आयकर अपीलीय अधिकरण "एल" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "L" BENCH, MUMBAI

सर्वश्री राजेन्द्र, लेखा सदस्य एवं संदीप गोसांई ,न्यायिक सदस्य

Before S/Shri Rajendra, A.M. and Sandeep Gosain,J.M.

आयकर अपील सं./ITA No. 3621/Mum/2015, **निर्धारण वर्ष /**Assessment Year: 2007-08

APM Terminals Management B.V. Maersk Line India Pvt.Ltd. 12th Floor, Tower A, Urmi Estate 95 Ganpatrao Kadam Marg Lowere Parel (W) Mumbai-400 013. **PAN: AAHCA 5570 H**	Vs.	DCIT (Intl. Taxation)-1(1) Scindia House, Ballard Pier NM Road, Mumbai-400 038.

(अपीलार्थी **/Appellant**) (प्रत्यर्थी / **Respondent**)

Revenue by: Shri M.V. Raj Guru-Sr.DR

Assessee by: S/Shri Sunil Motilala/ Fenil Bhatt/Tushar Hathiramani

सुनवाई की तारीख **/ Date of Hearing: 04/07.2017**

घोषणा की तारीख / **Date of Pronouncement: 06.09.2017**

आयकर अधिनियम,1961 की धारा 254(1)के अन्तर्गत आदेश

Order u/s.254(1)of the Income-tax Act,1961(Act)

लेखा सदस्य,राजेन्द्र के अनुसार -Per Rajendra,AM:

Challenging the order,dated 20/02/2015 of the CIT(A)-55,Mumbai the assessee has filed the present appeal.Assessee,a non-resident foreign company registered in the Netherland, is a part of A P Moller Maersk(APMM)Group.It is engaged in the business of providing technical and support services to various companies globally,which are in the business of Port and container terminal operations.In response to the notice issued u/s.142 (1) of the Act, the assessee filed its return of income on 31/03/2001,declaring total income of Rs.4.51crores.The Assessing Officer (AO)completed the assessment,u/s.143(3)r.w.s.147 and 144C (3) of the Act,on 28/01/ 2011, determining its income at Rs. 4.67 crores.

2.Effective ground of appeal is about taxability of Fees for Technical Services (FTS)/Royalty as per the provisions of the Act and Indian Netherland tax treaty.During the assessment proceedings,the AO found that the assessee had received an amount of Rs.1,67,58,000/-from Shanghai Zhenhua Port Machinery Company Ltd.,China(ZPMC),that it did not disclose the same in the return of income.He directed the assessee was justified and explain as to why said income should not be brought to tax.After considering the submission of the assessee,dated 24/11/2010, he held that APMM had entered into Main Purchase Agreement (MPA), dated 13/02/2004 and 17/06/ 2004 with ZPMC, China, that as per the agreement any group entity of

APMM wanting to buy the crane for its operation would by the same from ZPMC as per the terms and conditions of the agreement, that ZPMC was required to pay a fee of US dollars 15,000 to the assessee for each crane sold through its group company, that in accordance with the agreement Gujarat Pipavav Port Ltd.(GPPL) entered into a contract for purchase of planes from ZPMC,that the assessee is part of A P Moller group and was paid money through ZPMC as per the agreement between APMM and ZPMC,that as per the agreements ZPMC was required to pay consultancy fees to the assessee towards sale of cranes, that the payment was made by GPPL,that it was routed through ZPMC,that the receipt was in nature of income from a source in India and was liable to tax in India under the head royalty as per the Double Taxation Avoidance Agreement (DTAA) with Netherlands,that routing the payment through an entity would not transfer the source from India,that there was a diversion of income by overriding title to the assessee,that the income accruing to it in respect of sale of cranes in India by ZMPC was Rs.1.67 crores as calculated in order dated 24/07/2008 in the case of GPPL by the AO of that assessee.He further observed that the design for the crane was decided by APMM and ZPMC,that the group companies didn't have any say in change of design of the crane,that all the technical activities were carried out by APMM on behalf of its group companies worldwide, that the payment was actually in the nature of FTS.Referring to Article 12 of the DTAA,he held that he held that income had accrued to the assessee from India and was chargeable to tax as fees for technical services.

3.Aggrieved by the order of the AO, the assessee preferred an appeal before the First Appellate Authority (FAA) and made elaborate submissions.It also relied upon certain case laws.After considering the available material, he held that the assessee had tried to make an effort to prove its non-taxability of income without having any support of law or facts,that the AO had rightly held that it had conducted technical activities for its group entities,that the consultancy fees paid by ZPMC to it was in nature of FTS,that the payment of consultancy fees/receipt were linked to India,that same was liable to be taxed in India as royalty income as per the India-Netherland Tax Treaty,that the payment received in the hands of the assessee through ZPMC was in fact made by GPPL,that it was routed through ZPMC,that payment was liable to be taxed in India as royalty income as per the tax treaty,that the design of the crane was already decided by APMM and ZPMC, that the AO had rightly held that the income was taxable India.Finally,he upheld the order of the AO.

4.During the course of hearing before us,the Authorised Representative (AR) contended neither had any fixed place of business nor had any PE in India, that in order to facilitate purchase of cranes for its group entities engaged in the business of Port operations, APMM had entered into MPA,that the purpose of the agreement was to ensure procurement of standardised cranes for all its group entities and to facilitate trouble-free procurement of cranes,that group entities were required to enter into Specific Purchase Contract(SPC)with ZPMC for procurement of cranes,that as per the clause 22 and 23 of the MPA,ZPMC was required to pay to the assessee a fixed amount of consultancy fees per crane sold under the SPC,that GPPL had entered into SPC with ZMPC towards supply of 21 cranes,that persuant to SPC certain payments were made by GPPL and to ZMPC towards the purchase of the cranes,that consultancy fees received by the assessee from ZMPC for rendering services outside India could not be deemed to accrue or arise India as per section 5 read with section 9 of the act,that same was not taxable in India, that the AO had failed to examine the taxability of the consultancy fees received by the assessee under the provisions of the Act and had directly concluded that same was taxable in India as per the tax treaty,that the provisions of treaty would be applicable only when there was a privity of contract between an Indian entity and the assessee,that agreements were entered into by to non-residents i.e. APMM and ZPMC, that there was no privity of contract between the assessee and GPPL(the Indian entity),that the assessee had rendered consultancy services to ZPMC in China in designing basic specification and improvement in crane performance,that it did not relate to transfer of information concerning industrial commercial or scientific experience, that it was not in nature of royalty,that the designing basic specification and improvement in crane performance was only to equipment which was manufactured by ZMPC in China.Alternatively,it was argued that even if it was admitted that there was transfer of information concerning industrial,commercial or scientific experience the said information was transferred to ZPMC and not to an entity in India, that if any tax had to be paid for the said transaction it would have to be paid in China. It was further argued that even if it was presumed that the assessee had indirectly received the consultation fees from GPPL and that such payment was in the nature of FTS the disputed amount could not be subject to tax in India under the treaty.He referred to the provisions of articles 12(1)and 12(2) of the treaty and stated that FTS arising in India and paid to a tax resident of Netherlands can be taxed in India, that in the case under appeal consultancy fees were paid by a person non-resident in India i.e. ZPMC, China, that the payment could not be subject to tax in India as per articles 12 of the treaty, that in view of restricted definition of FTS in Article 12 (5) (b) of the

treaty,the consultancy fees received by the assessee could not be subject to tax in India, that it was not making available any technical knowledge experience and skill etc.,that it was not developing or transferring any technical plan or design for GPPL,that the provision for services rendered by the assessee might require technical skill and experience,that it would not enable GPPL or ZPMC to apply that skill and experience on their own in future activities,that purchase price was to be paid by GPLL,that disputed amount was not FTS as it was part of purchase price,that it was not FIS,that amount in question was received by the assessee in the next assessment year..He referred to the order of the Tribunal in the case of GPLL(ITA////)and stated that even if the disputed amount was to taxed it was to be taxed in the next AY.He relied upon the cases of .The Departmental Representative (DR) supported the order of the FAA and stated that the assessee had rendered technical services,that it was liable to pay taxes for the disputed amount.

5.We have heard the rival submissions and perused the material before us. We find that the assessee had received a sum of Rs. 1.67 crores from ZPMC,that as per the MPA,ZPMC had supplied cranes to GPPL, that the AO and the FAA were of the opinion that amount in question was taxable in India,that the disputed amount was received by the assessee in the next AY.,that both the revenue authorities had held that as per the provisions of tax treaty the amount in question was taxable in India under the head FTS/Royalty.

5.1. We find that while passing the order u/s.201 r.w.s.195 of the Act,in the case of GPLL(Pg.91-125 of the PB),the AO had (at page 123 of the PB),specifically mentioned that tax was deductibe on FIS or Royalty income of M/s.APM Terminals International B.V. The Netherlands,that GPPL was to be held defaulter of tax for the AY.2008-09.Clearly,the disputed amount does not pertain to the year under appeal.

5.1.1. In the cases of Seimens Aktiengesellschaft,NOCIL,Uhde GMBH(supra),the Tribunal has clearly held that royalty and FTS should be reckoned for taxation only when it is received and not otherwise.In the matter of Seimens Aktiengesellschaft,following question was raised by the Revenue (I.T. Appeal No.124 of 2010,)before Hon'ble Bombay High Court:

> *"i)Whether on the facts and in the circumstances of the case the Tribunal was right in law in holding that the Royalty and fees for technical services should be taxed on receipt basis without appreciating the fact that the Hon'ble Supreme Court has held in the case of Standard Drum Motors Private Limited V/s. CIT, 201 ITR 391 that the credit entry to the account of the assessee non-resident in the books of the Indian Company amounted to receipt by the non-resident?"*

The Hon’ble Court decided the issue,on 22.10.2012,as under :

> *"2. As regards first question is concerned, the Income Tax Appellate Tribunal referring to para-1 to 3 under Article IIX-A of the Double Taxation Avoidance Treaty with the Federal Germany Republic as per Notification dated 26th August 1985 held that the assessment of royalty or any fees for technical services should be made in the year in which the amounts are received and not otherwise. Counsel for the Revenue relied upon the Special Bench decision of the Tribunal in the assessee's own case, which in our opinion, has no relevance to the facts of the present case, as it relates to the period prior to the issuance of Notification dated 26t1 August 1985. In this view of the matter the decision of the Income Tax Appellate Tribunal in holding that the royalty and fees for technical services should be taxed on receipt basis cannot be faulted".*

Subsequently the aforementioned order was followed by the Hon'ble Court in respect of AY.s 1997-98,2001-02 and 2003-04.Considering the above,we are of the opinion that no taxable income was received by the assessee during the year under appeal.

5.2. With regard to applicability of Article 12 of the tax treaty, we want to mention that same is applicable if information concerning technical/industrial/commercial knowledge or experience or skill is imparted. It is a fact that services were rendered outside India to a non-resident i.e. ZMPC and that same were utilised in manufacturing the cranes outside India i.e. in China. In the circumstances consultancy fees received by the assessee from the Chinese entity for rendering services outside India cannot be deemed to accrue or arise in India, as per the provisions of section 5 read with section 9 of the Act. Consequently the same would not be taxable in India. India has signed the DD AA with the Netherlands and taxability of consultancy services had to be examined first as per the provisions of the tax treaty. In the case under consideration the AO, without referring to the treaty,had applied the provisions of the Act. In our opinion,the stand of the AO/FAA cannot be endorsed,as the provisions of tax-treaties have to be given preference over the provisions of the Act.

5.3. Besides,the consultancy was rendered outside India and even if same has to be taxed it would be chargeable to tax in that country and not in India.The AO/FAA has failed to prove that services rendered by the assessee to ZMPC were in the nature of Royalty.Nothing has been brought on record to prove that the assessee had made available any technical knowledge, experience, skill to Indian company.We also agree with the argument of the AR that in the case under appeal,consultancy fees were rendered to a person who was non-resident i.e.to ZMPC.As per the provisions of Article 12 of the treaty,FTS arising in India and paid to a tax-resident of the Netherlands can be taxed in India.But, as stated earlier,in the case under appeal the payment was paid to a Chinese company.Considering the above,we are of the opinion that consultancy fees received by the assessee from ZMPC cannot be held to be FTS and that same is not chargeable to tax in India.So,reversing the order of the FAA we

decide the effective ground of appeal in favour of the assessee.As the remaining grounds support the effective grounds,so,we allow them for statistical purposes.

As a result,appeal filed by the assessee stands allowed.
फलतः निर्धारिती द्वारा दाखिल की गई अपील मंजूर की जाती है.

Order pronounced in the open court on September , 2017.
आदेश की घोषणा खुले न्यायालय में दिनांक सितंबर, 2017 को की गई ।

Sd/- **Sd/-**

(संदीप गोसांई **/Sandeep Gosain)** (राजेन्द्र **/ RAJENDRA)**

न्यायिक सदस्य **/ JUDICIAL MEMBER** **लेखा सदस्य / ACCOUNTANT MEMBER**

मुंबई Mumbai; दिनांक/Dated : 06.9.2017.

Jv.Sr.PS.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1.Appellant /अपीलार्थी **2.** Respondent /प्रत्यर्थी

3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, **4.**The concerned CIT /संबद्ध आयकर आयुक्त

5.DR “ E ” Bench, ITAT, Mumbai /विभागीय प्रतिनिधि**,** खंडपीठ,आ.अ.न्याया.मुंबई

6.Guard File/गार्ड फाईल

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आदेशानुसार**/ BY ORDER,**
उप/सहायक पंजीकार **Dy./Asst. Registrar**
आयकर अपीलीय अधिकरण**,** मुंबई **/ITAT, Mumbai.**