

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "L", MUMBAI**

**BEFORE SHRI G.S. PANNU, VICE PRESIDENT AND
SHRI RAVISH SOOD, JUDICIAL MEMBER**

**ITA NOS. 1750 TO 1753/MUM/2015 : (A.Ys : 2006-07 TO 2008-09
& 2011-12)**

M/s. Braitrim UK Limited Vs. DCIT (IT)-1(3)(2), Mumbai
C/o. SRBC & Associates LLP, (Respondent)
14th floor, The Ruby, 29 Senapati
Bapat Marg, Dadar (W),
Mumbai 400 028 (Appellant)
PAN : AAECB3024A

**Assessee by : Shri Percy Pardiwalla &
Ms. Vasanti Patel**

Revenue by : Dr. Narendra Kumar

Date of Hearing : 19/06/2019

Date of Pronouncement : 21/08/2019

ORDER

PER G.S. PANNU, VICE PRESIDENT

The captioned four appeals are preferred by the assessee for Assessment Years 2006-07 to 2008-09 and 2011-12 and involve common issues. As a consequence, the appeal in ITA No. 1750/Mum/2015 pertaining to Assessment Year 2006-07 is taken as the lead case in order to appreciate the controversy.

2. The appeal being ITA No. 1750/Mum/2015 by the assessee is directed against the order passed by Assessing Officer, Mumbai dated

27.01.2015 u/s 143(3) r.w.s 147 r.w.s 144C(13) of Income Tax Act, 1961 (in short 'the Act') as per the directions of the Dispute Resolution Panel-I, Mumbai dated 19.12.2014.

3. In this appeal, assessee has raised the following Grounds of appeal :-

“Ground No.1 : Reassessment proceedings initiated are bad in law

On the facts and in the circumstances of the case and in law, the learned AO has erred in initiating reassessment proceedings under section 147 of the Act on the basis of surmise and conjectures and not on the basis of any tangible and conclusive material.

Ground No.2 : Reimbursement of rebate and discount is not in nature of Royalty

- i) On the facts and in the circumstances of the case and in law, the Hon'ble DRP and the learned AO erred in holding that reimbursement of rebate and discount received by the Appellant from Braitrim India Private Limited ('BIPL') is for the use of the brand 'Braitrim' and is assessable to tax as 'Royalty' under section 9(1)(vi) of the Act/Article 13 of the India-United Kingdom tax treaty.*
- ii) On the facts and in the circumstances of the case and in law, the Hon'ble DRP and the learned AO erred in not appreciating the fact that payments received by the Appellant from BIPL were purely in the nature of reimbursement of 'rebate and discount' which the Appellant had passed onto the Retailers on 'cost to cost' basis without any mark-up.*
- iii) On the facts and in the circumstances of the case and in law, the Hon'ble DRP and the learned AO erred in not appreciating the fact that the Appellant had already submitted adequate documentary evidence including certificate from a Chartered Accountant to substantiate the fact that payments were purely in the nature of reimbursement of rebate and discount and not in the nature of Royalty.*

- iv) *On the facts and in the circumstance of the case and in law the Hon'ble DRP and the learned AO erred in observing that:*
- a) *report of the independent Chartered Accountants does not give details of payments made to the Retailers; and*
 - b) *Remittances were made suddenly in 2013 for all the years.*
 - c) *There are inherent contradictions between the "Cost Reimbursement Agreement" and "Rebate Agreement" with Peacock Stores Limited which were not resolved or explained.*

Ground No.3 : Levy of interest under section 234B of the Act

On the facts and in the circumstances of the case and in law, the learned AO has erred in levying interest under section 234B of the Act.

Ground No.4 : Not granting credit of tax paid by the payer against 201 demand

On the facts and in the circumstances of the case and in law, the learned AO has erred in not granting credit for taxes partly discharged by BIPL in pursuance to the order passed under section 201 of the Act.

Ground No.5 : Levy of demand for recovery of tax already raised on deductor

On the facts and in the circumstance of the case and in law, the learned AO erred in recovering tax on same income i.e. from the payer (BIPL) by passing an order under section 201 (1) and 201 (1A) of the Act and from payee (the Appellant) by passing an order under section 147 of the Act."

4. As a perusal of the aforesaid Grounds of appeal reveal, the sum and substance of the dispute relates to the characterization of amount received by assessee from M/s. Braitrim India Pvt. Ltd. (in short 'BIPL'), which according to the assessee is merely reimbursement of rebates/discounts whereas as per the Revenue, the said payments are receipts for the use of brand 'Braitrim' and is thus assessable as royalty.

5. In order to appreciate the rival stands on the issue, the following discussion is relevant. The appellant before us is a company incorporated and tax resident of United Kingdom and is engaged in the business of supplying world class hangers. It has a subsidiary in India, i.e., BIPL, which is also engaged in trading of hangers. Likewise, assessee has group companies in other countries also. Assessee has agreements with various global retail chains (hereinafter referred to as 'retailers') in terms of which assessee and its group concerns are nominated as the preferred or exclusive sourcing point for hangers to be used by the garment suppliers of such retailers. Because of such arrangement, the retailers negotiate advantageous terms from the Braitrim group. Under such negotiated arrangements with the retailers, assessee-company is required to give a rebate/discount to the retailers based on the volume or units of sales of hangers made to garment suppliers by various Braitrim group entities worldwide. The assessee-company recovers proportionate share of such rebate/discount from its group companies based on the respective sales of such group companies to the respective retailers. Such arrangement included the Indian subsidiary, namely BIPL, also. Consequently, assessee-company has entered into a Cost Reimbursement Agreement (in short 'CRA') dated 13.2.2004 which is effective from 1.4.2001 onwards, a copy of which has been placed in the Paper Book at pages 19 to 24. In terms of such arrangement between the assessee and the retailers, the Indian subsidiary, BIPL sold hangers to Indian garment suppliers of the retailers. On such sales, retailers approach assessee to obtain the agreed rebate/discount. Assessee, in turn, re-invoiced the same to the

Indian subsidiary, i.e., BIPL for which remittances are made by BIPL to the assessee-company. In this manner, BIPL reimburses the rebate paid by the assessee to retailers to the extent it pertains to the sales made by BIPL to Indian garment suppliers of the retailers. Such reimbursements are depicted as administrative charges by the BIPL in its books of account. During the year under consideration, assessee-company received a sum of Rs.26,22,036/- on this count. Such receipts from BIPL have been held to be taxable in the hands of the assessee-company in India as royalty.

6. On the contrary, the stand of the assessee, which has been consistently raised before the lower authorities and also reiterated before us, is to the effect that the receipt from BIPL represent mere reimbursement of administrative charges which is not chargeable to tax in India. At the time of hearing, the learned representative for the assessee explained in detail that initially the retailer raised invoices on assessee computing the rebate due, based on the volume of purchases made by them during a specified period from Braitrim group concerns worldwide, which is met by the assessee-company. Thereafter, the assessee-company raises a consolidated invoice on its group companies worldwide including BIPL specifying the amount of rebate due from each of the concerns based on the volume of sales made by them to the respective retailers during the period to which the invoice relates to. It has been explained that on the strength of such invoicing made by the assessee-company, the Indian subsidiary, BIPL has remitted the impugned sums. Based on the aforesaid *modus operandi* it is sought to be pointed out that the ultimate responsibility of discharging such

rebate/discount rests on the group concerns worldwide including, BIPL because the same is in respect of sales made by the respective concerns to the retailers. The aforesaid has been sought to be substantiated by the various clauses of the CRA. Our attention was also invited to sample copies of invoices for administrative charges raised by the assessee on BIPL and also the respective invoices raised by the retailers on assessee-company, copies of which have been placed at pages 25 to 112 of the Paper Book. The case made out by the assessee is that there is no mismatch between the invoices raised by the retailers on assessee and the amount reimbursed by BIPL and it is further pointed out that assessee pays to the retailer the rebate/discount recovered from BIPL on a cost-to-cost basis without any profit mark-up.

7. The aforesaid stand of assessee has not been accepted either by the Assessing Officer in the draft assessment order dated 28.3.2014 passed u/s 144C(1) r.w.s 147 r.w.s 143(3) of the Act or in the final assessment order passed u/s 143(3) r.w.s 147 r.w.s 144C(13) of the Act consequent to the directions of the DRP dated 19.12.2014 (supra). The stand of the Revenue, as manifested in the orders of the authorities below, can be understood as follows. According to the Revenue, even though the remittances received by the assessee have been termed as administrative charges, but the CRA does not specifically mention these as discount/rebate given by assessee to the retailers. According to the Revenue, as per the CRA, the administrative charges are stated to be payments in respect of services provided by the retailer to Braitrim group. It has also been made out by the authorities that the assessee has not been able to substantiate that the administrative charges so

received from BIPL in terms of the CRA have been actually paid to the retailers. Having concluded so, the income-tax authorities have thereafter concluded that the remittance of Rs.26,22,036/- received by the assessee from BIPL is nothing but royalty. In coming to such a conclusion, Revenue has emphasised on Article 5 of CRA, more specifically Article 5.3. The Id. DR appearing for the Revenue pointed out that Article 5.3 of the CRA prescribes that no royalty or licensing fee shall be charged or paid "*separately*" pursuant to this agreement. It has been emphasised before us that use of the word "*separately*" in clause 5.3 shows that the sums payable under the CRA can be understood as in the nature of royalty. Thus, as per the lower authorities, BIPL is nothing but an agent of the assessee in India and the impugned receipts from BIPL are taxable in India in terms of Sec. 9(1)(vi) of the Act. It has also been pointed out that BIPL sells the garment hangers together with labels, etc. to the retailers which establishes that BIPL possessed right to manufacture the Braitrim garment hangers in India. It has also been pointed out that it is the assessee who enters into supply arrangements with retailers worldwide and BIPL is able to get business, then the moot question is as to what does the assessee-company gain from BIPL for providing it the clients to whom sales are made by BIPL ? According to the Revenue, the basic idea behind giving the so-called rebate/discount is to get orders from retailers in bulk and, in turn, the profits of the assessee would enhance and therefore it is argued that the entire transaction is to be termed as 'royalty income' from BIPL in return for allowing BIPL the right to use the trademark and manufacture hangers.

8. Another aspect which has been brought out by the DRP in this regard is that though BIPL was said to be manufacturing hangers of Braitrim brand name, but assessee has not shown as to whether any royalty was at all paid for the use of "Braitrim". The DRP in para 9.7 of its order says that it is also not shown as to whether BIPL is selling hangers to customers other than retailers which implies that the impugned rebate/discount have been made on all the sales effected, which would lead to the inference that it is a consideration paid for use of brand "Braitrim" and is thus, assessable as royalty under the Act as well as in terms of the India-U.K DTAA.

9. At the time of hearing, the learned representative for the assessee pointed out that it has been the consistent stand of assessee that the receipts from BIPL constitute reimbursement not chargeable to tax in India and in support, assessee had referred to sample copies of back to back invoices and the relevant clauses of the CRA. The learned representative pointed out that in the draft assessment order, the Assessing Officer had observed about non-production of details to substantiate the payment of rebate/discount to retailers; for the said reason, assessee had obtained a report from an independent U.K Chartered Accountant, Blick Rothenberg, a copy of which has been placed at pages 148 to 153 of the Paper Book, which clearly brings out the payment made to the retailers vis-a-vis the invoices of rebate/discount raised by retailers on assessee, which in turn, have been back to back invoiced by assessee to BIPL. It was, therefore, submitted that such evidence, which was brought before the DRP, and on which the report of Assessing Officer has also been called for, clearly

established that the impugned payment received by the assessee from BIPL were purely in the nature of reimbursements and not chargeable to tax in India. Apart therefrom, it has also been pointed out that assessee also produced one sample agreement with a retailer, namely M/s. Peacock Stores Ltd. dated 19.8.2005, which clearly brings out that the Braitrust group is required to pay the retailer, i.e. M/s. Peacock Stores Ltd. a sum equal to 5% of the total value of sales of hangers. Another pertinent plea, which has been raised before us, is based on the position of assessment in the case of BIPL for Assessment Year 2007-08. It has been pointed out that the transaction for reimbursement of administrative charges by BIPL to the assessee-company was a subject matter of transfer pricing proceedings in the assessment of BIPL for Assessment Year 2007-08. In this context, it was explained that in the course of proceedings before the TPO, the commercial expediency of BIPL having paid administrative charges to the assessee-company was questioned and its arm's length price was determined at NIL. In the course of such proceedings, the TPO accepted the position that the administrative charges were in the nature of price rebate on sale price of hangers calculated on the total units sold by BIPL. The issue of determination of arm's length price at NIL by the TPO was carried before the DRP, and the DRP vide order dated 29.9.2011, copy of which has been placed in the Paper Book at pgs. 113 to 121, appreciated the factual matrix that the expenses were nothing but reimbursement of expenses incurred by the Associated Enterprise of BIPL (i.e., the assessee-company) for the discount to be passed on to the retailers. In particular, our attention has been drawn to the following observations of the DRP in the case of BIPL :-

“8.1 Braitrim UK, the AE of the taxpayer, is in the business of supplying world class hangers and has agreements with various retailers, whereby the retailers have nominated Braitrim UK its group companies as their preferred or exclusive global source for hangers and related products to be used by their garment suppliers (situated all over the world). Under preferred or exclusive arrangements with retailers, Braitrim UK is required to give a rebate/discount to the retailers, based on the volume/units of sales to garment suppliers, associated with the Braitrim group. This rebate/discount is stated as “Administration charges” by Braitrim, for its accounting purposes. Subsequently, the proportionate share of rebate/discount is recovered by Braitrim UK, from its group companies (including Braitrim India), based on the relative sales of those group companies.

8.2 As a result of aforesaid arrangements between Braitrim UK and the third party retailers, the assessee sells hangers to the Indian garment suppliers of the said retailers. It is stated that the retailers then charge the agreed rebates to Braitrim UK. Thereafter, the assessee reimburses the rebate paid by Braitrim to the retailers to the extent it pertains to India sales (i.e. sales to Indian garment suppliers of the retailers located outside India). In view of the above, it is stated, that Braitrim UK has entered into a cost reimbursement agreement with the assessee, whereby the assessee is required to reimburse its proportionate share of the discount/rebate to Braitrim UK without any mark up.

10. As part of these arrangements/agreements, Braitrim UK agreed to pass on the discount at the rate 1% of sale of hangers by Braitrim group of companies to the retailers. As rightly stated by the assessee, because of this arrangement, the taxpayer is getting business without much effort on advertisement and marketing as evidenced by no expenses on marketing or advertisement debited in the profit and loss account for the FY 2006-07. The Braitrim group companies supply the hangers to the garment manufacturers, which in turn supply to the ultimate retailers in the form of pre-hanged clothes. The assessee also supplied hangers to garment

manufacturers within and outside India. Based on the sale of these hangers by the assessee, Braitrim UK has to pay to the retailers at the rate of 1% on these sales made by the taxpayer to retailers through garment manufacturers. Before the DRP, the taxpayer also produced invoices raised by third party retailers against Braitrim UK to show that the said discount @ 1% on sale of hangers by the Indian entity was passed on to the retailers. Thus, it is seen that Braitrim UK is passing on 100% of discount payable by the taxpayer to the retailers. Further, keeping in view the margin of the taxpayer at 15.82% on sales for the FY 2006-07 and also lower/hardly any marketing and advertisement expenses, the payment made is qualified by the benefit received from the AE, Braitrim UK..... As part of the arrangement between Braitrim UK and the retailers, Braitrim UK agrees to pass on benefit to the retailers in the form of incentive computed at the rate of 1% of sale value of hangers used by the retailers. Thus, in this transaction, there is no role to pay for Indian garment manufacturers. In view of the above discussion, we are satisfied that the discount given by the AE, Braitrim UK to the retailers is helping the taxpayer to get business without much marketing effort, for which the taxpayer is reimbursing the AE at the rate of 1% of sale of hangers in India, which was ultimately passed on to the retailers by the AE.”

10. Nevertheless, the DRP proceeded to revise the arm's length price for certain other considerations. The aforesaid matter also travelled to the Tribunal, and vide order dated 4.7.2012, copy of which has been placed at pages 122 to 132 of the Paper Book, the matter was restored to the file of DRP for examination of the reconciliation between the invoices raised by the assessee and the invoices recorded by BIPL while it was accepted that the payment of administrative charges to assessee-company was only reimbursement. The learned representative pointed out that as a consequence of the directions of the Tribunal, a remand report was called from DIT(IT) and based on the remand report

submitted by the DIT(IT) dated 21.11.2014, copy of which is placed at pages 203 to 210 of the Paper Book, the DRP vide its order, copy of which is placed at pages 249 to 254 of the Paper Book, has held that the Transfer Pricing adjustment is taken as NIL. On the basis of the aforesaid proceedings in the case of BIPL for Assessment Year 2007-08, what is sought to be emphasised is that the nature of administrative charges paid to the assessee-company has been accepted as mere reimbursements and, therefore, according to the assessee-company, the assessing authority in the present case cannot take a divergent view. On this aspect of the matter, the learned representative for the assessee relied upon the decision of the Chennai Bench of Tribunal in the case of *R.K. Swamy vs. ACIT, 88 ITD 185 (Chennai)* for the proposition that the same transaction cannot be characterised differently in the assessments of payer and recipient of income.

11. The learned representative has also countered the observations of DRP in para 9.7 of the order in the instant case regarding no sales having been made to customers other than the manufacturers of retailers. The learned representative pointed out that at no stage this aspect has been confronted to the assessee and, therefore, it was pointed out that the correct factual status is that BIPL has also made sales to other independent parties for which no discount/rebate or administrative charges are payable to the assessee-company. In this context, a tabulated working was furnished of major clients to whom sales have been made by BIPL in relation to the 4 years under consideration. The said tabulation clearly brings out that whereas sales have been made to the retailers, where rebate/discount have been

allowed in the form of administrative charges payable to the assessee-company, at the same time sales have been made to other independent parties also on which no administrative charges or rebate/discount is payable to assessee-company. The learned representative pointed out that if BIPL was found paying rebate/discount in terms of the agreement of assessee with the retailers on its entire sales, then it could have been inferred that there was an element of royalty, but the details clearly show that the payment of administrative charges is pertaining only to the sales made to the parties which are governed by the agreement of the assessee-company with the retailers worldwide.

12. At the time of hearing, the learned representative also pointed out that there is no justification in the stand of the DRP in finding fault with the report of the independent Chartered Accountant giving details of payment to retailers as also the inconsistencies noted between the CRA and the rebate agreement with M/s. Peacock Stores Ltd. In sum and substance, on the basis of aforesaid, it has been pointed out that there was no justification with the Revenue to treat the impugned receipts from BIPL as for the use of brand "Braitrim" so as to be taxable as royalty.

13. We have carefully considered the rival submissions and perused the material on record. We find that the assessee is required to give a rebate/discount to the retailers based on the volume / units of sales to garment suppliers achieved by the Braitrim group. Subsequently, the proportionate share of rebate / discount is recovered by the assessee from its group companies, including BIPL, based on the relative sales of

those group companies to the respective retailers. The assessee has, accordingly entered into a reimbursement agreement with BIPL, whereby BIPL has acknowledged its obligation to reimburse its proportionate share of the discount / rebate to the assessee based on sale volumes/units achieved by it. As per the Cost Reimbursement Agreement (CRA), such reimbursements are depicted as 'Administration charges' by BIPL in its books of account.

14. We find it relevant to refer to the following clauses of the Cost Reimbursement Agreement (CRA) in order to appreciate the nature and characterisation of the amount of reimbursements :-

- i) that the title to the agreement is described as 'Cost Reimbursement Agreement';
- ii) that the preamble to the agreement mentions the fact of payment of administration charges by the Assessee to the customer companies in respect of goods supplied by worldwide entities of Braitrim group including BIPL and the purpose of the agreement is to recover such charges by the assessee from BIPL;
- iii) that Article 3 requires BIPL to compensate the assessee towards the proportionate administration charges in respect of goods supplied to the customer companies/suppliers;
- iv) that Article 4 prescribes the method of computation of the proportionate share of the administration charges to be borne by BIPL determined as proportion of its sale to customer companies to the total worldwide sales of the Braitrim group; and,

- v) that Article 5 stipulates that the payments made under the agreement represent reimbursement of administration charges borne by the assessee.

15. Therefore, so far as the understanding of the parties to the CRA is concerned, the same has been understood to be in the nature of reimbursement of the rebate/discount passed on by the assessee to the retailers. Factually speaking, it has also been established that there is no mark-up retained by the assessee while recovering from BIPL the rebate/discount given to the retailers. It is also clear that BIPL has also made sales to other independent parties for which no discount/rebate or administrative charges are payable to the assessee-company. The aforesaid undisputed features of the arrangement clearly bring out that the transaction in question cannot be construed to be 'royalty' as understood by the income-tax authorities. This becomes even more pertinent once the nature of such payments by BIPL to the assessee has been admitted as such in the assessment of BIPL for assessment year 2007-08.

16. Pertinently, the assessee stated that the transaction for reimbursement of administrative charges by BIPL to the assessee was subject to transfer pricing proceedings during the assessment year 2007-08, wherein the TPO questioned the commercial expediency of the transaction of payment for administration charges and determined the arm's length price as 'Nil', which was effectuated accordingly by Assessing Officer in the draft assessment order.

17. Before the DRP, BIPL raised objections against the draft assessment order, which was based on the order of the Transfer Pricing Officer. The DRP held as under :-

"The DRP has carefully considered the order of the TPO, submissions of the taxpayer and objections of the taxpayer. The main issue here is that the assessee has paid to its AEs an amount of Rs.1,87,30,339 stating that these charges are paid as administration charges. However, as accepted by the taxpayer, these expenses are nothing but reimbursement of expenses incurred by the AE for the discounts to be passed on to the retailers by Braitrim UK. After considering the arguments of the assessee it can be inferred that Braitrim UK negotiates globally with various garment retailers to use the hangers manufactured by Braitrim group companies all over the world. As part of these arrangements/agreements BraitrimUK agreed to pass on the discount at the rate 1% of sale of hangers by Braitrim group of companies to the retailers. As rightly stated by the assessee because of this arrangement the taxpayer is getting business without much effort on advertisement and marketing as evidenced by no expenses on marketing or advertisement debited in the profit and loss account for the FY 2006-07. The Braitrim group companies supply the hangers to the garment manufacturers, which in turn supply to the ultimate retailers in the form of pre-hanged clothes. The assessee also supplied hangers to garment manufacturers within and outside India. Based on the sale of these hangers by the assessee Braitrim UK has to pay to the retailers at the rate of 1% on these sales made by the taxpayer to retailers through garment manufacturers. Before the DRP, the taxpayer also produced invoices raised by third party retailers against Braitrim UK to show that the said discount @ 1% on sale of hangers by the Indian entity was passed on to the retailers.....In view of the above discussion, we are satisfied that the discount given by the AE, Braitrim UK to the retailers is helping the tax payer to get the business without much marketing effort, for which the taxpayer is reimbursing the AE at the rate of 1% of sale of hangers in India, which was ultimately passed on to the retailers by the AE."

However, the DRP revised the arm's length price as computed by the TPO on account of the timing difference between the recognition of administration charges/ rebate in the books of account of BIPL, vis-à-vis the amount recognized by the assessee in its accounts; and, accordingly, the assessment was finalised. When BIPL filed appeal before the Tribunal, the Tribunal, while accepting the payments to be reimbursements, restored the issue to the file of the DRP for examination of the reconciliation of invoices raised by the assessee and the invoices recorded by BIPL. The TPO, in response to the remand report called for by the DRP, as directed by this Tribunal, had accepted the contentions of BIPL and found the same to be in order.

18. From the aforesaid, it follows that for the assessment year 2007-08 there is a concurrent acceptance of the claim of BIPL that the payments are in the nature of reimbursement by all the authorities, viz. the TPO, the DRP and the Tribunal. Therefore, in the face of such concurrent acceptance of the nature of payment as being a mere reimbursement, it is untenable for the Revenue to contend in the captioned cases that the nature of the amount is otherwise. Therefore, what follows is that the expenses have been incurred by the assessee on behalf of BIPL and the same were merely reimbursed to the assessee. Ostensibly, the contractual responsibility of the rebates to be paid to retailers lies with the assessee. However, since the sales are made by BIPL, the commercial prudence postulates that BIPL bears the ultimate responsibility of such rebates in respect of India sales, and thus the payment of such reimbursements. Admittedly, the liability is definite and crystallised in the books of BIPL, and it merely represents

normal discount. Thus, we are inclined to uphold the grievance of the assessee that the payments qualify as a pure reimbursement of expenses and accordingly, not taxable in India. The reimbursements received by the assessee are in respect of specific and actual expenses incurred by the assessee and do not involve any mark-up and the assessee has furnished sufficient evidence to demonstrate the incurrance of expenses. There is thus no good reason to make any addition to income in respect of these reimbursements of expenses. The action of the Assessing Officer, as the learned counsel rightly contends, is on pure surmises and conjectures.

19. Here, we would also like to refer to the judgment in the case of *AP Moller (supra)*. Facts of that case were that the assessee was a foreign company engaged in shipping business and was a tax resident of Denmark; that it had agents working for it, who booked cargo and acted as clearing agents for the assessee; and, that in order to help all its agents across the globe, the assessee had set up and maintained a global telecommunication facility called Maersk net system which was a vertically integrated communication system. The agents would pay for the system on *pro rata* basis. According to the assessee, it was merely a system of cost sharing and the payments received by the assessee from its agents in India were in the nature of reimbursement of expenses. The Assessing Officer, however, did not accept this contention and held that the amount paid by these three agents to the assessee were FTS rendered by the assessee and held them taxable in India under Article 13(4) of the Double Taxation Avoidance Agreement (DTAA) between India and Denmark and brought them to tax at 20% u/s 115A of the Act.

The CIT(A) dismissed the assessee's appeal, but the Tribunal allowed its further appeal. The Hon'ble High Court dismissed the Department's appeal holding that the Tribunal had rightly observed that the Maersk-net-communication-system was an automated software based communication system which did not require the assessee to render any technical services; that it was merely a cost sharing arrangement between the assessee and its agents to efficiently conduct its shipping business; and, that it was part of the shipping business and could not be captured under any other provisions except under the DTAA. The Hon'ble Supreme Court, dismissing the appeal held as under :-

"..... the facts that the assessee had its information technology system, that the assessee had appointed agents in various countries for booking of cargo and servicing customers in those countries, preparing documentation, etc., through these agents, that for the sake of convenience of all these agents, a centralised system was maintained to avoid unnecessary cost, that the system comprised booking and communication software, hardware and a data communications network and was, thus, an integral part of the international shipping business of the assessee and ran on a combination of mainframe and non-mainframe servers located in Denmark, that the expenditure incurred for running this business was shared by all the agents and that the systems enabled the agents to co-ordinate cargos and ports of call for its fleet were findings of fact. Once these were accepted, by no stretch of imagination, could the payments made by the agents be treated as fees for technical services. The payments were in the nature of reimbursement of cost whereby the three agents paid their proportionate share of the expenses incurred on these said systems and for maintaining those systems. Neither the Assessing Officer nor the Commissioner (Appeals) had stated that there was any profit element embedded in the payments received by the assessee from its agents in India. Once the character of the payment was in the nature of reimbursement of

the expenses, it could not be income chargeable to tax. Moreover, freight income generated by the assessee in the assessment years in question was accepted as not chargeable to tax as it arose from the operation of ships in international waters in terms of article 9 of the DTAA. Once that was accepted and it was also found that the Maersk net system was an integral part of the shipping business which was allowed to be used by the agents of the assessee as well in order to enable them to discharge their role more effectively as agents, and the business could not be conducted without it, it could not be treated as any technical services provided to the agents."

20. Quite clearly, payments by way of reimbursement of expenses incurred on behalf of the payer cannot be construed as income chargeable to tax in the hands of the payee, a proposition which is approved by the Hon'ble Bombay High Court in the case of *Siemens Aktiengesellschaft (supra)*. In view of the above discussion, we direct the Assessing Officer not to treat any part of reimbursement of expenses received by the assessee as income of the assessee. The assessee gets the relief accordingly on Ground no. 2 of the aforesaid appeal.

21. In so far as Ground of appeal nos.3 to 5 are concerned, it relates to charging of interest u/s 234B of the Act, which is consequential in nature and does not require any specific adjudication.

22. In the result, appeal of the assessee in ITA No. 1750/Mum/2015 is allowed, as above.

23. It was a common point between the parties that the facts and circumstances in the appeals being ITA No. 1751 to 1753/Mum/2015

are *pari materia* to those considered by us in ITA No. 1750/Mum/2015 in the preceding paragraphs, therefore, our decision therein shall apply *mutatis mutandis* to the said appeals also.

24. Resultantly, appeals of the assessee are allowed, as above.

Order pronounced in the open court on 21st August, 2019.

Sd/-
(RAVISH SOOD)
JUDICIAL MEMBER

Sd/-
(G.S. PANNU)
VICE PRESIDENT

Mumbai, Date : 21st August, 2019

SSL

Copy to :

- 1) The Appellant
- 2) The Respondent
- 3) The CIT(A) concerned
- 4) The CIT concerned
- 5) The D.R, "L" Bench, Mumbai
- 6) Guard file

By Order

Dy./Asstt. Registrar
I.T.A.T, Mumbai