अपीलीय अधिकरण, 'डी' न्यायपीठ,चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL

'D' BENCH, CHENNAI

श्री महावीर सिंह, उपाध्यक्ष एवं श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष

BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENTAND
SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER

आयकर अपील सं./**ITA Nos.: 1885/CHNY/2017 & 665/CHNY/2020**

निर्धारण वर्ष /Assessment Year:2013-14

Doosan Power Systems India Pvt. Ltd., 16th Floor, DLF Square, Jacaranda Marg, Near NH-8, DLF Phase-II, Gurgaon – 122 002.	v.	**The JCIT / DCIT,** Corporate Circle -1(1), Chennai.
PAN: AABCB 5946J		
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Appellant by : Shri Sandeep Bagmar, Advocate
प्रत्यर्थी की ओर से/Respondent by : Shri A. Sasikumar, CIT

सुनवाई की तारीख/Date of Hearing : 12.06.2023
घोषणा की तारीख/Date of Pronouncement : 23.06.2023

आदेश /O R D E R

PER MAHAVIR SINGH, VICE PRESIDENT:

These appeals by the assessee are arising out of the assessment order framed by the DCIT, Corporate Circle 1(1), Chennai u/s.143(3) r.w.s. 144C of the Income Tax Act, 1961 (hereinafter the 'Act'), vide order dated 30.05.2017 and

rectification order u/s.154 of the Act dated 17.01.2020 passed by the JCIT, Corporate Circle 1(1), Chennai as per the direction of the Dispute Resolution Panel, Bengaluru dated 04.04.2017 for the assessment year 2013-14.

ITA No.1885/CHNY/2017

2. The first issue raised by assessee is as regards to the assessment order framed u/s.143(3) r.w.s. 144C of the Act following the directions of TPO & DRP directing the AO to make transfer pricing adjustment by taking the comparable of Acropetal Technologies Limited ('Acropetal'). For this, assessee has raised the following Ground No.3:-

> 3. On facts and in law, the Ld. AO, Ld. TPO and the Hon'ble DRP erred in violating the provisions of Rule 10B(2) by arbitrarily including Acropetal Technologies Limited ('Acropetal') as a comparable to the Appellant:
>
> 3.1 following the Rule of Estoppel, without considering the differences in the functions performed, assets employed and risks assumed by Acropetal vis-à-vis the Appellant
>
> 3.2 by incorrectly holding that Acropetal is predominantly involved in provision of engineering design, drawing and consultancy services and thereby ignoring the fact that the revenue from information technology services segment (83.59 percent) is significantly higher

than the revenue from engineering design service segment (14.17 percent)

3. Brief facts are that the assessee company is engaged in the business of designing, building, installation and maintaining engineering plants with specialization in thermal and coal power plants. The assessee company renders engineering services to its associated enterprises Doosan Heavy Industries & Construction Co. Ltd. The TPO scrutinized the international transactions entered into by the assessee and analyzed the transactions and the margins for the manufacturing and engineering segments by computing the OP & OI of manufacturing segment at 10.48% and engineering segment at 3.75% of OP & OC. The assessee has taken the data of comparables with respect to financial years 2010-11, 2011-12 & 2012-13 and arrived at the arithmetic mean for the manufacturing segment at 10.48% and for engineering services segment at 3.75%. The TPO carried out independent search for comparables on the basis of single year data/margin after applying the following filters in EDS and consultancy segments:-

1	All Industries – Services – Engineering Design
2	Financials not available
3	Sales above 1 crore
4	Consecutive losses
5	Export turnover above 75%
6	RPT<25% Accepted
7	Functionally similar

The TPO also considered the Acropetal Technologies Ltd., which gives margin of 61.11%.

4. Now, the ld.counsel for the assessee before us only requested that the assessee wants exclusion of this comparable only i.e., Acropetal Technologies Ltd. The ld.counsel for the assessee very fairly admitted that assessee in its TP report has already included Acropetal Technologies Ltd., but he stated that the data for financial years 2010-11 & 2011-12 was available but for financial year 2012-13, no data was available and he drew our attention to page No.128 of assessee's paper-book. The ld.counsel stated that the assessee has taken weighted average method and by that, in the case of Acropetal Technologies Ltd., it was 11.49% before the financials of financial year 2012-13 was taken into consideration and by

taking Acropetal Technologies Ltd., the assessee has computed and since the margin earned by assessee is higher than the weighted average margin earned by comparable companies, it was reasonably concluded that the international transaction of rendering engineering services appears to be consistent with arm's length standard from the perspective of Indian transfer pricing. But now the ld.counsel stated that since the margin of this year in the case of Acropetal Technologies Ltd., is 61.11%, so the assessee wants exclusion of the same for two reasons. First, the reason is that the OP / OC in the case of Acropetal Technologies Ltd., is 61.11% as against the PLI of manufacturing segment of the assessee is 10.48%. The ld.counsel stated that this higher margin was although considered by the DRP and he took us through the DRP's order and argued that firstly the DRP has not considered that such a higher margin company cannot be considered as comparable because high profit and high loss making companies cannot be considered as comparable as per various judicial decisions as well as OECD guidelines. Second reason given by ld.counsel is that the Acropetal Technologies Ltd., has earned significantly

abnormal margin on year to year in its engineering design segment and apart from that, it enjoys significant benefit on account of intangibles developed and owned by it through its R&D centers whereas the assessee has not incurred any expenditure on R&D and hence, Acropetal Technologies Ltd., should not have been taken as comparable. The ld.counsel stated that the DRP has wrongly relied on Clause 8 of the agreement that all documents, data, engineering drawings and material will be submitted by the assessee to the AE and same will be the property of the AE. He also contested the finding of the DRP that intangibles created as a result of engineering design service by the assessee are passed on to the AE without any additional compensation. Apart from this, the ld.counsel also drew our attention to the Co-ordinate Bench decision in the case of J Ray DcDermott Engineering Services Pvt. Ltd., vs. DCIT in ITA No.3239/Chny/2017, wherein the Tribunal has also considered the alleged irregularities committed by Acropetal Technologies Ltd., and consequent investigation / enquiry by SEBI in regard to irregularities committed in the financials of the company and finding that the SEBI has clearly stated that

the company has committed a fraud in utilization of funds raised by IPO and has diverted majority of funds to non-business purposes, which has a significant bearing on operating margin. The ld.counsel also filed copy of report of Adjudicating Officer of SEBI in the case of Acropetal Technologies Ltd., dated 05.07.2018 vide No.SEBI/EAD-9/SM/JR/19001/11/2018, wherein SEBI has considered the fraud in utilization of funds raised in IPO and diversion of majority of funds for non-business purposes. The ld.counsel for the assessee also drew our attention to para 9 of the order of the Tribunal in the case of J Ray McDermott Engineering Services Pvt. Ltd., *supra,* and stated that Acropetal Technologies Ltd., is not a good comparable and hence, it should be directed to be excluded.

5. On the other hand, the ld.CIT-DR argued that the higher margins of Acropetal Technologies Ltd., cannot be a reason for exclusion of this comparable because this company is engaged in engineering design segment, the assessee company is also in the same business. But, he could not controvert the argument of ld.counsel that the Acropetal Technologies Ltd.,

had committed financial fraud by utilizing the funds raised in IPO for some other purposes other than business purpose.

6. We have heard rival contentions on the issue of exclusion of Acropetal Technologies Ltd. We agree with the arguments of the ld.counsel that if we compare the financial data of Acropetal Technologies Ltd., which is giving OP / OL at 61.11% with the present assessee which gives the OP / OC in manufacturing segment at 10.48%, the profit margin of Acropetal Technologies Ltd., is very high but that alone cannot be a reason for exclusion but we have to see that the financials of Acropetal Technologies Ltd., are on the basis of a fraud committed as per clear cut finding of SEBI adjudicator, copy of which was filed before us, which is dated 05.11.2018. From the SEBI report, it is clear there are irregularities committed in the financials of the company by way of committing a fraud in utilization of funds raised in IPO and diverted majority of funds to non-business purposes which has a significant bearing on the operating margins. This is a very good reason for not accepting the Acropetal Technologies Ltd., as comparable and

hence, we direct the TPO to exclude the same while computing operating margins of the assessee. In term of the above, we direct the TPO / AO accordingly.

7. The next issue in this appeal of assessee is as regards to exclusion of following three comparables:-

i. Accuspeed Engineering Ltd.
ii. Harita Techserv Ltd.
iii. Kirloskar Consultants Ltd.

The ld.counsel restricted his arguments to exclusion of these three comparables. For the exclusion of these three comparables, the assessee has raised following Ground Nos.4,5 & 6:-

> 4. On the facts and in law, the Ld. AO, Ld. TPO and Hon'ble DRP erred on facts and in law in rejecting Accuspeed Engineering Ltd. alleging non-availability of financial statements for financial year 2012-13 during the transfer pricing assessment proceedings, not appreciating that the financial statements of the Company were available in the public domain.
>
> 5. The Ld. AO, Ld. TPO and the Hon'ble DRP erred on facts and in law in violating the provisions of Rule 10B(2) of the Rules by rejecting Harita Techserv Ltd. (‘Harita').

6. The Ld. AO, Ld. TPO and the Hon'ble DRP erred on facts and in law in violating the provisions of Rule 10B(2) of the Rules by rejecting Kirloskar Consultants Ltd., ('Kirloskar').

8. The ld.counsel for the assessee drew our attention to the chart prepared by TPO at page 5 and rejected the above stated three companies by giving the following reasons:-

Assessee's companies	Rejected	Reason
Accuspeed Engineering Services India Ltd.	Rejected	No sale
Harita Techserv Ltd.	Rejected	(-) PLI
Kirloskar Consultants Ltd.	Rejected	No sale

The ld.counsel for the assessee before us stated that the TPO has rejected Accuspeed Engineering Services India Ltd., and Kirloskar Consultants Ltd., on account of 'no sales' but the assessee before TPO has made this plea that the Accuspeed Engineering Services has total turnover of Rs.12.27 crores and Kirloskar Consultants has turnover of Rs.10.39 crores. The ld.counsel for the assessee then took us through the findings given by DRP wherein the DRP has noted that these companies i.e., Accuspeed and Kirloskar cannot be considered as comparable for the reason that these two companies for which

the financial for the relevant year is not available during the TP study could not have been considered by the TPO as comparable. According to DRP since assessee did not produce the financials for the relevant year before the TPO and it is not the case of the assessee that financials of this company for financial year 2012-13 was available in the public domain at the time of TP proceedings conducted by the TPO, the claim of the assessee cannot be verified and hence, the argument of assessee was rejected. The ld.counsel stated that the DRP has simply rejected the claim of assessee in the absence of financial results of these two comparables whereas the TPO himself has recorded that the Accuspeed has a total turnover of Rs.12.27 crores and Kirloskar has total turnover of Rs.10.39 crores. Hence, the ld.counsel for the assessee drew our attention to the financials filed before us in regard to Accuspeed Engineering Services Ltd., at pages 56 to 57 of assessee's paper-book and in the case of Kirloskar Consultants Ltd., at pages 227 to 247. The ld.counsel stated that once these details are available now before Tribunal either Tribunal can decide the issue or matter can be referred back to the file

of the TPO for reconsideration whether these two companies have sales or not.

9. On the other hand, the ld.CIT-DR has not objected for remitting the matter back to the file of the TPO but he stated that once there are no sales there is no purpose in sending back the matter to the file of the AO and he strongly supported the order of TPO and that of the DRP.

10. We have heard rival contentions and gone through facts and circumstances of the case. We noted that since the assessee now before us has filed financials of Accuspeed Engineering Ltd., and Kirloskar Consultants Ltd., and this is the finding of the DRP that these financials are not available either before the TPO or DRP, we feel that in the interest of natural justice, we remit back the issue of these two comparables to the file of the AO for carrying out necessary enquiry and verification and then TPO will decide whether to consider the same as comparables or not. In term of the above, these two comparables are remitted back to the file of the TPO.

11. The next comparable i.e., Harita Techserv Ltd., the TPO has rejected this comparable selected by assessee because there is negative PLI. The TPO also noted that this company is not in line with the business of tested party and nothing is earned from engineering design services and the TPO has noted the details of revenue earned by Harita Techserv Ltd., and tabulated the same in his order.

12. The ld.counsel for the assessee before us argued that Harita Techserv Ltd., is engaged in providing solutions in project design engineering, highly skilled technical engineering resources and training services for diverse industry domains. He stated that the assessee company is engaged in providing engineering design 3D modeling & detailing, legacy conversion, engineering analysis, simulation, multi-body dynamics, virtual prototyping & testing, digital manufacturing, PLM & PDM and engineering illustration and publication (EIP), etc. He argued that engineering and designing services include tool & die designing, jigs and fixtures, NC programming, machine tool modeling, digital manufacturing apart from other digital

services. The ld.counsel also drew our attention to services as described in its annual return which reads as under:-

- Specialized engineering staffing services for multi-industry
- Strong engineering & design background – our core competency
- End-to-end solutions capability
- Proven expertise in dedicated development centers
- Finishing school and industry-first competency development programs in association with ARAI
- Capability to meet requirements of large Indian and Global customers
- Process rigor with speed, flexibility and engineering design center of excellence.

The ld.counsel assailed the order of DRP also that it has noted under the 'revenue recognition' mentioned the income of the company as derived from manpower deployment services, trading in securities and information technology related to consultancy and services whereas assessee is engaged in engineering design services. According to DRP, this company cannot be considered as financially similar and therefore, TPO has rightly rejected this as a comparable. The ld.counsel for the assessee stated that the TPO has rejected for the reason that there is a negative PLI whereas DRP has rejected altogether on different reason that the company is not

financially similar to that of the assessee. Now, the ld.counsel for the assessee before us filed details of engineering services and engineering and design background of the assessee company and stated that this can be considered by the TPO afresh.

13. On the other hand, the ld.CIT-DR supported the order of the TPO and that of the DRP.

14. After hearing rival contentions and going through the facts of the case, we noted that there is a contradiction in the order of TPO and that of the DRP. The TPO has simply rejected the comparable on the reason that it has a negative PLI whereas DRP has only considered that it is not financially similar whereas assessee now before us filed complete details that Harita Techserv Ltd., is also engaged in engineering design services and financially similar. This needs to be considered. We feel that let the matter be restored back to the file of the TPO in regard to this comparable and TPO will consider whether assessee is financially similar to Harita Techserv Ltd., or not.

In term of the above, we set aside this issue to the file of the TPO and allow for statistical purposes.

15. Apart from the above one inclusion and three exclusion, the ld.counsel for the assessee has not argued any other grounds and hence, the same are dismissed as 'not pressed'. Accordingly, the appeal of the assessee is partly-allowed for statistical purposes.

ITA No.665/CHNY/2020

16. The only issue in this appeal of assessee is as against the order of AO following the directions of DRP in disallowing the Ocean Freight charges paid by assessee to M/s. Doosan Corporation Korea for non-deduction of TDS by invoking the provisions of section 40(a)(i) of the Act. For this, the ld.counsel for the assessee drew our attention to additional grounds filed vide letter dated 07.09.2022. The ld.counsel stated that the original grounds raised are withdrawn and this revised ground can be considered, but the issue is only one. For this, assessee has raised six grounds vide revised grounds

which are argumentative and citation of case laws decided and hence, need not be reproduced.

17. Brief facts are that the assessee is also carrying out business of execution of turnkey projects of steam generating equipments, supply of spares and providing related services. In turn, assessee paid ocean freight charges to its AE M/s.Doosan Corporation Korea amounting to Rs.5,13,63,114/- but no TDS was deducted on this u/s.195 of the Act. Therefore, the DRP directed the AO to disallow this ocean freight charges paid by assessee to M/s. Doosan Corporation Korea by invoking the provisions of section 40(a)(i) of the Act. For this, the AO issued notice u/s.154 of the Act. The DRP gave direction to the AO vide order dated 17.04.2017 as under:-

> During the year the assessee has availed ocean freight services from its AE Doosan Corporation, Korea for which Rs. 5,13,63,114/- has been paid without deduction of tax. The assessee filed detailed submission arguing that the payment is not liable for TDS in India. The basic premises of the submission is that *'Ocean freight charges would not fall within the scope of fees for technical services under section 9(1)(vi) of the Act and under article 13 of the India-Korea DTAA. Since the same would be in the nature of business of profits under article 7 'of the DTAA. Since, Doosan Corporation does not have business activity in India, the same would not be taxable in India.'*

The submission of the assessee has been considered. The payment has been made to the AE as ocean freight charges for shipment of goods from various overseas ports to India. In its submission, the assessee has argued that the payment is in the nature of business income and not fees for technical service and hence, not taxable in India. But, there is no argument advanced by the assessee as to why this payment cannot be considered as royalty. Royalty is defined in Explanation 2 to section 9(1)(vi). As per clause 4(a) inserted by the Finance Act, 2001 with effect from 01-04-2002. Royalty means considered for the use of or right to use any industrial, commercial or scientific equipment, but not including the amounts referred to in section 44BB. As per article 12 of the DTAA, royalty means payments or credits made as consideration for the use of or the right to use any industrial, commercial or scientific equipment. The word 'equipment' is neither defined under the Act nor under the treaty. In view of meaning assigned to word 'equipment' in various dictionaries, it is clear that article 12 of DTAA with Korea relates to equipment and that ship is an equipment. The hire charges thus, would partake the character of royalty for the use of equipment under the provision of section 9(1)(vi)/article 12.3 of the DTAA.

Further, hire charges paid to a non-resident enterprise could not be treated as business income in view of the article 7.7 which states that where profits include items of income which are dealt with separately in other articles of the DTAA, the provisions of this article. In the instant case, the payments made to the non-resident enterprise were found to be hire charge, which were covered by the article 12 as being royalty payment. Under section 195, any person responsible for paying to a non-resident, including a foreign company, any income by way of interest or any other sum which is chargeable to tax in India, is required to deduct tax at source on such income at the time of payment. As per the mandate of the section, tax is to be deducted at source with reference to the income element embedded in the payments. However, a non-resident company including a foreign company may obtain from the assessing officer a certificate authorizing him to receive payment without deduction of tax at source

The expression 'any other sum' occurring in section 195(1) does not necessarily refer to sums which represent wholly income or profit. The scheme of tax deduction at source applies not only to the amount paid which wholly bears income character, but also to gross sums, the whole of which may not be income or profits of the recipient such as payments to contractors and sub-contractors under section 194C and payment of insurance commission under section 194D the provisions of section 195(2) make the intention of the Legislature very clear that what is required to be considered for the purpose of tax deduction at source under section 195(1) is not wholly the sum paid to any persons is not wholly chargeable under the provisions of the Act, the application of section 195 is ousted. Section 1995 takes within its sweep any sums paid to a non-resident which do not wholly represent income or profits chargeable under the Act, but a portion of which only so represents.

It is not open to assessee making payments to a non-resident to take unilateral decision that the payments made by it are not sums chargeable to tax. To take this vies, the concurrence of the Assessing Officer as provided in section 195(2) is sine qua non. Section 195 is for tentative deduction of income-tax subject to regular assessment. By the deduction of tax the rights of parties are not, in any manner adversely affected. The judicial decisions relied upon by the assessee are in support of the contention that if the payment to the non-resident is not chargeable to tax in India, no TDS is required to be made. However, as it has already been held that the amount of payment is chargeable to tax in India as royalty, the decisions cited will not be of help to the assessee. At the other hand, the Jurisdictional Madras HC, in case of Poompuhar Shipping Corporation Ltd 360 ITR 257 has held that a ship can be regarded as equipment of business of a ship owner on a natural and ordinary meaning of word ‘Equipment', in whatever name called either as an apparatus or as plant or machinery, so long as they are employed for purposes of one's income, same shall stand covered by clause (iva) of Explanation 2 to section 9(1)(ci). The Honorable Supreme Court in case of Transmission Corporation Of AP Ltd 105 taxman has held that the assessee who makes payments to

> non-resident under contract entered into is under obligation to deduct tax at source under section 195 and the obligation is limited only to appropriate proportion of income chargeable under the Act.
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> In view of the above, it is clear that the assessee has failed to discharge its statutory responsibility of making TDS under section 195 on the amount of Rs. 5,13,63,114/- paid to Doosan Corporation Korea as Ocean freight Charges. Consequently, the AO is directed to disallow this amount under section 40(a)(i) and add to the income of the assessee for the year.

The AO following the directions of DRP made disallowance of ocean freight charges at Rs.5,13,63,114/-. Aggrieved assessee is in appeal before the Tribunal.

18. Before us, the ld.counsel for the assessee argued that ocean freight charges would not fall within the scope of fee for technical services or royalty u/s.9(1)(vii) of the Act or under Article 13 of the India Korea DTAA. The ld.counsel for the assessee also stated that this ocean freight services would be in the nature of business provided under Article 7 of the DTAA and since M/s. Doosan Corporation Korea does not have any business activity in India, the same would not be taxable in India. The DRP finally considered the payment of ocean freight charges as royalty as defined in Explanation 2 to section

9(1)(vi) of the Act. The DRP also considered the amendment carried out by the Finance Act, 2001 w.e.f. 01.04.2002 by inserting clause 4(a) to section 9(1)(vi) of the Act i.e., royalty means consideration for the use of or right to use any industrial, commercial or scientific equipment, but not included the amount referred to in section 44BB of the Act. The DRP considered Article 12 of the DTAA and noted that the royalty means payment made as a consideration for the use of or right to use any industrial, commercial or scientific equipment and considering the judgment of Hon'ble Madras High Court in the case of Poompuhar Shipping Corporation Ltd.,vs. ITO, 360 ITR 257 held the shipping as an equipment. The DRP considered the decision of Hon'ble Supreme Court in the case of Transmission Corporation of AP Ltd., 105 taxman 742. Finally the DRP held that the payment to non-resident under contract entered into is under obligation to TDS u/s.195 of the Act but the obligation is limited only to appropriate proportion of income chargeable under the Act.

18.1 The ld.counsel for the assessee first of all drew our attention to the invoices raised and particularly drew our attention to pages 63, 64 & 65 of assessee's paper-book wherein as per invoices, the payment is on account of ocean freight charges and the ship hired by the assessee was travelling in international waters and it is not within India as is the case of Hon'ble Madras High Court in the case of Poompuhar Shipping Corporation Ltd., *supra.* The ld.counsel for the assessee drew our attention to the facts narrated by the Hon'ble Madras High Court in the case of Poompuhar Shipping Corporation that the freight charges paid by Poompuhar Shipping Corporation on hiring of ships was travelling within the territory of Indian waters and for this, he drew our attention to para 3. The facts narrated are as under:-

> "3. The appellant in Tax Case (Appeal) Nos.2206 to 2208 of 2006 is a Government of Tamil Nadu owned company engaged in the business of moving coal from various ports in India to Tamil Nadu Electricity Board, Chennai. For the purpose of transportation of coal, to meet the requirements of the Tamil Nadu Electricity Board, the assessee chartered foreign shipping vessels by entering into agreements in standard time charter form, approved by the New York Produce Exchange. As far as the foreign shipping vessels are concerned, the appellant entered into time charter agreement with the shipping companies having their vessels registered in different countries."

The ld.counsel tried to made distinguishion on facts of the present case with that of the Hon'ble Madras High Court in Poompuhar SHiping Corporation Ltd., *supra.*

18.2 The ld.counsel also took us through the India Korea DTAA, which is enclosed in assessee's paper-book at pages 97 to 112 and he drew our attention to Article 8, wherein hiring of ship for freight and treatment of income is described. The relevant Article 8 reads as under:-

ARTICLE 8
SHIPPING AND AIR TRANSPORT

1. Profits from the operation of ships or aircraft in international traffic carried on by an enterprise of a Contracting State shall be taxable only in that State.

2. For the purposes of this Article, the terms "profits from the operation of ships or aircraft in international traffic" shall include profits derived from

(a) the rental of a ship or aircraft on a bare boat charter basis; and
(b) the use, maintenance or rental of containers (including trailers and related equipment for the transport of containers) used for the transport of goods and merchandise, where such rental or such use, maintenance or rental, as the case may be, is incidental to the operation of ships or aircraft in international traffic.

> 3. Interest on investments directly connected with the operation of aircraft and ships in international traffic shall also be regarded as profits derived from the operation of such aircraft and ships if they are integral to the carrying on of such business.
>
> 4. The provisions of paragraph 1 shall also apply to profits derived from the participation in a pool, a joint business or an international operating agency.

The ld.counsel argued that the rental of a ship is profit from the operation of the ship or aircraft in international traffic carried on by an enterprise of a contracting state shall be taxable only in that state i.e., Korea because the company is a Korean company to whom the assessee has paid the freight charges. The ld.counsel for the assessee also drew our attention to the judgment of Hon'ble Supreme Court in the case of DIT vs. A.P. Moller Maersk AS, Civil Appeal No.8040 of 2015 and particular observation of Hon'ble Supreme Court at para 12 which reads as under:-

> "12. 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."

The ld.counsel for the assessee relied on Hon'ble Supreme Court judgment in A.P. Moller Maersk A S, *supra,* for the reason that it has a persuasive value of the above observation of the Hon'ble Supreme Court. The ld.counsel also stated that the revenues case is that the assessee has paid royalty instead of ocean freight charges. The ld.counsel drew our attention to Article 12 wherein the income from royalty or fee from technical services are covered from DTTA India Korea, but according to him by no stretch of imagination can be called as royalty because it is simpliciter ocean freight charges by a Korean company from Indian subsidiary for hiring of ships.

19. On the other hand, the ld.CIT-DR relied on the order of the DRP.

20. We have heard rival contentions and gone through facts and circumstances of the case. We noted that as per the facts of the case, the assessee has paid ocean freight charges to its

Korean counterpart M/s. Doosan Corporation Korea for hiring of ships. Admittedly, Doosan India has engaged M/s. Doosan Corporation Korea, a company registered in Korea and a tax resident of Korea for availing services such as shipmen of goods to various ports to Chennai in India. From the invoices clearly produced before us and for example page 63 of assessee's paper-book, the invoice clearly says that the M/s. Doosan Corporation Korea has been paid freight by Doosan Power Systems Pvt. Ltd., the assessee company for hiring of ship. Now the question arises whether these ocean freight charges will fall within the scope of fee for technical services or royalty u/s.9(1)(vi) or Article 12.3 of the DTAA. The relevant consideration paid by assessee is for hiring of ships i.e., rental or ocean freight paid for ships. The assessee's case is covered by Article 8 of DTAA of India-Korea and therefore the rentals of ship are in the nature of profit from the operation of ship or aircraft in international traffic carried on by an enterprise of a contracting state. The amount can be taxable only in contracting state and not taxable in India. Hence, the assessee is not liable to deduct TDS and therefore, no disallowance by

invoking the provisions of section 40(a)(i) of the Act. In term of the above, we reverse the order of DRP and that of the AO and allow the appeal of the assessee.

21. In the result, the appeals filed by the assessee in ITA No.665/CHNY/2020 is allowed and ITA No.1885/CHNY/2017 is partly-allowed for statistical purposes.

Order pronounced in the open court on 23rd June, 2023 at Chennai.

Sd/-	Sd/-
(मनोज कुमार अग्रवाल)	(महावीर सिंह)
(MANOJ KUMAR AGGARWAL)	**(MAHAVIR SINGH)**
लेखा सदस्य/ACCOUNTANT MEMBER	उपाध्यक्ष /VICE PRESIDENT

चेन्नई/Chennai,
दिनांक/Dated, the 23rd June, 2023

RSR
आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त /CIT
4. विभागीय प्रतिनिधि/DR
5. गार्ड फाईल/GF.