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

BEFORE SHRI PROMOD KUMAR, VICE PRESIDENT &
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA No. 6726/Mum/2018

(Assessment Years: 2015-16)

Van Oord Dredging and Marine Contractors BV 201, 2nd Floor, Central Plaza, 166 CST Road, Kalina, Mumbai – 400098	बनाम/ Vs.	DCIT (IT) 4(3)(1) 16th Floor, Air India Building, Nariman Point, Mumbai.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACH3500M		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

अपीलार्थी ओर से / **Appellant by** :	Shri Nishant Thakkar, AR
प्रत्यर्थी की ओर से/**Respondent by** :	Shri Sanjay Singh, CIT- DR

सुनवाई की तारीख / **Date of Hearing**	16/12/2020
घोषणा की तारीख /**Date of Pronouncement**	24/12/2020

आदेश / O R D E R

PER PAVAN KUMAR GADALE - JM:

The assessee has filed an appeal against the order u/s 144C(13)r.w.s143(3) of the Act dated 27.09.2018 passed in pursuance to the directions of the Dispute Resolution Panel (DRP) order dated 16.08.2018.

2. At the time of hearing the Ld. AR submitted that though the assessee has raised the grounds of appeal 1 to 14 but has not pressed grounds of appeal No. 10-13 and ground of appeal No.14 is raised prematurely. The assessee has filed a letter of withdrawal for ground of appeal No. 10-13 and the same is treated as withdrawn and dismissed. The effective grounds of appeal are as under:

"1. erred in making addition of Management service fees of Rs. 21,27,77,100/-.

2. erred in not following the order of the Hon'ble Jurisdictional Income tax appellate Tribunal, Mumbai for the A.Y 2009-10 in appellant's own case.

Taxability of Management service fees of Rs. 21,27,77,100/-

3. erred in not appreciating that the management service fees received by the appellant constitute pure allocation of cost without any make-up and hence, the same being reimbursement of cost, is neither taxable as Royalty nor taxable as Fees for Technical services under the Act as well as under the Double taxation avoidance agreement between India and Netherlands.

4. erred in treating the management service fees received by the appellant as Royalty under Article 12(4) of India – Netherlands DTAA as well as fee for technical services under Article 12(5) of India – Netherlands DTAA,

thereby making an addition of Rs. 21,27,77/- to the income of the Appellant.

5. erred in not appreciating that for the services rendered by the Appellant to qualify as royalty, the same should provide know-how to the recipient.

6. erred in not appreciating that the services provided by the appellant are in the nature of business support and administration services and are not in the nature of sharing information concerning industrial, commercial and scientific experience.

7. erred in not appreciating that the services rendered by the appellant are in the nature of business support and administration services and not in the nature of technical or consultancy services.

8. erred 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 DATT.

Set-off of management service fees treated as royalty with brought forward business loss not allowed.

9. erred in not setting off the brought forward business loss against the addit9ion of management service fees.

3. The brief facts of the case are that the assessee company is engaged in the business of trading and dredging activities. The assessee filed the return of

income for the A.Y 2015-16 on 05.11.2015 declaring total income of Rs. Nil. Subsequently, the case was selected for scrutiny and notice u/s 143(2) and 142(1) of the Act along with questionnaire were issued. In compliance the Ld. AR of the assessee appeared from time to time and submitted the details. The A.O on perusal of the financial details found that the assessee company was incorporated in Netherlands and is an international dredging contractor and executed several contracts in India. During the F.Y 2014-15 the assessee has not executed any dredging contracts in India but maintained its project office for managing certain formalities in connection with earlier projects. The A.O on perusal of the facts and the financial statements found that the assessee has provided certain business support services to Van Oord India Pvt Ltd and has charged Rs. 21,27,77,100/- and submitted that the above mentioned services do not make available any technical knowledge experience. The services are not in the nature of make available and are not taxable as fees for inclusive services under the provisions of India Netherlands Tax Treaty. The services are

rendered entirely from outside the country and the assessee company has not played any role in rendering the services. Therefore, the business support services are not taxable in India as per the India and Netherlands Tax Treaty. On the similar issue Hon'ble Tribunal for the A.Ys 2009-10, 2013-14 and 2014-15 held that the management service fees cannot be assessed as Royalty in terms of India Netherland Treaty and the assessee was granted relief. But the revenue has filed an appeal u/s 260A of the Act for the A.Y.2009-10 and regarding other Asst years still no information is available on record. But the A.O has calculated the total income of Rs. Nil after setting of brought forward loss. Whereas, the management service fees is treated as royalty income and taxed at treaty rate and passed the draft assessment order u/s 144 C(1) r.w.s 143(3) of the Act dated 28.12.2017.

4. Aggrieved by the draft assessment order the assessee has filed objections in Form – 35A with the Hon'ble DRP, DRP considering the grounds of objections and additional grounds raised on the disputed issue with respect to management service

fees and set off of management fees treated as a royalty and the brought forward business loss of the earlier years A.Y 2013-14, the DRP has directed the A.O to verify the claim. Whereas, in respect of taxability and treatment of the management service fees as Royalty income, the DRP has upheld the view of the A.O and rejected the grounds of objections and passed the order u/s 144C(5) of the Act on 16.08.2018. Subsequently, A.O has passed the order under 144C(13) r.w.s 143(3) of the Act dated 27.09.2018, considering the directions of the DRP has affirmed the management fee services as a royalty and was taxed. Aggrieved by the order, the assessee has filed an appeal with the Tribunal.

5. At the time of hearing the Ld.AR of the assessee submitted that the assessee's sole contention is with respect to management service fees rendered, which is not taxable and filed the paper book. The Ld.AR emphasized that the disputed issue is covered in favour of the assessee by earlier Assemment year's orders for the A.Y 2009-10 to A.Y. 2014-15 and also supported his arguments with the appeal memo filed by the Revenue for the A.Y 2009-10 and 2011-12

before the Hon'ble High Court and prayed for allowing the appeal.

6. Contra, Ld. DR supported the orders of the lower authorities.

7. We heard the rival submissions and perused the material on record. The sole matrix of the disputed issue as envisaged by the Ld. AR is with respect to management services fee claim in the assessee's own cases was allowed. We considering the latest decision for the A.Y 2013-14 and 2014-15 in ITA No. 6140 & 6141/Mum/2017, the Hon'ble Tribunal has relied on the earlier year orders and has granted the relief. We consider it appropriate to refer the observations of the Hon'ble Tribunal at page 3 para 5 to 8 of the order which is read as under :

> *5. We heard the parties and perused the record. We notice that the A.O had made identical disallowance in A.Y 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 operation portion of the order passed by the coordinate Bench of Tribunal in A.Y 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"

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 e marketing 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 Coordinate 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. AR 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 coordinate bench in A.Y 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 A.O in both the years on this issue.

7. Since we have disposed of the appeals filed by the assessee, the stay application shall become infructuous. Accordingly, we dismiss them as infructuous.

8. In the result, both the appeals of the assessee are allowed and the stay applications are dismissed".

7.1 We found that the facts of the present case are similar and identical, to the earlier years. Accordingly, we fallow the judicial precedence and ratio of the decisions the Hon'ble Tribunal and hold that the payments received by the assessee as per the service agreement dated 01.04.2004 does not come into the nature of royalty as defined Article 12(4) India Netherlands Tax Treaty. Accordingly, we set aside the order passed by the Assessing officer and allow the grounds of appeal of the assessee.

8. In the result, the appeal filed by the assessee is partly allowed.

Order pronounced in the open court on 24.12.2020

Sd/-	Sd/-
(PRAMOD KUMAR)	(PAVAN KUMAR GADALE)
VICE PRESIDENT	**JUDICIAL MEMBER**

Mumbai, Dated 24/12/2020

KRK, PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / The CIT(A)
4. आयकर आयुक्त(अपील) / Concerned CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

1.

उप/सहायक पंजीकार (Asst. Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Mumbai