

आयकर अपीलीय अधिकरण  
मंबई पीठ " आई "   
श्री विकास अवस्थी. न्यायिक सदस्य एवं  
श्री एम बालगणेश, लेखाकार सदस्य के समक्ष  
IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH " I ", MUMBAI  
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &  
SHRI M. BALAGANESH, ACCOUNTANT MEMBER  
आअसं. 5998/मुं/2019 (नि.व. 2016-17)  
ITA NO. 5998/MUM/2019(A.Y.2016-17)

CMA CGM SA

C/o. CMA CGM Agencies (India) Private Limited,  
Indiabulls Finance Center,  
Tower -3, 8<sup>th</sup> Floor, Senapati Bapat Marg,  
Elphinstone(W), Mumbai – 400 013.

PAN: AABCC-9048-G

..... अपीलार्थी /Appellant

बनाम Vs.

The Asstt.Commissioner of Income Tax  
(International Taxation)02(1)(1)Mumbai  
Room No.1713, 17<sup>th</sup> Floor,  
Air India Building, Nariman Point,  
Mumbai 400 021

..... प्रतिवादी/Respondent

अपीलार्थी द्वारा/ Appellant by : S/Shri M.P. Lohia and Nikhil Tiwari

प्रतिवादी द्वारा/Respondent by : S/Shri Miland Chavan and C.T. Mathews

सुनवाई की तिथि/ Date of hearing : 10/06/2022

घोषणा की तिथि/ Date of pronouncement : 02/09/2022

**आदेश/ ORDER**

**PER VIKAS AWASTHY, JM:**

This appeal by the assessee is directed against the assessment order dated 23/07/2019 passed under section 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 [ in short ' the Act' ] for the assessment year 2016-17.

2. The assessee in appeal has raised as many as sixteen grounds and has also filed six additional grounds of appeal. The gist of grounds raised by the assessee in appeal is as under:-

Ground No.1 – General.

Grounds No. 2 to 5 - Taxability of Inland Haulage Charges ('IHC').

Grounds No. 6 to 10 - Taxability of Freight Charges for transportation of cargo through Feeder Vessels.

Grounds No.11 to 13 – CMA CGA Agencies (India) Pvt. Ltd. – Whether Agency Permanent Establishment (PE)of the assessee in India.

Ground No. 14 - Error in computing Fees for Technical Services under the head "Income from Other Sources".

Ground No.15 – Error in calculation of Tax on interest on External Commercial Borrowings (ECB).

Ground No. 16 - Initiation of Penalty proceedings u/s. 271(1)(c) of the Act.

Additional Grounds of Appeal read as under:

*“ 17. On the facts and circumstances of the case and in law, the Appellant prays that the income earned in the nature of IT support fees [Fees for Technical Services ('FTS')] amounting to INR 8,12,79,561/- from its Agency company [CMA COM Agencies India Private Limited ('CCAI')] is not chargeable to tax in India by virtue of the beneficial provisions of Article 9 of India-France tax treaty.*

*18. On the facts and circumstances of the case and in law, while the Appellant has inadvertently offered the said income to tax at the rate of 10% plus surcharge and education cess (as per section 115A of the Act) in the return of income, it does not automatically constitute income chargeable to tax in India.*

*19. Without prejudice to the above, Hon'ble Pune Tribunal in the case of Appellant's Indian Agency company, CCAI (ITA NO.2314/PUN/2017 dated 2 January 2020) while adjudicating the similar payment for AY 2012-13 has held that the payment made for IT Services by CCAI to the Appellant is not chargeable to tax in India as per the Article 13 as well as Article 9 of India-France tax treaty and hence, CCAI was not liable to withhold tax on the same in India.*

20. *Without prejudice to the above, the Appellant prays that the income from provision of such services would not qualify as FTS as per the beneficial provisions of India - France tax treaty read along with protocol having the Most Favoured Nation ('MFN') clause as the same does not make available any technical knowledge, experience or skill etc to the Indian agent.*

21. *Without prejudice to the above, the said income from IT support services does not qualify as 'royalty' as per the provisions of India - France tax treaty as the payment of use of software does not satisfy the requirement of 'use of, or the right to use, any copyright of software'.*

22. *Without prejudice to the above, on the facts and circumstances of the case and in law, the Appellant prays that the provision of IT support services by CCSA was mainly aimed at facilitating its shipping business and accordingly, the amount received will assume the character of profit derived from the operations of ships as it is inextricably linked with its shipping activity and hence, exempt under Article 9 of India-France tax treaty."*

3. Shri M.P. Lohia appearing on behalf of the assessee submitted that the assessee is a tax resident of France. The assessee is engaged in the business of operation of ships in international traffic. The assessee has no branch office in India, and its management and affairs are controlled from France. During the period relevant to the assessment year under appeal, the assessee earned income from operation of ships in international traffic and the freight collected by it from its customers in India is not subject to tax in India by virtue of Article-9 of India-France DTAA. The Id. Authorized Representative for the assessee stated at the outset that majority of grounds of appeal are covered by the order of Tribunal in assessee's own case for assessment year 2012-13 to 2014-15 dated 14/03/2018 and the order of Tribunal for assessment year 2015-16 dated 30/12/2019.

4. The grounds raised by the assessee in appeal are decided in seriatim.

**Taxability of Inland Haulage Charges (IHC):**

5. The Id. Authorized Representative of the assessee submitted that the Assessing Officer has erred in making addition on account of IHC on the

ground that the same is chargeable to tax in India and levied tax @10% on deemed profit rate of taxable receipts. The Assessing Officer / DRP failed to appreciate the fact that IHC are not taxable in India as per Article – 9 of India-France DTAA. IHC are directly connected to and ancillary to the transportation of cargo in international traffic. The Id.Authorized Representative of the assessee submitted that the Tribunal in assessee's own case in ITA No.6095/Mum/2018 for assessment year 2015-16 decided on 30/12/2019 and also by the order of Tribunal dated 14/03/2018 common for ITANo.2185/Mum/2017 for assessment year 2013-14 and ITA No.6649/Mum/2017 for assessment year 2014-15 has held that IHC forms part of income from operation of Ships in international traffic, hence, covered by Article -9 of India-France DTAA.

6. Shri C.T. Mathews representing the Department vehemently defended the assessment order and the directions of the DRP. However, the Id.Departmental Representative fairly stated that grounds raised by the assessee, assailing taxability of 'IHC' was considered by the Tribunal in assessee's own case for the preceding assessment years.

7. We find that in assessment year 2015-16 similar ground was raised by the assessee before the Tribunal. The Tribunal following the order of Co-ordinate Bench in assessee's own case in ITA No.6649/Mum/2017(supra) decided the issue in favour of the assessee. The relevant extract of the findings of Tribunal in assessment year 2015-16 are reproduced hereunder:-

*“ 7. Having heard the parties, we find that while deciding identical issue in assessee's own case in the assessment year 2012–13, learned DRP had categorically held that the revenue earned from IHC is part of shipping business in International Waters, hence, covered under Article–9 of the Tax Treaty. However, subsequently, while deciding the identical issue in assessee's own case for the assessment years 2013– 14*

and 2014–15, learned DRP took a contrary view and decided the issue against the assessee. When the appeals preferred by the Revenue and the assessee for the aforesaid assessment years came up for consideration before the Tribunal, the Tribunal in ITA no.6649/ Mum./2017 & Ors., dated 14th March 2018, decided the issue in favour of the assessee holding as under:–

*“15. We have heard rival contentions on this issue and perused the record. We notice that the Id DRP has mainly declined to follow its own order passed in AY 2012-13 in the subsequent two years for the reason that there is difference between Article 8 of India-Belgium DTAA and Article 9 of India-France DTAA. According to Ld DRP that the India-Belgium DTAA contains specific provisions to include “any other activity directly connected with such transportation”, whereas the same is absent in the India France DTAA. The Ld A.R, on the contrary, submitted that the presence or absence of the above said provision will not make any difference. In support of this proposition, the Ld A.R placed reliance on OECD model conventions and the Commentary thereon, which are extracted above.*

*16. We notice that the decision in the case of Safmarine Container Lines N.V (supra) has been rendered by Hon’ble Bombay High Court in the context of India-Belgium DTAA. However, in the case of DIT Vs. A.P.Moller Maersk A/S (ITA No.1306 of 2013 dated 29- 04-2015), to which India-Denmark treaty would apply, the Hon’ble Bombay High Court has held that the principles involved in the decision of Safmarine Container Lines N.V (Supra) also govern the case of A.P. Moller Maersk A/S (supra). There is no dispute that the Article 9 of India-France DTAA is identically worded to the corresponding Article in India-Denmark DTAA.*

*17. We shall now discuss in brief the facts available in M/s A.P. Moller Maersk A/S case. The said company was resident of Denmark and hence India-Denmark DTAA applied to it. In order to help its agents in booking cargo and carrying out clearing agent works, the assessee maintained a global telecommunication facility called MaerskNet, which is a vertically integrated “Communication system”. The assessee recovered pro-rata costs from its agents and accordingly the Indian agents also remitted pro-rata costs to the above said assessee. Before AO, the assessee contended that it was merely a system of cost sharing and hence the amount recovered by it from its agents is in the nature of reimbursement of expenses. The AO, however, held to it to be fee for technical services.*

*18. Before the Hon’ble High Court, the assessee has also taken a plea that the communication system is very much an integral part of shipping business and therefore, the income received by the assessee from the agents, did in fact, amount to income from the shipping business of the assessee and therefore, not chargeable to tax. The Hon’ble Bombay High Court held that the amount*

received by the assessee for using the communication system by the agents is part of shipping business and could not be captured under any other provisions of the Income tax Act except DTAA. The High Court further held that it does not amount to technical service. Finally the High Court held that the amounts paid by the agents for using the communication system arose out of the shipping business and cannot be brought to tax.

19. The decision so rendered by Hon'ble Bombay High Court in the context of India-Denmark DTAA clearly shows that the ancillary activities connected with the shipping business are also included in the shipping business. The above said decision has been followed by the co-ordinate bench in the case of same assessee, viz., A.P.Moller Maersk A/S (ITA No.1798/Mum/2015 dated 15-02-2017) for AY 2011-12 to hold that the Inland Haulage charges received by that assessee shall also form part of shipping income from international traffic. The decision so rendered for AY 2011-12 was followed by the coordinate bench in the above said assessee's case in AY 2012-13 in ITA No.1743/Mum/2016 dated 07-02-2018.

20. Before us, the Id A.R demonstrated that the Article 9 of India France DTAA and Article 9 of India-Denmark DTAA are identically worded. Since the decision rendered by Hon'ble Bombay High Court in the case of Safmarine Containers Lines N.V (which was rendered in the context of India-Belgium DTAA) was held to be applicable to India-Denmark DTAA also by the Hon'ble Bombay High Court in the case of A.P.Moller Maersk A/S (ITA No.1306 of 2013), the Id A.R submitted that the absence of the expression "any other activity directly connected with such transportation" in the India-France DTAA will not make any difference. We notice that the contentions of the assessee also get support from the OECD model convention discussed supra.

21. In view of the foregoing discussions, we agree with the contentions of the Ld A.R on this issue. Accordingly we hold that Inland Haulage Charges received by the assessee shall form part of income from operation of ships in international traffic and accordingly Article 9 of India-France DTAA shall apply to it. Accordingly we uphold the order passed by Ld DRP in Ay 2012-13 on this issue and reverse the orders passed by it on this issue in AY 2013-14 and 2014-15."

8. Respectfully following the decision of the Co-ordinate Bench rendered in assessee's own case in the preceding assessment years, **we hold that IHC, since, forms part of income from operation of ships in International Traffic, is covered under Article-9 of the India-France Tax Treaty, accordingly, not taxable in India.** These grounds are decided allowed."

No contrary material has been brought on record distinguishing facts or the aforesaid decision. Respectfully following the decision of Co-ordinate Bench in assessee's own case, grounds of appeal No.2 to 4 are allowed for parity of reasons.

**Taxability of Freight Charges for Transportation of Cargo through Feeder Vessels:**

8. The Id.Authorized Representative of the assessee submitted that the Assessing Officer and DRP have erred in holding that freight charges for transportation of cargo through feeder vessels is income taxable in the hands of assessee under section 44B of the Act. The transportation of cargo through feeder vessels is inextricably linked to the international transportation of cargo. Therefore, freight charges for transportation of cargo through feeder vessels are covered by Article -9 of India-France DTAA. The Id.Authorized Representative of the assessee pointed that the issue is squarely covered by the order of Tribunal for the assessment years 2012-13 to 2014-15 and the order for assessment year 2015-16. The Id.Authorized Representative of the assessee further submitted that the Hon'ble Bombay High Court in assessee's own case in appeal filed by Department in Income Tax Appeal No.2175 of 2009 decided on 06/08/2012 has decided this issue in favour of assessee and has dismissed the appeal of Revenue. We find that in assessment year 2015-16 the Co-ordinate Bench following the order of Tribunal in assessee's own case for assessment years 2012-13 to 2014-15 dated 14/03/2018(supra) and the decision of Hon'ble Bombay High Court in assessee's own case held as under:

*" 17. Facts being identical, respectfully following the aforesaid decision of the Co-ordinate Bench rendered in assessee's own case, we hold that freight charges received from transportation of cargo through feeder vessels being part of shipping income in International Traffic is covered under Article-9(1) of the India-France Tax*

Treaty, hence, not taxable in India. In fact, the aforesaid view of the Tribunal was upheld by the Hon'ble Jurisdictional High Court while dismissing Revenue's appeal in assessee's own case in Assessment Year 2002-03 in Income Tax Appeal no. 2175 of 2009, vide judgment dated 6th August,2012. Accordingly, these grounds are allowed."

*[Emphasized by us]*

No contrary material has been brought to our notice to take a different view. Following the order of Co-ordinate Bench on this issue, ground No. 6 to 10 of the appeal are allowed for similar reasons.

**Permanent Establishment of the assessee in India :**

9. The Id.Authorized Representative of the assessee submitted that the Assessing Officer /DRP have erred in holding that CMA CGM Agencies (India) Pvt. Ltd. is dependent agent of the assessee in India. The Id.Authorized Representative of the assessee submitted that in the preceding assessment years similar findings were given by the Assessing Officer and the DRP. The issue travelled to the Tribunal. The Tribunal in appeals for assessment years 2012-13 to 2014-15 decided vide order dated 14/03/2018 (supra) and vide order for the assessment year 2015-16 dated 30/12/2019 held that Indian entity cannot be considered as Permanent Establishment and decided the issue in favour of the assessee. The Id.Authorized Representative of the assessee further pointed that a perusal of the Advance Pricing Agreement (APA) at page 117 of the paper book would show that the transaction is at arm's length, therefore, Indian entity cannot be held to be as agency Permanent Establishment.

10. Both sides heard. We find that in assessment year 2015-16 Co-ordinate Bench following the decision of Tribunal in assessee's own case for assessment year 2012-13 to 2014-15 held as under:

*“ 20. As could be seen from the aforesaid decision, the Tribunal has held that if the Indian agent has been remunerated at arm’s length, it cannot be considered as agency PE of the assessee. It is further relevant to observe, in the advance pricing agreement between the CMA CGM Agencies India Pvt. Ltd. and CBDT entered on 24th November 2015, it has been agreed that remuneration @ 18% between the assessee and its Indian agent has to be considered to be at arm’s length. **In the facts of the present case, it has been factually demonstrated before us that the payment made by the assessee to its Indian agent is at the arm’s length price of 18%. That being the case, following the aforesaid decision of the Co-ordinate Bench, we hold that the Indian Agent of the assessee cannot be considered as an agency PE.** Thus, grounds are decided in favour of the assessee.”*

[Emphasized by us]

There has been no change in the facts in impugned assessment year. No material is brought on record to suggest that the transaction with Indian entity is not at arm’s length. On the contrary assessee has demonstrated that transaction is as per APA therefore, no further adjustment is required. Respectfully following the decision of Co-ordinate Bench in assessee’s own case for assessment year 2015-16 grounds No.11 to 13 are allowed.

11. The Id.Authorized Representative of the assessee stated at Bar that he is not pressing ground No.14. In view of the statement made by Id.Authorized Representative of the assessee, ground No.14 of the appeal is dismissed.

12. In respect of ground No.15 of appeal, the Id.Authorized Representative of the assessee stated that the Assessing Officer has erred in taxing interest on ECB @ 10% instead of tax rate of 5%(+ surcharge @5% and cess @3%). The Id.Authorized Representative of the assessee pointed that rectification application has already been filed before the Assessing Officer on 25/02/2021, which is still pending for final disposal.

The Assessing Officer is directed to decide the rectification petition of the assessee dated 25/02/2021 expeditiously, preferably within a period of six

months from the date of receipt of this order. The ground No.15 of appeal is allowed for statistical purpose.

13. In ground of appeal No.16, the assessee has assailed initiation of penalty proceedings under section. 271(1)(c) of the Act. Challenge to penalty proceedings at this stage is premature, hence, dismissed, as such.

14. The assessee has filed application dated 22/03/2021 for admitting additional grounds. The additional grounds of appeal raised by the assessee are in connection with non-taxability of income on account of I.T.Support Services. The aforesaid receipts are in the nature of Fees for Technical Services(FTS) arising in India. The contention of the assessee is that FTS is not taxable in the light of beneficial provisions of India-France DTAA.

15. The reason given by the assessee for raising additional grounds of appeal before the Tribunal as per the application (supra) is reproduced herein below:

*“With regard to the additional ground relating to non-taxability of FTS received by the Appellant from its Indian agency company [CMA CGM Agencies India Private Limited ('CCAI')], it is submitted that the Appellant had inadvertently offered the same to tax at the rate of 10% plus surcharge and education cess (as per section 115A of the Act) in the return of income filed for the year under consideration. In this regard, attention is drawn to the decision of Hon'ble Pune Tribunal in case of CCAI (i.e. Indian agency company of the Appellant) (ITA No.2314/PUN/2017 dated 2 January 2020), wherein it was held that the said FTS paid by the assessee is not chargeable to tax in India as per the beneficial provisions of India-France tax treaty and hence, the assessee was not liable to withhold any tax on the same in India. In light of the said judicial precedent, the Appellant wishes to file an additional ground of appeal for non-taxability of FTS income in India as against tax rate of 10% (plus surcharge and education cess) as specified in under section 115A of the Act as considered by the Appellant in its return of income filed for the year under consideration. The assessed income to that extent would be lower when compared with the returned income.*

*It is submitted that the additional ground of appeal in respect of the above issue is a purely legal ground. In view of the above, the Appellant requests your Honours to admit the additional ground of appeal.”*

In support of its contention for admission of additional grounds of appeal, the assessee has placed reliance on the following decisions:

- (a) National Thermal Power Co. Ltd. vs. CIT [1998] 229 ITR 383 (SC);
- (b) Jute Corporation of India Ltd. [1991] 187 ITR 688 (SC);
- (c) Ahmedabad Electricity Co. Ltd. [1993] 199 ITR 351 (Bom) (FB); and
- (d) CIT v. Pruthvi Brokers & Shareholders 349 ITR 336 (Bom HC).

The assessee has also filed additional evidences in respect of the issues agitated in the additional grounds of appeal. The additional evidences field by the assessee are:

- (i) I.T Service agreement dated 25/02/2015 between CMA CGM SA and its Indian Agency.
- (ii) Addendum Dated 12/06/2016 to the I.T. Service agreement (supra).
- (iii) Addendum dated 13/12/2017 to I.T. Service agreement (supra).
- (iv) Copy of invoices raised by the assessee on the agency company.
- (v) Copy of Tribunal order dated 02/01/2020 in the case of CMA CGM Agencies India Pvt. Ltd. vs. DCIT in ITA No.2314/PN/2017 for assessment year 2012-13.
- (vi) Copy of agreement considered by Pune Bench of the Tribunal while deciding ITA No.2314/PN/2017(supra).

16. The Id.Departmental Representative vehemently opposed admission of additional grounds of appeal raised by the assessee and the additional evidences at this belated stage. The Id.Departmental Representative submitted that the assessee has raised a factual issue.

17. We have examined additional grounds of appeal raised by the assessee and additional documents supporting the claim made in additional grounds of appeal. The assessee in its return of income has offered to tax FTS @ 10% + surcharge and educational cess. In the additional grounds of appeal the assessee has stated that FTS arising from IT Services is not taxable in the light of beneficial provision in India – France tax treaty and also in the light of decision rendered by Pune Bench of the Tribunal in the case of assessee's Indian Agency Company CMA CGM Agencies India Pvt. Ltd.(supra). In so far as the issue raised in additional grounds of appeal it emanates from the proceedings before the Lower Authorities. The income which has been offered to tax by the assessee in return of income, now by way of additional ground assessee is claiming it non-taxable. It is a well settled principle that true income of the assessee should be taxed and only legitimate taxes should be collected from the assessee. [ Re: Balmukund Acharya Vs. DCIT, 310 ITR 310 (Bom)]. The assessee by way of additional evidences has supported the contentions raised in additional grounds of appeal. It is not a case where the assessee has raised altogether a fresh issue which was neither part of the income tax return or assessment proceedings. The assessee has changed its stand from offering income to tax in the return of income to claim the income as non- taxable under the provisions of DTAA. In the light of above, we are inclined to admit additional grounds of appeal, as well as additional evidences to substantiate additional grounds.

18. Since, this issue require fresh determination from a different dimension, we deem it appropriate to restore the same to Assessing Officer

for de-novo examination considering the additional evidences filed by the assessee and after affording reasonable opportunity of hearing/opportunity to make submissions, in accordance with law. The additional grounds of appeal are allowed for statistical purpose.

19. In the result, appeal by assessee is partly allowed.

Order pronounced in the open court on Friday the 2<sup>nd</sup> day of September, 2022.

Sd/-

( M. BALAGANESH )

लेखाकार सदस्य/ACCOUNTANT MEMBER

मुंबई/ Mumbai, दिनांक/Dated 02/09/2022  
Vm, Sr. PS(O/S)

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य/JUDICIAL MEMBER

**प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त(अ)/ The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT, Mumbai
6. गार्ड फाइल/Guard file.

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BY ORDER,

(Dy./Asstt. Registrar) /  
Sr.Private Secretary  
ITAT, Mumbai