INCOME TAX ACT 1961

A Joint Reading of Section 44B and Section 172 of Income Tax ACT 1961

Provisions of Section 44B

Special provision for computing profits and gains of shipping business in the case of non-residents.

44B. (1) Notwithstanding anything to the contrary contained in sections 28 to 43A, in the case of an assessee, being a non-resident, engaged in the business of operation of ships, a sum equal to seven and a half per cent of the aggregate of the amounts specified in sub-section (2) shall be deemed to be the profits and gains of such business chargeable to tax under the head "Profits and gains of business or profession".

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

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

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

[*Explanation*.—For the purposes of this sub-section, the amount referred to in clause (*i*) or clause (*ii*) shall include the amount paid or payable or received or deemed to be received, as the case may be, by way of demurrage charges or handling charges or any other amount of similar nature**.]**

Provisions of Section 172

Shipping business of non-residents.

172. (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, livestock, mail or goods shipped at a port in India.

(2) Where such a ship carries passengers, livestock, 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, livestock, 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, livestock, 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.

[(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.]

Case Law

2009 TMI - 34630 - AUTHORITY FOR ADVANCE RULINGS

Gearbulk AG., In re

Dated: 30-09-2009
Sections - 172,

Charter of Vessels – Permanent Establishment - The applicant, during the relevant years appointed JM Baxi & Co. as its port agent in India for handing the cargo. The activities of JM Baxi & Co., an independent shipping and logistics service provider consists of shipping agency services, charter brokering services and clearing and forwarding agent services. J.M.Baxi & Co. is working as port agent in India on behalf of several other shipping companies. JM Baxi & Co. has, on behalf of the applicant, deposited income-tax under S.172 of the IT Act, on 7.5% of the freight charges received by the applicant. – Held that – The shipping profit is not taxable in India – There is Permanent Establishment in India - freight income received by the applicant on account of carrying the cargo from the Indian ports to the foreign ports by deploying chartered vessels is liable to be taxed in India

Comparision of Section 44B and Section 172

Section 44B	**Section 172**
1. It is a charging section, i.e., it deals with computation of income	1. It is a recovery mechanism
2. It covers the amounts paid/payable for carriage of passengers, live stocks, mail or goods ***shipped at any port in India*** as well as amounts received in India or deemed to be received in India for carriage of passengers, livestock mail or goods ***shipped at any port outside India***	2. It covers only the amounts paid or payable for carriage of passengers, livestock, mail or goods ***shipped at any port in India***
3. Normal Tax rate shall apply	3. Flat Tax rate of 40% plus 2.5% (where total income exceeds Rs. 1 crore) surcharge plus education cess.
4. Over-rides section 28 to 43A of Income Tax Act 1961	4. Over-rides the Entire Income Tax Act.
5. Current year and brought forward losses of other business can be set off	5. No set off is permissible as it over-rides Chapter VI.
6. Chapter VI-A deductions are available (Section 80 deductions)	6. Chapter VI-A deductions are not available

Examples

Q.1. Why should an assessee opt for the normal provisions of the Income Tax Act (section 44B) after being subjected to section 172.

Ans: An assessee will opt for the normal provisions of Income Tax Act (Section 44B) after being subjected to section 172 in the following cases:

i) If the ship is owned by a non-resident individual

ii) To claim the set off of current year and brought forward losses of some other business carried on in India e.g., losses of manufacturing business

iii) To claim deductions under chapter VI-A

Q.2. A non-resident individual engaged in the business of operation of ships submitted the following information:

1. For carriage of goods from India Rs 1.00 crore, 2. Handling charges from the customers in India for Rs 5.00 Lakhs, 3. Expenses made Rs 10.00 Laks to earn the

above incomes, 4. Depreciation 30.00 Lakhs, 5. Broght forward losses for the Indian Business Rs. 2.00 akhs. Compute the Total Income.

Ans.: Opption-1 (if the assesse does not opt for the Normal provisions u/s 44B)

Assessment Year 2010-2011

Total Income As per section 172 = 7.5% of (1 crore + 5.00Lacs)	Rs.	7,87,500.00
Less brought forward of Business Loss		Nil

Total Income		7,87,500.00
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Tax thereon @ 40% as per section 172		Rs. 3,15,000.00
Add Education cess @ 3%		Rs. 9,4,50.00

The Assessee has to pay tax as per section 172		Rs. 3,24,450.00
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Option – 2 (If the Assessee opts for the normal provisions of Income Tax Act (Section 44B)

Assessment Year 2010-2011

Gross Receipts		Rs.	1,05,00,000.00
Less Expenses			Nil

Net receipts		Rs.	1,05,00,000.00
Profits and Gains from Business @ 7.5%		Rs.	7,87,500.00
Less Brought forward business losses		Rs.	2,00,000.00
Total Income		**Rs.**	**5,87,500.00**
Tax as per normal rates:			
Up to Rs. 1,60,000/- tax is	Nil		
Rs. 160,001 to Rs. 3,00,000 @ 10%	Rs. 14,000.00		
Rs. 300,001 to Rs. 5,00,000 @ 20%	Rs. 40,000.00		
Rs. 5,00,001 to Rs 5,87,500/- @ 30%	Rs. 26,250.00		
Total Tax Payables	Rs. 80,250.00		
Less Tax Payable U/S 172	**Rs. 3,24,450.00**		
Tax Refundable	**Rs. 2,44,200.00**		

As per Supreme court in A.S. Glittre, the assessee shall be entitled to interest on refund.