आयकर अपीलीय अधिकरण
मंबई पीठ " आई "
श्री विकास अवस्थी. न्यायिक सदस्य एवं
श्री गगन गोयल, लेखाकार सदस्य के समक्ष

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH " I ", MUMBAI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI GAGAN GOYAL , ACCOUNTANT MEMBER

आअसं. 833/मुं/2023 (नि.व. 2020-21)
ITA NO. 833/MUM/2023(A.Y.2020-21)

CMA CGM SA
C/o. CMA CGM Agencies (India) Private Limited,
Indiabulls Finance Centre,
Tower -3, 8th 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) 2(1)(1)Mumbai
Room No.1713, 17th Floor,
Air India Building, Nariman Point,
Mumbai 400 021 ..... प्रतिवादी/Respondent

अपीलार्थी द्वारा/ Appellant by : Shri Rajesh Poojari &
Ms. Jasmin Amalsadvala
प्रतिवादी द्वारा/Respondent by : Shri Soumendu Kumar Dash
सुनवाई की तिथि/ Date of hearing : 31/05/2023
घोषणा की तिथि/ Date of pronouncement : /06/2022

<u>आदेश/ ORDER</u>

PER VIKAS AWASTHY, JM:

This appeal by the assessee is directed against the assessment order dated 19/01/2023 passed u/s. 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 [in short 'the Act], for the assessment year 2020-21.

2. In appeal the assessee has raised 22 grounds. The gist of grounds of appeal is as under:

Ground No.1 – General in nature.

Grounds No. 2 to 6 - Taxability of Inland Haulage Charges ('IHC').

Grounds No. 7 to 11 - Taxability of Freight Charges for transportation of cargo through Feeder Vessels.

Grounds No.12 to 14 – CMA CGA Agencies (India) Pvt. Ltd. – Whether Agency Permanent Establishment (PE)of the assessee in India.

Ground No. 15-19 - Non-taxability of income in the nature of IT support services (FTS).

Ground No.20 – Interest under section 234A of the Act.

Ground No.21 – Interest u/s. 234B of the Act.

Ground No.22 – Initiation of penalty proceedings u/s. 270 of the Act.

3. Shri Rajesh Poojari appearing on behalf of the assessee submits at the outset that the facts in the present appeal are identical to the facts in appeal by the assessee in ITA No.5998/Mum/2019 for Assessment Year 2016-17 decided by the Tribunal on 02/09/2022. Even in the subsequent Assessment Years i.e. Assessment Year 2017-18 and 2018-19, the Tribunal in ITA No.1031/Mum/2021 decided on 03/11/2022 and ITA No.1820/Mum/2022 decided on 16/01/2023 has decided similar grounds of appeal taking consistent view. Thus, the grounds raised by the assessee in present appeal are squarely covered by the decisions of Co-ordinate Bench in assessee's own case for the preceding Assessment Years.

4. Shri Soumendu Kumar Dash representing the Department vehemently defended the impugned order. However, he fairly admitted that grounds similar to the grounds raised by the assessee in instant appeal have been considered by the Tribunal in assessee's own case in the preceding Assessment Years. The ld. Departmental Representative pointed that while adjudicating the issue of taxability of Inland Haulage Charges, the Tribunal has placed reliance on the decision of Hon'ble Jurisdictional High Court in the case of Safmarine Container Lines NV in ITA No.952 of 2011 & 147 of 2009 decided on 17/01/2013. In the said case the relevant treaty for Double Taxation Avoidance Agreement (DTAA) was between India and Belgium, whereas in the present case, the relevant treaty for that of France. The treaty clauses of Belgium and France are not at par. Hence, the decision in the case of Safmarine Container Lines NV(supra) is distinguishable.

5. We have heard the submissions made by rival sides and have examined the orders of authorities below. The Revenue has not disputed that the facts and grounds raised in the present appeal are in any manner different from the grounds and the facts in the preceding Assessment Year. We find that the primary grounds raised by the assessee in ground No.2 to 19 are perennial. Majority of the issues have been subject matter of repeated appeals before the Tribunal since Assessment Year 2012-13.The grounds/issues raised by assessee in appeal are decided as under:

INLAND HAULAGE CHARGES(IHC):

6. During the relevant period, the assessee collected IHC Rs.384,82,82,478/- and claimed to be not taxable in India in the light of Article-9 of India-France DTAA. The Assessing Officer rejected assessee's contention.

Based on profit percentage for assessment year 2020-21, he applied profitability rate of 20.63% and made addition of Rs.79,39,00,675/-. In similar maner the Assessing Officer had made addition qua IHC in preceding assessment years. The Co-ordinate Bench in Assessment Year 2016-17 decided this issue 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 ld 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 ld 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 ld 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."

The ld. Departmental Representative has raised objection that the decision rendered in the case of Safmarine Container Lines NV (supra) on which Tribunal has placed reliance in the preceding Assessment Years dealt with the DTAA between India and Belgium, whereas in the present case the relevant DTAA is with France. Thus, the said decision is distinguishable. We find that similar objection was raised by the Department in earlier assessment years. The same was considered and rejected by the Tribunal in the preceding Assessment Years. There has been no change in the facts in the impugned assessment year, hence, we see no reason to take a different view.

Consequently, ground No.2 to 5 of the appeal are allowed for parity of reasons.

6.1 The assessee without prejudice to the primary ground has taken an alternate plea to tax receipts @ 7.5% u/s. 44B of the Act. Since, we have allowed ground No.2 to 5 of appeal, the alternate argument raised by the assessee in ground No.6 is dismissed.

TAXABILITY OF FREIGHT CHARGES FOR TRANSPORTATION OF CARGO THROUGH FEEDER VESSELS:

7. During the period relevant to the assessment year under appeal, the assessee earned freight income of Rs.14,96,75,976/-. The assessee invoked treaty provisions and claimed that the said amount is not subject to tax in India. The Assessing Officer held that the said receipts are taxable in India u/s. 44B of the Act. Thus, the Assessing Officer made addition of 7.5% of the total receipts i.e. Rs.1,12,25,698/-. We find that the Co-ordinate Bench in ITA No.5998/Mum/2019 has decided this issue as under:

> *"8. The ld.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 ld.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 ld.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 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."*

Both sides are unanimous in stating that the facts in the impugned assessment year are identical. For parity of reasons the ground No.7 to 11 of appeal are allowed.

CMA CGA Agencies (India) Pvt. Ltd. – Whether Agency Permanent Establishment (PE)of the assessee in India.

8. We find that identical issue was raised in the appeal by assessee in ITA No.5998/Mum/2019. This issue is recurring and has been repeatedly subject matter of appeal since assessment year 2012-13. The Tribunal has been consistently holding that the assessee has no Agency PE in India. No material has been placed on record by the Revenue to force us to take a different view. Respectfully following the decision of Co-ordinate Bench on issue, ground No.12 to 14 of the appeal are allowed.

Non-taxability of income in the nature of IT support services (FTS).

9. The assessee in return of income offered Rs.96,42,989/- as income from I.T Support Services. During assessment proceedings, the assessee raised a plea that such income is not chargeable to tax in India, hence, the assessee be allowed refund of the tax paid on said income. Since, the claim was not made

by way of return of income /revised return of income the Assessing Officer rejected the claim made during assessment proceedings in the light of Goetze (India) Ltd. vs. CIT, 284 ITR 323(SC). The assessee raised an objection before the DRP. The DRP following its own decision in assessment year 2017-18 dismissed the objection of assessee. In assessment year 2017-18 the Co-ordinate Bench vide order dated 03/11/2022 in ITA NO.1013/Mum/2021 admitted the additional grounds of appeal raised by the assessee in respect of non-taxability of income in the nature of I.T. Support Services and restored the issue back to the file of Assessing Officer with following observations:

> *"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."

In the instant case, the DRP rejected the claim of assessee merely following its own order in assessment year 2017-18. Now, that the assessment order for assessment year 2017-18 has been reversed by the Co-ordinate Bench and has restored the issue back to the file of Assessing Officer for adjudication, we deem it appropriate to decide this issue in similar terms as the issue has neither been examined by the Assessing Officer or the DRP. Thus, ground of appeal No.15 to 19 are allowed for statistical purpose.

10. In ground No.20 & 21, the assessee has assailed charging of interest u/s. 234A and 234B of the Act, respectively. Charging of interest under the

aforesaid sections is mandatory and consequential. Hence, ground No.20 and 21 are dismissed.

11. In ground No.22, the assessee has assailed initiation of penalty proceedings u/s. 270A of the Act. Challenge to penalty proceedings at this stage is premature, therefore, ground No.22 of appeal is dismissed, as such.

12. In the result, appeal of the assessee is partly allowed.

Order pronounced in the open court on Monday the 12th day of June, 2023.

Sd/-	Sd/-
(GAGAN GOYAL)	(VIKAS AWASTHY)
लेखाकार सदस्य/ACCOUNTANT MEMBER	न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई/ Mumbai, दिनांक/Dated 12/06/2023
Vm, Sr. PS(O/S)

<u>प्रतिलिपि अग्रेषित</u>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., मुबंई/DR, ITAT, Mumbai
6. गार्ड फाइल/Guard file.

BY ORDER,

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