IN THE INCOME TAX APPELLATE TRIBUNAL
"I" BENCH, MUMBAI

BEFORE SHRI AMIT SHUKLA, HON'BLE JUDICIAL MEMBER AND SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER

ITA Nos. 1148 & 1297/MUM/2021
(A.Ys. 2016-17 & 2017-18)

Spencer Stuart International B.V. C/o Spencer Stuart India Pvt. Ltd., Birla Aurora, Level A, 14th Floor Dr. Annie Besant Road, Worli Mumbai – 400030 **PAN: AAKCS2299C**	*v.*	ACIT (IT) – 4(2)(2) 16th Floor, Air India Building Nariman Point Mumbai – 400 021
Appellant		**Respondent**

Assessee Represented by	**:**	**Shri Mukesh Bhutani & Ms. Nikky Jhamtani**
Revenue Represented by	**:**	**Shri Bharati Singh**
Date of Hearing	**:**	**25.07.2022**
Date of pronouncement	**:**	**06.09.2022**

ORDER

PER S. RIFAUR RAHMAN (AM)

1. Both these appeals are filed by the assessee against separate orders of Learned Commissioner of Income Tax (DRP-2), Mumbai-1 [hereinafter in short "Ld. DRP"] passed u/s. 144C(5) of the Income-tax Act, 1961 (in short "Act") dated 05.03.2021 and 17.03.2021 for the A.Ys. 2016-17 and 2017-18 respectively.

2. Since the issues raised in both these appeals are identical, therefore, for the sake of convenience, these appeals are clubbed, heard and disposed off by this consolidated order. We are taking Appeal in ITA.No. 1148/MUM/2021 for Assessment Year 2016-17 as a lead appeal.

ITA No. 1148/MUM/2021 (A.Y. 2016-17)

3. Assessee has raised following grounds in its appeal: -

> *"The appellant objects to the order dated 16 March 2021 (received on 17 March 2021) passed under section 143(3) r.w.s. 144C(13) of the Income-tax Act, 1961 [Act] by the Assistant Commissioner of Income-tax, (International Taxation) - 4(2)(2), Mumbai [Assessing Officer] on the basis of the directions of the Dispute Resolution Panel [DRP] for the aforesaid assessment year on the following among other grounds:*
>
> *A. Taxability of Search Fees*
>
> *1. That on the facts and circumstances of the case the impugned assessment completed vide order dated 16.03.2021 passed under section 143(3) read with section 144C of the Act, is illegal and bad in law.*
>
> *2. That on the facts and circumstances of the case, the impugned assessment having been completed on the basis of directions issued by the DRP under section 144C(5) of the Act, without judiciously and independently considering the factual and legal objections to the draft assessment order, is illegal and bad in law.*
>
> *3. The learned DRP/Assessing Officer erred in holding that a sum of Rs.6,29,16,235 received by the appellant from Spencer Stuart India Private Limited [SS India] towards executive search fees is taxable as fees for technical services under section 9(1)(vii) of the Income-tax Act, 1961 and under Articles 12(5)(a) and / or 12(5)(b) of the India-Netherlands tax treaty.*

4. In spite of the learned DRP accepting that the material facts and circumstances have not undergone any change when compared to the earlier years, the learned DRP/Assessing Officer erred in not following the orders of the Hon'ble Income-tax Appellate Tribunal, Mumbai Bench [ITAT] in Appellant's own case for Assessment years 2011-12, 2014-15 and 2015-16 wherein the issue of taxability of search fees is decided in favour of the Appellant and the Hon'ble ITAT has held that search fees are not taxable in India under Article 12(4), 12(5)(a) as well as 12(5)(b) of the India-Netherlands tax treaty.

5. The learned DRP/Assessing Officer ought to have followed the order of the Hon'ble ITAT passed in case of Spencer Stuart (India) Private Limited [SS India] for Assessment years 2012-13, 2013-14 and 2014-15. The Hon'ble ITAT has upheld the order of Commissioner of Income-tax (Appeals) [CIT(A)] for the said years wherein the CIT(A) has held that search fees remitted by SS India to the assessee company do not represent fees for technical services under Article 12(5)(a) of the India-Netherlands tax treaty and is not subject to TDS under section 195 of the Act.

6. Alternatively, and without prejudice, the learned DRP/ Assessing Officer erred in holding that the said amount of Rs.6,29,16,235 is taxable as royalty under Article 12(4) of the India-Netherlands tax treaty.

7. The learned DRP/Assessing Officer erred in holding that the search fees received by the appellant is nothing but 'ancillary and subsidiary' to the application or enjoyment of the right, property or information for which a payment (i.e. license fees) described in paragraph 4 of Article 12(5)(a) of the India-Netherlands tax treaty is made; without appreciating that rendering executive search services is the core business of the appellant.

8. The learned DRP/ Assessing Officer erred in holding that services rendered by the appellant makes available the technology/technical know-how to SS India without providing any documentary evidence to support the findings of the DRP/ Assessing Officer or reasons for the same.

9. The learned Assessing Officer erred in making the following observation at page 13 of the final assessment order which are

without any basis and contrary to the facts of the case and the appellant objects to the same.

"Hence, the search fees is nothing but an ancillary and to the application or enjoyment of the right, property or information for which a payment described in paragraph 4 of this Article is received"

B. ***Reimbursement of Expenses***

10. The learned DRP/ Assessing Officer erred in treating a sum of Rs.69,22,763 reimbursed to the appellant by SS India for expenses incurred on its behalf at cost (without any mark-up) as taxable as fees for technical services under section 9(1)(vii) of the Income-tax Act, 1961 as well as under Articles 12(5)(a) and 12(5)(b) of the India Netherlands tax treaty.

11. The learned DRP/Assessing Officer erred in stating that the appellant has not proved that there is no profit element without appreciating that the appellant had provided all the supporting third-party invoices at the time of assessment proceedings and DRP proceedings.

12. In spite of the learned DRP accepting that the material facts and circumstances have not undergone any change when compared to the earlier years, the learned DRP/ Assessing Officer erred in not appreciating the fact that the Hon'ble ITAT has decided the issue of taxability of reimbursement of expenses in favour of the Appellant's own case for assessment years 2011-12, 2014-15 and 2015-16 and the Hon'ble ITAT applied the principles laid down by the Hon'ble Supreme Court in the case of DIT (International Taxation) v. A.P. Moller Maersk AS 392 ITR 186 (SC).

13. Each one of the above grounds of appeal is without prejudice to the other.

14. The appellant prays leave to add, amend, alter, delete or forego any of the grounds either before or during the course of hearing."

4. At the outset, with regard to Ground No. 1 which is in respect of Taxability of Search Fees, Ld. AR of the assessee brought to our notice that the issue in appeal has been considered by the Co-ordinate Bench of this Tribunal in assessee's own case for the A.Ys. 2014-15 & 2015-16 and decided the issue in favour of the assesse and against the department.

5. On the other hand, Ld. DR has fairly accepted the submissions of the Ld.AR.

6. Considered the submissions and material placed on record, we observe from the record that identical issue is decided in favour of the assessee by the common order dated 01.04.2019 for the immediately preceding Assessment Years i.e., A.Y.2014-15 and 2015-16. While deciding the issue, the Coordinate Bench of the Tribunal in ITA.No. 6666/MUM/2017 dated 01.04.2019 held as under: -

> *"8. Before us, the learned representative for the assessee referred to the following discussion in the order of Tribunal dated 01.06.2018 (supra) pertaining to Assessment Year 2011-12:*
>
> > *"3.2. We have heard the rival submissions and perused the material on record. We find that the assessee had entered into a LA with SSIPL whereby it granted license to SSIPL to use trade-name, trademark, lagos of 'Spencer Stuart' and the rights to use software owned by it as well as certain other support services, that in lieu of the rights provided to SSIPL it was entitled to a license fee computed at 13.5% of the net revenues of SSIPL,*

that the license fee amounting to Rs.3,85,47,171/- received by the assessee from SSIPL, as per the LA, was offered to tax as royalty as per the provisions of the Act r.w.Article 12(4) of the India-Netherelands DTAA, that it had also entered into a SA whereby, both SSIPL and the assessee agreed to provide, on a principal to principal basis, support and services to each other in relation to executive search assignments (Pg.123A-123F of the PB), that the assessee, also received Rs.5.39 crores towards ESF provided by the it to the Indian AE, as per the SA, that it claimed that the search fee was in the nature of business income and was not taxable in India in the absence of a PE in India. that it also claimed that the search fee was not taxable as FTS in view of Article 12(5) of the DTAA, that the AO in his draft assessment order proposed to tax the search fees under Article 12(5)(a) of the DTAA, that the DRP upheld the draft assessment order.

In our opinion, license fees and search fees are governed by separate and distinct agreements entered into by the assessee and SSIPL and they would constitute different sources of its income for the year under consideration. In other words, receipt of search fee by the assessee was independent of earning the license fee. As per the SA search fees was to be determined on the basis of relative contribution of each party, which menas in a given situation, SSIPL could also receive search fees from the assessee. But, same was not true for licence fee. The assessee had not to pay anything to SSIPL as licnece fee. ESF were independent services and were not provided for the purpose of enjoyment/application of right, property etc. governed by the LA. Services, ancillary and subsidiary to the use of license/ trademark/software are provided for in the LA and same had no correlation with the SA. It is safe to say that the DRP had wrongly held that SA was originating from LA. Core business of the group was to identify, to evaluate and to recruit of senior personnel for a fee. If is found that to carry out the search function, SSIPL would employ consultants, who were supported by

researchers, knowledge managers and support staff. As per the Memorandum of Association (MOA) of SSIPL (Pg. 288-293 of the PB.), the principal business of SSIPL was to carry out or execution of executive searches and therefore, the ESF cannot be treated as ancillary/subsidiary to the LA. In fact, license fees was a percentage of the search fees earned by SSIPL from the executive searches done during the year.

We also hold that for a service to be categorised as FTS it should make available technical knowledge, experience, skill, know-how, or processes, or it should consist of the development/transfer of a technical plan or a technical design, in terms of Article 12(5)(b)of the DTAA. It is also observed that that the DRP had relied on the inclusion of the sharing clause (clause (bb) to Article 3) in the LA to arrive at the conclusion that the terms and conditions of the SA are part and parcel of the LA. But, we find that the departmental officers have not given any reasoning that could lead to the fact that SA was ancillary in nature to the LA. We find that the FAA his orders, dated 16/09/2016, for the AY.s. 2012-2013 to 2014-15, in context of the proceedings u/s 201 of the Act, has decided the identical issue in favour of SSIPL and has held that search fees remitted by SSIPL to the assessee did not represent fees for technical services under Article 12(5)(a) of the India-Netherlands DTAA and was not subject to TDS u/s.195 of the Act. We find that the FAA has referred to the APA entered between SSIPL and the Government of India. As per the APA, a separate benchmarking has been laid down for the international transaction of License fee and ESF. As per paragraph 5 & 6 of the APA, the Most Appropriate Transfer Pricing Methods for the covered transactions shall be Profit Spirt Method (PSM) for payment and receipt in relation to Cross border executive search transact-tion and Comparable Uncontrolled Price (CUP) method for Payment of License fees transact-tion.

Considering the above, we are of the opinion that the search fee and license fee were distinct from each other and that the search fee received under the SA was

independent of the LA and was not taxable in India as FTS under Article 12(5)(a)of the DTAA. It is a fact that in earlier years the AO himself had held that fees under the both the agreements were separate and that only licence fees was taxable. So, we have no hesitation in holding that the search fee could not be treated to be ancillary and subsidiary to LA, that the same did not in any way aid, promote or supplement the application or enjoyment of the right, property, or information, that the search fee received under the SA was independent of the LA and was not taxable in India. First effective ground of appeal is decided in favour of the assessee."

9. The aforesaid discussion by our coordinate bench clearly brings out that the Licence Agreement which results in earning of Royalty income (which has since been offered to tax) and the Service Agreement (which results in earning of Executive search fee) have been held to be separate and distinct agreements thereby constituting different sources of income. Our coordinate bench analysed the entire activities between assessee and SS India and observed that the principal business of SS India was to carry out or execute the mandate of Executive searches and thus the Executive search fee generating activities cannot be treated as ancillary and/or subsidiary to the Licence Agreement. Our coordinate bench has noted a pertinent fact that the licence fee payable in terms of the Licence Agreement was a percentage of search fee, which was earned by the Indian subsidiary, i.e. SS India, from the execution of Executive search mandate during a particular year. It is notable that in the context of Article 12(5)(b) of the India Netherlands Tax Treaty, our coordinate bench noted that the Executive search fee earned by the assessee was independent of the Royalty earned in terms of the Licence Agreement and was not taxable in India as 'fee for technical services' in terms of Article 12(5)(a) or 12(5)(b) India-Netherlands Tax Treaty. The aforesaid position continues to hold the field and, therefore, we do not find any reasons to distract from the aforesaid precedent. At this point, we may also note an undisputed fact which has been brought out by the learned representative for the assessee. It has been pointed out that the first assessment order relevant to the arrangement was Assessment Year 2007-08 wherein the return of income filed by

the assessee was accepted as such, as no scrutiny assessment was made. For Assessment Years 2008-09 and 2009-10, scrutiny assessments were made and issue was raised with regard to the assessee's stand of non-taxability of Executive search fee as 'fee for technical services' in terms of either Article 12(5)(a) or 12(5)(b) of the India-Netherlands Tax Treaty. In this context, reference has been made to the orders passed by the Assessing Officer for Assessment Years 2008-09 and 2009-10 dated 09.12.2011 and 08.12.2010 respectively, wherein after considering the submissions of the assessee, earnings by way of Executive search fee have been held to be not taxable in India. It is pointed out that in Assessment Years 2010-11, 2012-13 and 2013-14, no scrutiny assessments were carried out and for Assessment Year 2011-12, the stand of the assessee has already been upheld by the Tribunal vide order dated 01.06.2018 (supra).

10. The aforesaid background shows that in Assessment Year 2008-09 as well as in Assessment Year 2009-10, the assessing authority itself accepted the stand of the assessee that the Executive search fee was not taxable in India. Factually speaking, the aforesaid stand of the Assessing Officer is manifested in the scrutiny assessments finalised under Section 143(3) of the Act continues to hold the field. Thus, in this background it was all the more incumbent upon the Revenue in this year to discharge its onus as to why a different stand is being adopted, especially considering the fact that the nature and the sources of income in question remains the same. Therefore, on this aspect also, we are not inclined to uphold the stand of the assessing authority.

11. At this stage, we may also briefly touch upon the APA dated 30.08.2016 (supra) with the Indian subsidlary, l.e. SS India. In terms of the said APA, a copy of which is placed in the Paper Book, the period covered includes the captioned assessment years also. The transactions covered by the APA, inter-alia, involve payment of licence fee by SS India to the assessee before us as well as the Executive search transactions between SS India and the assessee before us, inter-alia, involving the impugned earning of 28,37,57,880/- by the assessee as Executive search fee from SS India. We are only trying to point out the aforesaid to say that the APA entered into by the Competent Authority with SS India covers the instant transactions, which are a mirror image

in the hands of the assessee before us. In fact, the proposition that the Licence Agreement (resulting in payment of licence fee offered to tax as Royalty) and the Service Agreement (resulting in payment of Executive search fee to the assessee) between the assessee and SS India are separate and distinct also found favour with the Competent Authority in the APA. In fact, the detailed discussion in the APA reveals an analysis of the functions performed, assets employed and risks undertaken by the assessee before it, i.e. SS India qua its transactions with the assessee before us. In fact, in the context of the arm's length price of the transactions, the APA makes a distinction between the payment of licence fee and Executive search transactions. So far as the Executive search transactions are concerned, the APA states that the 'Profit Split Method' is the most appropriate method for benchmarking the transactions. We are only highlighting the aforesaid features of the APA to point out that there is a complete dichotomy between the nature and characterisation of the transactions accepted in the APA in the context of SS India vis-a-vis the assessing authority of the present assessee. Ostensibly, it does not need any more emphasis that the nature and characterisation of the amount in the hands of the present assessee has to correspond to what has been accepted by the income-tax authorities in the case of the payer of the same, i.e. SS India. In fact, at the time of hearing, the learned representative for the assessee referred to the modified return of income under Section 92CD of the Act filed by SS India subsequent to the APA dated 30.12.2017 as also the order passed by the TPO under Section 92CA(3) dated 09.06.2017 and the assessment order under Section 143(3) dated 30.12.2017 in the case of SS India for Assessment Year 2014-15. The aforesaid orders give effect to the APA dated 30.08.2016 and it, inter-alia, reflects that the stated value of the payment of Executive search fee to the assessee before us has been found to be at an arm's length price. Similar is the situation for Assessment Year 2015-16.

12. At this stage, we may specifically take-up the stand of the Revenue that the Executive search fee is to be characterised as 'Royalty' in terms of clause (iv) of Explanation-2 to Sec. 9(1)(vi) of the Act r.w. Article 12(4) of the India-Netherlands Tax Treaty. As noted by us earlier, the aforesaid is a 'without prejudice' stand

by the Assessing Officer whereby it is asserted that the said fee is earned by the assessee "for using the Spencer Stuart's Worldwide Client List Database, Spencer Stuart's Mailing List Database, Spencer Stuart's Knowledge Management Resources Pages, Spencer Stuart's Board of Director's Database and other data base as per schedule B to the highlighting the aforesaid features of the APA to point out that there is a complete dichotomy between the nature and characterisation of the transactions accepted in the APA in the context of SS India vis-a-vis the assessing authority of the present assessee. Ostensibly, it does not need any more emphasis that the nature and characterisation of the amount in the hands of the present assessee has to correspond to what has been accepted by the income-tax authorities in the case of the payer of the same, i.e. SS India. In fact, at the time of hearing, the learned representative for the assessee referred to the modified return of income under Section 92CD of the Act filed by SS India subsequent to the APA dated 30.12.2017 as also the order passed by the TPO under Section 92CA(3) dated 09.06.2017 and the assessment order under Section 143(3) dated 30.12.2017 in the case of SS India for Assessment Year 2014-15. The aforesaid orders give effect to the APA dated 30.08.2016 and it, inter-alia, reflects that the stated value of the payment of Executive search fee to the assessee before us has been found to be at an arm's length price. Similar is the situation for Assessment Year 2015-16.

12. At this stage, we may specifically take-up the stand of the Revenue that the Executive search fee is to be characterised as 'Royalty' in terms of clause (iv) of Explanation-2 to Sec. 9(1)(vi) of the Act r.w. Article 12(4) of the India-Netherlands Tax Treaty. As noted by us earlier, the aforesaid is a 'without prejudice' stand by the Assessing Officer whereby it is asserted that the said fee is earned by the assessee "for using the Spencer Stuart's Worldwide Client List Database, Spencer Stuart's Mailing List Database, Spencer Stuart's Knowledge Management Resources Pages, Spencer Stuart's Board of Director's Database and other data base as per schedule B to the agreement which SSI has procured from SSI BV as part of Licence Agreement (supra)". This stand of the Assessing Officer is starkly in contrast to the position emerging in the APA dated 30.08.2016. If the Revenue was to contend that the Executive search fee is nothing but licence fee

(i.e. Royalty), then even in the APA proceedings, the Revenue was to have re characterised such Executive search fee as licence fee' and to tax it as "Royalty' under the APA. However, as we have noted the features emerging from the APA, the Executive search fee has been identified and held to be a separate and distinct transaction as compared to the licence fee, which flows from the Licence Agreement. Ostensibly, if the present stand of the Assessing Officer, which in any case was not preferred in the earlier year of 2011-12, is to prevail, then it would jeopardise the entire APA. We concur with the assertion of the learned representative for the assessee that such a situation would render the APA redundant, a situation which deserves to be avoided.

13. Apart from the aforesaid, if the stand of the Assessing Officer that the Executive search fee is to be taken as 'Royalty' is accepted, it would open up another anomalous situation, as our subsequent discussion would show. The functional analysis of the Executive search transactions, which have been detailed in the APA, clearly bring out that it encompasses a whole range of services for performing the Executive search and can by no stretch of imagination be characterised as 'Royalty'. Apart therefrom, we find that there is no reasoning made out by the Assessing Officer as to why the Executive search services activity is in the nature of 'Royalty'. Pertinently, it is stated that the search fee is received "for using the Spencer Stuart's Worldwide Client List Database, Spencer Stuart's Mailing List Database, Spencer Stuart's Knowledge Management Resources Pages, Spencer Stuart's Board of Director's Database and other data base as per schedule B to the agreement which SSI has procured from SSI BV as part of Licence Agreement (supra)". Notably, the fee which is earned by the assessee for allowing use of its trademark, trade name and software, etc. owned by it is a matter of contract in terms of the Licence Agreement dated 01.01.2006 for which the assessee receives Royalty. The payment of said Royalty has been factually found to be at arm's length price for the period under consideration as would be borne out of the order of TPO dated 09.06.2017 in the case of SS India. Therefore, once the payments in terms of the Licence Agreement, i.e. Royalty, has been found to be at arm's length price, no further amount can be attributable "for using the Spencer Stuart's Worldwide Client List Database, Spencer Stuart's Mailing List Database, Spencer Stuart's

Knowledge Management Resources Pages, Spencer Stuart's Board of Director's Database and other data base as per schedule B to the agreement which SSI has procured from SSI BV as part of Licence Agreement (supra)" as sought to be made out by the Assessing Officer in order to invoke clause (iv) of Explanation-2 to Sec. 9(1)(vi) of the Act read with Article 12(4) of the India-Netherlands Tax Treaty. Therefore, in our view, the said action of the Assessing Officer is completely misconceived and is liable to be set-aside and we hold that no charge can be made out under Section 9(1)(vi) read with Article 12(4) of the India-Netherlands Tax Treaty qua the impugned sum of Executive search fee.

14. In the result, we conclude by holding that the Assessing Officer erred in holding that the Executive search fee was in the nature of 'fee for technical services' under Article 12(5)(a) as well as 12(5)(b) of the India Netherlands Tax Treaty and also erred in his alternative conclusion that the same was taxable as 'Royalty' under Article 12(4) of the India-Netherlands Tax Treaty read with clause (iv) of Explanation-2 to Sec. 9(1)(vi) of the Act.

15. Thus, so far as the Ground of appeal nos. 3 to 8 is concerned, the same are allowed, as above.

7. Respectfully following the above decision and following the rule of "principle of consistency", the view taken by the Tribunal in A.Y. 2014-15 & 2015-16 is respectfully followed, ground raised by the assessee is accordingly allowed.

8. Coming to Ground No. 2 which is in respect of taxability of reimbursement of expenses, Ld. AR of the assessee submitted that the issue in appeal has been squarely covered in assessee's own case in ITA.No. 6666/Mum/2017 dated 01.04.2019. Copy of the order is placed

on record. Ld. AR brought to our notice Para No. 16 and 17 of the above order and submitted that the issue in appeal has been considered by the Coordinate Bench of this Tribunal and decided the issue in favour of the assesse and against the department.

9. On the other hand, Ld. DR has fairly accepted the submissions of the Ld.AR.

10. Considered the submissions and material placed on record, we observe from the record that identical issue is decided in favour of the assessee by the common order dated 01.04.2019 for the immediately preceding Assessment Years i.e., A.Y.2014-15 and 2015-16. While deciding the issue, the Coordinate Bench of the Tribunal in ITA.No. 6666/MUM/2018 dated 01.04.2019 held as under: -

> "*16. Insofar as Ground of appeal nos. 9 and 10 are concerned, the same relates to the taxability of reimbursement of expenses amounting to 1,24,43,236/- received by the assessee. The Assessing Officer and thereafter the DRP have held that the reimbursement of expenses received by the assessee in question are liable to be treated as 'fee for technical services' within the meaning of Article 12(5)(a) of the India-Netherlands Tax Treaty.*
>
> *17. In this context, we notice that the DRP relied upon the directions of its predecessor DRP in Assessment Year 2011-12 in concluding that the said amount is liable to be taxed in India as 'fee for technical services'. At the time of hearing, it was a common ground between the parties that the said stand of the DRP for Assessment Year 2011-12 has since been negated by the Tribunal in assessee's own case vide order dated 01.06.2018 (supra) and the said order continues to hold the field. In this*

context, the relevant discussion contained in the order of Tribunal dated 01.06.2018 is as under :

> *"4.2. We find the assessee had received payments from SSIPL towards reimbursement of expenses amounting to Rs.70,36,912, that the expenses reimbursed to the assessee by SSIPL were mainly towards travel and stay, video conferencing charges, insurance, reimbursement for purchase of fixed assets and other miscellaneous expenses, that the reimbursement of the expenses were supported by third-party invoices, that the reimbursements related to service agreement between the assessee and SSIPL for sharing the company services, that the services provided by the assessee were purely passed on as reimbursement of actual cost without any markup. We hold that marketing services are primarily in the nature of travel and stay abroad for Indian employees visiting overseas for global meetings, that Insurance coverage for employees is totally unrelated to search fees, that reimbursement of software license cannot be linked to search fees, that the QUEST NT software formed part of LA and the license fees were already offered to tax as royalties., that a confirmation letter dated 6/3/2014 submitted to the AO by SSIPL pertaining to purchase of fixed assets amounting to Rs.16,58,018 is part of the PB. In our opinion, reimbursement of expenses would not constitute FTS as per Article 12 of the tax treaty.*
>
> *Here, we would also like to refer to the judgment of AP Mollar (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, 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 AO, however, did not accept this contention and held that the amounts 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. FAA 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, 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 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."

Considering the above, we decide second ground of appeal in favour of the assessee."

Since the facts and circumstances are similar in this year, as noted by the DRP in the impugned order, following the precedent in assessee's own case dated 11.06.2018 (supra), the said issue is decided in favour of the assessee and the Assessing Officer is directed to delete the addition. Thus, so far as Ground of appeal nos. 9 and 10 are concerned, the same are allowed."

11. Respectfully following the above decision and following the principle of consistency, the view taken by the Tribunal in A.Y.2014-15 & 2015-16 is respectfully followed, ground raised by the assessee is accordingly allowed.

ITA.No. 1297/Mum/2021 (A.Y. 2017-18).

12. The grounds raised by the assessee are similar to grounds raised for the A.Y. 2016-17, accordingly, the decision taken therein shall apply mutatis-mutandis to the appeal for the A.Y. 2017-18 also. We order accordingly.

13. In the result, appeals filed by the assessee are allowed.

Order pronounced in the open court on 06th September, 2022.

Sd/-	Sd/-
(AMIT SHUKLA)	**(S. RIFAUR RAHMAN)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai / Dated 06/09/2022
Giridhar, Sr.PS

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum