IN THE INCOME TAX APPELLATE TRIBUNAL

"I" BENCH, MUMBAI

BEFORE SHRI PRAMOD KUMAR, VICE PRESIDENT, AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA No.1013/Mum./2021

(Assessment Year : 2017–18)

CMA CGM SA
C/o CMA CGM Agencies (I) Pvt. Ltd.
India Bulls Finance Centre
Tower–3, 8th Floor, Senapati Bapat Marg
Elphinstone Road (W), Mumbai 400 013
PAN – AABCC9048G

……. Appellant

v/s

Asstt. Commissioner of Income Tax
International Taxation
Circle–2(1)(1), Mumbai

.....Respondent

Assessee by : Shri Nikhil Tiwari
Revenue by : Shri Lovish Kumar

Date of Hearing – 03/10/2022	Date of Order – 03/11/2022

O R D E R

PER SANDEEP SINGH KARHAIL, J.M.

The present appeal has been filed by the assessee challenging the final assessment order dated 09/04/2021, passed under section 143(3) r/w section 144C(13) of the Income Tax Act, 1961 ('*the Act*'), pursuant to the directions dated 25/02/2021, issued by the learned Dispute Resolution Panel ("*learned DRP*") under section 144C(5) of the Act, for the assessment year 2017–18.

2. In this appeal, assessee has raised following grounds:

"General

1. erred in assessing the total income of the Appellant at INR 41,50,33,680/- as against returned income of INR 9,75,92,572/-;

2. erred in passing the final assessment order without having the appropriate charge/ jurisdiction over the present assessment proceeding and thereby entire assessment proceeding is bad in law;

Taxability of Inland Haulage Charges ('IHC') of INR 308,74,51,331/–

3. erred in making addition on account of IHC on the ground that same is chargeable to tax in India and accordingly brought to tax @ ad-hoc 10% deemed profit rate of taxable receipt:

4. erred in making an addition on account of IHC by denying the benefit of Article 9 of India -France Double Taxation Avoidance Agreement ('India-France DTAA') since IHC is directly connected to and ancillary to the transportation of cargo in international traffic;

5. erred in not taking cognizance of the decision of jurisdictional Tribunal in the Appellant's own case for AY 2012-13 to AY 2014-15 & AY 2015-16, wherein the Hon'ble Tribunal has held that IHC shall form part of income from operation of ships in international traffic and accordingly, not taxable in India as per Article 9 of India France DTAA;

6. without prejudice to the above, even if IHC is taxable in India under the Act, only 7.5% of such receipts should be taxable under section 44B of the Act;

Taxability of freight charges of INR 11,59,46,291/- from transportation of cargo through feeder vessels

7. erred in holding that 7.5% of freight charges from transportation of cargo through feeder vessels is income taxable in the hands of the Appellant and not eligible for benefit under Article 9 of India-France DTAA;

8. erred in not taking cognizance of the decision of jurisdictional Bombay HC in the Appellant's own case for AY 2002-03 (ITA No. 2175 of 2009), wherein the Hon'ble H has followed the decision in case of Balaji Shipping (UK) Ltd. and held that freight income from transportation of cargo through feeder vessels is not taxable in India.

9. erred in not taking cognizance of the decision of jurisdictional Tribunal in the Appellant's own case for AY 2012-13 to AY 2014-15 & AY 2015-16, wherein the Hon'ble Tribunal has followed the decision of Hon'ble jurisdiction Bombay HC in the Appellant's own case and held that the freight income from transportation of cargo through feeder vessels is eligible for relief as per article 9 of India-France DTAA;

10. erred in holding that while income from slot arrangement would fall within the ambit of section 44B of the Act, at the same time it is not eligible for benefit of Article 9 of Indi France DTAA;

CMA CGM Agencies (India) Private Limited ('CCAI") held to be agency permanent establishment ("PE") of the Appellant in India

11. erred in holding that the CCAI is dependent agent of the Appellant in India and, such dependent agent constitutes a PE of the Appellant in India, without appreciating the facts and circumstance of the case;

12. erred in not appreciating that CCAI cannot be considered a dependent agent of the Appellant as per Article 5 of the India-France DTAA since the transactions between the Appellant and CCAI are at arm's length;

13. without prejudice to the above, failed to appreciate that the agent of the Appellant in India had been compensated at arm's length and hence no further attribution could made towards Income of the Appellant liable to tax in India,

Interest under section 234B of the Act

14. erred in levying interest under section 234B of INR 6,32,15,145/-;

Initiation of penalty proceedings under section 270A of the Act

15. erred in initiating penalty proceedings under section 270A of the Act."

3. The brief facts of the case are: The assessee is a company incorporated in and a tax resident of France. It is engaged in the business of operation of ships in international traffic (i.e. transportation of cargo between ports in India and ports outside India). For the year under consideration, assessee filed its return of income on 30/11/2017 declaring total income at Rs. 9,75,92,572. The case of the assessee was selected for scrutiny and vide draft order dated 20/12/2019 passed under section 143(3) of the Act total taxable income of the assessee was computed at Rs. 41,50,33,680, after making various additions. The assessee filed detailed objections before the learned DRP. Vide directions dated 25/02/2021, issued under section 144C(5) of the Act, objections filed by the assessee were rejected following the directions issued in assessee's own case for preceding assessment years. In conformity to the directions issued by learned DRP, the Assessing Officer ("*AO*") passed the final assessment order

dated 09/04/2021 under section 143(3) read with section 144C(13) of the Act. Being aggrieved, the assessee is in appeal before us.

4. The issue arising in ground No. 1 is general in nature and therefore need no separate adjudication.

5. The issue arising in ground No. 2, raised in assessee's appeal, was not pressed during the course of hearing and therefore is dismissed as not pressed.

6. The issue arising in grounds No. 3 – 6, raised in assessee's appeal, is pertaining to taxability of Inland Haulage Charges ("*IHC"*).

7. The brief facts of the case pertaining to this issue, as emanating from the record, are: During the year under consideration, out of the total Revenue, the assessee had collected a sum of Rs. 308,74,51,331, from its customers on account of IHC. These charges were collected towards transportation of goods from the exporter's warehouse to the port of loading and vice versa. As per the assessee, the IHC activity is directly connected to and ancillary to the transportation of cargo in international traffic and it falls under Article 9 of India France Double Taxation Avoidance Agreement ("*DTAA*"). The AO vide draft assessment order rejected the claim of the assessee and held that the IHC received for transportation of goods in domestic areas. The AO further held that the handling charges are the charges paid for loading / unloading / stacking etc. of containers and that these charges are different than charges for transportation of goods. Accordingly, the AO held that IHC is taxable in India as business profit and these are not covered by Article 9 of DTAA or

section 44B of the Act. In absence of details of expenditure incurred for IHC, the AO applied net profit rate of 10% on IHC receipts on conservative basis and accordingly added Rs. 30,87,45,133, to the total income of the assessee. The learned DRP rejected the objections filed by the assessee, against the aforesaid addition, by following its directions rendered in assessee's own case for preceding assessment years, after noting that in the year under consideration facts are *pari materia* to the earlier assessment years and the issue is still pending before higher forums. In conformity to the directions issued by learned DRP, the AO passed the final assessment order. Being aggrieved, the assessee is in appeal before us.

8. During the course of hearing, learned Authorised Representative ("*learned AR*") submitted that this issue is covered in favour of assessee by decisions of the coordinate bench of the Tribunal rendered in assessee's own case for preceding assessment years.

9. On the other hand, learned Departmental Representative ("*learned DR*") vehemently relied upon the orders passed by the lower authorities.

10. We have considered the rival submissions and perused the material available on record. We find that similar issue was decided in favour of assessee by the coordinate bench of the Tribunal in CMA CGM SA vs ACIT, in ITA No. 5998/Mum/2019, for assessment year 2016–17, vide order dated 02/09/2022, after following judicial precedents rendered in assessee's own case for preceding assessment years. The relevant findings of the coordinate bench of the Tribunal, in aforesaid decision, are as under:

"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:*
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> > *"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.*
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> > *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 AD, 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."

11. The issue arising in the present appeal is recurring in nature and has been decided in favour of the assessee by the decision of the coordinate bench of Tribunal for preceding assessment years. The learned DR could not show us

any reason to deviate from the aforesaid decision and no change in facts and law was alleged in the relevant assessment year. Thus, respectfully following the order passed by the coordinate bench of the Tribunal in assessee's own case cited supra, we uphold the plea of the assessee and direct the AO to delete the addition on account of IHC. As a result, grounds No. 3 – 6 raised in assessee's appeal are allowed.

12. The issue arising in grounds No. 7 – 10, raised in assessee's appeal, is pertaining to taxability of freight charges from transportation of cargo through feeder vessels.

13. The brief facts of the case pertaining to this issue, as emanating from the record, are: During the course of scrutiny proceedings, it was noticed that the assessee was transporting the goods by means of feeder vessels which were neither owned nor chartered by the assessee company. The AO vide draft assessment order held that the journey through feeder vessels to mother vessel is falling under Article 7 of DTAA and accordingly treated the sum of Rs. 11,59,46,291 as business profits of the assessee. The AO treated this income as covered under section 44B of the Act and 7.5% thereof i.e. Rs. 86,95,972 was added the total income of the assessee. The learned DRP rejected the objections filed by the assessee, against the aforesaid addition, by following its directions rendered in assessee's own case for preceding assessment years, after noting that in the year under consideration facts are *pari materia* to the earlier assessment years and the issue is still pending before higher forums. In conformity to the directions issued by learned DRP, the AO passed the final assessment order. Being aggrieved, the assessee is in appeal before us.

14. During the course of hearing, learned AR submitted that this issue is covered in favour of assessee by decisions of the coordinate bench of the Tribunal rendered in assessee's own case for preceding assessment years.

15. On the other hand, learned DR vehemently relied upon the orders passed by the lower authorities.

16. We have considered the rival submissions and perused the material available on record. We find that similar issue was decided in favour of assessee by the coordinate bench of the Tribunal in CMA CGM SA vs ACIT (supra), for assessment year 2016–17, after following judicial precedents rendered in assessee's own case for preceding assessment years. The relevant findings of the coordinate bench of the Tribunal, in aforesaid decision, are as under:

> *"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 448 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 on06/08/2012 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 toxable 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."*

17. The issue arising in the present appeal is recurring in nature and has been decided in favour of the assessee for preceding assessment years. The learned DR could not show us any reason to deviate from the aforesaid decision and no change in facts and law was alleged in the relevant assessment year. Thus, respectfully following the order passed by the coordinate bench of the Tribunal in assessee's own case cited supra, we uphold the plea of the assessee and direct the AO to delete the addition on account of freight charges for transportation of cargo through feeder vessels. As a result, grounds No. 7 – 10 raised in assessee's appeal are allowed.

18. The issue arising in grounds No. 11 – 13, raised in assessee's appeal, is pertaining to treating the agent of assessee in India as permanent establishment of the assessee.

19. The brief facts of the case pertaining to this issue, as emanating from the record, are: The AO vide draft assessment order held that the assessee's agent in India is concluding the contract of cargo transport by issuing bill of lading, which is legally binding on the assessee. The AO further held that agent in India is assessee's own set up in India for the purpose of carrying out its shipping business activity in India. Therefore, the assessee is carrying out

business of operation of ships in India and thus having the PE in India as per Article 5 of DTAA. The learned DRP rejected the objections filed by the assessee, against the aforesaid findings, by following its directions rendered in assessee's own case for preceding assessment years, after noting that in the year under consideration facts are *pari materia* to the earlier assessment years and the issue is still pending before higher forums. In conformity to the directions issued by learned DRP, the AO passed the final assessment order. Being aggrieved, the assessee is in appeal before us.

20. During the course of hearing, learned AR submitted that this issue is covered in favour of assessee by decisions of the coordinate bench of the Tribunal rendered in assessee's own case for preceding assessment years. The learned AR further submitted that the transition is as per Advance Pricing Agreement ("*APA*") and therefore no further adjustment is required.

21. On the other hand, learned DR vehemently relied upon the orders passed by the lower authorities.

22. We have considered the rival submissions and perused the material available on record. We find that similar issue was decided in favour of assessee by the coordinate bench of the Tribunal in CMA CGM SA vs ACIT (supra), for assessment year 2016–17, after following judicial precedents rendered in assessee's own case for preceding assessment years. The relevant findings of the coordinate bench of the Tribunal, in aforesaid decision, are as under:

"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 P.E. 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."

23. The issue arising in the present appeal is recurring in nature and has been decided in favour of the assessee for preceding assessment years. The learned DR could not show us any reason to deviate from the aforesaid decision and no change in facts and law was alleged in the relevant assessment year. Thus, respectfully following the order passed by the coordinate bench of the Tribunal in assessee's own case cited supra, we uphold the plea of the assessee and accordingly, allow grounds No. 11 – 13 raised in assessee's appeal.

24. Ground No. 14 pertains to levy of interest under section 234B of the Act, which is consequential in nature. Therefore, the said ground is allowed for statistical purpose.

25. Ground no. 15 is pertaining to initiation of penalty proceedings, which is premature in nature and therefore is dismissed.

26. In addition to the grounds raised in the memorandum of appeal, assessee vide application dated 14/07/2022 requested for admission of following additional ground of appeal:

> *"Additional Ground- Non-taxability of income in the nature of IT support services [Fees for Technical Services ('FTS')) amounting to INR 8,29,29,430/-:*
>
> *16. 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 8,29,29.430/- from its Agency company [CMA CGM Agencies India Private Limited ('CCA)] is not chargeable to tax in India by virtue of the beneficial provisions of Article 9 of India-France tax treaty.*
>
> *17. 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*
>
> *18. 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.*
>
> *19. 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.*
>
> *20. 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*
>
> *21. 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.*

The Appellant craves leave to add to, alter, delete or modify the above ground of appeal."

27. In the aforesaid application, the assessee made following submissions to support its prayer for admission of additional ground of appeal:

"In view of the above, the Appellant wishes to submit additional ground of appeal in connection with the non-taxability of income in the nature of IT support fees [Fees for Technical Services (FTS)] amounting to INR 8,29,29,430/- arising in India as per the beneficial provisions of India-France tax treaty.

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."

28. The assessee has also filed following additional evidences, vide application dated 28/09/2022, in respect of the issues raised in the additional grounds of appeal:

(i) I.T service agreement between CMA CGM SA and its Indian agency company dated 25/02/2015;

(ii) Addendum dated 12/06/2015 to the said IT service agreement;

(iii) Addendum dated 13/12/2017 to the said IT service agreement;

(iv) Copy of invoices raised by the assessee on the agency company for a by 2017–18.

29. As per the assessee, for the year under consideration, it had earned income in the nature of IT support services amounting to Rs. 8,29,29,430 from its Indian agency company, which was inadvertently offered to tax at the rate of 10% plus surcharge and education cess in the return of income filed for the year under consideration. However, subsequently the coordinate bench of Tribunal in Indian agency company's case vide order dated 02/01/2020 in ITA No. 2314/PUN/2017 held that fee for technical services paid by Indian agency company is not chargeable to tax in India as per the beneficial provisions of DTAA and hence the Indian agency company is not liable to withhold any tax on the same in India. As the income has been offered to tax inadvertently by the assessee, therefore, the assessee has filed aforesaid additional grounds and additional evidences. We find that similar additional grounds and additional evidences were also filed by the assessee before the coordinate bench of the Tribunal in its appeal for assessment year 2016–17. The coordinate bench in CMA CGM SA vs ACIT (supra), for assessment year 2016-17 admitted the additional grounds of appeal as well as additional evidences filed to support the additional grounds and restore the same to the file of AO for *de novo* examination, by observing as under:

> *"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 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."

30. Since, in the present appeal also the assessee has raised similar additional grounds and also filed similar additional evidences, therefore, we deem it appropriate to admit the same and restore the issue raised vide aforesaid additional grounds of appeal to the file of AO with similar directions as were passed in earlier assessment year. Needless to mention that no order shall be passed without affording reasonable opportunity of being heard to the assessee. In the result, additional grounds of appeal filed by the assessee are allowed for statistical purpose.

31. In the result, appeal by the assessee is partly allowed for statistical purpose.

Order pronounced in the open Court on 03/11/2022

Sd/-	**Sd/-**
PRAMOD KUMAR	**SANDEEP SINGH KARHAIL**
VICE PRESIDENT	**JUDICIAL MEMBER**

MUMBAI, DATED: 03/11/2022

Copy of the order forwarded to:

(1) The Assessee;

(2) The Revenue;

(3) The CIT(A);

(4) The CIT, Mumbai City concerned;

(5) The DR, ITAT, Mumbai;

(6) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

Assistant Registrar
ITAT, Mumbai