* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **WRIT PETITION (CIVIL) NO. 9780/2009**

Reserved on: 24th May, 2012

% **Date of Decision: 26th July, 2012**

Emirates Shipping Line, FZE ....Petitioner
Through Mr. Ajay Vohra with Ms. Kavita Jha and Mr. Somnath Shukla, Advocates.

Versus

Assistant Director of Income Tax …Respondent
Through Mr. Sanjeev Sabharwal, Sr. Standing Counsel.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V. EASWAR

SANJIV KHANNA, J.

Emirates Shipping Line, FZE, is a foreign company incorporated under the laws of United Arab Emirates (UAE, for short). It is a shipping company engaged in the business of transport of containers by sea. Some of their ships visit India and ship cargo to and from India.

2. Petitioner impugns and has challenged initiation of reassessment proceedings under Section 147 read with Section 148 of the Income Tax Act, 1961 (Act, for short) for the assessment year 2007-08 by notice dated 23rd March, 2009, issued by the Assistant Director of Income Tax, Circle 1(2), International Taxation, New Delhi. The petitioner had filed

objections to the said reassessment notice which have been dismissed by the respondent vide order dated 4th June, 2009.

3. The petitioner has raised the following contentions:

(A) Section 172 of the Act is a complete code and, therefore, reassessment proceedings under Section 147/148 of the Act cannot be initiated.

(B) For the assessment year 2007-08, the respondent had earlier issued 'annual no objection certificate' dated 14th November, 2006. The respondent was satisfied that the petitioner was entitled to benefit under Article 8 of the Double Taxation Avoidance Agreement (DTAA) between India and the UAE. The said certificate is binding on the respondent and therefore reassessment proceedings cannot be initiated.

(C) The respondent had earlier issued notice under Section 172(4) dated 22nd September, 2008, in respect of assessment year 2007-08 and thereafter questionnaire dated 17th November, 2008 was issued. The petitioner had submitted detailed replies dated 28th November, 2008 and 10th December, 2008. However, the proceedings abated and no order under Section 172(4) was passed. The respondent cannot initiate reassessment proceedings. Reliance is placed on ***KLM Royal Dutch Airlines vs. ACIT***, (2007) 292 ITR 49 (Del) and ***CIT vs. Ved & Co.,*** (2008)

302 ITR 328(Del) and ***Mohindra Mohan Sirkar vs. ITO*** (1978) 112 I[illegible] (Cal).

(D) Reasons for reopening are based on mere surmise and conjectures or are reasons to suspect and not "reasons to believe" on the following grounds:-

(i) There is no new material or information with the Assessing Officer that income has escaped assessment after issue of no objection certificate and after issue of notice under Section 172(4) and, therefore, conditions precedent for issue of reassessment proceedings are not satisfied.

(ii) The petitioner is entitled to benefit of Article 8 of the DTAA and the reasons recorded by the Assessing Officer are contrary to the ratio of the decision of the Supreme Court in ***Union of India vs. Azadi Bachao Andolan,*** (2003) 263 ITR 706, decision of this Court in ITR No. 1000/2011 titled ***Director of Income Tax vs. Mushtaq Ahmed Vakil*** dated 23rd August, 2011 and the High Court of Gujarat in ***Director of Income Tax (International Taxation) vs. Venkatesh Karrier Limited,*** (2012) 206 Taxman 488.

4. Certain basic facts which are relevant for decision of the present writ petition may be noticed. The petitioner vide letter dated 20th June, 2006 had applied for 'annual no objection certificate' under

Section 172 of the Act for the Assessment Year 2007-08. The said 'annual no objection certificate' is issued under Circular No. 732 dated 20th December, 1995, which is as under:-

> "Subject : Issue of annual no-objection certificate- Section 172 of the Income-tax Act of, 1961.
>
> Under the provisions of the section 172 of the Income-tax Act of, 1961, seven and half per cent. of the amount paid or payable to the owner or charterer of a ship on account of carriage of passengers, live stock, mail or goods shipped at a port in India, is deemed to be income accruing in India to the owner or the charterer. The port clearance is granted only after the return of the full amount to be paid is filed, evidence of payment of tax on such income is produced before the Customs authorities, or satisfactory arrangements are made to file the return and pay the tax within thirty days of departure of the ship.
>
> 2. In cases where such ships are owned by an enterprise belonging to a country with which India has entered into an Agreement on Avoidance of Double Taxation, which 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. Under such circumstances, a "No objection certificate" is to be obtained by the master of the ship from the concerned income-tax authority.
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> 3. It has been represented to the Board that in cases where no tax is payable in India, the procedure of obtaining a "No objection certificate" from the income-tax authorities before each voyage, should be done away with.
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> 4. The Board have considered the matter. It has been decided that in such cases, the Assessing Officer shall be competent to issue an annual NOC, valid for a year, in respect of taxation of shipping profits under section 172 of the Income-tax Act, 1961, after carefully verifying the applicability of the relevant provisions concerning taxation of shipping profits in the DTAA

with the country of which the owner or the charterer is a resident.

5. While examining the relevant articles of the DTAA, the Assessing Officer should ensure that the non-resident shipping company is engaged in "international traffic", a term which is invariably defined in the DTAA itself. An undertaking from the non-resident company that during the period of the currency of the NOC, no ship belonging to it will be in any traffic other than "international traffic" shall be obtained before the issue of the NOC.

Sd/-
Siddhartha Mukherjee
Secretary
CBDT

[F. No. 500/138/94-FTD dt. 20-12-1995 from CBDT, New Delhi]"

5. The respondent issued the 'annual no objection certificate' vide letter dated 14th November, 2006. Paragraphs 2 to 6 of the said letter read as under:-

"2. The application and other documents filed in this regard were examined. On prima facie examination of documents and details filed, it appears that the Emirates Shipping Line FZE is entitled for the benefit of the Article 8 of the DTAA between Govt. of India and Govt. of UAE.

3. In view of this and in accordance with the Board's circular No. 732 dated 20-Dec-1995, EMIRATES SHIPPING LINE FZE is eligible for 100% relief on account of income from the transportation of goods carried by EMIRATES SHIPPING LINE FZE on vessels chartered, owned or in a pool arrangement with the other shipping lines operating in international traffic. Accordingly, an Annual No Objection Certificate is hereby granted to EMIRATES SHIPPING LINE FZE in respect of taxation of shipping profits under section 172 for the following ports:-

Sl. No.	Port Location	Represented by
1.	Mumbai	Emirates Shipping Agencies (India) Private Limited (Agent)
2.	Chennai	-do-
3.	Mundra	Emirates Shipping Agencies (India) Private Limited (Agent) or agents M/s Volkort Shipping & Services Limited
4.	Tuticorin	-do-
5.	Kolkata & Haldia	-do-
6.	Cochin	-do-
7.	Pipavav (Gujarat)	-do-

4. This certificate is valid for period 01.04.2006 to 31.03.2007.

5. Certificate is being given on an undertaking given by EMIRARATES SHIPPING LINE FZE that no ship will be engaged in any traffic other than 'international traffic' during the currency of this certificate.

6. In case this certificate has been procured on basis of any misrepresentation of facts or false & misleading submission, the same will be cancelled immediately. IN such a case EMIRATES shipping AGENCIES (INDIA) PRIVATE LIMITED & EMIRATES SHIPPING LINE FZE will be liable for penal consequence under the Income Tax Act, 1961."

(emphasis supplied)

6. The respondent again issued no objection certificate for the succeeding assessment year 2008-09. The terms and conditions of the said no objection certificate were identical to the no objection certificate dated 14th November, 2006. However, the petitioner was

directed to submit annual consolidated freight tax return for the assessment year 2007-08, within two months, with the respondent as well as authorities having jurisdiction on the concerned port. Failure to file said return, it was observed, would be construed as a breach of conditions imposed for issue of no objection certificate inviting cancellation of the certificate.

7. The petitioner filed annual tax return on 18th June, 2007, disclosing freight earned from all ports in India for the Assessment Year 2007-08.

8. The respondent issued notice and raised queries by letter dated 17th November, 2008. The petitioner responded by letters dated 28th November, 2008 and 10th December, 2008. As per the petitioner, no order under Section 172(4) was passed and the limitation for passing of an order under the said Section came to an end on the expiry of nine months from the end of financial year. In the queries raised and the reply given, the issue was whether the petitioner was entitled to benefit under Article 8 of the DTAA. The specific query raised was that the petitioner was not liable to pay income tax on the income earned in UAE and, therefore, whether the petitioner was entitled to benefit of DTAA.

9. Notice dated 23rd March, 2009 was issued under Sections 147/148 of the Act for the assessment year 2007-08. By letter dated 22nd April, 2009, the petitioner replied and requested that the consolidated annual return filed earlier should be treated as the return filed pursuant to the reassessment notice.

10. On 13th May, 2009, the petitioner was provided with extracted reasons for initiation of reassessment proceedings, which read as under:-

> "2. As per the request made vide such letter, an extract of reasons recorded for re-opening the case u/s 147 for A.Y. 2007-08 is reproduced as below:-
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> > "The assessee is a company incorporated under the laws of United Arab Emirates on 06.02.2006 and is engaged in the business of shipping of containers in international traffic and operating following services:-
> >
> > IDX – India to US East Coast Service
> > AFA – China to East Africa
> > GIA - India to Africa
> > HLS – India to Thailand
> > HGX – China to Saudi Arabia
> > ICS – India to China
> > MAX – China to UAE
> > MIX – Pakistan to Spain
> >
> > As per terms of Article 8 of Indo- UAE Double Tax Avoidance Agreement, the assessee has been claiming exemption from tax in India with respect to income earned from shipping operations. To substantiate its claim, the assessee has filed Residence certificate

issued by Ministry of Finance and Industry, United Arab Emirates.

As per the provisions of the said treaty, it shall apply to persons who are residents of one or both the Contracting States. Under the said treaty resident of the UAE is any person who is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature. But the UAE has not enforced its income Tax Legislation and no income tax is currently paid in the UAE unless a company's activities relate to oil extraction or banking.

It has been held by the authorities for Advocate Ruling in the case of Cyril Eugene Pereria, In re 239 ITR 650 that 'liability to pay tax both in India and the foreign country entitles a tax payer to claim relief under the rules laid down in the Double Taxation Avoidance Agreement. If the tax payer pays tax or is liable to pay tax under the laws in force in one country alone, he cannot claim any relief from a non-existent burden of double taxation under the Double Taxation Avoidance Agreement. The Double Taxation Avoidance Agreement is meant only for the benefit of taxpayers, who are liable to pay tax twice on the same income. This agreement will apply to any taxes on income or capital in addition to the taxes mentioned in Paragraph-2 of Article 2 as and when such taxes are imposed. Also the AAR, in the case of Abdul Razack A. Menon In re (2005) 267 ITR 306 has concluded that 'though the payment may not be necessary, but tax should be payable in the other country for getting the relief.'

The position regarding eligibility to the tax treaty is clarified by the Notification No. SO 2001(E) dated 28.11.2007, wherein for the

> purpose of tax treaty in case of UAE, a company, incorporated in UAE and managed and controlled wholly in UAE is treated as resident of UAE."

11. The petitioner filed objections to the assumption of jurisdiction for initiation of the reassessment proceeding on various grounds in terms of the procedure and the ratio of the decision of the Supreme Court in ***GKN Driveshafts (India) Limited vs. Income Tax Officer***, (2003) 259 ITR 19. By the order dated 4th June, 2009, the objections filed by the petitioner to the assumption of jurisdiction for initiation of reassessment proceedings was rejected by the respondent.

12. Section 172 of the Act as applicable reads:-

> "**172. Shipping business of non-residents**.--(1) The provisions of this section shall, notwithstanding anything contained in the other provisions of this Act, apply for the purpose of the levy and recovery of tax in the case of any ship, belonging to or chartered by a non-resident, which carries passengers, live-stock, mail or goods shipped at a port in India.
>
> (2) Where such a ship carries passengers, live-stock, mail or goods shipped at a port in India, seven and a half per cent. of the amount paid or payable on account of such carriage to the owner or the charterer or to any person on his behalf, whether that amount is paid or payable in or out of India, shall be deemed to be income accruing in India to the owner or charterer on account of such carriage.
>
> (3) Before the departure from any port in India of any such ship, the master of the ship shall prepare and furnish to the Assessing Officer a return of the full amount paid or payable to the owner or charterer or

any person on his behalf, on account of the carriage of all passengers, live-stock, mail or goods shipped at that port since the last arrival of the ship thereat:

Provided that where the Assessing Officer is satisfied that it is not possible for the master of the ship to furnish the return required by this sub-section before the departure of the ship from the port and provided the master of the ship has made satisfactory arrangements for the filing of the return and payment of the tax by any other person on his behalf, the Assessing Officer may, if the return is filed within thirty days of the departure of the ship, deem the filing of the return by the person so authorised by the master as sufficient compliance with this sub-section.

(4) On receipt of the return, the Assessing Officer shall assess the income referred to in sub-section (2) and determine the sum payable as tax thereon at the rate or rates in force applicable to the total income of a company which has not made the arrangements referred to in section 194 and such sum shall be payable by the master of the ship.

(4A) No order assessing the income and determining the sum of tax payable thereon shall be made under sub-section (4) after the expiry of nine months from the end of the financial year in which the return under sub-section (3) is furnished :

Provided that where the return under sub-section (3) has been furnished before the 1st day of April, 2007, such order shall be made on or before the 31st day of December, 2008.

(5) For the purpose of determining the tax payable under sub-section (4), the Assessing Officer may call for such accounts or documents as he may require.

(6) A port clearance shall not be granted to the ship until the Collector of Customs, or other officer duly

> authorised to grant the same, is satisfied that the tax assessable under this section has been duly paid or that satisfactory arrangements have been made for the payment thereof.
>
> (7) Nothing in this section shall be deemed to prevent the owner or charterer of a ship from claiming before the expiry of the assessment year relevant to the previous year in which the date of departure of the ship from the Indian port falls, that an assessment be made of his total income of the previous year and the tax payable on the basis thereof be determined in accordance with the other provisions of this Act, and if he so claims, any payment made under this section in respect of the passengers, live-stock, mail or goods shipped at Indian ports during that previous year shall be treated as a payment in advance of the tax leviable for that assessment year, and the difference between the sum so paid and the amount of tax found payable by him on such assessment shall be paid by him or refunded to him, as the case may be.
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> (8) For the purposes of this section, the amount referred to in sub-section (2) shall include the amount paid or payable by way of demurrage charge or handling charge or any other amount of similar nature."

13. The aforesaid Section is a special provision for levy and recovery of tax from non-resident owners and charterers of ships. The tax is paid at flat rate of 7.5% by the non-resident owners and charters which carry passengers, live stock, mail or goods. The tax is payable on the account of such carriage, whether or not the amount is paid or payable in or out of India. The amount payable or paid is deemed to be income accruing in India to the owner or the charterer. Under Section 172(3), before

departure of ship, a return is required to be filed by the Master of the ship specifying the amount paid or payable. The proviso provides and states that return may not be filed under Section 172(3), where the Master of the ship has made satisfactory arrangements for filing of the return and payment of tax by any other person on his behalf. On the return being filed under Section 172(3), the Assessing Officer has to assess the income referred to in sub-section (2) and pass an order under Section 172(4) of the Act determining the tax payable. The said sum is payable by the Master of the ship, unless arrangement has been made under Section 194. For the purpose of the said determination, the Assessing Officer can call for documents and/or accounts as he may require. Port clearance cannot be granted unless the Collector of Customs or other officer authorized, is satisfied that the tax assessable under the said Section has been duly paid or satisfactory arrangements have been made for payment thereof.

14. A reading of the said Section would show that Section 172(4) postulates a summary assessment of payment of tax payable under Section 172 before the ship leaves India. This is necessary because after the ship leaves India, it would be difficult; (if not impossible), to recover the tax. The section postulates that the ship can be allowed to leave when satisfactory arrangements have been made for filing of

return and payment of tax. These are special provisions which have been enacted keeping in view the specific need and requirement relating to international shipping and their liability to pay income tax in India.

15. Sub-section (7) to Section 172 elucidates that an order under Section 172(4) is a summary order, which cannot be equated with an order of assessment under Section 143(3) of the Act i.e. the regular assessment. The assessee in question i.e. the non-resident ship owner or the charterer can invoke the said sub-section and call upon the Assessing Officer to pass a regular assessment order. This section, therefore, enables the assessee concerned to ask the Assessing Officer who has passed order under Section 172(4) to proceed and pass a regular assessment order. This provision is required because normally an assessee cannot ask an Assessing Officer to pass a regular assessment order under Section 143(3). In the absence of the said stipulation, the Assessing Officer alone has the option and right to initiate regular assessment proceedings by issue of notice under Section 143(2). The tax paid during the previous year under Section 172(4) on summary assessment is treated and regarded as Advance tax paid.

16. It is noticeable from the facts of the present case that in terms of Circular No. 732 dated 20th December, 1995, the petitioner was issued

an 'annual no objection certificate' and in terms thereof, the ships operated and owned by the petitioner were allowed to leave the ports. The certificate as itself was treated as valid and binding and in compliance with the Section 172. It is after the ships had left the ports and after the end of assessment year on 31st March, 2007, that the petitioner had filed an annual return on 18th June, 2007. We do not think that annual return can be treated as a return filed under Section 173(3) as the same is to be filed at the port on arrival and before departure of the ship, by the Master of the ship after she arrives at the port. It is in respect of each ship. Return filed in the present case was a consolidated return for the entire year and was not filed by the Master of the ship who had anchored the ship at the port.

17. It is difficult to accept the contention of the petitioner that provisions of Section 147/148 cannot be invoked in the present case or in cases where summary assessment is made under Section 172(4) of the Act. As in the present case, no objection certificate was issued in terms of Circular No. 732 dated 20th December, 1995 and no summary assessment order was passed. Only a prima facie or tentative view is taken, when an 'annual no objection certificate' is issued under the Circular No. 732 dated 20th December, 1995. No doubt, Section 172 is a special and specific provision and is a complete code but the

exception or special procedure carved out is confined and restricted to the stipulations and what is circumscribed and stated in sub-sections. We have to keep the purpose and object behind the section 172 in mind. Section 172(1) states that notwithstanding other provisions of the Act, tax shall be levied and recovered in the manner stated in the Section. The said Section does not postulate or mandate that Section 147/148 or other provisions like Sections 154, 263 etc. of the Act would not be applicable. There is no conflict between Sections 147, 148 and 172 of the Act. Provisions of Sections 147 and 148 can apply even when an order under Section 172(4) or 172(7) has been passed. There can be escapement of income even when order under Section 172 (4) or 172(7) is passed and therefore when conditions of Section 147/148 are satisfied, notice for reassessment can be validly issued. Section 172(4) as noticed above is only a summary procedure and not a detailed regular assessment order. It is somewhat like an order under Section 195/197 of the Act.

18. Further, Section 147 does not refer to an assessment order under Section 143(1) or (3). The requirement is recording of 'reasons to believe' that income chargeable to tax has escaped assessment for any assessment year. The proviso refers to orders under Section 143(3) and when Section 147 can be invoked after expiry of 4 years, where an

order under the said Section has been passed. There is no inconsistency or repugnancy between Section 147 of the Act and Section 172. Section 172 does not specifically state that reopening provisions are not applicable. It is difficult to accept that Section 172 by implication negates or contradicts application of Section 147 or the reopening provisions. No doubt Section 172 is a special provision but the provisions of the said Section are not anti-thesis or contradict application of Sections 147 or 148 of the Act. A provision or Section is not to be read or construed in isolation but should be read to make it consistent with the whole statute. Other parts of the statute along with the section have to be read to find out the intention of the Legislature. Section 172 of the Act should not be, therefore, construed as a standalone provision existing and having separate existence, independent of the entire Act. This will make the other parts inconsistent with Section 172, even when there is no conflict between them. An order made under Section 172(2)/172(4) is amenable to correction under Section 154 and even Revision, both by the assessee or by the Revenue, when conditions under Sections 263 or 264 of the Act are satisfied. In the present case, as noticed there is no inconsistency or repugnancy between Section 147 and 172 and if we consider and read them harmoniously, we do not think that the

contention of the petitioner that Section 172 incorporates a b... prohibition for invoking reassessment proceedings under Section 147/148 can be acceptable. The two provisions can operate simultaneously and are reconcilable. Both operate independently and within the parameters stated. In fact the contention of the petitioner if accepted will result in a serious challenge to the validity of the Circular No. 232. This will not be in the interest of the petitioner or other shipping companies.

19. The view we have taken is in consonance with the reasoning and ratio expounded by the Supreme Court in ***A.S. Glittre D/5 I/5 Garonne and Ors. vs. Commissioner of Income Tax***, (1997) 225 ITR 739 (SC). In the said case, assessment made under Section 172(4) of the Act was treated and categorized as ad-hoc assessment. In the said case, the assessee exercised their right under Section 172(7) of the Act and claimed that regular assessment be made. On regular assessment being framed, the assessee was found entitled to refund, since the income assessed under the regular assessment was far less than the income assessed under Section 172(4). The refund was paid but no interest was paid. Question arose whether the payments made pursuant to assessment under Section 172(2) could be treated at par with advance tax payment and accordingly, the interest was payable

under Sections 207-213 of the Act. Accepting the contention of the assessee and allowing the appeal, the Supreme Court observed:-

> "The scheme of s. 172 of the Act appears to be this : S. 172(1) of the Act gives a right to the Income-tax Officer to levy and recover tax in the case of any ship belonging to a non-resident, in a summary manner notwithstanding anything contained in the other provisions of the Act. It is an absolute right conferred on the assessing authority. The assessee has no right to object to the same. Normally, this will be the assessment of the assessee for the year. But, u/s. 172(7) of the Act a right is given to the assessee to claim before the expiry of the assessment year relevant to the previous year in which the date of departure of the ship from the Indian port falls, that an assessment, according to the provisions of the Act, in a regular manner be made. Thus, a right is given to the assessee to opt for a regular assessment although a "rough and ready" or a "summary assessment" has already been made u/s. 172(4) of the Act. It is a valuable right. If the assessee exercises the right conferred on him u/s. 172(7) of the Act, the Income Tax Officer is bound to make an assessment of the total income of the previous year of the assessee and the tax payable on the basis thereof "should be determined in accordance with the other provisions of the Act" and any payment made under the section (earlier) "shall be treated as a payment in advance of the tax" leviable for that assessment year and the difference between the sum so paid and the amount of tax found payable by him on such assessment, shall be paid to the assessee or refunded to him. The "ad hoc" assessment made u/s. 172(4) of the Act is superseded and a "regular assessment" is made as per the provisions of the Act. In such a case, it is only proper and appropriate to hold that all "the provisions" of the Act in the determination of the tax liability including the ancillary or incidental or consequential matters pertaining to it are necessarily attracted.
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> Xxxxx
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> So, necessarily all the provisions in the Act in respect of the payment of advance tax will apply. On effecting the regular assessment, if there is any excess payment made by the assessee, then the assessee would be entitled to the excess amount paid and also interest, for payments made in excess of the tax assessed. We are unable to appreciate the distinction drawn by the High Court between "advance tax" and "payment in advance of the tax" mentioned in sub- s. 172(7) of the Act. We hold that the distinction so drawn has no basis. The High

> Court has further held that the payment made u/s. 172(4) of the Act is not a payment of advance tax within the meaning of the Act, as the tax paid u/s. 172(4) of the Act is a payment on assessment and not a payment of advance tax under the Act. We are afraid that the High Court has failed to give due effect to the language employed in s. 172(7) of the Act and the scope of the legal fiction enshrined therein. The reasoning of the High Court is rather strained as the distinction drawn is without any substance or difference. S. 172(7) of the Act provides for a regular assessment, wherein all the provisions of the Act will apply. It is not a mere provision for adjustment. The High Court was swayed by the title used in the corresponding provision of the predecessor Act , wherein there was a heading to the section - "Adjustment". S. 172 of the Act contains no such heading. We hold that the Income Tax Appellate Tribunal was justified in holding that since the payment made u/s. 172(4) of the Act is, by fiction, treated as advance tax, all the provisions in respect of the advance tax will apply and if on regular assessment made u/s. 172(7) of the Act, there is any excess payment made by the assessee, then the assessee would be entitled to it and also interest thereon u/s. 214 of the Act."

20. This decision was referred to by the Kerala High Court in ***Commissioner of Income Tax vs. Taiyo Gyogyo Kabhushiki Kaisha***, (2000) 244 ITR 177 (Ker.). The said case pertains to the Companies (Profits) Surtax Act, 1964. On the basis of assessment under Section 172(4) of the Income Tax Act, 1961, the Assessing Officer had computed levy of surtax. The High Court pointed out the difference between an assessment under Section 172(4) of the Act which was classified and regarded as provisional, ad-hoc or for special purpose assessment and observed that this does not preclude the Assessing Officer from resorting to Section 44B of the Act in regular assessment proceedings, which could be resorted to and enforced by the Assessing Officer. It was observed that even when an ad-hoc assessment is made under Section 172(4), the assessee can exercise option under

Section 172(7) or the Assessing Officer could have made regular assessment in terms of Section 44B of the Act. We need not examine the legal ratio but what is relevant and material for us is a factum and acceptance of the principle that Section 172 does not preclude operation of all provisions of the Act. Provisions which are in consonance and do not come into conflict with Section 172 continue to apply and can be enforced.

21. Accordingly, the first contention of the petitioner that provisions of Section 147/148 cannot be invoked, has to be rejected. We also rely upon decision of a Division Bench of this Court in ***Areva T&D, SA vs. ADIT***, 179(2011)DLT314. The following quote in the decision in ***Areva T&D SA*** (supra), is relevant and material:-

> "28. Explanation 2(a) of the aforesaid Section clearly takes care of the situation where no return has been filed. On a conjoint reading of Sections 195 and 197 of the Act, we are of the view that if any opinion is expressed at the time of grant of certificate it is tentative or provisional or interim in nature and the same would not debar the assessing officer from initiating a proceeding under Section 147 of the Act on the ground that there has been a change of opinion…"

22. This brings us to the second issue; validity of initiation of reassessment proceedings i.e. whether pre-condition for re-initiation of proceedings are satisfied in the present case. As noticed above, several

contentions have been raised by the petitioner. We, however, do not think that all contentions raised by the petitioner are required to be examined or decided, as we are of the opinion that the "reasons to believe" as recorded by the Assessing Officer do not meet the requirements and mandate of Section 147.

23. We have quoted the "reasons to believe" recorded by the Assessing Officer. For invoking this power, it is not the requirement nor is the provision confined to cases of concealment of income. Reassessment provision empowers the Assessing Officer to assess income which has escaped assessment. The object of the section is to ensure that the taxable income is computed and calculated as per the Act and tax payable thereon is paid. At the same time, the power under this Section is not unbridled and there are several safeguards. One of the safeguards stipulated in the section itself is the requirement that the Assessing Officer must record 'reasons to believe'. This requirement mandates that the Assessing Officer must state in writing why and for what reason, i.e. cause or justification, he is invoking the said power. The said reasons must satisfy the stipulation that the Assessing Officer should have formed a prima facie belief that income has escaped assessment.

24. 'Reasons to believe' recorded by the Assessing Officer are a result of the subjective satisfaction of the assessing officer, but in a way has to satisfy the test of objectiveness. The belief must be honest and should be based upon some material or basis but not on mere suspicion, gossip or rumour. 'Reasons to believe' do not mean 'reasons to suspect'. The Assessing Officer cannot institute or start a fishing investigation or rowing inquiry. There must be some information or material which is on the file which makes the assessing officer form a tentative or prima facie opinion that income has escaped assessment. This material or information cannot be wholly vague, indefinite or farfetched. It must have nexus or live link with the formation of belief. The test is whether a reasonable person would have formed the requisite belief on the basis of information or material as stated/recorded by the Assessing Officer that income has possibly escaped assessment. Mere ipse dixit or a hunch does not amount to reason to believe. Inspite of the wide power, the exercise of power must meet this requirement that there was relevant material and ground for the Assessing Officer to form a tentative or prima facie opinion that the income as escaped assessment which includes non assessment or under assessment. But, it is not the requirement that the Assessing Officer should have finally ascertained the fact of escapement of income by recording findings or conclusion.

This final ascertainment takes place when the final assessment order is passed. ***T***he Assessing Officer has to show tentatively or prima facie that income has escaped assessment. There should be some material or basis for the said formation of belief (refer ***Assistant Commissioner of Income Tax v. Rajesh Jhaveri Stock Brokers*****,** (2008) 14 SCC 208; ***ITO v. Selected Dalurband Coal Co. (P) Ltd.*** (1997) 10 SCC 68; ***Raymond Woollen Mills Ltd. v. ITO,*** (2008) 14 SCC 218).

25. The Assessing Officer in the present case has in the reasons to believe observed that the assessee was incorporated under the laws of UAE on 6th February, 2006 and engaged in the business of shipping of containers. It claims benefit and advantage of Article 8 of DTAA and has filed residency certificate issued by Ministry of Finance and Industry, UAE. The Assessing Officer, thereafter has observed that UAE had not enforced its income tax legislation and no income tax was currently payable or paid in UAE unless assessee's transactions relate to oil extraction or banking. Thereafter, the Assessing Officer has relied upon judgments of Advance Ruling Authority in ***Cyril Eugene Pereira, In Re (1999) 239 ITR 650*** and ***Abdul Razak A. Meman, In Re*** (2005) 276 ITR 306, for the proposition that benefit under DTAA is only meant for taxpayers who are liable to pay tax twice in two countries on the same

income and not where tax is not payable in one country. Notification No. SO 200(3) dated 28th November, 2007 is relied upon.

26. The Assessing Officer has, however, not noticed and referred to the decision of the Supreme Court in ***Azadi Bachao Andolan (supra)*** which was pronounced on 7th October, 2003 i.e. before recording of the reasons to believe. In the said decision, the Supreme Court has specifically referred to the decision of the advance ruling in ***Cyril Eugene Pereira's case (supra)*** and disapproved the reasoning/ratio mentioned therein. In the case of ***Azadi Bachao Andolan (supra),*** the Supreme Court had examined the DTAA between India and Mauritius and whether the circular issued by CBDT No. 789 dated 13th April, 2000, reported in (2000) 243 ITR (St.) 57 was valid or ultra vires to Section 90 and other provisions of the Act. The circular was upheld after drawing a distinction between "liability to pay tax" and "actual or de facto payment of tax". Phrase 'liable to taxation' it has been held is not the same as 'payment of tax'. The test for liability for taxation is not determined on the basis of an exemption granted in respect of any particular source of income but by taking into consideration the totality of provisions of income tax law [refer ***Ramanathan Chettiar (K.V.Al.M.) v. Commissioner of Income-tax*** *(1973) 88 ITR 169 (SC)]*. Merely because at the given time there is an exemption from income tax in

respect of any particular head, it cannot be contended or held that the assessee is not liable to tax. The Supreme Court referred to the concept of "fiscal residence of a company" after making reference to OECD and UNO Model Conventions and interpretations placed by Courts in different countries and manuals of international taxation. It was observed that "liable to taxation" does not refer to current but also potential double taxation. It was elucidated:-

> **"**In our view, the contention of the respondents proceeds on the fallacious premise that liability to taxation is the same as payment of tax. Liability to taxation is a legal situation; payment of tax is a fiscal fact. For the purpose of application of article 4 of the DTAC, what is relevant is the legal situation, namely, liability to taxation, and not the fiscal fact of actual payment of tax. If this were not so, the DTAC would not have used the words, "liable to taxation", but would have used some appropriate words like "pays tax". On the language of the DTAC, it is not possible to accept the contention of the respondents that offshore companies incorporated and registered under the MOBA are not "liable to taxation" under the Mauritius Income-tax Act ; nor is it possible to accept the contention that such companies would not be "resident" in Mauritius within the meaning of article 3 read with article 4 of the DTAC…**."**

27. During the course of arguments before us, learned counsel for Revenue has relied upon another decision of Authority of Advance Ruling in ***Abdul Razak A. Meman, In re*** (supra) and had read the following passage:-

> "From the above discussion, as the UAE Decree stands now, it follows that the applicant, who has settled in UAE, does not satisfy the requirements of the expression "resident of a Contracting State" so he cannot be treated as a resident of UAE within the meaning of Article 4(1) of the treaty. Had the proposed codified tax law come into force an individual would have become a resident within the meaning of Article 4(1) of the treaty and Article 4(2) would have become applicable to him. In the result, we have reached the same conclusion as was recorded by the Authority in Pereira's case (supra) but for different reasons."

28. We are not inclined to accept the contention of the Revenue for several reasons. The decision of the Advance Ruling Authority is not binding precedent but of persuasive value. Advance Ruling Authority in ***Mohsinally Alimohammed Rafik In re*** (1995) 213 ITR 317, had taken a contrary view. The said decision again relates to DTAA between India and UAE. It was observed that on straightforward and literal interpretation of Article 4(1) of DTAA it appears that it supports the contention that to be a resident of UAE, a person must be actually subjected to tax in UAE under its tax laws, but, this interpretation was not accepted. It was observed that there was good logic and reason why this interpretation should not be accepted. Reference was made to the income tax law applicable in Dubai. It was accordingly observed in ***Mohsinally Alimohammed Rafik In re*** (supra):-

"While, ex facie, the above seems to be a simple way of reading the DTAA, a more liberal interpretation is suggested by other circumstances. The most crucial circumstance to be taken note of is that there is no income-tax or wealth-tax on individuals in any of the Emirates. There was no such tax there when the earlier limited agreement of 1989 was entered into which provided the occasion for discussion on a more comprehensive tax treaty and there can be no doubt that both the States were fully aware of this position. The fact that such a comprehensive DTAA was considered necessary in spite of a clear knowledge that there was no such tax in the U.A.E. can only mean that the DTAA was intended to encourage the inflow of funds from Dubai to India for investment. In this context, it is necessary to remember that U. A. E. provides one of the largest export markets for India in West Asia. Thanks to their oil resources, the Emirates of U. A. E. represent a very prosperous region in West Asia, and in that sense, can be considered to be developed countries. But they are really developing countries in the true sense of the term. They have no industries and there is not much prospect of joint ventures with other countries or of flow of technology either way. There is not much possibility of Indian companies carrying on trade or business in or of foreign companies carrying on trade in Dubai having income in India. The attraction of the U. A. E. lies in the vast surplus funds it has available for investment outside the country. It is common knowledge that there is a competition for its surplus funds from the U. S. S. R. as well as several European and Asian countries. India is also in the process of looking out for foreign countries interested in investing in India and must have considered the DTAA as providing an opportunity to improve the economic relations between the two countries and encourage the flow of funds from Dubai to India. There could be no better way of doing this than by the offer of some tax incentives to attract investment in India of Dubai capital. Any incentive offered in respect of Dubai

would also attract investment from the other countries in the region which could hope for a DTAA on similar lines. The U. A. E. has a sizeable expatriate population of Indians and a little concession could go a long way in inducing flow of substantial funds to India. The preamble to the DTAA is indicative of these considerations. Given the clear knowledge on the part of India that individual Indian investors in U. A. E. have to pay no, or only a nominal, income-tax on their income, the only purpose of the DTAA was clearly to provide some benefits to all U. A. E. investors in India. Read in this background, articles 10 and 11 clearly envisage a lower rate of income-tax to all U. A. E. investors on such investments and article 13 clearly leaves it to the U. A. E. to deal with the capital gains on movable property realised by all U. A. E. investors.

It could perhaps be argued that as the DTAA is to be an agreement indefinite in its period of operation, it will be appropriate to consider it as applicable to entities liable to tax under the existing law at any point of time during its subsistence. Thus, it can be said, corporate bodies are now liable to tax and hence will be residents of U. A. E. entitled to avail of the benefits of the agreement. Individuals, not being now liable to tax, cannot claim to be residents but, if at a future date, income-tax is levied on individuals too in U. A. E., they will become entitled to invoke the terms of the DTAA. Though this argument may be consistent with the narrow interpretation of article 4 earlier set out, there are difficulties in accepting this construction of the DTAA. It is too artificial and far-fetched to say that India, with the full knowledge of the absence of any income tax in Dubai in respect of individuals, proceeded to enter into a DTAA on the off chance, or to provide against a future contingency, of the U. A. E. imposing an income-tax on individuals also at a future date. In the first place, there was no urgency for a DTAA in anticipation of future possibilities. There was no reason to expect that Dubai, where there is no organised tax system at

present, would be able to draw up a comprehensive tax law in the near future. Secondly, the presence of a number of articles in the agreement solely concerning themselves with individuals (see, in particular, articles 14 to 21) militate against this suggestion. In fact, even article 4, crucial to the application of the agreement, concerns itself with individuals in paragraphs 1 and 2 and deals with other categories of persons in paragraph 3 only as a residuary class. These are clear indications that the DTAA was an agreement intended to be applicable to individuals from the very date of its coming into force and was not intended to be a dead letter qua individuals until appropriate U. A. E. legislation brought them within the tax net in that country. It should also be noted that though there is no term of operation provided for in the agreement, it cannot be described as an agreement of permanent duration. On the other hand, article 31 makes the agreement liable to termination by either side at short notice. The argument suggested, therefore, though plausible, is not acceptable.

If we now turn to interpret article 4(1) of the agreement in the above background, it will be seen that it takes on a different complexion altogether. The reference to a person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of incorporation or place of management or any other criterion of a similar nature will then connote not the existence of an actual taxation measure in the State under which the person in question is factually charged to tax in that State but will connote a person who is liable to be subjected to tax by the taxation laws of that State because of a nexus existing between him and the State, of one of the kinds mentioned in the article. The mention, in the article, of the four kinds of nexus reinforces this interpretation. For, if the relevant criterion was only to be whether the person in question is actually subject to tax in the State or not, the article would have used the words "a person who is subjected to tax

in that State" or stopped with the words "liable to tax in that State under the laws of that State". The further words in the paragraph would then be pure surplusage. Secondly, as already pointed out, the several articles in the DTAA which specifically concern individuals would make no sense at all, if individuals living in U. A. E. are treated as excluded from the benefits of the agreement because they are not currently subjected to any tax in U. A. E. It is difficult to conceive of a large number of such provisions being inserted in the agreement merely to meet a situation which does not arise on the date of the agreement but may possibly arise in future. These provisions are consistent only with the interpretation that certain benefits qua Indian tax are intended to be conferred on individuals resident in the U. A. E. even though they are not liable to tax in their State. Thirdly, if one accepts the stricter interpretation, all corporate bodies will be residents entitled to the benefits of the agreement, they being liable to tax under the Dubai Ordinance although as pointed out earlier those provisions are not actually enforced against several categories of companies. In other words, even companies which are not called upon to pay any tax in Dubai will be entitled to claim benefits under the agreement. If this be so, logically, there is no reason why individuals should not also be permitted to avail of the benefits of the agreement for the reason that they are not actually subject to tax in Dubai. Fourthly, the structure of the agreement also indicates that it is more a tax avoidance agreement than a tax relief agreement. Many of the articles are so structured as to ensure that the income arising to a person out of activities in both States is taxed in one or the other State but not both (see articles 6, 7, 8, 13, 15, 18, 19, 22). It is only in regard to items like dividends, interest and royalty (articles 10, 11, 12) that, while the general practice of having them taxed in both countries is retained, the rate of tax in the source country is pegged at a low figure so as to attract more capital. In this view of the matter, the agreement clearly voices

> the intention that income of certain types should be taxed only at a concessional rate in its country of source.
>
> It will thus be seen that the language of paragraph 1 of article 4 lends itself to two equally plausible interpretations. One of them seems to give effect to the natural meaning of some of the words employed in the paragraph. However, it not only results in certain other words becoming an unnecessary surplusage but also renders the agreement practically devoid of all contemporary relevance. On that interpretation, only companies can take advantage of the agreement and all other categories of assessees would be excluded from its benefits for the present. The second interpretation perhaps places some strain on some of the words but gives a meaning to all the words employed, fully accords with the intention and objective of the agreement and gives immediate effect to all its terms. In this situation, the Authority is of the opinion that the second interpretation is the more preferable one and that an individual like the applicant, though at present not actually liable to pay any income-tax in Dubai, should also be considered to be a resident of Dubai for the purposes of the DTAA as, being a person living in Dubai and having sources of income there, he is certainly liable to be called upon to pay income-tax under the tax laws of that country."

29. Lastly, and more importantly, we find that we are bound by the ratio and the decision of the Supreme Court in **Azadi Bacho Andolan's case (supra)** wherein reference was made to the decision in ***Cyril Eugene Pereira's case (supra)*** and ***Mohsinally Alimohammed Rafik's case*** *(supra)* and it was observed as under:-

"In A Manual on the OECD Model Tax Convention on Income and on Capital, at paragraph 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 allow- ances, 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."

Interestingly, Baker refers to the decision of the Indian Authority for Advance Ruling in Mohsinally Alimohammed Rafik, In re [1995] 213 ITR 317(AAR). An assessee, who resided in Dubai claimed the benefits of the UAE- India Convention of April 29, 1992, even though there was no personal income-tax in Dubai to which he might be liable. The Authority concluded that he was entitled to the benefits of the convention. The Authority subsequently reversed this position in the case of Cyril Eugene Pereira, In re [1999] 239 ITR 650 (AAR) where a contrary view was taken.

The respondents placed great reliance on the decision by the Authority for Advance Rulings constituted under section 245-O of the Income-tax Act, 1961, in Cyril Eugene Pereira's case [1999] 239 ITR 650 (AAR). Section 245S of the Act provides that the Advance Ruling pronounced by the authority under section 245R shall be binding only :

"(a) on the applicant who had sought it ;

(b) in respect of the transaction in relation to which the ruling had been sought ; and

(c) on the Commissioner, and the income-tax authorities subordinate to him, in respect of the applicant and the said transaction."

It is therefore obvious that, apart from whatever its persuasive value, it would be of no help to us. Having perused the order of the Advance Rulings Authority, we regret that we are not persuaded.**"**

30. As noticed above, in ***Mohsinally Alimohammed Rafik's case*** (supra), the Advance Ruling Authority had specifically taken into account the nature and character of the taxation law in Dubai and then stated and given their finding.

31. A Division Bench of this Court in ITA No. 1000/2011 titled ***Director of Income Tax vs. Mushtaq Ahmed Vakil,*** has held as under:-

"It is an undisputed fact that India has entered into a Double Taxation Avoidance Agreement (DTAA) with United Arab Emirates (UAE). It is also an undisputed fact that as per the provision of this agreement, no tax is payable by non-resident on an income earned under short-term capital gain. This is specifically provided in Article 13(3) of the said DTAA between India and UAE. In the instant case, respondent /assessee, who is a resident of UAE, had filed return for the assessment year 2004-05 and declared income at ` NIL after claiming short –term capital gain of `77,10,248/- accrued to him in India as the same was not taxable in India due to benefits under DTAA between India and UAE invoking article 13(3) of the said treaty. The Assessing Officer, however, disallowed the exemption on the ground that there was no tax regime in UAE and as the assessee was not liable to taxation in UAE, the question of benefit under the said DTAA was not applicable. The assessee preferred an appeal before

the CIT(A) which was allowed reversing the order of the Assessing Officer having regard to the judgment of the Apex Court in Union of India v Azadi Bachao Andolan (2003) 263 ITR 706. This view is upheld by ITAT in its order dated24th September 2010 confirming the aforesaid view of CIT(A) and dismissing the appeal of the revenue. Challenging that order, the present appeal is preferred. The only contention raised by the revenue in this appeal (which was based on the assessment order passed by the Assessing Officer) is that in absence of any tax laws in UAE and as the respondent is not liable to pay the tax on the aforesaid short term capital gain in UAE, the provisions of DTAA would not be applicable as there is no question of avoiding payment of double tax in the said case. Howsoever attracted this proposition may be, we are not in a position to accept the same inasmuch as this very contention was negated by the Supreme Court in Azadi Bachao Andolan (supra). Interestingly, that was a case where Azadi Bachao Andolan had filed a Public Interest Litigation raising this contention which was accepted by the High Court. However, against that order, the appeal filed by none else than the Union of India itself and had argued that even if tax revenue actually paid by a non-resident in other country with which India has entered into such a treaty, that would be of no consequence and that contention was accepted by the Supreme Court in the following words: ?The appellants (i.e. Union of India) contend that, acceptance of the respondent?s submission that double taxation avoidance is not permissible unless the tax is paid in both countries is contrary to the intendment of section 90. It is urged that clause (b) of the sub-section (1) of section 90 applies to a situation where income-tax has been paid in both the countries, but clause (b) deals with the situation of avoidance of double taxation of income, inasmuch as Parliament has distinguished between the two situation, it is not open to a Court of law to interpret clause (b) distinguished between the two situations, it is not

> open to a Court of law to interpret clause (b) of section 90 sub section (1), as if it were the same as situations contemplated under clause (a)?
>
> Having regard to the aforesaid pronouncement of the Apex Court which is binding on us, we are of the view that no question of law much less substantial question of law arises in these appeals. We, therefore, dismiss both these appeals."

32. Similar view has been taken by Gujarat High Court in ***Venkatesh Karrier Limited*** (supra) holding that the company incorporated in Dubai and carrying on shipping business in India is entitled to benefit under Article 8 of the DTAA and there is no scope of taxing them in any port of India.

33. We may also note that Article 4(1) of the DTAA has been amended w.e.f. 1st April, 2008, and after amendment the said Article reads:-

> "**Article 4: Resident**
>
> 1. For the purposes of this Agreement, the term 'resident of a Contracting State' means :
>
> (a) in the case of India : any person who, under the laws of India, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature. This term, however, does not include any person who is liable to tax in India in respect only of income from sources in India ; and
>
> (b) in the case of the United Arab Emirates : an individual who is present in the UAE for a period or

periods totalling in the aggregate at least 183 days in the calendar year concerned, and a company which is incorporated in the UAE and which is managed and controlled wholly in UAE."

34. Under the amended Article, therefore, the requirement of liability to tax has been done away with.

35. While taking the above view, we have followed the principle of certainty and consistency.

36. In view of the aforesaid findings, we allow the present writ petition and quash the impugned reassessment notice and proceedings. In the facts of the case, there will be no order as to costs.

-sd-
(SANJIV KHANNA)
JUDGE

-sd-
(R.V. EASWAR)
JUDGE

July 26, 2012
Kkb/VKR