Director Of Income Tax (It) - I vs A.P. Moller Maersk A/S/ on 17 February, 2017

Equivalent citations: AIR 2017 SC 1756, 2017 (5) SCC 651, 2017 (3) ABR 596, AIR 2017 SC (CIV) 1507, (2017) 3 SCALE 123, 2017 (4) KCCR SN 509 (SC), 2018 (183) AIC (SOC) 2 (SC), AIR 2017 SUPREME COURT 1756, 2017 (3) ABR 596 AIR 2017 SC (CIVIL) 1507, AIR 2017 SC (CIVIL) 1507

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Bench: Abhay Manohar Sapre, A.K. Sikri

NON-REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 8040 OF 2015

DIRECTOR OF INCOME TAX (IT) – I	.....APPELLANT(S)	
VERSUS		
A.P. MOLLER MAERSK A S	.....RESPONDENT(S)	

W I T H

CIVIL APPEAL NO. 2959 OF 2017
(ARISING OUT OF SLP (C) NO. 5979 OF 2017
@ SLP (C) … CC NO. 18880 OF 2015)

CIVIL APPEAL NO. 2958 OF 2017
(ARISING OUT OF SLP (C) NO. 5978 OF 2017
@ SLP (C) … CC NO. 20220 OF 2015

CIVIL APPEAL NO. 2962 OF 2017
(ARISING OUT OF SLP (C) NO. 5984 OF 2017
@ SLP (C) … CC NO. 20248 OF 2015

CIVIL APPEAL NO. 2961 OF 2017
(ARISING OUT OF SLP (C) NO. 5983 OF 2017
@ SLP (C) … CC NO. 20404 OF 2015

CIVIL APPEAL NO. 2964 OF 2017
(ARISING OUT OF SLP (C) NO. 5992 OF 2017
@ SLP (C) … CC NO. 18833 OF 2015

CIVIL APPEAL NO. 2963 OF 2017

(ARISING OUT OF SLP (C) NO. 5985 OF 2017
@ SLP (C) … CC NO. 20038 OF 2015

A N D

CIVIL APPEAL NO. 2960 OF 2017
(ARISING OUT OF SLP (C) NO. 5980 OF 2017
@ SLP (C) … CC NO. 19935 OF 2015

J U D G M E N T

A.K. SIKRI, J.

Delay condoned.

Leave granted in all SLPs.

In these appeals, which are filed by the Revenue challenging the validity of the judgment passed by the High Court of Bombay, the appellant-Revenue has posed the issue that arises for consideration in the following manner:

> "Whether the High Court is correct in holding that the income from the use of Global Telecommunication Facility called 'Maersk Net' can be classified as income arising out of shipping business and not as fees for technical services?" Similar question of law, according to the Revenue, arises in all these appeals and for the sake of convenience, we will take note of the facts of Civil Appeal No. 8040 of 2015.
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> The High Court has decided the aforesaid issue by common judgment dated 29.04.2015, which is under appeal. From the aforesaid, it becomes clear that the only issue that has to be decided by this Court is whether the income from the use of "Maersk Net" is an integral part of the shipping business and cannot be taxed in India as fees for technical service under the Indo-Danish Double Taxation Avoidance Agreement.

Seminal facts giving background of the dispute may be taken note of at this stage in order to understand the nuances of the aforesaid issue. The respondent assessee is a foreign company engaged in the shipping business and is a tax resident of Denmark. There is a Double Taxation Avoidance Agreement (hereinafter referred to as the 'DTAA') between India and Denmark. The Assessing Officer (AO) assessed the income in the hands of the assessee and allowed the benefit of the said DTAA. However, while making the assessment, the AO observed that the assessee had agents working for it, namely, Maersk Logistics India Limited (MLIL), Maersk India Private Limited (MIPL), Safmarine India Private Limited (SIPL) and Maersk Infotech Services (India) Private Limited (MISPL). These agents booked cargo and acted as clearing agents for the assessee. In order to help all its agents, across the globe, in this business, the assessee had set up and was maintaining a global telecommunication facility called Maersk Net System which is a vertically integrated

communication system. The agents were paying for said system on pro-rata basis. According to the assessee, it was merely a system of cost sharing and the payments received by the assessee from MIPL, MLIL, SIPL and MISPL were in the nature of reimbursement of expenses. The AO did not accept this contention and held that the amounts paid by these three agents to the assessee was consideration/fees for technical services rendered by the assesses and, accordingly, held them to be taxable in India under Article 13(4) of the DTAA and assessed tax @ 20% under Section 115A of the Income Tax Act, 1961.

The assessee preferred an appeal against the Assessment Order before the Commissioner of Income Tax (Appeals) (for short, 'CIT (A)'). The CIT(A) vide order dated 23.08.2010 dismissed the appeal. Aggrieved by the order passed by the CIT(A), the assessee preferred further appeal before the Income Tax Appellate Tribunal (ITAT). Here the assessee succeeded as the ITAT, by order dated 14.12.2012, allowed the appeal of the assessee following decisions of the Madras High Court in Skycell Communications Ltd. & Anr. v. Deputy Commissioner of Income Tax & Ors.[1], and the Delhi High Court in Commissioner of Income Tax v. Bharti Cellular Ltd.[2]. The ITAT considered the nature of the costs incurred by the assessee and observed that the three agents were booking cargo and acting as clearing agents for the assessee and were entitled to utilisation of the Maersk Net facility which consisted of a communication system connected to a mainframe and other computer services in each of the countries of operation. These were all connected to Maersk Net Connecting Point (MCP) which were installed in each of the premises. This communication network enabled the agent concerned to access via the MCP the following services:

> “Global Customer Service System (GCSS);
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> Global Schedule Information System (GSIS);
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> Global Transportation Systems such as Customer Information and Cargo Tracking (Star Track), Transportation Schedule and Service Guide;
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> Maersk Product Catalogue (MEPC);
>
> Maersk Shared Knowledge System (MSKS);
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> EDI Data Quality Enhancement and Electronic Data Interchange;
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> 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).” Aggrieved by the order passed by the ITAT, the department filed ITA No. 1306 of 2013 before the High Court of Bombay. The High Court, by judgment dated 29.04.2015, has dismissed the Revenue's appeal holding that the ITAT has correctly observed that utilisation of the Maersk Net Communication System was an 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. The High Court has further held that the principles involved in the decision of The Director of Income Tax (International Taxation)-1 v. M/s. Safmarine Container Lines NV[3] will also govern the present case and that the Maersk Net used by the agents of the assessee entailed certain costs reimbursement. It was part of the shipping business and could not be captured under any other provisions of the Income Tax Act except under DTAA. It is also pertinent to mention that while arriving at the aforesaid decision, the High Court has specifically observed that there is no finding by the AO or the Commissioner that there is only profit element involved in the payments received by the assessee from its agents.

It is in the aforesaid circumstances the issue arose as to whether any technical services were rendered by the assessee to its aforesaid three agents and the payment made by the agents was in the form of fee for the said technical services OR the payment was nothing but reimbursement of the cost by the three agents to the assessee for using the Maersk Net.

The facts which emerge on record are that the assessee is having its IT System, which is called the Maersk Net. As the assessee is in the business of shipping, chartering and related business, it has appointed agents in various countries for booking of cargo and servicing customers in those countries, preparing documentation etc. through these agents. Aforementioned three agents are appointed in India for the said purpose. All these agents of the assessee, including the three agents in India, used the Maersk Net System. This system is a facility which enables the agents to access several information like tracking of cargo of a customer, transportation schedule, customer information, documentation system and several other informations. For the sake of convenience of all these agents, a centralised system is maintained so that agents are not required to have the same system at their places to avoid unnecessary cost. The system comprises of booking and communication software, hardware and a data communications network. The system is, thus, integral part of the international shipping business of the assessee and runs on a combination of mainframe and non-mainframe servers located in Denmark. Expenditure which is incurred for running this business is shared by all the agents. In this manner, the systems enable the agents to co-ordinate cargos and ports of call for its fleet.

Aforesaid are the findings of facts. It is clearly held that no technical services are provided by the assessee to the agents. Once these are accepted, by no stretch of imagination, payments made by the agents can be treated as fee for technical service. It is in the nature of reimbursement of cost whereby the three agents paid their proportionate share of the expenses incurred on these said systems and for maintaining those systems. It is reemphasised that neither the AO nor the CIT (A) has stated that there was any profit element embedded in the payments received by the assessee from its agents in India. Record shows that the assessee had given the calculations of the total costs and pro-rata division thereof among the agents for reimbursement. Not only that, the assessee have even submitted before the Transfer Pricing Officer that these payments were reimbursement in the hands of the assessee and the reimbursement was accepted as such at arm's length. Once the character of the payment is found to be in the nature of reimbursement of the expenses, it cannot be income chargeable to tax.

Pertinently, the Revenue itself has given the benefit of Indo-Danish DTAA to the assessee by accepting that under Article 9 thereof, freight income generated by the assessee in these Assessment Years is not chargeable to tax as it arises from the operation of ships in international waters. Once that is accepted and it is also found that the Maersk Net System is an integral part of the shipping business and the business cannot be conducted without the same, which was allowed to be used by the agents of the assessee as well in order to enable them to discharge their role more effectively as agents, it is only a facility that was allowed to be shared by the agents. By no stretch of imagination it can be treated as any technical services provided to the agents. In such a situation, 'profit' from operation of ships under Article 19 of DTAA would necessarily include expenses for earning that income and cannot be separated, more so, when it is found that the business cannot be run without these expenses. This Court in Commissioner of Income Tax-4, Mumbai v. Kotak Securities Limited[4] has categorically held that use of facility does not amount to technical services, as technical services denote services catering to the special needs of the person using them and not a facility provided to all.

After taking note of Section 19 of the Income Tax Act,1961 and explanation 2 thereof which defines fee for technical services, the Court went on to describe the meaning of the said expression in the following manner:

> "6. What meaning should be ascribed to the words "technical services" appearing in Explanation 2 to clause (vii) to Section 9(1) of the Act is the moot question. In CIT v. Bharti Cellular Ltd. [CIT v. Bharti Cellular Ltd., (2014) 6 SCC 401 : (2011) 330 ITR 239] this Court has observed as follows: (SCC p. 402, para 5) "5. Right from 1979, various judgments of the High Courts and Tribunals have taken the view that the words "technical services" have got to be read in the narrower sense by applying the rule of noscitur a sociis, particularly, because the words "technical services" in Section 9(1)(vii) read with Explanation 2 comes in between the words "managerial and consultancy services"."
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> 7. "Managerial and consultancy services" and, therefore, necessarily "technical services", would obviously involve services rendered by human efforts. This has been the consistent view taken by the courts including this Court in Bharti Cellular Ltd. [CIT v. Bharti Cellular Ltd., (2014) 6 SCC 401 : (2011) 330 ITR 239] However, it cannot be lost sight of that modern day scientific and technological developments may tend to blur the specific human element in an otherwise fully automated process by which such services may be provided. The search for a more effective basis, therefore, must be made.
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> 8. A reading of the very elaborate order of the assessing officer containing a lengthy discourse on the services made available by the Stock Exchange would go to show that apart from facilities of a faceless screen based transaction, a constant upgradation of the services made available and surveillance of the essential parameters connected with the trade including those of a particular/single transaction that would lead credence to its authenticity is provided for by the Stock

Exchange. All such services, fully automated, are available to all members of the Stock Exchange in respect of every transaction that is entered into. There is nothing special, exclusive or customised service that is rendered by the Stock Exchange. "Technical services" like "managerial and consultancy service" would denote seeking of services to cater to the special needs of the consumer/user as may be felt necessary and the making of the same available by the service provider. It is the above feature that would distinguish/identify a service provided from a facility offered. While the former is special and exclusive to the seeker of the service, the latter, even if termed as a service, is available to all and would, therefore, stand out in distinction to the former. The service provided by the Stock Exchange for which transaction charges are paid fails to satisfy the aforesaid test of specialised, exclusive and individual requirement of the user or consumer who may approach the service provider for such assistance/service. It is only service of the above kind that, according to us, should come within the ambit of the expression "technical services" appearing in Explanation 2 to Section 9(1)(vii) of the Act. In the absence of the above distinguishing feature, service, though rendered, would be mere in the nature of a facility offered or available which would not be covered by the aforesaid provision of the Act.

9. There is yet another aspect of the matter which, in our considered view, would require a specific notice. The service made available by the Bombay Stock Exchange [BSE Online Trading (BOLT) System] for which the charges in question had been paid by the appellant assessee are common services that every member of the Stock Exchange is necessarily required to avail of to carry out trading in securities in the Stock Exchange. The view taken by the High Court that a member of the Stock Exchange has an option of trading through an alternative mode is not correct. A member who wants to conduct his daily business in the Stock Exchange has no option but to avail of such services. Each and every transaction by a member involves the use of the services provided by the Stock Exchange for which a member is compulsorily required to pay an additional charge (based on the transaction value) over and above the charges for the membership in the Stock Exchange. The above features of the services provided by the Stock Exchange would make the same a kind of a facility provided by the Stock Exchange for transacting business rather than a technical service provided to one or a section of the members of the Stock Exchange to deal with special situations faced by such a member(s) or the special needs of such member(s) in the conduct of business in the Stock Exchange. In other words, there is no exclusivity to the services rendered by the Stock Exchange and each and every member has to necessarily avail of such services in the normal course of trading in securities in the Stock Exchange. Such services, therefore, would undoubtedly be appropriate to be termed as facilities provided by the Stock Exchange on payment and does not amount to "technical services" provided by the Stock Exchange, not being services specifically sought for by the user or the consumer. It is the aforesaid latter feature of a service rendered which is the essential hallmark of the expression "technical services" as appearing in Explanation 2 to Section 9(1)(vii) of the Act." In

the present case, a common facility of using Maersk Net System is provided to all the agents across the countries to carry out their work using the said system.

Mr. Radhakrishnan, learned senior counsel appearing for the assessee, laboured to demonstrate that reliance by the High Court on its earlier judgment in the case of M/s. Safmarine Container Lines NV was not appropriate as that was the case where Indo-Belgium DTAA was considered by the Court which was different from Indo-Denmark DTAA. However, having regard to the factual position noted above, it is not even necessary to go into this aspect, though we may observe that it is the principle of law enunciated in Safmarine which is followed. Mr. Radhakrishnan also referred to Article 17 of the Agency Agreement between the assessee and the Indian agents which provides that the assessee may, from time to time, temporarily place its employees in agents office "for training or other purposes". However, it could nowhere be pointed out that payment in question was made by the agents to the assessee for the aforesaid purposes. Mr. Radhakrishnan also argued that arrangement of profits is not essential to qualify receipt as income from free for technical services. This argument is, again, untenable as on the facts of this case it is clearly established that the payment made by the assessee was not for reimbursement of any technical services.

After the arguments were concluded, additional written submissions were filed by Mr. Radhakrishnan on behalf of the Revenue wherein altogether new point is raised viz. the payments made by the agents to the assessee for use of that Maersk Net System can be treated as royalty. However, this desperate attempt on the part of the Revenue cannot be allowed as no such case was sought to be projected before the High Court or even in the appeals in this Court. We have already mentioned in the beginning the issue raised by the Revenue itself which shows that the only contention raised is as to whether the payment in question can be treated as fee for technical services. Having held that issue against the Revenue, no further consideration is required of any other aspects in these appeals. These appeals are, therefore, bereft of any merit and are accordingly dismissed.

.....J. (A.K. SIKRI) .....J. (ABHAY MANOHAR SAPRE) NEW DELHI;

FEBRUARY 17, 2017.

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[1] (2001) 251 ITR 53 [2] (2009) 319 ITR 139 [3] (2014) 367 ITR 209 [4] (2016) 383 ITR 1 (SC)