IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH "B" BENCH NEW DELHI)

BEFORE SHRI N.K. SAINI ACCOUNTANT MEMBER

&

SHRI AMIT SHUKLA, JUDICIAL MEMBER

ITA No. 3429/Del./2011
Assessment Year: 2002-03

ADIT **Intl. Taxation,** **13A, Subhash Road, Aayakar Bhawan, Dehradun**	**Vs.**	**Maersk Company Ltd.** **C/o A.f. Furgusen & Co.,** **Allahabad Bank Building,** **1st Floor, Bombay** **Samachar Marg, Fort** **Mumbai**
(Applicant)		(Respondent)
(PAN:)		

Revenue by: Shri Rajesh Kumar, Sr. DR
Assessee by: Shri Porus Kaka, Sr. Advocate
Shri Manish Kanth, Advocate
Shri Divesh Chawla, Advocate

Date of hearing	18/04/2017
Date of pronouncement	25/04/2017

ORDER

PER AMIT SHUKLA, JUDICIAL MEMBER:

The aforesaid appeal has been filed by the revenue against impugned order dated 31.12.2010, passed by the ld. CIT (Appeals)-2, Dehradun for the A.Y. 2002-03, in relation to the proceedings/orders passed u/s 163(1) read with section 149(3). The assessee in the grounds of appeal has raised following grounds:-

"1. That the ld. CIT (A) erred in holding that the assessee company cannot be treated as agent of the technicians/employees.

2. That the ld. CIT (A) erred in quashing the notice u/s 148.

3. The appellant prays for leave to add, amend, modify or alter any grounds of appeal at the time or before the hearing of the appeal."

2. At the outset, the ld. counsel Sh. Porus Kaka, submitted that in the main quantum appeal, the matter has been decided in favour of the assessee not only from the stage of the Tribunal but also from Hon'ble Jurisdictional High Court (Uttarakhand) holding that the assessee cannot be held to be an agent of the Expatriate Personnel and therefore, no assessment can be made in the case of assessee as a representative assessee u/s 163(1). The ld. DR too accepted this fact that the impugned issue stands decided in favour of the assessee from the stage of Hon'ble High Court.

3. On a perusal of the impugned order, we find that the Assessing Officer has noted that during the course of the assessment proceedings in the case of the assessee for the A.Y. 2002-03, the Assessing Officer had come to conclusion that 14 technicians (expatriates) were engaged by the assessee company to whom salary/remuneration were paid; and also it was found by him that these technicians where residents of India for specific period. All the details of the personnel and salary paid to them and aggregate days spent by them in India have been mentioned/ incorporated by the AO in his order dated 16.2.2005. In response to the show cause notice u/s 163(2) r.w.s. 149(3) as to why the assessee company

should not be treated as an agent of the 14 technicians, the assessee company contended that it cannot be treated as an agent of the said personnel, because the whole crew engaged by the assessee were in fact employees of AP Moller-Maersk A/S and not the assessee company. Apart from that, it was submitted that all the personnel were non-resident and even the assessee company is also a non resident company and therefore, in terms of article 16 of the DTAA the income of the personnel cannot be taxed in India as their stay in India was less than 183 days. The ld. Assessing Officer however had not agreed with the submission of the assessee on the ground that the assessee company has given PSV on hire to ONGC and has hired personnel from AP Moller-Maersk A/S to whom it has made payment without deducting TDS and therefore, the assessee company should be held as assessable agent of AP Moller-Maersk A/S in India. While coming to this conclusion AO has completely relied upon the assessment order for the same A.Y. 2002-03 which was upheld by the Ld. CIT (Appeals) also. The relevant observation of the findings of the Assessing Officer reads as under:-

> *"From the above provisions it is clear that income of a non resident employee is assessable in the first contracting state (Denmark) only if all the three conditions are cumulatively satisfied. In this case conditions 'c' is not satisfied as The company had though claimed in A.Y. 2000-01 that it had no P.E. in India but such claim was rejected by the A.O. and income was assessed treating its P.E. in India. The action of the A.O. has been upheld by CIT (A)-2 Dehradun vide his order dated 20.09.2004 in appeal No. 132/DDN/03-04 Moreover, the assessment for A.Y. 2002-03 has been completed treating the company's P.E. in India reacting its*

claim of no P.E. The company could not establish either in the assessment proceedings or in the course of instant proceedings that salary/remuneration paid to technicians/employees has not been borne by the P.E. in India. The income of the company has been assessed as per provisions of section 44BB i.e. @ 10% of contract receipts deeming expenditures at 90% of such receipts. The company had taken stand in the course of assessment proceedings that income has already been assessed under the laws of Denmark but no evidence of any kind was furnished to substantiate its claim. Condition 'a' is also not satisfied as worthy ITAT, Delhi, B - Bench has in the case of Sedco Forex International Drilling Inc. and others Vs. ACIT, 58 ITD 177, ruled that if the employee of a non resident stays in India for a period or periods exceeding 90 days in a fiscal year, the income derived in India is liable to be taxed.

5. Having regard to the facts and circumstances and keeping in view legal provisions governing the issue, I have come to the conclusion that the income of all the above technicians/employees is liable to be brought to tax in India. The Maersk company was liable to pay taxes on income of technicians/employees and to file their return of income, I therefore, hold The Maersk Company as agent of all the above 14 technicians/employees. Issue notice u/s 148 to all the technicians/employees treating Maersk Company as agent."

The Learned CIT(Appeals), in the impugned order has observe that now the Tribunal in the case of the assessee has held that the assessee cannot be held as an agent of the expatriate personnel and therefore, once the assessment has been set aside or reversed in this case on the same issue in quantum proceedings u/s 143(3), then the very action of the Assessing Officer for treating the assessee as an agent of the personnel has become unsustainable and accordingly, he cancelled the impugned order.

4. We find that the Tribunal in bunch of cases decided in case of assessee in ITA No. 1347, 1353, 1355, 1365/Del/2008 for the A.Y. 2002-03 & 2003-04 has categorically held that the assessee cannot be treated as an agent expatriate personnel belonging to AP Moller-Maersk A/S. This order of the Tribunal has now been affirmed by the Hon'ble Uttarakhand High Court vide judgment and order dated 23.11.2012. The relevant observations and findings of the High Court reads as under:-

> *"Respondent/assess is a non-resident company. It was engaged in certain businesses in India. In respect of those businesses it employed 13 people. Each one of them was a Danish national. According to the respondent/assessee, such engagement though entailed those 13 people to receive salaries for work done by them in India, but those salaries were not directly paid by them to those 13 people, instead those were paid to some other non-resident company. Appellant is disputing the said contention. Therefore, the admitted facts are that in connection with the business activities of the assessee company, those 13 Danish nationals were engaged for doing work in India and for doing*

such work, they were also remunerated. The question is, whether such remuneration was taxable in India or not? As will be evident from the assessing orders forming part of the assessments pertaining to those 13 Danish people, on details being filed by the assessee company, the Assessing Officer accepted the fact that each of those 13 people were Danish nationals and stayed in India or worked in India, for which they were remunerated and, in respect whereof it was contended that such remuneration is taxable in India, for a period less than 183 days. It does not appear either from the orders of the Assessing Officer or from the orders of the Commissioner of Appeals that the Department, at any point of time, disputed either the nationality of those 13 people or the duration of their stay in India, when they worked and were remunerated with the remunerations, which were sought to be included as taxable in India.

3. Having regard to the fact, principally, that those 13 Danish nationals received salaries for services rendered in India, it was held by the Assessing Officer and by the Commissioner of Appeals that those salaries are taxable in India. The matter, then, travelled to the Tribunal at the instance of the assessee. Tribunal noticed the treaties on Double Taxation Avoidance Agreements between the Government of Denmark and the Government of India, whereby it has been specifically provided that the remuneration derived by a resident of either of those two countries in respect of an employment exercised in the other country shall be taxable only in the country, to which he belongs, if he is present in the other country for a period or periods not exceeding in the aggregate 183 days in the fiscal

year of the other country and the remuneration is paid by or on behalf of an employer, who is not a resident of the other country and the remuneration is not borne by a permanent establishment or a fixed base, which the employer has in the other country. Therefore, by reason of the said treaty the Government of India has accepted that such income while shall not be deemed to have arisen in India, the same will also not be construed as payable in India. The fact remains that the Tribunal found as a fact that each of those 13 Danish nationals were remunerated in respect of employment in India for a period not exceeding 183 days in the concerned fiscal year and that the remuneration was paid by or on behalf of an employer, who is not a resident of the country and, in any event, the remuneration was not borne by a permanent establishment or a fixed base, which the employer has in India. Tribunal, accordingly, held that those remunerations are, therefore, in view of the said treaty, taxable at Denmark and not in India. The facts, upon which the said conclusion were arrived at by the Tribunal, are not in disputes the same stands admitted right from the time the original assessment was made. There appears to be a purported dispute as to the residence of the assessee. It is being contended that the assessee is not a resident of Denmark, instead it is a resident of UK. That is of hardly any importance, inasmuch as, treaty requires employer to be a non-resident of India and not necessarily a resident of Denmark. The other dispute seems to be, whether the assessee has a permanent establishment or fixed base in India? Even if the assessee has a permanent establishment or fixed base in India, the same is of no consequence, inasmuch as, it is to be shown and established

that the remuneration is borne by that establishment or fixed base, which the assessee has in India. Tribunal has noted that the remuneration was not borne by any permanent establishment or a fixed base, which the assessee had, if any, in India.

4. That being the situation, no question of law has arisen in these appeals. They are basically questions of facts and the decisions rendered are based on accepted facts. We, accordingly, dismiss these appeals."

6. Thus, in view of the aforesaid judgment in case of assessee by the Hon'ble Jurisdictional High Court, this issue stands covered in favour of the assessee that it cannot be treated as an agent of the expatriate personnel of A P Moller Maersk and hence no assessment can be made in the case of the assessee as an agent. Accordingly, the grounds raised by the revenue are dismissed.

Order pronounced in the open court on 25.04.2017.

(N.K. SAINI)	**(AMIT SHUKLA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 25.04.2017

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Copy forwarded to:

1) Appellant

2) Respondent

3) CIT

4) CIT (Appeals)

5) DR: ITAT

ASSISTANT REGISTRAR

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