ARTICLE 8 OF THE UN MODEL CONVENTION

SHIPPING, INLAND WATERWAYS TRANSPORT
AND AIR TRANSPORT

PRESENTATION BY – CA GAURANG V. GANDHI
INDEX

- Background
- Relevant provisions under the Income-Tax Act, 1961 (ITA)
- Rationale behind Article 8
- Provisions of Article 8 – UN MC
- Provisions of Article 8 – OECD MC
- Distinguishing features of India’s DTAA
- Provisions of Article 8 – India-Singapore DTAA
Nature of Activities involved

- Booking of passengers & cargo
- Transport of goods from factory to intermediate port and from there to final port of embarkation
- Ferrying of passengers from smaller cities / feeder routes to main port of embarkation
- Transit accommodation / accommodation at final destination
- Storage / demurrage and other services at port
- Other services – container leasing, cargo handling, ticketing and travel related services for others
- High seas related activities
Players involved

- Booking Agents
- Operating company viz. Ship chartering company / Aircraft lessee company engaged in Shipping & Airline operation
- Ship / Aircraft owner company – Time Charters & Voyage Charters
- Port / Ground handling & Engineering Services company
- Other companies providing incidental services
Section 5: Income of a non-resident can be taxed in India only if it accrues or arises in India or if it is received or deemed to be received in India.

- In *Reliance v/s DCIT(81 TTJ 787(Mumbai))*, hire charges paid to non-resident ship-owners were held on facts that income cannot be said to have accrued or arisen in India.

- In case of *Lufthansa Cargo India Ltd v/s DCIT(92 TTJ 837)*, payments made by the assessee being for earning income from a source outside India and also not being in the nature of fees for technical services, were held to be not taxable in India.
RELEVANT PROVISIONS UNDER ITA

- **Section 44B** – Non-resident engaged in the business of operation of ships – Presumptive profits @ 7.50% of the amount received or receivable or deemed to be received in India for carriage, demurrage charges, handling charges etc. at any port in India and / or outside India

  - Sec 44B overrides sec 28 to 43A. Tax should be payable at flat rate Nedlloyd Lines v/s DCIT (43 ITD 433(BOM))
  - Ship hired for the business of exploration of oil not covered by this section but covered by section 44BB (Interocean Shipping (I)(P) Ltd. (51 ITD 582))
  - ONGC v/s IAC (29 ITD 422)(Delhi), where ITAT held that sec 44B applies only when payment is for carriage of passengers & not when it is for hire of Ship
  - Poompuhar Shipping Corporation Ltd. v. Income-tax Officer, International Taxation - II, Chennai [2013] 38 taxmann.com 150 (Madras) – Assessee hired ships from various non-resident companies for transportation of coal from various ports in India to State Electricity Board, Chennai, payments of hire charges made to said companies under time charter agreement amounted to royalty falling under clause (iva) of Explanation 2 to section 9(1)(vi)
  - Essar Oil Ltd V/S DCIT TDS Circle 1 (102 TTJ 614 (Mum)) – Since a DTAA was already in force, same should be considered first in preference to Act and, therefore, sections 9 and 44B could not take precedence over relevant articles of DTAA
RELEVANT PROVISIONS UNDER ITA

- Section 44BBA – Non-resident engaged in operation of aircrafts – Presumptive profits @ 5% of the amounts received or receivable or deemed to be received in India for carriage from any place in India / outside India.

  - Aircraft hired for the business of exploration of oil not covered by this section but covered by section 44BB (Lloyd Helicopters International Pty Ltd. (249 ITR 162)(AAR))
RELEVANT PROVISIONS UNDER ITA

× Section 172

+ Machinery & procedure for levy & recovery of tax in case of any passengers, goods, etc. shipped in India belonging to or chartered by a non-resident which carries passengers, livestock, mail or goods shipped at a port in India

+ Section does not apply to hire of a ship i.e. bare boat charter (Gosalia Shipping (113 ITR 307)(SC))

+ Before the departure of ship or within 30 days thereof (if so authorised by AO) – to file a Return of Income & pay the tax

+ Port clearance by collector only if tax is paid or arrangement for payment of tax is made or treaty exist between India and the state of the Shipping enterprise

+ Option to the owner/charterer of the ship to assess his income as per the provisions of ITA S.172(7).


+ However, in case of Norasia Lines Ltd. (68 TTJ 485), it was held that a non resident company opting for 172(7) is not liable to interest u/s 234A
RELEVANT PROVISIONS UNDER ITA

- Section 44B viz.-a-viz. Section 172
  - Sec. 44B & Sec. 172, application of these two provisions distinguished
    - CBDT vs. Chowgule & Co. Ltd. [1991] 192 ITR 40 (Kar.)
    - Cir. No. 169 dt. 23.06.75
    - Cir. No. 763 dt. 18.02.98
  - Sec. 44B & Sec. 172 – Double taxation on slot chartering – Nedlloyd Lines BV vs. DCIT [1992] 43 ITD 433 (Mum)
  - One of the function of both the Section is similar, a recovery of taxes – Cir. No. 723 dated 19.09.95
  - No option to pay lower tax u/s. 44 BB whereas it is possible u/s. 172

- TDS on payment to non resident
  - Sec. 194C & Sec. 195 shall not apply
  - Sec.172 applies notwithstanding the provisions of the Act
Section 10(15A) -

- Exemption from tax on any payment made by an Indian Company engaged in business of operation of aircraft or acquisition on lease of an aircraft or an aircraft engine from a foreign enterprise or a foreign Government (exemption only if agreement entered into before 1/04/2007)

- This exemption does not apply to payments for providing spares, facilities or services in connection with operation of a leased aircraft

- Sahara Airlines (83 ITD 11 (Del)) – Exemption covers supplemented rent i.e. rent over and above regular rent to keep the aircraft in airworthy condition

- Approval of the Central Government is necessary for exemption – AFT Trust Sub & Ors v. CBDT(192 CTR 406)
RATIONALE BEHIND ARTICLE 8

- Purpose is to secure that profits will be taxed in one country only

- Gives right of taxation exclusively to the Country where place of effective management (POEM) is located

- Takes account of the way in which international shipping and air transport industries typically operate
RATIONALE BEHIND ARTICLE 8

- Why POEM and not PE
  - PE principle would result in difficulty of how to allocate to each PE its proper share of profits
  - PE principle may result in fragmented taxation
  - If POEM not considered taxation would rest in the country where registered office was situate but while actual business would be conducted from a place outside that country
### Distinction Between POEM & PE

<table>
<thead>
<tr>
<th><strong>POEM (Place of Effective Management)</strong></th>
<th><strong>PE (Permanent Establishment)</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Means the place where the top level management / Board controlling the business is located</td>
<td>Means fixed place of business through which business activity is wholly or partly carried on e.g. Branch, Office, Factory, Workshop, Place of Management, Mine / Quarry</td>
</tr>
<tr>
<td><strong>POEM is PE</strong></td>
<td><strong>PE is not necessarily POEM</strong></td>
</tr>
<tr>
<td>Existence of POEM establishes right to tax international shipping / air transport under Article 8 or under the Tie-Breaker Rule under Article 4(2) in case of persons other than individuals</td>
<td>Existence of PE establishes right to tax business income under Article 5</td>
</tr>
</tbody>
</table>
CASE LAWS ON POEM

- POEM would generally mean the place where the Board controlling the business is situated [Universal Cargo Carriers Inc. and another vs. CIT, 205 ITR 215 (Calcutta)]

- POEM is also referred at Article 4(3), U/s 115VC of the ITA under Tonnage Tax Scheme

- POEM of Enterprise under Article 8 and that of Tax Payer under Article 4

- POEM is the de facto control & management, mere right to control is not sufficient. (Refer CIT V/s Bank of China [1985] 154 ITR (Cal.)
IMPORTANT DEFINITIONS

- Article 3(1)(d) – International Traffic – UN MC & OECD MC
  - The term “international traffic” means any transport by a ship or aircraft operated by an enterprise that has its place of effective management in a Contracting State, except when the ship or aircraft is operated solely between places in the other Contracting State.

- Intention of the definition is:
  - To preserve the right of country where POEM is situated to tax
    - Purely domestic traffic
    - International traffic between third states
  - To allow the other country to tax traffic solely within its borders i.e. place of departure & arrival are in the same country.
IMPORTANT DEFINITIONS

 “Ship” or “Aircraft” – Not defined by UN MC or OECD MC

 But Collins English Dictionary defines them as follows
  + “Ship” – A vessel propelled by engines or sails for navigating on the water
  + “Aircraft” – Any machine capable of flying by means of buoyancy or aerodynamic forces, such as a glider, helicopter, or aeroplane
IMPORTANT DEFINITIONS


  - The place of effective management is the place where key management and commercial decisions that are necessary for the conduct of the entity’s business as a whole are in substance made.

  - The place of effective management will ordinarily be the place where the most senior person or group of persons (e.g. a board of directors) makes its decisions, the place where the actions to be taken by the entity as a whole are determined.

  - Where a board of directors formally finalizes and/or routinely approves key management, commercial and strategic decisions necessary for the conduct of the entity’s business in one State but these decisions are in substance made in another State, the place of effective management will be in the latter State.

  - In determining the place where a decision is in substance made, one should consider the place where advice on recommendations or options relating to the decision were considered and where the decision was ultimately taken.

  - An entity may have more than one place of management, but it can have only one place of effective management at any one time.
IMPORTANT DEFINITIONS

Explanation to Section 115VC of the ITA – Place of Effective Management

For the purposes of this section, "place of effective management of the company" means—

(A) the place where the board of directors of the company or its executive directors, as the case may be, make their decisions; or

(B) in a case where the board of directors routinely approve the commercial and strategic decisions made by the executive directors or officers of the company, the place where such executive directors or officers of the company perform their functions.
### Article 8 – UN MC & OECD MC

<table>
<thead>
<tr>
<th>UN Model Convention – Alternative A</th>
<th>OECD Model Convention</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Profits from the operation of ships or aircraft in international traffic shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.</td>
<td>1. Profits from the operation of ships or aircraft in international traffic shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.</td>
</tr>
<tr>
<td>2. Profits from the operation of boats engaged in inland waterways transport shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.</td>
<td>2. Profits from the operation of boats engaged in inland waterways transport shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.</td>
</tr>
</tbody>
</table>
### Article 8 - UN MC & OECD MC

<table>
<thead>
<tr>
<th>UN Model Convention – Alternative A</th>
<th>OECD Model Convention</th>
</tr>
</thead>
<tbody>
<tr>
<td>3. If the place of effective management of a shipping enterprise or of an inland waterways transport enterprise is aboard a ship or a boat, then it shall be deemed to be situated in the Contracting State in which the home harbour of the ship or boat is situated, or, if there is no such home harbour, in the Contracting State of which the operator of the ship or boat is a resident.</td>
<td>3. If the place of effective management of a shipping enterprise or of an inland waterways transport enterprise is aboard a ship or boat, then it shall be deemed to be situated in the Contracting State in which the home harbour of the ship or boat is situated, or, if there is no such home harbour, in the Contracting State of which the operator of the ship or boat is a resident.</td>
</tr>
<tr>
<td>4. The provisions of paragraph 1 shall also apply to profits from the participation in a pool, a joint business or an international operating agency.</td>
<td>4. The provisions of paragraph 1 shall also apply to profits from the participation in a pool, a joint business or an international operating agency.</td>
</tr>
</tbody>
</table>
1. Profits from the operation of aircraft in international traffic shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.

2. Profits from the operation of ships in international traffic shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated unless the shipping activities arising from such operation in the other Contracting State are more than casual. If such activities are more than casual, such profits may be taxed in that other State. The profits to be taxed in that other State shall be determined on the basis of an appropriate allocation of the overall net profits derived by the enterprise from its shipping operations. The tax computed in accordance with such allocation shall then be reduced by ___ per cent. (The percentage is to be established through bilateral negotiations.)

3. Article 2 of Alternative A

4. Article 3 of Alternative A

5. The provisions of paragraphs 1 and 2 shall also apply to profits from the participation in a pool, a joint business or an international operating agency.
BROAD SCHEME OF ARTICLE 8

- Divided into 4 Sub-Articles

  - Article 8(1) – Grants taxation rights with respective profits from operation of ships or aircraft in international traffic

  - Article 8(2) – Grants taxation rights with profits from operation of boats in inland waterways transport

  - Article 8(3) – When the ‘Place of Effective Management’ is aboard a ship or aircraft

  - Article 8(4) – Widens the scope of Article 8(1)
ARTICLE 8(1)

- Provisions will apply only to the profits from the operation of ships or aircraft in international traffic or from the operation of boats engaged in inland water transport
  - Ownership of ship is not important for shipping operation (KLM Royal Dutch Airlines 178 Taxman 291 (Del))

- Income derived from operations of ships and aircraft other than in international traffic will fall under Article 7 if the same constitutes business profits

- Profits from operation of ships or aircraft in international traffic shall be taxable only in the country in which the POEM of the enterprise is situated

- Access to treaty available only if POEM is in one of the contracting countries

- What is not relevant
  - Where the PE is situated
  - Where the enterprise is Registered
  - Where the enterprise is Resident
  - Exception
    - Residence based – e.g. India-UK / India-USA
    - Both (Residence + PEM)
ARTICLE 8(1)

- International Traffic covers

  - Coastal traffic between 2 countries as opposed to ‘inland waterways transport’

  - ‘Inland transportation’ involved in delivering goods directly to the consignee subsequent to their international transportation – Essar Oil Ltd V/S DCIT TDS Circle 1 (102 TTJ 614 (Mum))
 Examples – International Traffic

Where the journey forms part of a longer voyage involving a place of departure or arrival which is outside the other country – it is “international traffic”

+ Starting place – Country A
+ Destination 1 – Country B place ‘x’
+ Destination 2 – Country B place ‘y’
+ Traffic between ‘x’ & ‘y’ is also ‘international traffic’

When operation is between only two places in same country, even if part of transport takes place outside that country – it is not international traffic

+ Starting place – Country B place ‘x’
+ Ending place – Country B place ‘y’ (without stopping in a foreign port)
+ Traffic between ‘x’ & ‘y’ is not ‘international traffic’
ARTICLE 8(1)

- “Ship” includes:
  + Means of transport moving or moved on or under water – submarines & hydrofoils
  + Plastic containers designed to transport liquids and hauled by tugs – the need be equipped with engines

- “Ship” does not include:
  + Watercraft not designed as means of transport – dredge boats, fishing vessels, sea going tugs, floating docks and floating desalination facilities

- Vessel should be registered as ‘sea-going craft’

- Hovercrafts are considered as
  + Ships – if ‘sea-going’
  + Boats – if ‘river-going’

- Section 115VD specifically excludes following as “qualifying Ship” (for the purpose of “Tonnage Tax” scheme)
  + Fishing vessels
  + Factory ship
  + Pleasure crafts
  + Harbour and river ferries
“Aircraft” covers:
+ All flying machines that take off from or touch down on water or land & are capable of moving in air space
+ Space craft if they provide transportation – space shuttle
+ Gliders, balloons, etc.

“Aircraft” does not cover:
+ Hovercrafts (being ships / boats)

Height at which they fly is immaterial
ARTICLE 8(1)

Activities Covered

- Transportation of passengers & freight
- Time Charterer is treated as operator of Ship and hence services are covered by Article 8
- “Wet Lease” on charter fully equipped, manned & supplied
- Gains on alienation of ships (e.g. India-U.K., India-U.S)
- All activities connected directly and ancillary with such transportation services – preparatory and auxiliary activities

Rule 11R of the IT Rule includes following as incidental activities (for the purpose “Tonnage Tax” scheme)

- Maritime consultancy charges
- Income from loading and unloading of cargo
- Ship management fees
- Maritime education of recruitment fees
ARTICLE 8(1)

Examples – Preparatory, Auxiliary & Ancillary

- Sale of tickets on behalf of other enterprise (only if auxiliary)
- Operation of a bus service connecting a town with an airport
- Advertising & commercial propaganda for third parties
- Transportation of goods by truck connecting a depot with a port or airport
- Passengers of ships operated by others
- Arrangement to have goods / passengers picked up
- Lease of containers – supplementary or incidental
- Rent from giving right to third parties to run restaurants on board
- Sale of obsolete engines and spare parts
- Preparatory and auxiliary activities related to transportation – activities of legally dependent agencies
- Provision of goods and engineers, ground and equipment maintenance staff, cargo handlers, catering staff, etc. if directly connected or ancillary
Does Not Cover

- "Bare boat charter" covered under Art 7 / Art 12 unless ancillary – Recently Mumbai Tribunal in the case of Caribjet Inc (4 SOT 18) has held that "wet lease" is no different from "dry lease" and so not covered u/s. 44BBA (OECD commentary takes opposite view)
- Operation of ship building yard in other country
- Operation of a hotel, restaurant & duty free shop in the landing area of a hovercraft line.
- Running restaurant, snack bars, shops, etc. on board – by any person other than the shipping enterprise itself (Different from earning of Rent)
- Income from provision of goods & services by engineers, ground staff, cargo handler, catering staff, etc. to other enterprises (unless these are supplementary or incidental to the operation of ships or aircraft in international traffic)
  - British Airways (73 TTJ 519) (Delhi ITAT)
  - Delta Airways
- Investment income of shipping or aircraft companies not directly connected (some treaties specifically cover e.g. Germany, Mauritius, USA)
ARTICLE 8(1) – UN MC – ALTERNATIVE B

- Article 8(1) – Alternative A – is split into two paragraphs
  + 1st paragraph is devoted to the “operation of Aircraft” with similar provisions where right to tax has been given to the country where POEM situated
  + 2nd paragraph deals with profits from “operation of Ships” in the International traffic provides for the source country taxation on the Profits from operation of ships in the International traffic if operations in the other country are “more than casual”
    - James Mackintosh & Company Private Limited V. ACIT [93 ITD 466 ITAT (Mum)]

- Meaning of “more than casual” – ‘Fixed schedule’, ‘planned irregular visit’ except ‘Tramp Shipping’
  + The number of visits it makes is immaterial
  + “Tramp Shipping” – calling on ports “as and when required” – more than casual

- Indian treaties have not used Alternative B of UN MC
ARTICLE 8(1) – US MC

- Article 8(1) of US MC gives the right to tax profits from operation of ships / aircrafts to the country of enterprise’s residence only

- It taxes on the basis of Residence rather than POEM

- India’s treaty with USA broadly follows US Model in respect of Article 8
ARTICLE 8(2)

- Provisions will apply only to the profits from the operation of boats engaged in inland water transport.

- Profits from operation of boats engaged in inland water transport shall be taxable only in the country in which the POEM of the enterprise is situated.

- “Inland Waterways Transport” means transport on Rivers, Canals & Lakes of two or more countries.

- “Profits from operation of boats” – covers
  - Transportation proper
  - Towage
  - All preparatory & auxiliary activities connected therewith.

- All the principle discussed in relation to “profits from international traffic” shall apply here too.
ARTICLE 8(2)

- It is immaterial the operator of the tug or the boat owns the same or has leased the same or has chartered the same.

- Rule on boats engaged in inland waterways transport applies:
  - International traffic on inland waterways
  - Transportation services between two points within one country by an operator of another country

- In other words, the Country of POEM is entitled to tax unrestrictedly the profits from operation of boats in inland waterways transport even in those cases where this is carried out solely between points within the other Country.
ARTICLE 8(2) – US MC

- Defines profits from the operation of ships or aircraft and provides that they include, but are not limited to:
  - Profits from the rental of ships or aircraft on a full (time or voyage) basis
  - Profits from the rental on a bareboat basis of ships or aircraft if the rental income is incidental to profits from the operation of ships or aircraft in international traffic
  - Profits from the rental on a bareboat basis of ships or aircraft if such ships or aircraft are operated in international traffic by the lessee

- It clarifies that profits derived by an enterprise from the inland transport of property or passengers within either of the contracting countries will be treated as profits from the operation of ships or aircraft in international traffic if such transport is undertaken as part of international traffic

- Thus, profits from inland waterways transport (other than forming part of international traffic) are covered by Article 7 under US Model
This paragraph deals with the particular situation where the POEM of the enterprise is aboard a ship or a boat.

In such a situation POEM will be the country in which the home port of the ship is located.

- Tax will only be charged by the Country where the home harbour of the ship or boat is situated.

If the home port / harbour cannot be determined – in the case of tramp steamers, POEM is deemed to be the ship operator’s country of residence.

- Tax will be charged only in the Country in which the operator of the ship or boat is a resident.

If the operator is residing on board the ship or boat the country whose flag the ship is flying will be treated as the country of POEM.

If a ship is not flying flag of any country and the operator lives on the ship then the ship will be treated as lawless under international law.

- In such a case POEM may be the country of which the ship operator is a National.
ARTICLE 8(3)

- Home Port

  + Home port is that port from which the shipping business is actually operated

  + In the case of registered ships home port of ships or boats is generally the port of registry – the port mentioned in the shipping register as the home port

  + Alternately, the ship or boat will be said to have acquired the nationality of the country whose flag it flies
    - Thus, if a ship is flying say the flag of Panama, then Panama will be the State of place of effective management
ARTICLE 8(3) – US MC

- Provides that profits of an enterprise of a contracting country from the use, maintenance, or rental of containers (including trailers, barges, and related equipment for the transport of containers) shall be taxable only in that contracting country – country of residence
  - Except to the extent that those containers are used for transport solely between places within the other contracting country
- Thus, profits from use, maintenance, or rental of containers as part of inland waterways transport (other than forming part of international traffic) are covered by Article 7 under US Model
ARTICLE 8(4)

- Provisions of this paragraph state that provisions of Para 8(1) shall also apply to profits from participation in a pool, a joint business or an international operating agency
  - As a result, profits from participation in a pool, joint business or an international operating agency shall be taxable only in the country in which the POEM of the participating enterprise is situated

- The terms cover all forms of co-operation and are used in an inclusive sense
  - Such cooperation ranges from pooling of supplies of spare parts at airports, alternatively operation of certain flight routes, merger of enterprises, etc.
  - As per Section 115V-I "pooling arrangement" means an agreement between two or more persons for providing services through a pool or operating one or more ships and sharing earnings or operating profits on the basis of mutually agreed terms

- The British Airways and the Delta Airways did not argue on these lines otherwise, perhaps, the decisions in their cases could have been in their favour

- In Lufthansa German Airlines (90 ITD 310) wherein pool arrangement for technical support in India on a reciprocal basis with other airlines was constituted as income from international traffic it was held that income in India was not taxable u/s. 8(4)

- Similar view was also taken by the ITAT in DIT v/s Cia de Navegacao Norsul
ARTICLE 8(4) – US MC

- Provides that provisions of paragraphs 1 and 3 shall also apply to profits from participation in a pool, a joint business, or an international operating agency.

- Thus, gives the right to tax profits from participation in a pool, a joint business, or an international operating agency to the country residence of the participating enterprise only.
In a case where enterprise is engaged in a mixed business:

- Article 8 applies only to Transportation Income
- Same principle applies irrespective whether Enterprise is engaged in only transportation business at its place of Residence or elsewhere
- Article 8 will apply to Transportation income and to other business income Article 7 will apply
- POEM concept under Article 4(3) refers to POEM of a Resident whereas Article 8 refers to PEM of the enterprise
- POEM of Enterprise, apart from facts of management, will depend upon the ownership structure of the Enterprise such as Individual, Partnership or Company as owners
In a case where enterprise is engaged in a mixed business:

- POEM of overall Enterprise v. POEM for Transportation business
- POEM at the place of PE of Transportation business (Reservation by few countries)
- POEM and Partnership: Treaty will apply irrespective of whether Partnership is treated as a pass-through or not in the state of POEM (unlike Article 5)
A Trans Pte. is engaged in the business of shipping and related activities

- Incorporation Country X
- Place of Effective Management Country Y
- Earns income from shipping activities as well as rent from immovable property (unrelated to and independent from shipping activity) from Country Z
- Earns investment income from Country S

Discuss applicability of DTAA to its incomes

- Shipping income
- Rent from immovable property
- Investment income
DISTINGUISHING FEATURES OF INDIA’S DTAA

- POEM as the connecting factor
  - Brazil, Canada, Cyprus, Germany, Libya, Mauritius, Mongolia, Namibia, Netherlands, Sri Lanka, Syria, Tanzania (air transport) & Zambia

- Alternative B, modified form
  - Bangladesh, Bulgaria, Finland, Greece, Ireland, Jordan, Kenya, Korea, New Zealand, Norway, Philippines, Poland, Romania, Russia, Sri Lanka, Tanzania (shipping), Thailand, Uzbekistan (source taxation as per domestic law)
DISTINGUISHING FEATURES OF INDIA’S DTAA

- Country of Residence as the connecting factor
  - Australia, Austria, Belarus, Belgium, Bulgaria, China, Czech Republic, Denmark, Egypt, Finland, France, Greece, Hungary, Indonesia, Ireland, Israel, Italy, Japan, Jordan, Kazakhstan, Kenya, Korea, Kyrgyzstan, Malaysia, Malta, Morocco, Nepal, New Zealand, Norway, Oman, Philippines, Poland, Portugal, Qatar, Romania, Russia, Singapore, South Africa, Spain, Sweden, Switzerland, Tanzania (shipping), Thailand, Trinidad & Tobago, Turkey, Turkmenistan, Ukraine, UAE, UK, USA (Reciprocity), Uzbekistan & Vietnam
Distinguishing Features of India’s DTAA

- Interest income connected to operations
  - Australia, Czech Republic, Denmark, Finland, France, Germany, Hungary, Indonesia, Ireland, Israel, Japan, Italy, Jordan, Kazakhstan, Kenya, Korea, Malta, Mauritius, Mongolia, Morocco, Namibia, Netherlands, Poland, Qatar, Romania, Russia, Singapore, South Africa, Spain, Sri Lanka, Syria, Tanzania (air transport), Thailand, Trinidad & Tobago, Turkey, Ukraine, UAE, USA, UK, Uzbekistan, Vietnam & Zambia
DISTINGUISHING FEATURES OF INDIA’S DTAA

- Miscellaneous
  - Switzerland – does not cover shipping profits separately.
  - Mongolia, Uzbekistan – includes land vehicle / motor transport as well
  - Malaysia, UK, USA, UAE – includes gain on alienation of ships
  - No provision on shipping – Kyrgyzstan, Nepal, Switzerland & Zambia
  - No air transport – UAE (separate agreement)
ARTICLE 8 – SHIPPING AND AIR TRANSPORT

+ Divided into 4 Sub-Articles
+ Article 8(1) – Grants taxing rights
+ Article 8(2) – Expands the scope of Article 8(1)
+ Article 8(3) – Deals with certain type of interest income
+ Article 8(4) – Defines the term profit
Text

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

Reading

Profits derived by an enterprise of a Singapore from the operation of ships or aircraft in international traffic shall be taxable only in that Singapore.
The provisions of paragraph 1 shall also apply to profits from the participation in a pool, a joint business or an international operating agency engaged in the operation of ships or aircraft.
Interest on funds connected with the operation of ships or aircraft in international traffic shall be regarded as profits derived from the operation of such ships or aircraft, and the provisions of Article 11 shall not apply in relation to such interest.
For the purposes of this Article, profits from the operation of ships or aircraft in international traffic shall mean profits derived from the transportation by sea or air of passengers, mail, livestock or goods carried on by the owners or lessees or charterers of the ships or aircraft, including profits from:

+ (a) the sale of tickets for such transportation on behalf of other enterprises;
+ (b) the incidental lease of ships or aircraft used in such transportation;
+ (c) the use, maintenance or rental of containers (including trailers and related equipment for the transport of containers) in connection with such transportation; and
+ (d) any other activity directly connected with such transportation.
A FEW IMPORTANT DECISIONS

- Inland haulage charges (IHC), i.e., charges towards transporting goods from exporter’s place to port was incidental to activity directly connected with international traffic, and would squarely fall under Article 8 of DTAA – therefore, IHC earned by assessee could not be subjected to tax in India
  + ADIT vs Safmarine Container Lines, NV [24 SOT 211 ITAT (Mum)]
  + DDIT vs Delmas Shipping South Africa (Pty) Ltd. [2008-TIOL-547-ITAT (Mum)]
  + ADIT vs Federal Express ITAT Mumbai [2009-TIOL-179-ITAT (Mum)]

- Inland transportation is not only incidental but also closely connected with direct operations of ships; and, therefore, inland haulage charges being income from operation of ships in international traffic, is exempt under article 8
  + [2013] 33 taxmann.com 619 (Mumbai - Trib.) Deputy Director of Income-tax (IT) - 2(1) v. Safmarine Container Lines NV
  + [2012] 20 taxmann.com 719 (Mum.) Hapag-Lloyd Container Line GMBH v. Additional Director of Income-tax (International Taxation), Mumbai

- Section 172 of the Income-tax Act, 1961, read with article 8 of DTAA between India and Cyprus - Non-resident - Shipping business of (Shipping, Inland Waterways Transport and Air Transport)
  + If an enterprise is registered and having its head quarter in a country, its effective management would be in that country Treaty benefit available - [2014] 48 taxmann.com 388 (Pune - Trib.) Shaan Marine Services (P.) Ltd. v. DDIT (Intl. Taxn.-I), Pune
A FEW IMPORTANT DECISIONS

- ‘Slot Charter’
  + Income from ‘Slot Charter’ is exempt as income from ‘operation of ships’
  + DIT v. Balaji Shipping UK Ltd. (Mum. High Court decided on 23/8/2012)
  + DIT v. Balaji Shipping UK Ltd. [2009] 121 ITD 61 (Mum.)

- Effectively connected with PE
  + Shipping profits not taxable in India even if there is a PE – ADIT v. Mediterranean Shipping Co. S.A. [ITAT Mum 7/11/2012]

- Application of Article 22; meaning of “dealt with”
  + Since international shipping profits earned by assessee, a resident of Switzerland, did not fall or was not dealt with by any other articles of Indo-Swiss Treaty, it was governed by residuary article 22
  + Gearbulk AG (2009) 318 ITR 66 (AAR)
A FEW IMPORTANT DECISIONS

✘ Bare Boat charter charges paid to non-resident
  + Not treated as operation of ship in international traffic
  + May be treated as Equipment Royalty as payment was for use or hire of Equipment / Vessel and not for services
  + West Asia Maritime Ltd. vs ITO (109 TTJ 617 ITAT Chennai)
  + Pumpuhar Shipping Corp. Ltd. Vs ITO (178 TTJ 970 ITAT Chennai)

✘ Service tax
  + Would form part and partial of aggregate amount for purpose of determining presumptive profit and gain under section 44B – [2013] 38 taxmann.com 2 (Mumbai - Trib.) China Shipping Container Lines (Hong Kong) Co. Ltd. v. ADIT (Intl Tax)1(2) Mum
  + Being in nature of statutory payment which does not involve any element of profit, cannot be included in gross receipts for purpose of computing presumptive income of assessee under section 44B – [2013] 35 taxmann.com 342 (Mumbai - Trib.) Orient Overseas Container Line Ltd. v. ADIT (Intl Tax), Range – 4
A FEW IMPORTANT DECISIONS

- **TDS**
  - Where duty was cast on payer to deduct tax at source then on his failure of payer to do so, no interest could be charged from payee under section 234B - [2013] 38 taxmann.com 2 (Mumbai - Trib.) China Shipping Container Lines (Hong Kong) Co. Ltd. v. Assistant Director of Income-tax (International Taxation) 1(2), Mumbai
  - Where assessee was a non-resident in India and its entire income was liable for deduction of tax at source, interest under section 234B could not be imposed on it on account of failure of payer to deduct tax at source while making payments - [2013] 35 taxmann.com 342 (Mumbai - Trib.) Orient Overseas Container Line Ltd. v. ADIT, (International Taxation), Range – 4
  - Payment to non-resident (In section 172 cases) Where an assessee claims that tax is not required to be deducted at source because payment of freight has been made to foreign shipping company, in such a case, assessee has to show that shipping companies to whom payments have been made are not only non-residents but also that they have been assessed under section 172. Aforesaid legal position will not change even if payments to non-resident shipping companies are made through their Indian agents - [2014] 48 taxmann.com 175 (Mumbai - Trib.) ACIT 23(3) v. Raj Girish Karia [Matter remanded]

- **UAE Treaty** – [2012] 23 taxmann.com 400 (Delhi) Emirates Shipping Line, FZE v. Assistant Director of Income-tax
  - 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
  - Though assessee did not pay income tax in UAE, it was still entitled to exemption from tax in India with respect to income earned from shipping operations under article 8
THANK YOU!

QUESTIONS ARE WELCOME!

gaurang@gaurangvgandhi.com