IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH, 'C' PUNE

BEFORE SHRI R.S. SYAL, VICE PRESIDENT AND
SHRI S.S. VISWANETHRA RAVI, JUDICIAL MEMBER

आयकर अपील सं. / ITA No.48/PUN/2018

निर्धारण वर्ष / Assessment Year : 2012-13

Vanderlande Industries Private Limited, 702, Level 7, Pentagon Tower P4, Magarpatta City, Hadapsar, Pune 411 028 PAN : AACCV8546K	Vs.	ACIT, Circle-13, Pune
Appellant		Respondent

Assessee by	Shri Aliasger Rampurawala & Shri Pratik Shah
Revenue by	Shri Suhas Kulkarni
Date of hearing	25-09-2023
Date of pronouncement	26-09-2023

आदेश / ORDER

PER R.S. SYAL, VP :

This appeal by the assessee is directed against the order passed by the ld. CIT(A)-5, Pune on 25-09-2017 in relation to the assessment year 2012-13.

2. It is a recalled matter inasmuch as the earlier order passed by the Tribunal on 09-02-2022 was subsequently recalled vide its later order dated 20-02-2023 in M.A.No.211/PUN/2022 to the limited extent of examining as to whether payment made by the assessee to its foreign entity towards use of overall ICT infrastructure was

chargeable to tax in the latter's hands in terms of the Double Tax Avoidance Agreement between India and Netherlands (`the DTAA').

3. Briefly stated, the facts of the case relevant for our purpose are that the assessee made payment to its wholly owned company Vanderlande Industries Holding, B.V. Netherlands (hereinafter also called "VIBV") amounting to Rs.53,53,204/-. The Assessing Officer (AO) observed that no deduction of tax at source was made. He held that such amount was chargeable to tax in the hands of the recipient and in the absence of assessee having deducted tax at source, the amount was liable to be disallowed in terms of section 40(a)(i) of the Income-tax Act, 1961 (hereinafter also called 'the Act'). In holding so, he treated the amount paid as covered u/s.9(1)(vi) r.w. Article 12 of the DTAA as Royalty. When the matter came up before the Tribunal, the assessee's contention of the same being `reimbursement' was rejected. The Tribunal examined the nature of services as a *quid pro quo* for the consideration by setting out the relevant clauses of the Agreement. After considering the pertinent details, it came to the conclusion in para 9 that the payment made for using the overall ICT Infrastructure facility of the Netherlands entity for getting served rather than the Netherlands entity providing any specific services to the assessee. Thereafter, it

considered the taxability of the amount in the hands of the recipient under the Act and held the same to be chargeable to tax.

4. From para 12 onwards of the order, the Tribunal proceeded to examine the taxability under the DTAA between India and Netherlands. For this purpose, it initially considered para 4 of Article 12, defining the term `Royalties' in the Treaty as notified on 27-03-1989 and held that the payment was not covered within the same. Thereafter, it took note of the Notification No.11050 dt. 30-08-1999 making amendment to para 4 of Article 12, defining `Royalties', in two parts, viz., 4(a) and 4(b). Para 4(a) was found to be similar to para 4 of the originally notified DTAA and hence not bringing the amount within the definition of `Royalties' in the hands of the recipient. It was noticed that para 4(b) of the amended Article 12 covered payment of any kind received for use of industrial, commercial or scientific equipment. In the light of this para of the Notification, the Tribunal held that the case of the assessee was caught in Article 12(4)(b) of the DTAA making the amount taxable in the hands of the recipient requiring deduction of tax at source.

5. The assessee moved rectification application contending that while considering the amendment to Article 12(4)(b) by means of Notification No.11050, dt. 30-08-1999, the Tribunal considered only

Para (III) which was effective from 01-04-1997 and omitted to consider Para (VI) which was effective from 01-04-1998 in which the amendment made effective from 01-04-1997 having para 4(b) of Article 12 also including payment for use of industrial, commercial or scientific equipment as Royalties, was omitted from the definition of Royalties under Article 12(4) w.e.f. 01-04-1998. It was contended that such latter amendment was applicable to the case of the assessee. The Tribunal recalled the order to this extent for examining the taxability of the amount of ICT charges under the DTAA and its consequential effect.

6. We have heard the rival submissions and gone through the relevant material on record. It is worthwhile to mention that the recall of the order is only from para 12 onwards of the original order passed u/s.254(1) of the Act. The Tribunal in its earlier order came to the conclusion in paras 9 and 10 that the amount paid by the assessee was towards the use of the overall ICT Infrastructure set up by VIBV. The same was examined under the Act to hold that the payment was taxable in the hands of the recipient under the Act. Now the limited issue is to examine the taxability of amount in the hands of recipient under the DTAA.

7. The Tribunal took note of the amending Notification dated 30-08-1999 containing Para (III), providing in para 4(b) of Article 12, that the term `Royalties' also included payment for use of industrial, commercial or scientific equipment. The case of the assessee is that this amendment was effective only for one year from 01-04-1997, which was contained in the same notification itself in Para (VI), redefining para 4 of Article 12, omitting clause (b) of the original para 4. We have examined Para (VI) of the Notification dated 30-08-1999, effective from April 1, 1998, reading as under :

> "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, trademark, design or model, plan, secret formula or process, for information concerning industrial, commercial or scientific experience."

8. On a perusal of the amendment to Article 12(4) of the DTAA effective from 01-04-1998, it is clear that the term `Royalties' means payment received as a consideration for the use or right to use any copyright including any patent, trademark, design or model for information concerning industrial, commercial or scientific experience. The hitherto inclusion of payment for use of industrial, commercial or scientific equipment constituting `Royalties' under para 4(b) of article 12 as per Para (III) in para 4(b) has been omitted

w.e.f. 01-04-1998. Since the assessment year involved is 2012-13, on a pertinent query as to whether the DTAA was further amended vide any Notification, the ld. AR answered it in negative by placing on record a copy of the DTAA. When we consider the copy of original DTAA as placed on record at page 92 onwards of the paper book, with the copy of the DTAA as now given, it is seen that after clause VII of the Protocol in the originally filed DTAA, there is a heading `Amending Notification No. SO 693(E), dt. 30-08-1999' and thereafter mention is made of the Paras (III) and (VI) which are under consideration. No reason could be adduced as to why there was change in the text of two copies of the DTAA. The ld. DR expressed his inability to point out if any further amending notification was also issued in respect of the DTAA having impact on the ambit of Article 12(4) from 1998 up to the financial year relevant to the A.Y. 2012-13 under consideration. In such circumstances, we are of the considered opinion that it would be just and fair if the impugned order on this issue is set aside and the matter is restored to the file of the AO for examining the position of the DTAA prevailing for the assessment year under consideration and then deciding the issue by treating the amount paid by the assessee as a consideration for use of the overall Infrastructure facility of VIBV.

In other words, if the amending notification dated 30-08-1999 is the last notification, in that situation, the case will fall under Para (VI) and not Para (III), making the amount not chargeable to tax in the hands of VIBV. In the otherwise scenario, the AO will examine the effect of such further amendments, if any, to Article 12(4) to the DTAA for deciding the issue in the right perspective. Needless to say, the assessee will be allowed a reasonable opportunity of hearing in such fresh proceedings. The originally order passed u/s.254(1) is amended to this extent.

9. In the result, the appeal is allowed for statistical purposes.

Order pronounced in the Open Court on 26th September, 2023.

Sd/-	Sd/-
(S.S. VISWANETHRA RAVI)	(R.S.SYAL)
JUDICIAL MEMBER	VICE PRESIDENT

पुणे Pune; दिनांक Dated : 26th September, 2023
सतीश

आदेश की प्रतिलिपि ग्रेषित/Copy of the Order is forwarded to:

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The respondent
3. The CIT(A)-5, Pune
4. The PCIT-4, Pune
5. DR, ITAT, 'C' Bench, Pune
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune

		Date	
1.	Draft dictated on	25-09-2023	Sr.PS
2.	Draft placed before author	25-09-2023	Sr.PS
3.	Draft proposed & placed before the second member		JM
4.	Draft discussed/approved by Second Member.		JM
5.	Approved Draft comes to the Sr.PS/PS		Sr.PS
6.	Kept for pronouncement on		Sr.PS
7.	Date of uploading order		Sr.PS
8.	File sent to the Bench Clerk		Sr.PS
9.	Date on which file goes to the Head Clerk		
10.	Date on which file goes to the A.R.		
11.	Date of dispatch of Order.		

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