be a RESIDENT of India for income tax purposes if He/She is in India for 182 days or more during the financial year

OR

If he/she is in India for at least 365 days during the 4 years preceding that year AND at least 60 days in that year.

(b) NON RESIDENT

RESIDENT INDIAN. In case you are an Indian Citizen and you leave India for Employment outside of India or as a member of the crew on an Indian ship, in if you do not satisfy the condition laid out above you will be considered a NON RESIDENT or other words if you take up a job outside India the 60 days minimum period will be increased to 182 days.

In Case of Sailing Foreign ships: Indian crew serving on foreign ships for 182 days or more are treated as non-resident in India, irrespective of where the ship trades (including Indian waters).

In case of sailing on Indian ships: A seafarer serving on Indian ships outside India for a period

of 182 days or more in a year is considered to be a non resident. However, the time spent by a ship in Indian territorial waters is considered as period of service in India

According to tax rules framed in 1990. The number of days outside India of Indian crew working on such Indian ships gets counted only from the date when the Indian ship crosses the coastal boundaries of India.

This increase in days is also applicable to you if you are an India citizen or a PIO and you live outside India and you come on a visit to India. The intention behind relaxing the minimum number of days to 182 is to protect your taxability (so you don't get taxed as a Resident Indian) in case you decide to visit India for an extended stay to visit family or meet other obligations and end up staying more than 2 months. If this sounds confusing, you can look at the clear tax Non Resident India for more help.

Besides Resident & Non Resident Indian there is a third category - That of a RESIDENT BUT NOT ORDINARILY RESIDENT- after having spent many years abroad if you have recently moved back to India, you may fall in the category of Resident but not Ordinarily Resident.¹²

RESIDENT BUT NOT ORDINARILY RESIDENT

You will be considered Resident but Not Ordinarily Resident in a year- if you y one of the two conditions for a Resident (mentioned above) AND

If you have been an Non Resident In India in 9 out of 10 financial years preceding the year
OR
You have during the 7 financial years preceding the year been in India for a period of 729 days or less.

A bit complicated is it - see our info graphic that summarizes how to assess if you are a NRI or a RNOR. Please note here that this is how the Income Tax Act considers your status and applies purely to your taxability in India. before you decide to invest money in India you must get yourself a PAN (Permanent Account Number) issued by the Government of India

What is your taxable income for the purpose of Indian Tax Laws: If you are a NON RESIDENT INDIAN, simply put - Any income that is 'earned' in India is taxable for you in India.

Your Income outside of India is not taxable in India.

In case of Salary of a non-resident seafarer for services outside India on a foreign ship will not

¹² Book Name-Principal of International Tax Planning, Author Name-Rohit Gupta.

be included in the total taxable income of the seafarer, even though such salary is credited in the NRE account of the seafarer with an Indian bank. For instance seafarer rendered services in Europe and spent less than 182 days in India. The company credited his salary in NRE account with Indian Bank. This income will not be included in the total taxable income of theseafarer.

Interestingly, in case you have just returned back to India – you are allowed to India. That could benefit you in a big way since your taxation will be very keep your RNOR status for up to 3 financial years post your return back to much in line with that of an NRI and therefore income that you may earn outside of India (while you may have returned back) will continue to be not taxed in India. Therefore like an NRI -

Any income that is 'earned' in India is taxable for you in India Your income outside of India is not taxable in India and you can continue this status for a period of 3 years. However, once you have attained thestatus of a Resident, all of your income within and outside India will be taxable in India, barringany concessions that may be available under the Double Taxation Avoidance Agreement between India and the country from where your overseas income has arisen.

What does 'Accrues in India' mean?

This is laid out in Section 9 of the Income Tax Act (note that this applies to everyone while considering the income that accrues or arises to them irrespective of what their residential status is)"

If your answer to any of these is a YES the law will consider these incomes to have accrued in India: Income from a business connection in India

Income from any property, asset or source of income in India Capital gain on the transfer of a capital asset situated in India Income from salary if the services are rendered in India Income from salary which is payable to you by the Government of India for services rendered outside of India when you are an Indian citizen Dividend paid by an Indian company even though this may have been paid outside India Interest, Shipping, Aircraft, royalty or technical fees received from the Central or the State Government or from specified persons in certain circumstances¹⁵

Here is a snapshot of Taxability of your Income in India based on your status:

STATUS	INCOME EARNED IN INDIA	INCOME ACCRUE IN INDIA	INCOME ACCRUE OR ARISE IN INDIA

RESIDENT	YES	YES	YES
NON RESIDENT	YES	YES	NO
RESIDENT BUT NOT ORDINARILY RESIDENT	YES	YES	NO

NATIONAL PERSPECTIVE WITH REFER TO WITHHOLDING TAX ON SHIPPING:

Airlines Section 44BBA¹³

Applicability

Non-resident engaged in the business of operation of Aircraft.

Non resident has option to be governed by normal provisions of the Act.

Starts with a non-obstante clause

Overrides Sections 28 to 43A. All other provisions of the Act to apply.

Income deemed @ 5% of gross receipts from-

Export fare/ freight (whether received in or out of India) by or on behalf of the assessee on account of carriage of passengers, livestock, mail or goods from any place in India; and Import fare/ freight received or deemed to be received in India by or on behalf of the assessee on account of the carriage of passengers, livestock, mail or goods from any place outside India+

Purpose

Regular assessment of the non-resident assessee under provisions of the Act

SECTION 44B-Vs SECTION 172 SHIPPING BUSINESS OF NON-RESIDENTS:

SECTION 44B Notwithstanding anything to the contrary contained in sections 28 to 43A, in the case of an assessee, being a non-resident, engaged in the business of operation of ships, a sum equal to seven and a half per cent of the aggregate of the amounts specified in sub-section (2) shall be deemed to be the profits and gains of such business chargeable to tax under the head "Profits and gains of business or profession".

The amounts referred to in sub-section (1) shall be the following, namely:

¹³ taxworry.com section-44b-section-172-differences-explained/

(i) the amount paid or payable (whether in or out of India) to the assessee or to any person on his behalf on account of the carriage of passengers, livestock, mail or goods shipped at any port in India; and

(ii) the amount received or deemed to be received in India by or on behalf of the assessee on account of the carriage of passengers, livestock, mail or goods shipped at any port outside India.

Explanation.-For the purposes of this sub-section, the amount referred to in clause (i) or clause

(ii) shall include the amount paid or payable or received or deemed to be received, as the case may be, by way of demurrage charges or handling charges or any other amount of similar nature¹⁶.

SECTION 44B -VS-SECTION 172

Here we see the difference between above sections:

SECTION 44B	SECTION 172
Business of operation of ship regularly and income is earned in account of passengers, livestock, mail or goods at a port in India or outside India in respect of export and import transaction Amount payable by Non Resident @7.50% business income ¹⁷ Set off loss is available Deductions is available Section 44AB- Tax audit provision is not applicable Lower income cannot be claimed Assessment by Assessing Officer within 36 months from end of financial year in which shipping income derived No deduction under section 28 to 43 A available	Business of operation of ship Occasionally and income is earned on account of passengers, livestock, mail or goods at a port in India in respect of export transaction Amount payable by Non Resident @ 7.50% is taxable income Set off loss is not available Deduction is not available This section overrides entire Income Tax Act Import transaction taxable as per section 5(2) on receipt basis Return to be filed within 30 days of departure of ship No order of assessment by Assessing Officer after expiry of 12 months from end of financial year in which return furnished Amount paid or payable in or out of India covered

TAXABILITY ON SHIPPING

Transport and logistics services providers in India are disappointed and bewildered at government changes to a controversial service tax on prepaid, or cost and freight, imports.

Heeding appeals from various trade and shipping groups, notably the Mumbai and Nhava Sheva Ship Agents' Association, the union government has amended the tax to shift the onus of compliance from ship agents to ship owners or those receiving cargo¹⁸.

In respect of services provided or agreed to be provided by a person located in non-taxable territory to a person located in non-taxable territory by way of transportation of goods by a vessel from a place outside India up to the customs station of clearance in India, person liable for paying service tax other than the service provider shall be the importer," the Ministry of Finance said in its revised decree issued.

The provisions relating to taxability of Foreign Shipping Business have been introduced in the Income Tax Act, 1961 to govern and regulate the manner in which Foreign Shipping Businesses will be taxed in India. The reason behind introduction of a separate or special tax provision under the Income Tax law in India is Increase in Import and Export of Goods and Services in India through Foreign Shippers.

The provisions relating to taxability of foreign shipping business will be attracted only if the Income of such foreign shipping business is chargeable to tax in India under Article 8 (UN Model for Tax Convention) of Double taxation avoidance agreements between India and other Countries. To tax these foreign shipping businesses in India, Section 172 has been introduced in Income Tax Act, 1961. This section overrules the entire Income Tax Act and lays down the tax recovery mechanism for foreign shipping businesses in India. The section covers only those transactions where the amount is paid/payable whether in or outside India for carriage of any livestock, mail, passengers or goods shipped at any port in India. The amount paid/payable shall also include demurrage, handling charges or any other charges of similar nature.

The Income under section 172 shall be computed at 7.5% of the amount that is paid/payable whether in or outside India for carriage of any livestock, mail, passengers or goods shipped at any port in India. Tax under this section shall be at the rate as applicable to a Foreign Company plus surcharge/cess if any. Also, under section 172 of Income Tax Act, 1961, the master of the ship shall furnish a return to the Assessing Officer and pay the amount of tax before its departure from the port. However, if it is not possible for the master of ship to furnish a return of income

before departure, the master of the ship has to make necessary arrangements for filing return of income and payment of tax within 30 days of departure of ship. Since, this section overrules the entire Income Tax Act, No TDS under Chapter XVII-B is required to be deducted on payments made to foreign shipping lines. There could be a case where payment is made to a resident shipping agent of a Non-resident foreign shipping line; here the resident acts on behalf of the non-resident and steps into the shoe of such non –resident, no TDS is required to be deducted under Income Tax Act, 1961.

Further, Section 44B of Income Tax Act, 1961 is also a special provision for computing profits and gains from foreign shipping business in India. Section 44B of Income tax Act, envisage the concept of presumptive taxation of Income for foreign shipping businesses in India. The section covers 2 type of transactions,

1. Amount is paid/payable whether in or outside India for the carriage of any livestock, mail, passengers or goods shipped at any port in India.
2. Amount is received or deemed to be received in India for the carriage of any livestock, mail, passengers or goods shipped at any port outside India. Under Section 44B of Income Tax Act, 1961; Income of a Foreign Shipping Business in India shall be presumed to be 7.5% of the sum of the aggregate of the above 2 transactions and the tax shall be such as applicable to a Non-resident.

The non-resident foreign shipping business can opt to compute Income and pay tax according to any one of the above 2 sections for the amount which is paid/payable whether in or outside India for the carriage of any livestock, mail, passengers or goods shipped at any port in India. However, the assessee opting to pay tax under section 172 can at the end of the relevant assessment year decide to pay tax according under section 44B of Income Tax Act, 1961 on presumptive Income.

The question that arises on such transition from section 172 to section 44B are:

1. Whether the assessee is required to deposit advance tax on such Income?
 2. Whether the assessee is liable to pay interest u/s 234B and 234C of Income tax Act on late payment of advance tax and whether the assessee is eligible to Interest on refund u/s 244A of IT?
1. The honourable supreme court in the case of A.S. Glittre held that where the assessee subsequently opts to pay tax in accordance with other provisions of Income tax act (I.e. other than section 172) the payment of tax made by the assessee u/s 172 shall be deemed to be advance

tax deposited by the assessee under the normal provisions of Income Tax Act, 1961.

2. The Central Board of Direct taxes issued a circular bearing circular no. 9/2001 dated 09.07.2001 clarifying that Interest u/s 234B and 234C shall not be levied on short payment of advance tax and correspondingly, the assessee shall not be entitled to any Interest u/s 244A of Income Tax Act on the amount of refund. In view of the aforesaid provisions, it can be seen that taxability of foreign shipping businesses is very clear in India.

Article 15 of India -UK May be taxed in the CS of which the person deriving the profits from the operation of the ship or aircraft is a resident.

Article 16 of India – USA May be taxable in the country of enterprise which operates such aircraft or ship

Article -8 - Special provision for allocation of taxing rights on profits of a non-resident from 'Operation of Ships or Aircrafts' in 'International traffic'.

Special provision –

Prevails over Article

Existence of PE irrelevant- Mitigates burden of profit attribution-

Art.8 OECD Model 2017 allocates taxing rights to the country of incorporation

Subject to bilateral variations - each treaty needs to be separately examined
Applies to Profits of an enterprise engaged in operation of Ships /Aircraft in international traffic

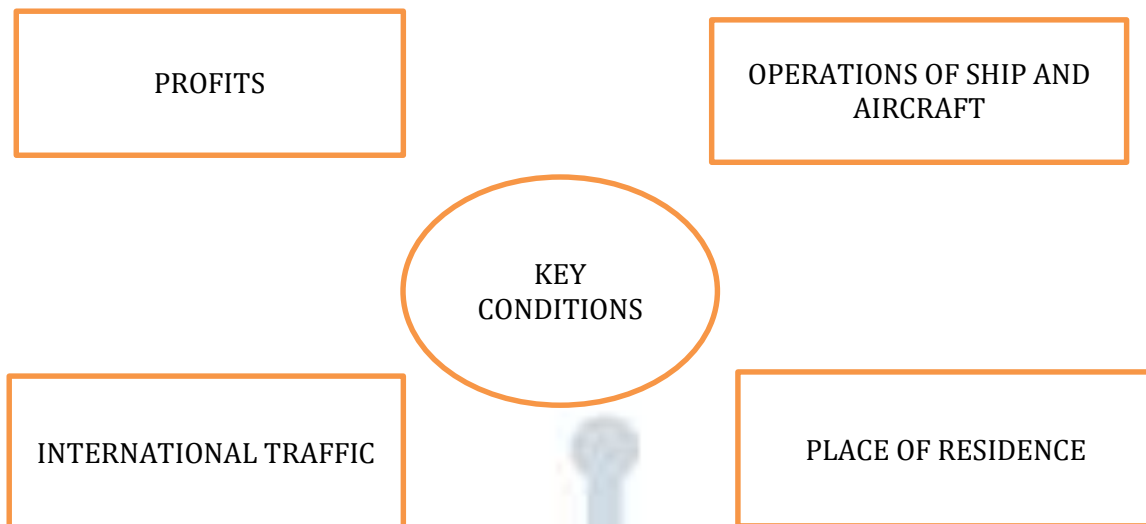
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Article 8(1) Profits from Operations - Discussed separately

Ships or Aircrafts- Discussed separately. Ship/ Aircraft could be owned or leased } in
'International Traffic' – Discussed separately

Activities 'directly connected with operations' or 'incidental or ancillary to operations'
– Discussed separately

Profits from participation in a pool; a joint business or an international operating agency covered – Article 8(2) – Discussed separately.



Leasing a ship or aircraft on a full charter basis (i.e. along with crew)¹⁴ —

Wet lease / Time charter – Hire of a vessel fully equipped and crewed - Provision of services - considered to be a form of ‘Operations’ of ships or aircrafts - Para 5 of OECD MC 2017 on Article-8 —

CIT v. Poompuhar Shipping Corporation Ltd. [2006] 153 Taxman 486/ 282 ITR 3 (Mad.) — Ship was held to be ‘Commercial Equipment’. Payment for ‘time charter’ was on facts held to be for ‘use and hire of vessel’ and hence payment was held to be in the nature of royalty. —

Nan Lian Ship Management LLC Vs. ACIT (Int. Tax) – ITAT Mumbai – ITA No. 1857/Mum/2022 dated 30.12.2022 — ‘Time Charter Agreement’, is not taxable as ‘royalty’ under Section 9(1) (vi) of the Income Tax Act, 1961, if control and dominance over the ship remained with the owner and not with charterer. — Bareboat charters — S. 9(1)(vi) - consideration for leasing of a Commercial Equipment – hence royalty — Under DTAA- Does not amount to “operation of ships” except when it is an incidental/ ancillary lease by an enterprise primarily engaged in operations¹⁵. - Para 5 of OECD MC 2017 on Article-8 —

West Asia Maritime Ltd. v. ITO ([2008] 111 ITD 155 / [2007]109 TTJ 617)(ChennaiTrib.)

Inland Haulage Charges (IHC) — Charges collected from customers mainly towards recovery of cost incurred in inland transportation of cargo from customer locations to the port and vice versa — Benefit of Article – 8 is available for IHCs which are incidental and ancillary to the ‘Operation of Ships’ in ‘International Traffic’ as defined bilaterally. —

Dy. DIT v. Safmarine Container Lines NV ([2009] 120 ITD 71 / [2008] 24 SOT 211) (Mum.-

¹⁴ www.ibfd.org/sites/ibfd.org/files/content/pdf/aptb

¹⁵ Income Tax Act 1961

Trib.)- Confirmed by Bombay HC –

DIT (International Taxation) v. Safmarine Container Lines NV[2014] 48 taxmann.com 238 / 225 Taxman 299 / 367 ITR 209 (Bom.) –

Asstt. CIT vs. Federal Express Corporation ([2010] 125 ITD 1 (Mum.-Trib.) / 2010-35- DTR-425-ITAT-Mum) –

Asstt. DIT vs. Federal Express Corporation ([2010] 125 ITD 1 (Mum.-Trib.) / 2009 TIOL 179 Mum ITAT) –

Avana Global FZCO Vs Dy. CIT ([2022] 142 taxmann.com 386 (Mum. - Trib.) – Income from equipment for security screening, maintenance and charter handling - Benefit of Article 8 denied –

ACIT v. Delta Airlines Inc. (2008-TIOL-646-ITAT-Mum) – Slot arrangement incidental and ancillary to ‘Operation of Ships’ - Covered by Article -8 based on commentary in MC –

Bombay HC in DIT V. Balaji Shipping UK Ltd. ([2012] 24 taxmann.com 229 / 211 Taxman 535 (Bom.) / 315 ITR 62 (Mum)

Article 8 – Indian Treaty Context

- Place of effective management – Mauritius, Germany, Netherlands
- Place of Residence – USA, UK, Japan, France, UAE, Australia, Cyprus, Singapore, etc.
- UN model (Alternative B) – Netherlands, etc.
- Pooling arrangement – Denmark, US, UK, France, Singapore, etc.
- Alienation of ship / aircraft taxable in the country of residence – UK, Cyprus, USA, etc.
- Interest from investments – USA, Singapore, Japan, France, etc.
- Rental on Bareboat basis incidental to the main activity covered – UK, USA, Singapore etc.
- Income from use, maintenance or rental of containers (including trailers and related equipment for transport of containers) used for the transport of goods or merchandise – UK
- Country specific provisions- Example Article 8 of India- Singapore DTAA.

INDIA – UK TREATY

Article 9 – Shipping

1. Income of an enterprise of a Contracting State from the operation of ships in international traffic shall be taxable only in that State.

2. The provisions of paragraph 1 of this Article shall not apply to income from journeys between places which are situated in a Contracting State.....

3. The provisions of this Article shall apply also to income derived from participation in a pool, a joint business or an international operating agency.

Maersk Tankers Singapore (P) Ltd Vs. Asstt. CIT- [(2022) 145 taxmann.com 260 (Rajkot-Trib.)]. –

Issue: The Assessee had remitted freight income to its agent in Denmark. As the amount is not remitted to Singapore, can the benefit under Article 8 of India-Singapore DTAA be denied by invocation of Article 24? –

Held: Benefits under Article -8 cannot be denied to Singapore resident shipping enterprise by invoking Article 24 of DTAA – Held on the basis of clarification by Singapore IRS that 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.

ARTICLE 8	OECD	UN MODEL ALTERNATIVE A	UN MODEL ALTERNATIVE B
8(1)	Profits of an enterprise of a Contracting State from the operation of ships or aircraft in international traffic shall be taxable only in that State	Profits of an enterprise of a Contracting State from the operation of ships or aircraft in international traffic shall be taxable only in that State	Profits of an enterprise of a Contracting State from the operation of aircraft in international traffic shall be taxable only in that State.

CONCLUSION AND SUGGESTION

The shipping transactions are complex web of transactions involving several issues. As discussed above, the taxation of shipping income has been subject to litigation. Even for determining the nature of income/taxability, no straight jacket formula can be applied, and the taxation will depend on the nature and substance of the transactions. The tax payers should be cautious while determining their tax liability, especially in the borderline cases as the taxability of the income in India carries involves certain obligations on the payer of income, such as

deduction of tax at source and consequent penal actions.

The Indian shipping industry has been growing; however the competitive position of the Indian shipping industry needs to be strengthened. Government of India has been supporting the growth of the industry through tax systems. Government has a role to develop Indian port sector, which would contribute to the growth of the Indian shipping. Indian shipping industry needs to team up with foreign consortium of fleet owners to tap the growing withholding tax to the non resident and the current tax on withholding shipping is effective and it must be more effective in future.

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