Bombay High Court

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 1306 OF 2013

Director of Income Tax (IT)-I,]
Scindia House, 1st Floor, Ballard Estate,]
Mumbai – 400 038.] ... Appellant

Versus

A.P. Moller Maersk A/S.]
C/o. Maersk Line India Pvt. Ltd., 12th Floor,]
Tower A, Urmi Estates, Ganpatrao Kadam]
Marg, Lower Parel(W), Mumbai – 400013] ... Respondent

WITH

INCOME TAX APPEAL NO. 1456 OF 2013
WITH
INCOME TAX APPEAL NO. 1487 OF 2013
WITH
INCOME TAX APPEAL NO. 1488 OF 2013
WITH
INCOME TAX APPEAL NO. 1688 OF 2013
WITH
INCOME TAX APPEAL NO. 1690 OF 2013
WITH
INCOME TAX APPEAL NO. 1780 OF 2013
WITH
INCOME TAX APPEAL NO. 2509 OF 2013

Mr. Tejveer Singh for the Appellants.

Mr. Porus F. Kaka, senior counsel with Mr. Divesh Chawla and Mr. Atul K. Jasani for the Respondents.

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CORAM : S.C. DHARMADHIKARI &
A.K. MENON, JJ.

WEDNESDAY, 29TH APRIL, 2015

ORAL JUDGMENT : [Per A.K. Menon, J.]

1. The present set of appeals involve a common set of questions which have been proposed as substantial questions of law. For the sake of convenience, we will take up the facts in Appeal No.1690 of 2013 which is the lead case pertaining to assessment year 2001-2002.

2. The facts, in brief, are as follows.

The assessee is a foreign company engaged in the shipping business and is a tax resident of Denmark. A firm by name and style M/s. A.P. Moller Maersk A/S was designated as the managing owner of the company as well as another Denmark resident shipping company by name Atieselskabet Dampskibsselskabet Svendborg (ADS). M/s. A.P. Moller Maersk A/S was assessed to tax during the assessment years 2001-02 to 2003-04. The Commissioner of Income Tax held that A.P. Moller Maersk A/S being the managing owner, the income from the shipping business would be taxed in the hands of the

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two shipping companies referred to above. Pursuant to the directions of the Commissioner, the Assessing Officer assessed the income in the hands of the assessee which was allowed benefit of Double Taxation Avoidance Agreement (DTAA) between India and Netherlands. It was observed that the assessee had three agents working for them viz. Maersk Logistics India Limited (MLIL), Maersk India Private Limited (MIPL) and Safmarine India (Pvt) Limited (SIPL). These agents would book cargo and act as clearing agents for the assessee. In order to held them in this business, the assessee had procured and maintained a global telecommunication facility called MaerskNet which is a vertically integrated communication system. The agents would incur pro rata costs for using the said system and the agents share of the cost was, therefore, recovered from these three agents. According to the assessee, it was merely a system of cost sharing and hence the payments received by the assessee from MIPL, MLIL and SIPL were in the nature of reimbursement of expenses.

3. The Assessing Officer did not accept this contention and held that the amounts paid by these three agents to the assessee is

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consideration / fees for technical services rendered by the assessee and, accordingly, held them to be taxable in India under Article 13(4) of the DTAA and assessed tax at 20% under section 115A of the Income Tax Act, 1961.

4. In appeal, the Commissioner of Income Tax also confirmed the Assessing Officer's stand and dismissed the assessee's appeal. This is how the assessee approached the Tribunal which allowed the appeal of the assessee following decisions of the Madras High Court *Skycell Communications Limited 251 ITR 53 (Mad)* and the Delhi High Court in *Commissioner of Income Tax vs. Bharati Cellular Ltd. 319 ITR 139 (Del)*. The Tribunal, in the present case had occasion to consider the nature of the costs incurred by the assessee. In doing so, it observed that the three agents were booking cargo and acting as clearing agents for the assessee and were entitled to utilisation of the MaerskNet facility which consisted of a communication system connected to a main frame and other computer services in each of the countries of operation. These were all connected to what is known as MaerskNet Connecting Point (MCP) which were installed in each of the premises.

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This communication network would enable the agent concerned to access via the MCP, the following services :

> *"Global Customer Service System (GCSS);*
>
> *Global Schedule Information System (GSIS);*
>
> *Global Transportation Systems such as Customer Information and Cargo Tracking (Star Track), Transportation Schedule and Service Guide;*
>
> *Maersk Product Catalogue (MEPC)*
>
> *Maersk Shared Knowledge System (MSKS)*
>
> *EDI Data Quality Enhancement and Electronic Data Interchange;*
>
> *System for Documentation (RKDS), Equipment Management, Container Control (RKEM), Freight Invoicing (RKFR/RKIN/MLIS), Accounting and Performance (RRIS) Geography (GEO), Statistics (RKMS) and Tables (RKTS/RKST)"*

5. The assessee submitted before the Tribunal that without this system, it was not possible to conduct international shipping business efficiently and in having the system set up, the assessee had incurred costs. A share of this cost would have to be borne by each of the agents which utilise the system and, accordingly, these pro rata costs relatable to each of the agents was billed to the agents and these amounts were thus paid. It was merely a "charging back" to the agent,

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proportionate costs of the global shipping communications system and did not, in any manner, amount to rendering of any technical services.

6. Mr. Kaka, the learned senior counsel appearing on behalf of the assessee pointed out that but for the system, it would not be possible to efficiently carry out the business of shipping cargo and that each of these agents would be in a position to effectively communicate with the assessee and other relatable companies in the group so as to efficiently carry out the shipping business on a global scale especially since the consignments would be sourced from and dispatched to different locations. No technical service was thus rendered by the assessee. It is merely an automated system using advanced technology and there was no human element involved in terms of "rendering of services" which would be the requirement of Article 13(4).

7. Mr.Kaka further submitted that the facility known as MaerskNet was located in Denmark where the assessee was a tax resident and the system was very much a part of an integral part of the 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

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assessee and, therefore, not chargeable to tax in India.

8. Mr. Tejveer Singh on the other hand submitted that the agent were using devices provided by the assessee which would amount to the assessee rendering technical services, the consideration for which would be correctly termed as "fees for technical services" and, therefore, the same was liable to be taxed in India.

9. In this behalf, there is no finding by the Assessing Officer or the Commissioner that there was any profit element involved in the payments received by the assessee from its Indian agents. On the other hand, having considered the various submissions, we are of the view that no technical services as contemplated by the Act have been rendered in the instant case.

10. In the case of *Director of Income Tax (International Taxation) vs. Safmarine Container Lines NV (2014) 209 ITR 366*, this Court had occasion to consider the effect of the Double Taxation Avoidance Agreement between India and Belgium in which the questions

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involved were whether the income from inland transport of cargo within India was covered by Article 8(2)(b)(ii) of the Tax Treaty between India and Belgium. This Court, while considering the said issue found that the assessee was not liable to tax by virtue of DTAA in that case. Moreover, in the present case, there was no occasion for the Tribunal to come to any different view. In our view, the Tribunal has correctly observed that utilisation of the Maersk Net Communication system was a automated software based communication system which did not require the assessee to render any technical services. It was merely a cost sharing arrangement between the assessee and its agents to efficiently conduct its shipping business. In the case of Safmarine Container Lines NV (supra), the assessee is a shipping company was charging freight for picking up goods from places within India and delivering them at the destination port. This collection of Inland Haulage charges which the customers would pay was in respect of the transportation charges of the goods from the inland container depots to the port where the goods will be loaded on to the ships for international destination. The Assessing Officer in that case held that Inland Haulage Charges were not within

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the purview of Section 44B of the Act and, therefore, were chargeable to tax under the provisions of the Act. The Commissioner (Appeals) held that inland haulage charges earned by the assessee were only part of the income derived from the operation of ships and, therefore, were covered under Article 8 of the Double Taxation Avoidance Agreement (DTAA) entered into between India and Belgium and, therefore, not taxable as business profits in India.

11. The Tribunal in the meanwhile had also decided (in the case the assessee's own case) for the previous assessment year in favour of the assessee and, therefore, upheld the order of the Commissioner. This Court vide order dated 17th July, 2014 to which one of us (S.C. Dharmadhikari, J.) was a party held that the inland transport of cargo within India was covered under article 8(2)(b)(ii) and (c) of DTAA between India and Belgium and, therefore, not liable to tax in India. The principles involved in the said decision also govern the present case. The Maersk Net used by the agents of the assessee entailed certain costs reimbursement to the assessee. It was part of the shipping business and could not be captured under any

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other provisions of the Income Tax Act except under DTAA.

12. Our attention is also drawn to the decision of this Court in the case of *Commissioner of Income-tax V/s. Siemens Aktiongeselleschaft* reported in *[2009] 310 ITR 320 (Bom)*, wherein this Court has held that once there is a treaty between two sovereign nations, though it is open to a sovereign Legislature to amend its laws, a DTAA entered into by the Government, in exercise of the powers conferred by section 90(1) of the Act must be honoured. The provisions of Section 9 Income Tax Act were applicable and the provisions of DTAA, if more beneficial than the I.T. Act, the provisions of DTAA would prevail. Thus, in the instant case also, it is not possible for the revenue to unilaterally decide contrary to the provisions of the DTAA. We are informed that the agreements inter parties had been performed and the payments were made by the agents to use Maersk Net for the Maersk group's global shipping business and for no other reason. It related to shipment of cargo and their movement across the oceans. The views of the revenue that it amounted to technical service is misconceived. In fact, the Assessing Officer relied upon the decision of M/s. Arthur

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Anderson & Co. in ITA No.9125/Mum/1995, Mumbai, 'D' bench in which the Tribunal had observed that repayment of money may be construed as "reimbursement" only if it is bereft of profits for the services rendered. There is no profit element in the pro rata costs paid by the agents of the assessee to the assessee and accordingly, we have no hesitation in holding that the amounts paid by the agents to utilise the amount arose out of the shipping business cannot be brought to tax as sought to be done.

13. In view of the above discussion, we are of the view that there are no substantial questions of law that arise in the present case. The appeals are, accordingly, dismissed. There will be no order as to costs.

A.K. MENON, J. ***S.C. DHARMADHIKARI , J.***

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