IN THE INCOME TAX APPELLATE TRIBUNAL

"L" BENCH, MUMBAI

BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER AND

SHRI RAVISH SOOD, JUDICIAL MEMBER

ITA no.1798/Mum./2015
(Assessment Year : 2011–12)

DCIT (IT)1 (1)(2),
Room No. 117, 1st Floor, Scindia House
N.M Road
Mumbai 400 038 ……. Appellant

v/s

A.P. Moller Maersk A/S,
C/o Maersk Line, P.Ltd., 12th Floor,
Tiwer A Urmi Estate Ganapat Rao,
Kadam Marg, Lower Parel
Mumbai 400 013
PAN AAECA4801C ……. Respondent

Assessee by : Shri. Jasbir chauhan
Revenue by : Shri. Porul Kaka
Shri. Divesh Chawla

Date of Hearing –23.01.2017	Date of Order –

O R D E R

PER: SHAMIM YAHYA

This appeal by the revenue is arising out of the directions of the learned dispute resolution panel-iv, income tax Department, Mumbai passed in objection number 125 under section 144C of the income tax act vide its direction dated 19/12/2014. While giving effect to the

above directions of the learned DRP assessment was framed by the assessing officer vide order dated 28/1/2015.

2. The grounds of appeal as under:-

i. "Whether on the facts and in the circumstances of the case and in law, The Hon'ble DRP has erred is treating the amounts received towards its share of SAP based ERP called FACT of Rs.44,60,1001- and amount received towards IT and procurement cost of Rs.39,37,970/- as profit derived from the operation of ships in international traffic as per Article 9 of the DTAA between India and Denmark and not holding it as Royalty as per Article 13 and section 9(1)(vi) and (vii) of the LT. Act, as held by the 'AO' in the draft assessment order."

ii. "Whether on the facts and in the circumstances of the case and in law, the DRP was justified in holding that income from Inland Haulage Charges of cargo was covered under Article 9 of the tax treaty between India and Denmark and therefore not liable for tax in India and that section 44B of the IT Act has no application in the facts of the case."

iii. "Whether on the facts and circumstances of the case Article9 of the tax treaty between India and Denmark includes within its ambit the activity of Inland Haulage Charges of cargo?"

iv. "Whether on the facts and circumstances of the case and in law, the DRP erred in not holding that the income from Inland Haulage Charges is deemed to accrue and arise in India in terms of section 9(1)(i) of the LT. Act."

v. "The Appellant prays that the order of the DRP-4 be set Aside on the above grounds and that of the Assessing Officer he restored."

vi. "The Appellant craves leave to amend or alter any ground or add a new ground which may be necessary."

3. Apropos ground no. 1

At the outset in this case learned counsel of the assessee submitted that the issue is squarely covered in favour of the assessee by the decision of this tribunal in assessee's own case in earlier assessment year's. Learned counsel claimed that the facts are identical and hence there is no infirmity in the directions of DRP in this regard. He pointed out that Ld. DRP has inter-alia followed the tribunal order for earlier years. Per Contra learned departmental representative did not dispute that this issue is covered in favour of the assessee as submitted by the learned counsel of the assessee.

4. Upon careful consideration, & perusing the records we find that this tribunal in assessee own case ITA no. 1927 and 2054 for

assessement year's 2010-11 as per its order dt. 7.10.2016 has adjudicated identical issue as under:-

"Brief facts leading to the above issue are that during the year assessee incurred certain expense towards operation, maintenance and upgradation of SAP based ERP solution (FACT), FACT has been procured by the assessee for efficient management of operations of its shipping business. This was done in order to streamline operations with its group companies around the world, and FACT is provided by the assessee to its agents across the globe including India. To streamline operations of its group companies having Container Inland Services (CIS) operations around the world, APMM requires them to install and use FACT system software. The Fact system software is used by CIS Division of Maersk India Pvt. Ltd. (MIPL.), an Indian agent of the assessee. The explained before us the broad nature of activities carried on by CIS division are as under;-

Container Freight Station: This includes provisions of warehousing facilities to the customers of AIMM by moving and storing container at the facility maintained on the Port. Equipment Maintenance and Repairs: This includes maintenance and repairs of containers used by Al 'MM in its business activities for carriage of cargo for its customers Trucking: This includes carriage of

containers for APMM's Customers from port to the ultimate destination of the Customers.

The facts explained by the assessee are that the cost incurred by the assessee for operation and maintenance of FACT system solution, is recovered from the agents. During the year tinder consideration, the assessee recovered an amount of Rs.2,23,27,783/- from MIPL, being MIPL's share of FACT system solution cost. This recovery is pursuant to a Service Level Agreement (SLA) entered into between MIPL and APMM and is without any mark-up and represents mere allocation of cost. The assessee claimed before the revenue that this amount recovered by the assessee is proportion the cost incurred and it is in the nature of reimbursement of cost not chargeable to tax in India as the same was without any mark-up and was a cost to cost basis. But the AP vide draft assessment order dated 26.03.2013 treated recovery of FACT cost as royalty/ Fees for Technical Services (FFS) and taxed the same under section 115A of the Act at the rate of 10%. The DRP vide its directions dates 23.12.2013 upheld the aforesaid additions made by the AO in his draft assessment order by treating such recovery as royalty/FTS. Aggrieved, assessee is in appeal before Tribunal. Before us it was explained that Mumbai Tribunal on a similar issue on taxability of recovery of cost towards

IT Global Portfolio Tracking System has passes an order in the case of entity Dampskibsselskabet of 1912 A/s Aktieselskabet, which merged into Svendborg, being the assessec (the merged entity, Svendborg, was renamed as A. P. Moller Maersk A/S post-merger) In this order dated 11.06.2010 of AY's 2001-02 to 2003-04, the Mumbai Tribunal has held that such recovery cannot be taxed in India, because, these systems are an integral part international shipping business, and without these systems, the international shipping business cannot be conducted, nor would the agents of the assessee across the world be able to discharge their role as agents of the assessee. Activities are directly connected to its business of operations of ships in international traffic and hence taxable only in Denmark tinder Article 9(1) of India Denmark Tax Treaty. The assessee is in the business of shipping and not in the business of providing any technical services While the system enables better and efficient conduct in the business, it does not mean that the assessee is providing technical services. The cost for setting tip the IT Global System is shared between the assessee and its agent across the globe. The payment received is nothing hut a payment by way of reimbursement of cost for providing a particular system. The percentage of the payments received by the assessee towards reimbursement compared to the total receipts in

the form of freight etc., from shipping business in India is less than 1%. The above order of the Hon'ble Tribunal has been followed by tribunal in orders for subsequent years in assessee's own case in Aktieselskabet Dampskibsselskabet Svendborg vs. ADIT order dated 31-08-2012 and in A.P. Moller Maersk AJS vs. DDIT (International Taxation) dated 14/12/2012. The orders of the Hon'ble Tribunal referred above has been upheld by the Hon'ble Bombay High Court the order dated 29th April 2015 in Income Tax Appeal No. 1306 of 2013 in DIT (international Taxation vs. A.P. Moller Maersk). No profit element in the Pro-rate cost paid by the agent to the assessee. Payments were made by the agent to use the fact of the assessee for the global shipping business.

Further, the Mumbai Tribunal has also decided the identical on the issue of FACT software system in assessee's own case in Dy. Director of Income Tax (International Taxation) Vs. A.P. Moller Maersk A/S in ITA no. 1807/Mum/2012 dated 08.11.2013, following its earlier decision of file Mumbai Tribunal, which has now been affirmed by the High Court, held that such recovery cannot be taxed in India since:

- *The system helps on conducting its shipping business in more effective and efficient manner globally.*

- The FACT software is art part of shipping operations and therefore any kind of receipts recovered by way of software usage / development cost cannot be taxed in India.

- The FACT is a tool and integral part of shipping operations and the profits as per Article 9(1) of the Tax Treaty includes not only activities directly connected with shipping operations but also activities which facilitate or support such operations.

- It was thus held that any kind of receipts by way of software usage! development cost cannot be taxed in India under Article 9(1) of Tax Treaty.

- The receipts also cannot be taxed as royalty/FTS independently because in the present case, the Appellant is not rendering any services of managerial, technical or consultancy to its agents or group entities by allowing its group companies to be usage of software.

- The assessee has been reimbursed at cost without any mark-up.

We relying on the decision of the Hon'ble Bombay High Court are of the view that such cost is an integrated part of the Shipping business. Usage of such software by the CIS division, which handles tracking of the containers, accounting and in bills of freight receipts, warehouse functionality, etc. which in turn,

helps the assessee in conducting its shipping business in more effective and efficient manner globally. This software in fact is a tool and integrated part of shipping operations only, usage of software cannot be segregated from such activities of overall shipping operations so as to hold it as rendering of any independent technical services. These activities are intrinsically linked to its business operation of ships in international traffic and therefore are a part of the business activity of the assessee. Which is operation of ships in international traffic. The FACT cost represent merely allocation of cost incurred and hence in the nature of reimbursement of expenses not having any element of profit embedded in it. Such recovery only includes proportionate cost incurred by the assessee for the development and maintenance of the system. Therefore, such recoupment of cost does not constitute income chargeable to tax in the hands of the assessee. It is undisputed that the assessee is in business of conducting operation of ships in international traffic and not engaged in the business of providing communication services, and therefore, per se no separate royalty/FTS were rendered by the assessee. We are conscious of the fact that FACT cost represents mere 0.07% of the total freight income of the assessee during the year. Further, the DRP held the

facilities/systems is a software and the payments to be royalty under the retrospectively amendment of the Act. Various Judicial precedents decided this issue by Hon'ble Delhi High Court in case of DIT vs Nokia Networks 253 CTR 417, Mumbai Tribunal in case of ADIT vs Baan Corp 71 Taxmann.com 213 and WNS Global Services (UK) Ltd. vs ADIT 52 SOT 121 wherein it has been held that any amendment is carried out under domestic law, same cannot be read into the treaty. Accordingly, we are of the view that The FACT cost represent merely allocation of cost incurred and hence in the nature of reimbursement of expenses not having any element of profit embedded in it. Such recovery only includes proportionate cost incurred by the assessee for the development and maintenance of the system. Therefore, such recoupment of cost does not constitute income chargeable to tax in the hands of the assessee. It is undisputed that he assessee is in business of conducting operation of ships in international traffic and not engaged in the business of providing communication services, and therefore, per se no separate royalty/FTS were rendered by the assessee. Hence, we allow this issue of assessee's appeal."

5. Since facts in this regard are identical we do not find any infirmity in the direction of Ld. DRP in this regard. Accordingly, we

uphold the same. Hence, the ground raised by the revenue on this issue stands dismissed.

6. Apropos ground no. 2-4

On this issue also Ld. Counsel of the assessee submitted that the issue is squarely covered in favour of the assessee by the decisions of the tribunal in assessee own case and also Hon'ble Bombay High Court also for earlier year. Per Contra Ld. DR not dispute this proposition.

7. Up on careful consideration we find that similar issue was decided in favour of the assessee by this tribunal as per its order dated 7/10/2016 as above.

8. After elaborately considering the issue the tribunal concluded as under;

> *"In view of the facts of this case and precedence discussed above, we are of the view that the entire IHC of the assessee is necessarily in connection with transport of containers either discharged or loadable at Indian ports for the purpose of delivery through international waters and is directly connected with such transportation will always be included within the term "operations of ships'. The activities of the IHC are connected directly or an ancillary activity that provides minor contribution and should not be regarded as a*

separate business to the operations of ships. These activities are linked or connected to each other and as such one cannot say that one is to be conducted efficiently without the other and which have a nexus to the main business of the assessee of operations of ships should be considered as integral part of income from shipping operations. Accordingly, we allow the claim of assessee and hence, this common issue of assessee appeal is allowed and that of revenue dismissed."

9. Further more we note that Hon'ble jurisdictional High Court in assessee's own case in income tax appeal number 1306 and others as per order dated 29/14/2015 has considered the same issue elaborately and concluded as under;

"The Tribunal in the meanwhile had also decided (in the case the assessee's own case) for the previous assessment year in favour of the assessee and, therefore, upheld the order of the Commissioner. This Court vide order dated 17" July, 2014 to which one of us (S.C. Dharmadhikari, J.) was a party held that the inland transport of cargo within India was covered under article 8(2)(b)(ii) and (c) of DTAA between India and Belgium

and, therefore, not liable to tax in India. The principles involved in the said decision also govern the present case. The Maersk Net used by the agents of the assessee entailed certain costs reimbursement to the assessee. It was part of the shipping business and could not he captured under any other provisions of the Income Tax Act except under DTAA."

"Our attention is also drawn to the decision of this Court in the case of Commissioner of Income-tax V/s. Siemens Aktiongeselleschaft reported in [2009] 310 ITR 320 (Bom), wherein this Court has held that once there is a treaty between two sovereign nations, though it is open to a sovereign Legislature to amend its laws, a DTAA entered into by the Government, in exercise of the powers conferred by section 90(1) of the Act must be honoured. The provisions of Section 9 Income Tax Act were applicable and the provisions of DTAA, if more beneficial than the IT Act, the provisions of DTAA would prevail. Thus, in the instant case also, it is not possible for the revenue to unilaterally decide contrary to the Provisions of the DTAA. We are informed that the agreements inter

parties had been performed and the payments were made by the agents to use Maersk Net for the Maersk group's global shipping business and for no other reason. It related to shipment of cargo and their movement across the oceans. The views of the revenue that it amounted to technical service is misconceived. In fact, the Assessing Officer relied upon the decision of M/s. Arthur Anderson & Co. in ITA No. 9125/Mum/1995, Mumbai, 'D' Bench in which the Tribunal had observed that repayment of money may be construed as "reimbursement" only if it is bereft of profits for the services rendered. There is no profit element in the pro rata costs paid by the agents of the assessee to the assessee and accordingly, we have no hesitation in holding that the amounts paid by the agents to utilize the amount arose out of the shipping business cannot be brought to tax as sought to be done. "

10. Thus from the above it is apparent that the issue involved is squarely covered in favour of the assessee. Accordingly, we uphold the direction of Ld. DRP in this regard also.

In the result this appeal filed by the revenue stands dismissed.

Order pronounced in the Open Court on 15.02.2017

Sd/-	**Sd/-**
RAVISH SOOD	**SHAMIM YAHYA**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

MUMBAI, DATED:

Copy of the order forwarded to:

(1) The Assessee;
(2) The Revenue;
(3) The CIT(A);
(4) The CIT, Mumbai City concerned;
(5) The DR, ITAT, Mumbai;
(6) Guard file.

By Order

Nishant Verma
Sr. Private Secretary

(Dy./Asstt.Registrar)
ITAT, Mumbai