

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'I' BENCH
MUMBAI**

**BEFORE: SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SHRI S RIFAUR RAHMAN, ACCOUNTANT MEMBER**

**ITA No.1146/Mum/2021
(Assessment Year :2017-18)**

M/s. Van Oord Dredging and Marine Contractors BV 201, 2 nd Floor Central Plaza 166, CST Road Kalina, Mumbai-400 098	Vs.	Assistant Commissioner of Income Tax (International Tax-4(3)(1), 16 th Floor, Air India Building Nariman Point Mumbai - 400 021
PAN/GIR No.AAACH3500M		
(Appellant)	..	(Respondent)

Assessee by	Shri Sapan Chokshi
Revenue by	Shri Chetan M Kacha
Date of Hearing	12/05/2023
Date of Pronouncement	27/06/2023

आदेश / O R D E R

PER AMIT SHUKLA (J.M):

The aforesaid appeal has been filed by the assessee against final Assessment Order dated 28/04/2021 passed in pursuance of direction given by the ld.DRP u/s.144C(5) vide order dated 19/03/2021 for the A.Y.2017-18.

2. In various grounds of appeal, the assessee has merely challenged taxability of Management Service Fees (MSF) of Rs.25,46,37,970/-.

3. Another issue which has been raised relates to set off of management services treated as 'Royalty' with current year losses as well as brought forward business losses not allowed and similarly set off of Management Services Fees treated as 'Royalty' with brought forward unabsorbed depreciation. The other two issues relates to short grant of TDS deducted at source of Rs.12,57,756/- and levy of penalty u/s.234B.

4. Before us ld. Counsel for the assessee submitted that this issue stands covered by series of decisions of the Tribunal in assessee's own case right from A.Y.2009-10 to 2015-16.

5. The ld. DR though admitted that issue stands covered by the earlier decisions of the Tribunal, however, he relied upon the order of the ld. AO.

6. After considering the relevant finding given in the impugned order as well as material referred to before us, the brief facts in the background of the case are that the assessee is a company incorporated in the Netherlands and is an international dredging contractor. The assessee filed its Return of Income for the said AY on 31/10/2017 declaring a business loss of Rs 6,43,325/-. With an objective to achieve consistency of approach and economies of scale for the various group entities across the globe, the assessee provides ongoing assistance and support in the field of operations,

quality, health & safety, information technology, estimating and engineering marketing, administration, personnel etc to all its group affiliates

7. In this regard, Van Oord India Private Limited (VOIPL), a subsidiary of VODMC in India, has entered into a service agreement dated 01/04/2004 with VODMC. Pursuant to the said agreement, ongoing assistance and support is provided to VOIPL by assessee in the field of information technology, operations, quality, health & safety estimating and engineering, marketing, administration, personnel etc. This ongoing assistance and support assists VOIPL in achieving economies of scale and to maintain uniformity within the Van Oord group. For rendering the above services, assessee has recovered Rs. 25,46,37,970/- from VOIPL, without any markup. These services are performed through correspondence, telephone, telex, facsimile, electronic mail, periodic visits by Applicant's personnel and such other means.

8. As per the said agreement, the entire costs incurred by the Appellant for undertaking the support activities are allocated/ shared between the affiliates based on an allocation key. Further, no mark-up is charged by the assessee on the cost allocated to its affiliates. The services rendered by assessee to VOIPL during the year under consideration as per the aforesaid agreement on an ongoing basis are summarized and tabulated as under:

Sr.No.	Particulars	Benefits
1	Operational Support	<ul style="list-style-type: none"> - Performance guarantee provided without pledging any security - Review and advice of legal contracts - Assistance in determining the nature of dredger to be used for the project - Assistance in determining the price for the project - Advise to increase the efficiency and production of the project - Review of project plan for each contract - Assistance in arranging client, crew and vessel insurance
2	Information Technology (IT)	<ul style="list-style-type: none"> - Access to systems which specifically adhere to the requirement of the dredging industry for no separate cost. - Access to servers, anti - virus applications, etc. for no separate costs. - Availing IT maintenance,

		troubleshooting and other day to day IT support services.
3	Quality, Health, Safety and Environment ('QHSE')	<ul style="list-style-type: none"> - Ongoing assistance in meeting global QHSE standards - Conducting quality audits at regular intervals - Assistance in obtaining ISO 9001:2008 certificates - Avoiding and minimising accidents on projects - Compliance with environmental laws
4	Marketing	<ul style="list-style-type: none"> - Providing appreciation certificates received from global clients which assist in advertising and winning contracts by getting an edge over the competitors - Carrying out marketing at international trade fairs - Updating and maintaining the website for <u>Van Oord group</u> - Printing and publishing brochures on international assignments handled and sophisticated dredgers used
5	Estimating	- Assistance in cost estimation

	and Engineering	for the project <ul style="list-style-type: none"> - Advice and assistance to determine and increase production on the project. - Assistance in increasing efficiency and productivity of the project. - Regular access to research and other material available on the intranet which assists in estimating and engineering
6	Personnel and Organization, Administration and Legal	<ul style="list-style-type: none"> - Providing training to the personnel of VOIPL by VODMC BV - Guidance on employment to be followed for staff

9. Since the management service fees charged for the aforesaid services provided by the assessee are without any markup and represents pure allocation of cost, the same have not been considered as taxable by the assessee.

10. However, the ld. AO in its draft assessment order dated 27/12/2019 has considered the said payments to be for the use of Information concerning industrial, commercial or scientific experience in India and has accordingly, held the same to be taxable as Royalty in India. The ld. AO held that the said issue is recurring in nature and on verification of the documents provided in the earlier years, it was held that the

same evidence the fact that assessee was doing nothing but sharing of experience of Industrial, Commercial and scientific in nature.

11. The ld. DRP following its own direction in case of the assessee for earlier years, approved the draft assessment order passed by the ld.AO vide its directions dated 19/03/2021.

12. The ld. AO in conformity with the directions of the ld.DRP and relying on its decision of the earlier years where the issue is pending adjudication before the Hon'ble High Court for earlier years, passed order dated 28/04/2021 holding that the receipt of MSF fees amounts to Royalty in India.

13. The case of the assessee before us is that, services provided by the assessee do not constitute Royalty as per India- Netherlands Double taxation avoidance agreement ("DTAA).

14. We find that this Tribunal, in assessee's own case for AY 2009-10 (ITA no. 7589/Mum/2012 dated 07/10/2016), pursuant to analyzing the nature of services envisaged in the service agreement between assessee and VOIPL has held that there is no imparting of any know-how or transfer of any knowledge, skill or experience and hence, none of services provided by assessee in terms of the service agreement falls within the scope of "Royalty", as defined in Article 12(4) of India-Netherlands DTAA. Further, the ITAT has given a clear finding that the consideration received by assessee is purely

on allocation of actual cost which has been certified by the auditors and hence, the same cannot be reckoned as payment towards "Royalty". The relevant extract of the ITAT's order is reproduced as under

15. 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, it has been held that 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, assessee has stated that, information technology services are provided for use of group companies computer system where IT teams provide manual general information without providing any information or method to design or create a computer system. IT is mainly kind of help desk and troubleshooting services which are required on a 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 certificate of approval from concerned organizations and obtained the contracts on the regular basis. Regarding quality health and safety environment services, the assessee merely conducts internal audits at regular intervals so that proper adherence

to such quality standards and procedures are valid/ should remain valid. Similarly, in the estimating and 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 any "know how or there is transfer of any knowledge, skill or experience. **Thus, in our opinion, we hold that 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.**

16. Here again, Management services fees charged is an allocation of cost which is without markup, hence it has been stated that the same being in nature of reimbursements do not constitute Royalty as per India-Netherlands Double taxation avoidance agreement (DTAA'). We find that the aforementioned decision of the ITAT in assessee's own case for AY 2009-10 has also held that the payments received by the assessee are in nature of reimbursement without any markup and thereby, such reimbursements cannot be held to be royalty.

17. In any case, it is an admitted fact that, only actual mark-up has been charged by the assessee and the payment has been received purely on allocation of actual cost and the working of cost allocation as reproduced above has not been disputed either by the ld. AO or by the Ld. DRP. The assessee

has charged specified percentage of cost incurred by it for rendering aforesaid services which is based on turnover of each entity and the turnover of Van Oord Group as highlighted above which has been certified by the Auditors as given in the paperbook from pages 9 to 11. Once the auditors have certified that, such allocation of costs represents actual expenditures then, we do not find any reason to hold that reimbursement of the cost can be reckoned as payment towards royalty".

18. Further, it is seen that the ITAT in Appellant's own case for the various years has followed the aforesaid ITAT order for AY 2009-10 by observing that the management service fees represent pure allocation of actual cost incurred which has been certified by the auditors and accordingly held that the said services are not taxable in India:

Assessment year	Appeal no.	Date of order
2005-06	ITA no 495/Mum/2016	28 February 2018
2007-08	ITA no. 496/Mum/2016	
2010-11	ITA no 4136/Mum/2016	5 September 2019
2011-12	ITA no 2029/Mum/2016	31 May 2019
2012-13	ITA no. 1382/Mum/2017	15 July 2022

2013-14	ITA no. 6140/Mum/2017	10 November 2017
2014-15	ITA no 6141/Mum/2017	
2015-16	ITA no. 6726/Mum/2018	24 December 2020

Recently also, the Tribunal in assessee's own case for AY 2018-19 (ITA no. 672/Mum/2022) and AY 2019-20 (ITA no. 1980/Mum/2022) has passed order dated 31/03/2023 relying upon the aforesaid orders and allowing the appeal in favour of the Assessee.

19. It is seen that the said service agreement continues in AY 2017-18 as well. Also, the fact that management service fees represents pure allocation of actual cost incurred has been certified by the auditors in AY 2017-18. Accordingly, management service fees are not taxable in India based on principles laid down and findings given by ITAT in assessee's own case for AY 2009-10, AY 2010-11, AY 2011-12, AY 2012-13, AY 2013-14, AY 2014-15, AY 2015-16, AY 2018-19 and AY 2019-20.

20. Accordingly, once this issue consistently have been allowed in favour of the assessee, holding that none of the services provided by the assessee in terms of service agreement falls within the scope of Royalty as defined in Article 12(4) of the India Netherlands DTAA and also that the payments received by the assessee are in the nature of reimbursement without any mark-up and therefore, the same cannot be held to be 'Royalty' and not taxable in India.

Further, Management Services if represents the allocation of the actual cost incurred which has been certified by the auditors and the Tribunal has held that Management Services Fee are not taxed in India. Accordingly, this issue is decided in favour of the assessee.

21. In so far as set off of management service fee treated as royalty is concerned, since this issue has been decided in ground Nos. 2-6 in favour of the assessee, therefore, it is purely academic in nature and hence, dismissed.

22. Coming to the issue of short grant of tax deducted at source, it has been stated that in the return of income filed for A.Y.2017-18, assessee had claimed credit of TDS of Rs.2,66,21,553/-, however, the ld. AO has granted credit only of Rs.2,54,63,797/-. Accordingly, we direct the ld. AO to examine the issue and grant appropriate credit of tax after verification.

23. In so far as issue relating to levy of interest u/s.234B, once the aforesaid grounds are decided in favour of the assessee, it has become purely consequential in nature.

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

Order pronounced on 27th June, 2023.

Sd/-
(S. RIFAUH RAHMAN)
ACCOUNTANT MEMBER

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

Mumbai; Dated 27/06/2023
KARUNA, sr.ps

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai