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

BEFORE SHRI G.S. PANNU, VICE-PRESIDENT AND

SHRI PAWAN SINGH, JUDICIAL MEMBER

ITA No. 4136/Mum/2016 for (Assessment Year 2010-11)

Van Oord Dredging and Marine Contractors BV, 201, 2nd Floor, Central Plaza, 166, CST Road, Kalina, Mumbai-400098. **PAN: AAACH3500M**	Vs.	Dy.CIT (International Taxation)-4(3)(1), 1st Floor, Scindia House, Ballard Estate, Mumbai-400038.
Appellant		Respondent

Appellant by : Shri Nishant Thakkar (AR)

Respondent by : Shri Samuel Daise (CIT-DR)

And Sh. Manoj Kumar Singh Sr DR

Date of Hearing : 04.09.2019

Date of Pronouncement : 05.09.2019

ORDER UNDER SECTION 254(1)OF INCOME TAX ACT

PER PAWAN SINGH, JUDICIAL MEMBER;

1. This appeal by assessee is directed against the order of ld. Commissioner of Income-Tax (Appeals)-58 [for short the ld. CIT(A)], Mumbai dated 28.03.2016 which arises from assessment order passed on 03.04.2014 under section 44C read with section 143(3) for Assessment Year 2010-11. The assessee has raised the following grounds of appeal:

> "On the facts and in the circumstances of the case and in law, Van Oord Dredging and Marine Contractors bv (hereinafter referred to as the 'Appellant') craves leave to prefer an appeal against the order passed by the Commissioner of Income Tax (Appeals) ['CIT(A)'] dated 28 March 2016 under section 250 of the Income-tax Act, 1961 (hereinafter referred to as the 'Act') on the following grounds, each of which are without prejudice to one another:
>
> 1. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in upholding the addition of Rs 34,49,00,936 on account of management

service fees made by the learned Assessing Officer, to the total income of the Appellant.

Taxability of Management service fees of Rs 34,49,00,936

On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in upholding the action of the Assessing Officer:

2. in treating the management service fees received by the Appellant as "Royalty" under Article 12(4) of the Double Taxation Avoidance Agreement ('DTAA') between India and the Netherlands as well as fees for technical services under Article 12(5) of India - Netherlands DTAA, thereby making an addition of Rs 34,49,00,936 to the income of the Appellant.

3. in not appreciating that for the services rendered by the Appellant does not provide any know-how to the recipient and hence, the same does not qualify as royalty.

4. in not appreciating that the services provided by the Appellant are in the nature of business support and administration services and are neither in the nature of sharing information concerning industrial, commercial and scientific experience nor in the nature of technical or consultancy services;

5. in not appreciating that the services rendered by the Appellant do not "make available" any technical knowledge, experience, skill, know-how or processes and hence, is not taxable even as fees for technical services in view of Article 12(5) of the India - Netherlands DT AA.

6. in not appreciating that the management service fees received by the Appellant are without any mark up and constitute pure allocation of cost which is neither taxable as Royalty nor taxable as Fees for Technical Services under the Act as well as under the India - Netherlands DTAA.

Taxability of the reimbursements of salary received of Rs 22,43,552

On the facts and in the circumstances of the case and in law, the learned CIT(A):

7. erred in giving observations which are not in connection with the determination of the total income of the Appellant.

8. erred in holding that the dredger Volvox Delta is not a foreign ship by the virtue of the same being under the control of Van Oord India Private Limited (,VOIPL') and therefore, erred in holding that salary paid by the Appellant to the employees which was subsequently reimbursed by VOIPL is not covered by the provisions of section 10(6)(viii) of the Act.

9. erred in holding that the taxability of salary paid by the Appellant to the employees subsequently reimbursed by VOIPL under section 10(6)(viii) of the Act needs to be examined, as the employees are working under the control and management of VOIPL.

2. Brief facts of the case are that assessee is a company incorporated in Netherlands and is eligible for benefit of India-Netherlands Double Taxation Avoidance Agreement (DTAA). The assessee is engaged in dredging activities filed its return of income for Assessment Year 2010-11 on 15.10.2010 declaring loss of Rs. 38,15,40,242/-. The assessment was completed on 03.04.2014 under section 143(3) r.w.s. 144C(3) of the Act. The Assessing Officer noted that during the relevant period the assessee executed dredging contract with Marg Ltd., Essar Bulk Terminal Ltd. and L&T Ship Building Ltd. in India. The assessee provided business support services to Van Oord India Pvt. Ltd. (VOIPL) under a management support agreement dated 01.04.2004. Pursuant to the said agreement on going assistance and support is provided to VOIPL by assessee in the field of information technology, operation, quality, health and safety, estimating an engineering, marketing, administration personnel etc. The assessee claimed in assisting the VOIPL in achieving economies of the scale and maintained uniformity within the Van Oord group. The assessee claimed that the project office of assessee does not have any role to play in rendering these services. The assessee charged from VOIPL a consideration of Rs. 34,49,00,396/- for the services rendered by assessee. The assessee claimed that services were rendered outside India and

no role was played by assessee project office in rendering the said services. The amount charged to VOIPL has not included in the books of account. The assessee also claimed that the services are not in the nature of 'make available' and not taxable as fees for technical services as per India-Netherlands Tax Treaty (Treaty). The Assessing Officer asked the assessee to submit the detail and nature of business management services and the basis of allocation to the services to the Indian entity and as to why the same is not taxable in India. The assessee filed its reply dated 15.01.2014. The assessee provided the detail of nature of services consisting operational support, information technology, quality health safety and environment, marketing, estimating and engineering and personnel and organisation administration and legal. The assessee also provides operational detail and cost break-up. The assessee also contended that the services rendered are not taxable as fees for technical services (FTS) under Treaty, the same could be taxed in India as business profit of a permanent establishment (PE) constituted in India. These services have been rendered directly by assessee Head Office to VOIPL and its does not have any PE in India to render such services. The project office of assessee in India did not perform any activity/function in rendering the said services. Accordingly, the consideration directly received by assessee head office for providing management services, cannot be attributed to its Indian operation i.e. assessee's project in India. The project office of assessee has not played any role in rendering the above services. The amount charged to VOIPL has not

been included in its books of account. The management feeds received by assessee head office is without any mark up and constituted for pure allocation of cost which is not taxable as fees for technical services. For rendering management services, the assessee head office had a specific percentage of cost incurred by it for rendering aforesaid services to VOIPL. The said cost is allocated to all group companies of assessee based on turnover of each company. A copy of certificate from Netherlands Auditor of assessee stating that cost allocated to VOIPL is verified and not mark up is charged by assessee. The contention of assessee was not accepted by Assessing Officer holding that payment made by India company to assessee are clearly for the use of information concerning industrial commercial or scientific experience in India. These payments are specifically covered under Circular-4 of Article-12 of Double Taxation Avoidance Agreement (DTAA) between India and Netherlands and are taxable as royalty. The payments received by assessee-company are nothing but a royalty as per Article-12 of Treaty. There is no dispute that these services are utilized in India by Indian entity. The contention of assessee that the services have been rendered outside India does not hold good and same is taxable in India. The Assessing Officer by treating the services rendered by assessee in the nature of royalty and taxed @ 10%. On appeal before the ld. CIT(A), the action of Assessing Officer was confirmed. The ld. CIT(A) while confirming the action of Assessing Officer hold that the concept of royalty and make available of technical knowledge are similar to

some extent. Although the requirement of are more stringent than the concept of make available. In royalty, a “transfer of knowledge” or “transfer of right to use” is contemplated. In the term “make available” as used in Article-12(5)(b), transfer is not contemplated but mere making available is sufficient, no right is created while make available any technical knowledge, skill, experience of process in favour of the recipient of service but the technical knowledge is shared and the recipient become more informed in the area in which knowledge is shared to the benefit of recipient. The concept of “make available” can be taken to the somewhere between the concept of royalty and concept of fees for technical services as provided under section 9(1)(vii). Thus, the concept of “make available” is wider than the royalty, so far as requirement of transfer of technology is concerned. A mere sharing of technical knowledge, experience, skill or process which enable the recipient to apply this knowledge, experience like skill or process subsequently will be sufficient to conclude that the knowledge, skill, process or skill has been made available. The ld. CIT(A) also concluded in nomenclature cannot be relied to characterise a transaction. A reimbursement may be actually royalty or FTS or actual reimbursement depending on the nature of services rendered. The claim of assessee that amount represent reimbursement of expenditure and does not have element of income is not acceptable. Thus, further aggrieved by the order of ld. CIT(A), the assessee has filed the present appeal before us.

3. We have heard the submission of ld. Authorized Representative (AR) of the assessee and ld. Departmental Representative (DR) for the revenue and perused the material available on record. Ground No.1 is general. Ground No.2 to 6 relates to taxability of managements fees of Rs. 34.49 Crore as 'Royalty'. The ld. AR of the assessee submits that vide agreement dated 1st April 2004 the assessee entered into service agreement with VOIPL which is subsidiary of assessee in India. Pursuant to the said agreement, the assessee provided services in the field of information technology, operation, quality, health safety as provided in the agreement. Copy of service agreement is filed at page no. 52 to 55. The assessee provided standard services to ensure the consistency in the approach worldwide. The payment received by assessee was treated as royalty. The ld. AR further submits that on the basis of the same service agreement dated 1st April 2004 similar payment was treated as royalty in assessment for A.Y. 2009-10, which were confirmed by DRP, however, on appeal before the ld. CIT(A), that the payments received by assessee are reimbursement of cost and does not fall under the realm of "royalty". The ld. AR further submits that by following the decision of A.Y. 2009-10, similar relief was granted to assessee in appeal for A.Y. 2013-14 & 2014-15. The ld. AR further submits that after treating the management service fees as royalty in A.Y. 2009-10, the assessment for A.Y. 2005-06 & 2007-08 was re-opened. However, on appeal before the Tribunal, the Tribunal by following the order of A.Y. 2009-10, 2013-14 & 2014-15 held that the management services fees received cannot be

assessed as royalty in term of Article-12(4) India-Netherlands Treaty. The ld. AR of the assessee filed the copy of decision of Tribunal for A.Y. 2005-06, 2007-08, 2009-10, 2013-14 & 2014-15.

4. On the other hand, the ld. DR for the revenue supported the order of lower authorities. The ld. DR submits that order for A.Y. 2009-10 was passed on 07.10.2016 and the impugned order was passed by ld. CIT(A) on 28.03.2016. The ld. DR further submits that the payments received on account of various services by assessee are in the nature of royalty.

5. We have considered the rival submission of the parties and have gone through the orders of authorities below. We have noted that on almost similar set of fact and on the basis of same service agreement between the assessee and VOIPL, the Assessing Officer for A.Y. 2009-10 treated the amount received on account of various services rendered by assessee as royalty, however, on appeal before the Tribunal, the same was held as reimbursement of cost vide order dated 07.10.02016 in ITA No. 7589/Mum/2012. We have further noted that the co-ordinate bench of Tribunal for A.Y. 2013-14 & 2014-15 by following the decision of Tribunal for A.Y. 2009-10, the co-ordinate bench passed the following order:

> 5. We heard the parties and perused the record. We notice that the assessing officer had made identical disallowance in assessment year 2009-10 and the Tribunal, vide its order referred supra, has held that none of the services provided by the assessee in the terms of "service agreement" falls under the scope and ambit of "royalty" as defined in Article 12(4) of the DTAA. For the sake of convenience, we extract below the operative portion of the order passed by the co-ordinate bench of Tribunal in AY 2009-10:-

14. We have heard the rival submissions, perused the relevant finding given in the impugned orders as well as material referred and relied upon before us. The first issue for our adjudication is, whether the fees received by the assessee from its Indian entity, VIOPL for management and support services is to be treated as "royalty" under Article 12(4) of India-Netherland-DTAA or not. The entire gamut of facts and nature of services provided by the assessee to VOIPL in the terms of service agreement dated 1st April, 2004 has already been discussed above elaborately. The revenue's case is that, the VOIPL is completely dependent on assessee (VODMC) for its experience in industrial, commercial and scientific field. The Indian entity is engaged in highly technical business of dredging activities for which it requires the information and experience of the VODMC right from the pre-bidding stage till the post project completion stage. Thus, the payment received by the assessee-firm for rendering such kind of services falls within the realm and ambit of 'royalty' as defined in para (4) of Article 12 of the DTAA. The relevant definition of 'royalty' as given in Article 12(4) of India-Netherlands-DTAA reads as under:-

> "The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, any patent, trade mark design or model, pan secret formula or process, or for information concerning industrial, commercial or scientific experience".

Here, the main emphasis of the Revenue is on the term "for information concerning industrial, commercial or scientific experience". This term mainly alludes to concept of use of or right to use of providing of "knowhow", where one party agrees to impart the information on knowhow concerning industrial, commercial or scientific experience to the other. OECD in its commentary has explained these terms in para 11 in the following manner:-

"The classifying as royalties payments received as consideration for information concerning industrial, commercial or scientific experience, paragraph 2 is referring to the concept of "know-how".

Various specialized bodies and authors have formulated definitions of know-how. The words "payments ... for information concerning industrial, commercial or scientific experience" are used in the context of the transfer of certain information that has not been patented and does not generally fall within other categories of intellectual property rights. It generally corresponds to un-divulged information of an industrial, commercial or scientific nature arising from previous experience, which has practical application in the operation of an enterprise and form the disclosure of which an economic benefit can be derived. Since the definition relates to information concerning previous experience, the Article does not apply to payments for new information obtained as result of performing services at the request of the payer;

In the know-how contract, one of the parties agrees to impart to the other, so that he can use them for his own account, his special knowledge and experience which remain unrevealed to the public. It is recognized that the grantor is not required to play any part himself in the application of the formulas granted to the licensee and that he does not guarantee the result thereof.

This type of contract thus differs from contracts for the provision of services, in which one of the parties undertakes to use the customary skills of his calling to

execute work himself for the other party. Payments made under the latter contracts generally fall under Article 7.

The need to distinguish these two types of payments, i.e. payments for the supply of know-how and payments for the provision of services, sometimes gives rise to practical difficulties. The following criteria are relevant for the purpose of making that distinction:

Contracts for the supply of know-how concern information of the kind described in paragraph 11 that already exists or concern the supply of that type of information after its development or creation and include specific provisions concerning the confidentiality of that information.

In the case of contracts for the provision of services, the supplier undertakes to perform services which may require the u se, by that supplier, of special knowledge, skill and expertise but not the transfer of such special knowledge, skill or expertise to the other party.

In most cases involving the supply of know-how, there would generally be very little more which needs to be done by the supplier under the contract other than to supply existing information or reproduce existing material. On the other hand, a contract for the performance of services would, in the majority of cases, involve contractual obligations. For instance, the supplier, depending on the nature of the services to be rendered, may have to incur salaries and wages for employees engaged in researching, designing, testing, drawing and other associated activities or payments to subcontractors for the performance of similar services.

Examples of payments which should therefore not be considered to be received as consideration for the provision of know-how but, rather, for the provision of services, include:

- payments obtained as consideration for after-sales service;

- payments for services rendered by a seller to the purchaser under a warranty;

- payments for pure technical assistance;

- payments for a list of potential customers, when such a list is developed specifically for the payer out of generally available information (a) payment for the confidential list of customers to which the payee has provided a particular product or service would, however, constitute a payment for know-how as it would relate to the commercial experience of the payee in dealing with these customers),

- payments for an opinion given by an engineer, an advocate or an accountant, and

- payments for advice provided electronically, for electronic communications with technicians or for accessing, through computer networks, a trouble-shooting database such as a database that provides users of software non=confidential information in response to frequently asked questions or common problems arise frequently"

From the above clarification, it can be ostensibly inferred that, to qualify as payment towards information concerning industrial, commercial or scientific experience, person must provide knowhow to the recipient, that is, a strong emphasis has been given to concept of "knowhow". There is an element of imparting of knowhow to the other so that other can use or has right to use such 'knowhow'. In case of industrial, commercial or scientific experience, if services are being rendered simply as an advisory or consultancy then it cannot be reckoned as "royalty" because the advisory or assistance does not connotes imparting of the skill or experience to other albeit the person is rendering the services from his own knowhow and what he is imparting is his conclusion based on his own skill and experience. The imparting of 'knowhow' envisages that the recipient should be able to make use of such knowhow independently on its own account without recourse of the provider of the knowhow in future. For being regarded as "royalty" there has to be alienation or use of or right to use of any knowhow and without any transfer of any knowledge, experience or skill, it cannot be termed as "royalty". In the case of GECC Asia Ltd. vs. DDIT (supra) had occasion to deal with the term "information concerning to industrial, commercial or scientific experience" and after referring to various commentaries, observed and held as under:

> "The royalty payment received as consideration for information concerning industrial, commercial, scientific experience alludes to the correct of knowhow. There is an element of imparting of knowhow to the other, so that the other person can use or has right to use such knowhow. In case of industrial, commercial and scientific experience, if services are being rendered simply as an advisory or consultancy, then it cannot be termed as "royalty", because the advisor or consultant is not imparting his skill or experience to other, but rendering his services from his own knowhow and experience. All that he imparts is a conclusion or solution that draws from his own experience. The eminent author Klaus Vogel I his book "Klaus Vogel On Double Tax Convention" has reiterated this view on differenced between royalty and rendering of services. The thin line distinction which is to be taken into consideration while rendering the services on account of information concerning industrial, commercial and scientific experience is, whether there is any imparting of knowhow or not. If there is no "alienation" or the "use of" or the "right to use of" any knowhow, then it cannot be termed as "royalty". The services may have been rendered by a person from own knowledge and experience but such a knowledge and experience has not been imparted to the other person as the person retains the experience and knowledge or knowhow with himself, which are required to perform the services to its clients. Hence, in such a case, it cannot be held that such services are in nature of "royalty". Thus, in principle we hold that if the services have been rendered de-hors the imparting of knowhow or transfer of any knowledge, experience or skill, then such services will not fall within the ambit of Article -12. .... If such services do not involve imparting of knowhow or transfer of any knowledge, experience or skill, then it cannot be held to be taxable as royalty"
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> 15. Thus, what we have to see is, whether the various services provided by assessee to VOIPL can be reckoned as providing of any kind of imparting of knowhow or information concerning industrial, commercial or scientific experience or not. As highlighted above, with regard to various streams of services like providing of information technology; operational support; marketing; quality, health, safety and environment; estimating and engineering;

> and personal and organization, administration and legal services, there is no imparting of any kind of knowledge, skill or experience by way of information concerning industrial, commercial or scientific which is made available to VOIPL. For instance, information technology services are provided for use of group companies' computer system where IT teams providing manual general information without providing any information or method to design or create a computer system. It is mainly kind of help desk and trouble-shooting services which are required on regular basis. For operational support system also, it mainly provides for check-list for project plans, safety work and inspection plans etc. Similarly, for marketing, the assessee provides for emarketing through its website and maintaining it, printing and publishing brochures which can be distributed to its potential clients. It also helps VOIPL to obtain the certificate of approval from the concerned organizations and obtained the contracts on the regular basis. Regarding quality health and safety environment services, the assessee merely conducts internal audits on regular intervals so that proper adherence to such quality standard and procedures are valid/ should remain valid. Similarly, in the estimating an engineering services and other services also, the assessee is mainly providing tender process, helping and preparing (estimates) and bids and plan consisting in local performance and other guarantees to the client of VOIPL etc. For rendering of these services, there is no element of imparting of any "knowhow" or there is transfer of any knowledge, skill or experience. Thus, in our opinion, none of the services provided by the assessee in the term of "service agreement" falls within the scope and ambit of "royalty" as defined in Article 12(4) of the DTAA.

> 6. The co-ordinate bench of Tribunal has dealt with the payment received by the assessee pursuant to the agreement dated 01-04-2004. In the years under consideration also, the assessee received payments pursuant to very same agreement. The Ld A.R submitted that there is no change in facts between both the years. Before us, the revenue could not bring any material in order to compel us not to follow the order passed by the co-ordinate bench in AY 2009-10. Since a particular view has already been taken by the Tribunal on identical payments received by the assessee, following the same, we hold that the payments received by the assessee in terms of "service agreement dated 01-04- 2004" do not fall under the definition of "royalty" as defined in Article 12(4) of India-Netherlands DTAA. Accordingly we set aside the order passed by the assessing officer in both the years on this issue.

6. Considering the decision of co-ordinate bench of A.Y. 2009-10 (ITA No. 7589/Mum/2012 dated 07.10.2016), which was followed in A.Y. 2013-14 & 2014-15 (ITA No. 6140 & 6141/Mum/2017 dated 11.10.2017) wherein the similar payments received pursuant to the same agreement was treated that payment received by assessee are on account of reimbursement and does not fall under the definition of ‘Royalty’ as defined in Article-12(4) of the India-

Netherlands Tax Treaty. Further, by following the decision for A.Y. 2009-10, 2013-14 and 2014-15 similar payment was treated as Management Service Fees in appeal for A.Y. 2005-06 & 2007-08 in ITA No. 495 & 496/Mum/2016 dated 28.02.2018. Therefore, we find that the ground of appeal raised by assessee is covered in favour of assessee and against the revenue. Therefore, ground no.1 to 6 of the appeal is allowed in favour of assessee.

7. Ground No. 7 to 9 relates to reimbursement of salary. During the hearing, the ld. AR of the assessee made statement that he is not pressing these grounds of appeal. Considering the submission of ld. AR of the assessee, ground no. 7 to 9 are dismissed as not pressed.

8. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 05/09/2019.

Sd/	Sd/-
G.S. PANNU	**PAWAN SINGH**
VICE-PRESIDENT	**JUDICIAL MEMBER**

Mumbai, Date: 05.09.2019
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<u>Copy of the Order forwarded to</u> :

1. Assessee
2. Respondent
3. The concerned CIT (A)
4. The concerned CIT
5. DR “L” Bench, ITAT, Mumbai
6. Guard File

BY ORDER,

Dy./Asst. Registrar
ITAT, Mumbai