**IN THE INCOME TAX APPELLATE TRIBUNAL**

**"I" BENCH, MUMBAI**

**BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER AND**

**SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER**

**ITA no.4533/Mum/2023**
(Assessment Year : 2021-22)

Van Oord Dredging and Marine
Contractors BV
201, 2nd Floor, Central Plaza,
166 CST Road, Kalina,
Mumbai-400098.
PAN – AAACH3500M
……………. Appellant

v/s

Asstt. Commissioner of Income Tax,
Intl Tax Circle-4(3)(1)
16th Floor, Air India Building,
Nariman Point, Mumbai-400021.
............... Respondent

Assessee by : Shri Darshan Koikar
Revenue by : Shri Anil Sant

| Date of Hearing – 07/05/2024 | Date of Order – 04/06/2024 |
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**O R D E R**

**PER SANDEEP SINGH KARHAIL, J.M.**

The present appeal has been filed by the assessee challenging the impugned final assessment order dated 17/10/2023, passed under section 143(3) r/w section 144C(13) of the Income Tax Act, 1961 (*"the Act"*), pursuant to the directions issued by the learned Dispute Resolution Panel-2, Mumbai-1, [*"learned DRP"*], under section 144C(5) of the Act, for the assessment year 2021-22.

2. In its appeal, the assessee has raised the following grounds:–

*"<u>General Ground</u>*

*On the facts and in the circumstances of the case and in law, the learned AO, based on directions of DRP -*

*1. Erred in making addition of Management service fees amounting to INR 30,18,32,720/- as against loss claimed by the Appellant in the return of income filed for AY 2021-22.*

*<u>Taxability of Management Service Fees of INR 30,18,32,720/-</u>*

*On the facts and in the circumstances of the case and in law, the learned AO/DRP has:*

*2. erred in not appreciating the fact that the Management Service Fees received by the Appellant constitute pure allocation of cost without any mark-up and hence, the same being reimbursement of cost, is not taxable as Royalty under the Act as well as under the Double Taxation Avoidance Agreement ('DTAA') between India and the Netherlands.*

*3. erred in treating the management service fees received by the Appellant as "Royalty" under Article 12(4) of India — Netherlands DTAA, thereby making an addition of INR 30,18,32,720/- to the income of the Appellant.*

*4. 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.*

*5. 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.*

*6. erred in not following the order of the Hon'ble jurisdictional Income-tax Appellate Tribunal ('ITAT'), Mumbai for AY 2009-10 in Appeliant's own case which has also been relied upon and followed in subsequent orders passed by ITAT for AY 2005-06, 200708, 2010-11, 2011-12, 2012-13, 2013-14, 2014-15, 2015-16, AY 2017-18, AY 2018-19 and AY 2019-20.*

*7. Erred in not appreciating the fact the Hon'ble High Court of Bombay vide its order dated 09 February 2022 has dismissed the appeal filed by the Department against the ITAT order for AY 2009-10.*

*<u>Set-off of management service fees treated as royalty with brought forward business loss not allowed</u>*

*Without prejudice to the above grounds, and on the facts and in the circumstances of the case and in law the learned AO / DRP has:*

*8. erred in not setting off the brought forward business losses against the addition of Management Service Fees.*

> *<u>Set-off of management service fees treated as royalty with brought forward unabsorbed depreciation not allowed</u>*
>
> *Without prejudice to the above grounds, and on facts and in circumstances of the case and in in law the learned AO/DRP has:*
>
> *9. erred in not setting off the brought forward depreciation against the addition of Management Service Fees.*
>
> *<u>Erroneous levy of surcharge of INR 15,09,164 and education cess of INR 12,67,697 on tax computed as per rates prescribed under the India-Netherland DTAA</u>*
>
> *On the facts and in the circumstances of the case and in law, the learned AO/ DRP has:*
>
> *10. erred in computing surcharge of INR 15,09,164 and education cess of INR 12,67,697 on the tax computed as per rates prescribed under the India-Netherlands DTAA;*
>
> *<u>Short grant of interest u/s 244A of the Act</u>*
>
> *On the facts and in the circumstances of the case and in law, the learned AO/ DRP has:*
>
> *11. erred in short granting interest us 244A of the Act on the refund determined in the assessment order;*
>
> *<u>Penalty</u>*
>
> *Without prejudice to the above, and on the facts and in the circumstances of the case and in law, the learned AO has:*
>
> *12. erred in initiating penalty proceeding under section 270A of the Act, which is applicable in cases of Underreporting or misreporting of income, without considering the full and true disclosures made by the Applicant, both, in the Return of Income as well as during the assessment proceedings.*
>
> *The above grounds of objections are distinct and separate and without prejudice to each other.*
>
> *The appellant craves leave to add, alter, vary, omit, substitute or amend the above grounds of appeal, at any time before or at, the time of appeal, so as to enable the Hon'ble Tribunal to decide the appeal in accordance with the law."*

3. Ground no.1 is general in nature and therefore the same needs no separate adjudication.

4. The issue arising in grounds no.2-7, raised in assessee's appeal, pertains to the taxability of Management Service Fees received by the assessee.

5. The brief facts of the case pertaining to this issue are: The assessee is a company incorporated in the Netherlands and is engaged in the business of international dredging contractor. For the year under consideration, the assessee filed its return of income on 14/03/2022 declaring a total income of Rs. Nil after claiming a refund of Rs.4,01,80,860 out of the taxes paid. During the year, the assessee has not executed any dredging contracts in India. During the assessment proceedings, from the notes to the computation of income submitted by the assessee, it was observed that the assessee provided certain business support services to Van Oord India Private Ltd. For the above services, the assessee charged Rs.30,18,32,720 to the Indian entity and the Indian entity has remitted the amount after deducting TDS on the same on a conservative basis. The assessee has not charged the Indian entity any markup for the aforesaid services on the basis that the same constitutes pure allocation of the cost incurred for the rendition of such services. It was further claimed that the said services are not in the nature of '*make available*' and hence are not taxable as '*Fees for Technical Services*' under the provisions of the India Netherlands Double Taxation Avoidance Agreement ("*DTAA*"). It was further claimed that the above services have been rendered entirely from outside India and the project office of the assessee has not played any role in rendering the said services. The assessee also claimed that it does not have any Permanent Establishment in India to which the said services are attributable. Accordingly, the consideration received for business support services, i.e. Management Service Fees, was claimed to be not taxable in India as per the provisions of the DTAA. During the assessment proceedings, the assessee was asked to submit the nature, the details, nature of business

management services, and the basis of allocation of the services to the Indian entity and was asked as to why the same is not taxable in India. The assessee was also asked to show cause as to why the assessment proceedings on the issue of taxability of Management Services Fees, received during the year, should not be completed on the basis of the stand taken by the Revenue in earlier years and in accordance with the directions given by the learned DRP in earlier years. In response thereto, the assessee, inter-alia, submitted that the Tribunal has decided the issue in favour of the assessee in earlier years.

6. The Assessing Officer ("*AO*") vide draft assessment order dated 20/12/2022 passed under section 144C(1) of the Act after taking into consideration the provisions of the Service Agreement dated 01/04/2004 held that the payments made by the Indian company to the assessee are clearly for the use of information concerning industrial, commercial or scientific experience in India. Thus, these payments are specifically covered under Article 12(4) of the India Netherlands DTAA and taxable as Royalty. The AO also noted that the issue is recurring in nature and during the assessment proceedings in earlier years, it was found that there was a sharing of experience of industrial, commercial, and scientific in nature. The AO also noted that even while deciding the issue, the learned DRP in earlier years categorically considered these payments as '*Royalty*'. On the basis that the issue has not attained finality and the Revenue is in appeal before the Hon'ble jurisdictional High Court for earlier years, the receipt was treated as '*Royalty*' under the provisions of the DTAA as well as the Act.

7. The assessee filed detailed objections before the learned DRP against the addition made by the AO. Vide directions dated 22/09/2023, issued under section 144C(5) of the Act, the learned DRP following its directions rendered in assessee's own case for the assessment year 2020-21, wherein the learned DRP followed its directions rendered in the assessment year 2018-19, rejected the objections filed by the assessee on this issue, after noting that there is no change in the material facts and circumstances as well as the applicable law when compared to the earlier assessment years, where the learned DRP had an occasion to decide the issue under consideration. In conformity with the directions issued by the learned DRP, the AO passed the impugned final assessment order treating the Management Service Fees as '*Royalty*' taxable at the rate of 10%. Being aggrieved, the assessee is in appeal before us.

8. During the hearing, the learned Authorised Representative (*"learned AR"*) submitted that this issue has been decided in favour of the assessee by the decision of the coordinate bench of the Tribunal in assessee's own case for preceding assessment years. The learned AR further submitted that even lower authorities have accepted that facts for the year under consideration are similar to the facts of the preceding assessment years, wherein this issue has been decided in favour of the assessee.

9. On the other hand, the learned Departmental Representative (*"learned DR"*) vehemently relied upon the order of the authorities below and submitted that the Department's appeals against the decisions of the Tribunal are currently pending before the Hon'ble jurisdictional High Court.

10. 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 Van Oord Dredging and Marine Contractors BV vs ADIT, ITA no.7589/Mum/2012, for the assessment year 2009-10, vide order dated 07/10/2016, decided the similar issue in favour of the assessee and held that none of the services provided by the assessee in terms of the Service Agreement dated 01/04/2004 falls within the scope and ambit of '*Royalty*' as defined in Article 12(4) of the India Netherlands DTAA. The coordinate bench of the Tribunal also held that since the allocation of costs represents the actual expenditure, there cannot be any reason to hold that reimbursement of the cost can be reckoned as payment towards '*Royalty*'. The relevant findings of the coordinate bench of the Tribunal, in the aforesaid decision, are as under:-

> *"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 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.*

*16. In any case, as pointed by Mr. Porus Kaka, 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 costs and the working of cost allocation as reproduced above has not been disputed either by the Assessing Officer or by the Ld. DRP. The assessee has charged the 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 paper book from pages 9 to 11. Once the auditors have certified that, such allocation of costs represents the actual expenditures then, we do not find any reason to hold that reimbursement of the cost can be reckoned as payment towards "royalty". As regards the decision of ITAT Chennai Bench in Van Oord vs. DIT (supra), we agree with the contention of the Ld. Senior Counsel that the said decision is not applicable for the reasons highlighted by him and also, we ourselves have analyzed each and every aspect of services rendered by the assessee in terms*

> *of the "service agreement" and also analyzed the definition of "royalty" as given in Article 12(4) and have reached to a conclusion that the said services and reimbursement of cost does not fall under the realm of "royalty". Moreover here in this case, the revenue's main thrust is that the payment received by the assessee from VOIPL is "royalty" and here it is not the case of FTS by the department and, therefore, we are refraining ourselves from going into the aspect of FTS qua the services rendered in terms of the service agreement."*

11. We find that following the aforesaid decision rendered in the assessment year 2009-10, similar findings have been rendered by the coordinate bench of the Tribunal in assessee's own case for the subsequent assessment years, including the immediately preceding assessment year 2020-21. The learned DR could not show us any reason to deviate from the aforesaid decisions rendered in assessee's own case and no change in facts and law was alleged in the relevant assessment year. The issue arising in the present appeal is recurring in nature and has been decided by the coordinate bench of the Tribunal for the preceding assessment years. Thus, respectfully following the orders passed by the coordinate bench of the Tribunal in assessee's own case cited supra, we uphold the plea of the assessee and delete the impugned addition in respect of the Management Service Fees received by the assessee. As a result, grounds no. 2-7 raised in assessee's appeal are allowed.

12. In view of our findings rendered in respect of grounds no.2-7, the issues arising in grounds no.8-10 are rendered academic and hence require no separate adjudication.

13. Ground no. 11, raised in assessee's appeal pertains to short grant of interest under section 244A of the Act. This issue is restored to the file of the AO with the direction to grant the interest under section 244A of the Act, in accordance with the law, after conducting the necessary verification. As a

result, ground no.11 raised in assessee's appeal is allowed for statistical purposes.

14. Ground no.12 raised in assessee's appeal pertains to the initiation of penalty proceedings, which is premature in nature and therefore is dismissed.

15. In the result, the appeal by the assessee is partly allowed for statistical purposes.

Order pronounced in the open Court on 04/06/2024

| **Sd/-**<br>**PRASHANT MAHARISHI**<br>**ACCOUNTANT MEMBER** | **Sd/-**<br>**SANDEEP SINGH KARHAIL**<br>**JUDICIAL MEMBER** |
|---|---|

**MUMBAI, DATED: 04/06/2024**

Vijay Pal Singh, (Sr. PS)

*Copy of the order forwarded to:*

*(1) The Assessee;*
*(2) The Revenue;*
*(3) The PCIT / CIT (Judicial);*
*(4) The DR, ITAT, Mumbai; and*
*(5) Guard file.*

True Copy

By Order

Assistant Registrar
ITAT, Mumbai