IN THE INCOME TAX APPELLATE TRIBUNAL

"L" BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND

SHRI N. K. PRADHAN, ACCOUNTANT MEMBER

ITA no.2187/M./2017
(Assessment Year : 2013–14)

Delmas S.A.S.
(Now merged with CMA CGM SA)
C/o CMA CGM Agencies (India) P. Ltd.
Indiabulls Finance Centre, Tower–3 ……. Appellant
8th Floor, Senapati Bapat Marg
Elphinstone (W), Mumbai 400 013
PAN – AABCD6027A

v/s

Dy. Commissioner of Income Tax
(International Taxation) ……. Respondent
Range–2(1)(1), Mumbai

Assessee by : Shri M.P. Lohia
Revenue by : Shri Samuel Darse

Date of Hearing – 05.06.2018	Date of Order – 13.06.2018

O R D E R

PER SAKTIJIT DEY, J.M.

Aforesaid appeal at the instance of the assessee is directed against assessment order dated 25th January 2017, passed under section 143(3) r/w section 144C(13) of the Income Tax Act, 1961 (for short *"the Act"*) for the assessment year 2012–13, in pursuance to the directions of the Dispute Resolution Panel (DRP).

2. Ground no.1, being of general nature is dismissed.

3. In grounds no.2 and 3, assessee has challenged the decision of the Departmental Authorities in bringing the Inland Haulage Charges (IHC) to tax under section 44B of the Act.

4. Brief facts are, the assessee a tax resident of France is engaged in shipping business in international water. During the year under consideration, the assessee is stated to have carried out its business activities in India through its agent Parekh Marine Agencies Pvt. Ltd. For the impugned assessment year assessee filed its return of income on 27th September 2013, declaring total income of ₹ 9,52,43,663. During the assessment proceedings, the Assessing Officer noticing that the assessee has not offered to tax IHC, service tax in relation to IHC and feeder vessel charges, called upon the assessee to explain why it should not be brought to tax. In response, it was submitted by the assessee that these charges are not taxable as they are income forming part of the operation of ships in international traffic, hence, exempt under Article–9 of India–France Double Taxation Avoidance Agreement (DTAA). Further, it was submitted by the assessee that in the immediately preceding assessment year i.e., A.Y. 2012–13, the issues have been decided in its favour by the DRP. Though, the Assessing Officer agreed that in the immediately preceding assessment year the issues were decided in favour of the assessee by the DRP,

however, stating that the Department has preferred appeal before the Tribunal and the dispute in the earlier year are sub judice in the High Court, to maintain consistency he proceeded to frame the draft assessment order by holding that the IHC of ₹ 5,02,93,182 was earned from the activity of Inland Transportation and not from International Transport, hence, is taxable in India under section 44B of the Act. In the process, the Assessing Officer held that the assessee is not entitled to the benefit of Article–9 of the relevant Tax Treaty. Further, the Assessing Officer held that the service tax amounting to ₹ 62,16,237 collected by the assessee has to be included in the gross receipt of the assessee for the purposes of taxation. Accordingly, he included these two items to the income of the assessee and brought it to tax. Being aggrieved with the additions made in the draft assessment order, the assessee raised objections before the DRP.

5. The DRP, after considering the submissions of the assessee, though, agreed that the issues relating to the disputed addition have been decided in favour of the assessee in the preceding assessment year by the DRP, however, the DRP preferred to differ from the view expressed by the DRP in assessee's case for the preceding assessment year. The DRP observed, while deciding the issue in favour of the assessee in assessment year 2012–13, the DRP has relied upon the decision of the Hon'ble Jurisdictional High Court in case of Safmarine

Container Lines N.V.(367 ITR 209). The DRP observed, the decision of the Hon'ble Jurisdictional High Court in case of Safmarine Container Lines N.V.(supra) was rendered in the context of India Belgium Tax Treaty. Comparing Article–8 of India–Belgium Tax Treaty with Article–9 of India–France Tax Treaty which governs the taxability of shipping income in international traffic, the DRP held that there are material differences in the wordings of both the treaties insofar as it relates shipping income from international traffic. They observed, as per Article 8 of the India Belgium Treaty income derived from the operation of ships in international traffic also includes income derived from the transportation by ship of goods etc., and also any other activity directly connected with such transportation. However, in Article–9 of India France Tax Treaty, the expression *"any other activity directly connected with such transportation" is absent.* Thus, the DRP ultimately concluded that IHC not being part of international traffic has to be brought to tax under section 44B of the Act. Accordingly, they upheld the decision of the Assessing Officer.

6. The learned Authorised Representative submitted that the issue in dispute now stands decided in favour of the assessee in assessee's own case by virtue of order of the Tribunal in ITA no.6649/Mum./2017 and Ors., dated 14th March 2018.

7. Learned Authorised Representative taking us through the relevant observations of the Co–ordinate Bench submitted that the Tribunal specifically dealing with the reasoning of the DRP on the basis of which the addition was upheld in the impugned assessment year has held that the ratio laid down by the Hon'ble Jurisdictional High Court in Safmarine Containers Lines N.V.(supra) would squarely apply as IHC received by the assessee are incidental to and directly connected with operation of ships in international traffic. He submitted that the Tribunal while dealing with the aforesaid reasoning of the DRP has taken note of the fact that in case of DIT v/s A.P. Mooler Maersk A/S. involving India Denmark Tax Treaty, the Hon'ble Jurisdictional High Court has held that the principle laid down in Safmarine Containers Line N.V. (supra) would be applicable. The Tribunal had noted that Article–9 of India–France Tax Treaty is identically worded to the corresponding Article in India–Denmark DTAA. Thus, the Tribunal has ultimately concluded that the absence of the expression "*any other activity directly connected with such transportation"* in the India–France DTAA will not make any difference. In this context, the Tribunal has also referred to OECD Model Convention. Thus, ultimately, the Tribunal held that the IHC being part of income from operation of ships in international traffic is not taxable in India as per Article–9 of India–France DTAA. He submitted, the aforesaid decision of the Tribunal squarely applies to the facts of the present case.

8. The learned Departmental Representative, though, agreed that the issue in dispute has been decided in favour of the assessee by the Tribunal in assessee's own case for the preceding assessment year, however, he heavily relied upon the observations of the DRP in the impugned assessment year. The learned Departmental Representative submitted, in the absence of the expression *"any other activity connected with such transportation"* in Article–9 of India–France DTAA IHC being not connected with transportation in International Traffic is not exempt under Article–9 of India–France DTAA.

9. We have considered rival submissions and perused materials on record. Undisputedly, in the immediately preceding assessment year i.e., A.Y. 2012–13, while deciding identical dispute, the DRP has held that IHC received by the assessee being part of income derive from operation of ships in international traffic is exempt under Article–9 of India–France DTAA. The aforesaid decision of the DRP in assessment year 2012–13, was challenged by the Department before the Tribunal. It is necessary to observe, while deciding similar issue in case of CMA CGM SA, the company with which the assessee subsequently got merged, identical issue came up for consideration before the DRP in assessment years 2012–13, 2013–14 and 2014–15. While in assessment year 2012–13, the DRP decided the issue in favour of the assessee, in assessment years 2013–14 and 2014–15 the DRP took a

diametrically opposite view by holding that IHC is taxable in India under section 44B of the Act. The reason for doing so as observed by the DRP was, in the absence of expression *"any other activity connected with such transportation"* in Article–9 of India–France DTAA, it cannot be said that IHC is exempt under Article–9 of India–France DTAA. As could be seen from the impugned order of the DRP, on identical reasoning the DRP has held that IHC is taxable in India under section 44B of the Act. Notably, while deciding the Revenue's appeal against the order of the DRP in case of the present assessee as well as the appeals filed by the assessee and the Department in case of CMA CGM SA involving identical issue, the Tribunal after considering all aspects of the issue has held as under:–

> *"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.*
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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 IndiaFrance DTAA is identically worded to the corresponding Article in IndiaDenmark 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.*
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> *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."*

10. Thus, as could be seen from the aforesaid decision of the Co–ordinate Bench, after dealing with identical reasoning of learned DRP on the basis of which IHC was brought to tax in the impugned assessment year, the Tribunal has decided the issue in favour of the assessee in assessment year 2012–13, which is evident from Para–30 and 31 of the order of the Co–ordinate Bench referred to above. In view of the aforesaid, respectfully following the decision of the Co–ordinate Bench, we hold that IHC being part of the income derived from the operation of shipping in international traffic is exempt under Article–9 of India–France DTAA, hence, not taxable in India. These grounds are allowed.

11. In grounds no.4 and 5, the assessee has challenged the decision of the Departmental Authorities in bringing to tax service tax collected from customers amounting to ₹ 62,16,237 u/s 44B of the Act.

12. As discussed earlier, while framing draft assessment order, the Assessing Officer held that IHC being not part of income derived from shipping operation in international traffic is taxable in India. Thus, he held, service tax collected amounting to ₹ 62,16,237 on IHC is also taxable in India. Though, assessee objected to the aforesaid decision of the Assessing Officer, however, the DRP rejecting the objections of the assessee held that service tax collected on IHC is taxable u/s 44B since it is part of IHC which is taxable under the said provision. The DRP observed that while deciding the issue in the preceding assessment year the DRP has relied upon the decision of the Hon'ble Delhi High Court in Mitchel Drilling. However, they observed, in case of Halliburton Off–shore Inc. v/s ACIT, Division Bench of Hon'ble Uttarakhand has referred identical issue to a Larger Bench. The DRP observed, considering the fact that the provisions of section 44B and section 44BB of the Act are similar; the position of law on the issue has not attained finality. The DRP observed, since, the order of the DRP is not appealable by the Department, in order to protect the interest of Revenue they have to uphold the decision of the Assessing

Officer in bringing the service tax collected to tax under section 44B of the Act along with the IHC.

13. Learned Authorised Representative submitted that this issue has also been decided in favour of the assessee by the Co–ordinate Bench while deciding assessee's appeal for assessment year 2012–13.

14. The learned Departmental Representative relied upon the decision of the DRP.

15. We have considered rival submissions and perused materials on record. The basic and fundamental reasoning on which the service tax collected by the assessee on IHC has been brought to tax under section 44B of the Act by the Departmental Authorities is, IHC is taxable under section 44B of the Act. However, it is noticed while deciding identical issue in assessee's own case for assessment year 2012–13 along with the appeals of group concerns, the Tribunal has held as under:–

> *"26. The next issue relates to the inclusion of Service tax as part of Gross receipts. The assessee has collected service tax also on Inland haulage charges collected from its clients. Since we have held that the Inland Haulage Charges received by it is part of income from operation of ships in International traffic and is eligible for relief under Article 9(1), the question of assessing the same u/s 44B of the Income tax Act would not arise. Consequently the question whether the service tax would form part of Gross receipts or not in the context of sec. 44B of the Act would become academic in nature. In any case, this issue is covered in favour of the assessee by the decision rendered by Hon'ble Delhi High Court in the case of Mitchell Drilling*

International (P) Ltd (2016)(380 ITR 130). We have noticed that the Ld DRP has considered the decision rendered by Hon'ble Uttarakhand High Court in the case of CIT Vs. Halliburton Offshore Services (300 ITR 265). It is settled principle of law that in case of divergent views expressed by non-jurisdictional High Courts, the view in favour of the assessee should be taken. Accordingly the assessee was justified in placing reliance on the decision rendered by Hon'ble Delhi High Court in the case of Mitchell Drilling International (P) Ltd. (supra). Accordingly we uphold the view taken by the Ld DRP in AY 2012-13 on this issue and reverse its decision rendered in AY 2013-14 and 2014-15 on this issue.

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30. We shall now take up the appeals filed in the case of M/s Delmas SAS (now merged with CMA CGM SA). The revenue has filed appeal and the assessee has filed cross objection for assessment year 2012-13. The grounds urged by the revenue relate to

(a) Taxability of Inland Haulage Charges.
(b) Taxability of freight charges received on transportation of cargo through feeder vessels.
(c) Inclusion of service tax as part of Gross receipts.

31. The decision rendered by us in the hands of CMA CGM SA in the earlier paragraphs on identical issues shall equally apply to the issues urged in the case of this assessee also. Accordingly, following the decisions so rendered, we confirm the order passed by Ld DRP in all the above said three issues."

16. Respectfully following the aforesaid decision of the Co–ordinate Bench, we hold that service tax collected on IHC is not taxable in India as per Article–9 of India–France DTAA. These grounds are allowed.

17. In grounds no.6 and 7, the assessee has challenged the decision of the Departmental Authorities in holding Parekh Marine Agencies Pvt. Ltd. as the agency Permanent Establishment (P.E) of the assessee in India.

18. We have considered rival submissions and perused materials on record. It is agreed before us that this issue becomes academic if grounds no.2 to 5 are decided in favour of the assessee. In view of the aforesaid, it is not necessary to dwell upon the issue any further. Suffice to say, in assessee's own case for assessment year 2010–11 in ITA no.6041/Mum./2014, dated 22nd March 2017, the Tribunal has held in the following manner:–

> *"3.3.2 On an appreciation of the facts on record and the issues raised in this appeal in A.Y. 2010–11 (supra), we find that in this year also the facts largely remain the same as in the earlier Asst. years, and this forms the basis on which relief has been granted to the assessee by the Ld. CIT(A) in the impugned order, wherein it was held that the assessee's agent did not constitute its PE or agency PE of the assessee. The finding rendered by the Ld. CIT(A) that Parekh Marine Agencies Pvt. Ltd. ("PMAPL") the assessee's agent is not its fixed PE or agency PE, has not been controverted before us by the revenue either on facts or in law……"*

19. The aforesaid decision of the Co–ordinate Bench is squarely applicable to the facts of the present case.

20. Grounds no.8 and 9 being on the issue of levy of interest under section 234B and 234C of the Act are consequential, hence, dismissed.

21. Ground no.10, against initiation of penalty proceedings under section 271(1)(c) of the Act being pre–mature at this stage, does not require adjudication.

22. In the result, assessee's appeal is partly allowed.

Order pronounced in the open Court on 13.06.2018

Sd/-	**Sd/-**
N. K. PRADHAN	**SAKTIJIT DEY**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

MUMBAI, DATED: 13.06.2018

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

(Sr. Private Secretary)
ITAT, Mumbai