

**IN THE INCOME TAX APPELLATE TRIBUNAL
“I” BENCH, MUMBAI**

**BEFORE SHRI AMARJIT SINGH, ACCOUNTANT MEMBER &
SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER**

**ITA Nos.909 & 937/Mum/2023
(A.Ys. 2017-18 & 2020-21)**

Maersk Logistics & Services International B.V.(Erstwhile, DAMCO International B.V) Unit No. 401 & 402, Godrej Two, Pirojshanagar, Eastern Express Highway, Vikhroli (East)	Vs.	Dy. Commissioner of Income Tax International Taxation, Circle 3(2)(1) Room No. 1615, 16 th Floor, Air India Building, Nariman Point, Mumbai - 400021
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AAECD6659B		
Appellant	..	Respondent

Appellant by :	Manish Kanth
Respondent by :	Chandip Singh

Date of Hearing	08.06.2023
Date of Pronouncement	19.06.2023

आदेश / O R D E R

Per Amarjit Singh (AM):

These 2 appeals filed by the assessee are directed against the different final assessment orders of the assessing officer for A.Y. 2017-18 and A.Y.2020-21 respectively. Since, these two appeals are based on similar issues and identical facts therefore for the sake of convenience these two appeals are adjudicated together by taking ITA No. 909/Mum/2023 as a lead case and its finding will be applied mutatis mutandis to the other appeal.

ITA No. 909/Mum/2023

- “1. On the fact and the circumstances of the case and in law, the reassessment notice and the reassessment order is bad in law and void ab initio being contrary to the provisions of the Act.
2. On the facts and in the circumstances of the case and in law, the Hon'ble DRP erred in directing the learned AO to treat, and the learned AO erred in treating, the Network Fee of Rs. 29,53,69,631/-, earned during the year by the Appellant, as fees for technical services and royalty under the Income-tax Act, 1961 (Act).
3. On the facts and in the circumstances of the case and in law, the Hon'ble Dispute Resolution Panel (DRP) erred in directing the learned Assessing Officer (AO) to treat, and the learned AO erred in treating, the Network Fee of Rs. 29,53,69,631/-, earned during the year by the Appellant, as fees for technical services and royalty under Article 12 of the India-Netherlands Double Tax Avoidance Agreement (DTAA).
4. Without prejudice to the above and on facts and in circumstances of the case and in law, the final assessment order dated January 24, 2023 passed by the Assessing Officer, having been passed beyond limitation provided in terms of section 144C read with 153 of the Act, is bad in law, void ab initio and is liable to be quashed.

Your appellant most respectfully prays that the final assessment order is liable to be quashed being barred by the limitation.

5. On the facts and in the circumstances of the case and in law, the learned AO erred in levying surcharge on tax computed under Article 12(2) of the India- Netherlands Double Tax Avoidance Agreement (DTAA).
6. On the facts and in the circumstances of the case and in law, the learned AO erred in levying education cess on tax computed under Article 12(2) of the India-Netherlands Double Tax Avoidance Agreement (DTAA).
7. On the facts and in the circumstances of the case and in law, the learned AO erred in levying interest for default in payment of advance tax of Rs.16,85,040 under section 234B of the Act.
8. On the facts and in the circumstances of the case and in law, the learned AO erred in initiating penalty proceedings under section 270A(2) of the IT Act.

The appellant craves leave to add, alter, vary, omit, substitute or amend the grounds of appeal, at any time before or at, the time of hearing of the appeal, so as to enable the Hon'ble Income-tax Appellate Tribunal to decide this appeal according to law.”

2. Fact in brief is that assessee filed return of income declaring total income of Rs.nil for the year under consideration on 30.11.2017 which was revised on 30.03.2018. The case of the assessee was reopened u/s

147 of the Act and notice u/s 148 of the Act issued to the assessee on 30.03.2021. The assessee company M/s Maersk Logistics & Services International B.V. (Erstwhile DAMCO International B.V.) is incorporated in Netherland and was engaged in the business of logistics and freight forwarding across the globe. For the purpose of such business, the assessee company has various business infrastructure such as IT network E-commerce portal facilitating interface with customers network pool of various service providers, such as freight insurance etc.

3. During the year under consideration, the assessee company has earned income from services provided to its Indian associated enterprises i.e Damco India Pvt. Ltd. (DIPL) as network transportation fee. The assessee had received network fees of Rs.29,53,69,631/- from Damco India Pvt. Ltd.. The TDS of Rs.295,36,963/- was deducted treating the remittance as FTS. This income was not offered in the return of income and same was treated as business income on the ground that there was no PE in India during the year under consideration. However, the AO was of the view that the payment was in the nature of fees for technical services. During the assessment proceedings the show cause notice was issued to the assessee on 05.02.2022 as to why the aforesaid receipt be not treated as fees for technical services.

4. The assessee submitted that Damco BV is a company incorporated in the Netherland and is a tax resident of Netherland for tax purposes in terms of Article 4 of the India-Netherland Tax Treaty. During A.Y. 2017-18, Damco BV did not have any place of business (i.e branch office or any other place of management in India, further it did not satisfy any other conditions specified in Article 5 of the Tax Treaty in relation to constitution of Permanent Establishment (PE) in India. The assessee explained that assessee act as central coordinator for the provision of

services such as insurance, procurement of various product and information technology related support services etc. needed by Damco entities across globe. The assessee further submitted that in the network model/local Damco entity enjoy the economy of global Damco network support under the assumption limited risk and with the security of business as well as arm's length return on the operational cost incurred in services to the customer. It was also submitted that the arrangement is not where the company has not laid out a network which enables the users to use the technical commission and technology for the furtherance of business of the network, where any payment received for usage of the exclusive network is to be considered as royalty. The assessee also submitted that the network fees received by the company under existing agreement with the assessee company is nothing but a method of profit split by which the local Damco entity received guaranteed returns. The assessee company submitted that such Network fee received from DIPL were business income under article 7 of the India-Netherlands Tax Treaty and in the absence of a PE of the company in India, such Network Fee Receipts were not taxable in India by virtue of Article 5 of the India-Netherland Tax Treaty. It is also explained that in order to ensure that the group as a whole is benefitted the company acts as the central coordinator for all Damco entities across globe. As a coordinator the company acts with various service providers such as the Maersk Global Service Centre (I) Pvt. Ltd, TT Global Mutual Insurance Ltd. etc. for production of service such as insurance, procurement of various product and information technology related support services etc. needed by Damco entities across globe. The assessee company further submitted that said payment were nothing but business receipts for the company and in the absence of a permanent establishment in India, such receipts are not taxable in the light of Article 7 of India Netherland DTAA. However, the AO has not agreed

with the submission of the assessee and he was of the view that services provided by Damco International BV to Damco India Pvt. Ltd. were managerial and technical in nature. The assessee has raised invoices to Damco India Pvt. Ltd. and the Damco India Pvt. Ltd. has deducted TDS of the payment to the assessee @ 10% treating this payment as FTS. Therefore, network fees of Rs.29,53,69,631/- was treated as fees for technical services/royalties by the assessing officer.

5. The assessee filed objection before the ld. DRP against the draft assessment order dated 27.03.2022. The DRP vide direction u/s 144C(5) dated 28.12.2022 rejected objections filed by the assessee and stated that they are of the opinion that the amount received by the assessee as business support charges is taxable as royalty and fees for technical services under the Act as well as under the Article 13 of India Denmark DTAA. The DRP also stated that the issue at hand was similar to those which was dealt with by the DRP -1, Mumbai for assessment year 2012-13 and assessment year 2013-14 on identical set of facts. The DRP also stated that the facts involved in this years were identical to those in assessment year 2018-19 and 2019-20, therefore, they saw no reason to deviate from the decision of DRP on the issue in the earlier years.

6. During the course of appellate proceedings before us the ld. Counsel at the outset submitted that similar issue on identical facts have been adjudicated by the ITAT, Mumbai in the case of the assessee for the assessment year 2013-14 and 2018-19 and assessment year 2019-20 vide ITA No. 545/Mum/2022, ITA No. 2240/Mum/2022 & ITA No. 7447/Mum/2017.

On the other hand, the ld. Departmental Representative relied upon the order of authorities below.

7. Heard both the sides and perused the material on record. With the assistance of the Id. Representative we have perused all the three judicial pronouncements in the case of the assessee itself as referred supra. The relevant operating part of the decision of ITAT for assessment year 2018-19 vide ITA No. 545/Mum/2022 after considering the decision of ITAT for assessment year 2013-14 is reproduced as under:

“9. We have considered the rival submissions and perused the material available on record. We find that the coordinate bench of the Tribunal in assessee’s own case in Damco International BV vs DCIT, in ITA No. 7447/Mum./2017, for the assessment year 2013-14, vide order dated 22/08/2022 held that network fees received by the assessee from Damco India are neither in the nature of Royalty nor Fees for Technical Services. The relevant findings of the coordinate bench of the Tribunal, in the aforesaid decision, are as under:-

“6. We have heard submissions made by the rival sides and have examined the orders of authorities below. We have also considered the documents on which rival sides have placed reliance in support of their respective submissions. The assessee during the period relevant to the assessment year under appeal has received network fees from Damco India. The services have been rendered by the assessee in accordance with Network Agreement dated 01/01/2013 (at page 3 of the paper book). The contentions of the assessee is that it does not have Permanent Establishment (PE) in India in terms of Article -5 of India- Netherland DTAA. And by virtue of Article-7 of India – Netherland DTAA, network fees earned by the assessee is not taxable in India. At the outset it would be pertinent to mention that the network fee which is subject matter of dispute in the present appeal was earned by the assessee for the period starting from 01/03/2013 to 31/03/2013. For the period starting from 01/04/2012 to 31/12/2012 falling under the same assessment year i.e. assessment year 2013-14, Damco India had agreement with Damco International AS, a Danish entity. Both the agreements i.e. agreement between Damco International AS - Damco India and assessee - Damco India are stated to be similar. A perusal of the directions of DRP dated 11/09/2017 would show that the DRP has placed heavy reliance on the directions of the DRP for assessment year 2012-13, wherein instead of present assessee, Damco International AS, a Danish entity was the assessee. In para 4.2 of the DRP directions, the DRP has categorically mentioned that the only change in the impugned assessment year is that instead of Damco International AS, the Damco India has entered into new agreement w.e.f. 01/01/2013 with Damco International BV (the assessee). Thereafter, the DRP has listed the general/ specific obligations of the assessee and Damco India as per the Network agreement . In the assessment order for assessment year 2013-14 the Assessing Officer while passing the final assessment order reiterated the observations made by the DRP. The Assessing Officer has made no observation that the facts or the agreement in the impugned assessment

year are in any manner at variance with the facts of the earlier agreement between the assessee and Damco International AS. The Assessing Officer based on the observations made by DRP finally concluded that the amount of Rs.8,46,91,990/- is taxable as "Royalty" and "Fee for Technical Services" under the provisions of the Act as well as under Indo-Netherland Tax Treaty.

7. We find that in the case of Damco International AS vs. DCIT in ITA No.933 & 6465/Mum/2017 for assessment years 2012-13 and 2013-14, decided on 20/07/2020 the Tribunal has held that business support charges paid by Damco India are not taxable as FTS/Royalty under the Act or the relevant DTAA as the same is purely in the nature of reimbursement of cost.

8. We have thoroughly examined network agreement dated 01/01/2013. The remuneration clause for the services and obligation of Damco India is contained in Clause -7 read with Appendix-3 of the agreement. As per the terms of Appendix - 3, Damco India shall pay to the assessee network fee calculated as under:

$$\text{Network Fee} = \text{CMI} - (\text{Company Costs} + \text{Mark up})$$

CM1 has been defined in the Definitions clause of the Network Agreement as under:

" 1.2 "CM1" OR "GROSS MARGIN" is the result of the Company computed by deducting carriage and consolidation charges, including direct labour cost and related costs, from sales revenue;"

In Addendum Network Agreement "Network Fee Basis" and "Mark Up" has been explained. For the sake of completeness the relevant extracts of Addendum Network Agreement are reproduced herein below:

"3 NETWORK FEE BASIS

As per Appendix 3 of the Network Agreement, the Network Fee shall be an amount equal to the CM1 in the accounts of the Company, reduced by the Company Costs and Mark-up.

It is understood by Parties that the CM1 and Company Costs are determined on the basis of financials reported in the HFM accounting system (based on IFRS principles) as used by INTERNATIONAL and Company.

4. xxxxxxxx

5 MARK UP

With reference to item (d) of Appendix 3 of the Network Agreement, Parties agree that the Mark-Up for the Territory will be set at 10% for 2013 and onwards- until otherwise agreed.

In another addendum network agreement "Network Fee Payment" has been explained, the same is reproduced herein below:

" NETWORK FEE PAYMENT

Thus, Parties declare and confirm that in the event the calculation of Network Fee results in a negative figure, Company shall be entitled to

receive from INTERNATIONAL a payment as compensation for damages for not having been able to obtain the committed results.

By virtue of the foregoing, if the calculation of Network Fee is negative, INTERNATIONAL shall pay compensation as indemnity for damages to Company. Such compensation is valued in advance by the parties, as penalty clause, in an amount such as to enable the Company to obtain EBT based on Cost Company, equivalent to the agreed Mark Up, as defined in the Network Agreement.”

From above clauses in the Network Agreement it is ambiguously clear that Damco India remunerates the assessee only in the event of surplus profits. In the event of insufficient receipts Damco India is entitled to retain “Cost + 10% Mark Up”. In the impugned assessment year Damco India had surplus that was shared with the assessee in accordance with the terms and conditions of agreement. We observe that the entire risk is borne by the assessee and Damco India is insulated from the risk. It has been contended that the obligation under both the agreements i.e. agreement between Damco International AS and Damco India as was applicable in the assessment year 2012-13 and 2013-14 (from 01/04/2012 to 31/12/2012) and the subsequent agreement between the assessee and Damco India effective from 01/01/2013 to 31/03/2013 relevant to assessment year 2012-13 are similar. This fact has not been rebutted by the Revenue. In fact, as pointed earlier, the DRP and the Assessing Officer has admitted this fact. The Ld. Counsel for the assessee has drawn our attention to the order passed under section 93CA(3) of the Act by the TPO for assessment year 2014-15 and 2015-16 in the case of Damco India, where Damco India has received minimum guaranteed network income of Rs.32.41 crores in assessment year 2014-15 and Rs.4.71 crores in assessment year 2015-16 from the assessee.

9. It has been further submitted that network fees received by the assessee does not fall within the meaning of FTS or Royalty under Article -12 of India – Netherland DTAA. For the sake of ready reference the relevant extract of Article -12 is reproduced herein below:-

“ 4. 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, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience.

5. For purposes of this Article, "fees for technical services" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services:

(a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 4 of this Article is received; or

(b) make available technical knowledge, experience, skill, know-how or processes, or consist of the development and transfer of a technical plan or technical design.

A bare perusal of Article -12 of the DTAA defining the term „Royalty” would show that the nature of payment received by the assessee does not fall within the meaning of Royalty.

The clause -5 of Article 12 defines FTS. A reading of clause -5 shows that FTS is with respect to rendering of any technical or consultancy services. It does not include managerial services. Further, sub-clause (b) to clause (5) refers to “make available” condition. In the present case nothing has been brought on record by the Revenue to substantiate that any technical knowhow has been “made available” to Damco India by the assessee.

10. Thus, in view of our above observations we hold that network fee received by the assessee from Damco India is neither in the nature of Royalty nor FTS. Consequently, the aforesaid amount received by the assessee is not exigible to tax under the provisions of the Act or India – Netherlands DTAA.”

10. The learned DR could not show us any reason to deviate from the aforesaid decision rendered in assessee”s own case and no change in facts and law was alleged in the relevant assessment year. Thus, respectfully following the order passed by the coordinate bench of the Tribunal in assessee”s own case cited supra, we uphold the plea of the assessee and direct the AO to delete the impugned addition on account of receipt of network fees from Damco India Private Ltd. As a result, grounds no.1-3 raised in assessee”s appeal are allowed.”

Respectfully following the decision of coordinate bench of the Tribunal on similar fact and identical issue as supra we direct the assessing officer to delete the impugned addition on account of receipt of network fees from Damco India Pvt. Ltd. Therefore, ground of appeal No. 2 & 3 are allowed.

8. Ground No. 5 & 6 are not discussed before us by the ld. Counsel therefore the same stand dismissed.

9. Ground No. 7 regarding levy of interest u/s 234B is of consequential nature therefore, the same stand dismissed.

10. Ground No. 8 pertaining to initiation of penalty proceeding is premature in nature therefore, the same stand dismissed.

11. In the result, the appeal of the assessee is partly allowed.

ITA No. 937/Mum/2023

Ground No. 1 & 2:

12. The issue in this ground of appeal are similar to the issue as we have adjudicated vide ground No. 2 & 3 of ITA No. 909/Mum/2023, therefore, applying findings of ground no. 2 & 3 of that appeal as mutatis mutandis this ground of appeal of the assessee are allowed.

13. Ground No.3 are not pressed by the ld. Counsel therefore the same stand dismissed.

Ground 4 & 5:

14. The issue in this ground of appeal are similar to the issue as we have adjudicated vide ground No. 5 & 6 of ITA No. 909/Mum/2023, therefore, applying findings of ground no. 2 & 3 of that appeal as mutatis mutandis these ground of appeal of the assessee are dismissed.

Ground No.6

15. pertaining to the issue of refund issued to the assessee company. In this regard, the ld. Counsel submitted that actually amount of the refund was issued to the amount of Rs.6,47,28,790/- as against the amount of refund of Rs.6,89,52,422/.

16. Heard both the side and perused the material on record. We restore this issue to the file of the assessing officer for deciding afresh after verification of the relevant supporting record, therefore, this ground of appeal of the assessee is allowed for statistical purposes.

Ground No. 7 & 8:

17. These ground of appeal are pertained to the issue of charging of interest u/s 234A & 234B of the Act. We find that these ground of appeal are consequential in nature, therefore, the AO is directed to levy interest u/s 234A & 234B as per law. Therefore, this ground of appeal of the assessee are allowed for statistical purposes.

Ground No. 9:

18. Regarding initiating of penalty proceedings u/s 270A(2) of the Act is premature at this stage therefore, these ground of appeal of the assessee stand dismissed.

19. In the result, the appeals of the assessee are partly allowed.

Order pronounced in the open court on 19.06.2023

Sd/-

(Sandeep Singh Karhail)
Judicial Member

Sd/-

(Amarjit Singh)
Accountant Member

Place: Mumbai

Date 19.06.2023

Rohit: PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण DR, ITAT,
Mumbai
5. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//
आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण/ ITAT, Bench,
Mumbai.