

| आयकर अपीलीय अधिकरण न्यायपीठ, मुंबई |
IN THE INCOME TAX APPELLATE TRIBUNAL
"I" BENCH, MUMBAI

BEFORE SHRI NARENDRA KUMAR BILLAIYA, HON'BLE ACCOUNTANT MEMBER
&
SHRI RAHUL CHAUDHARY, HON'BLE JUDICIAL MEMBER

I.T.A. No. 4345/Mum/2023
Assessment Year: 2021-22

Maersk Logistics & Services International B.V. [Erstwhile, Damco International B.V.) Unit No. 401 & 402, Godrej Two Pirojshanagar Eastern Express Highway Vikhroli (East) Mumbai - 400079 [PAN: AAECD6659B]	Vs	Dy. Commissioner of Income Tax, International Taxation, Circle - 3(2)(1), Mumbai
अपीलार्थी/ (Appellant)		प्रत्यर्थी/ (Respondent)

I.T.A. No. 4325/Mum/2023
Assessment Year: 2021-22

Maersk Logistics & Services International A/S [Erstwhile, Damco International A/S] Unit No. 401 & 402, Godrej Two Pirojshanagar Eastern Express Highway Vikhroli (East) Mumbai - 400079 [PAN: AAECD1262G]	Vs	Dy. Commissioner of Income Tax, International Taxation, Circle - 3(2)(1), Mumbai
अपीलार्थी/ (Appellant)		प्रत्यर्थी/ (Respondent)

Assessee by :	Shri Manish Kanth, A/R
Revenue by :	Shri Anil Sant, Addl. CIT, D/R

सुनवाई की तारीख/Date of Hearing : 06/08/2024
घोषणा की तारीख/Date of Pronouncement : 14/08/2024

आदेश/ORDER

PER NARENDRA KUMAR BILLAIYA, AM :

I.T.A. No. 4345/Mum/2023 & I.T.A. No. 4325/Mum/2023, are two separate appeals by the assessee preferred against the two separate orders dt. 23/10/2023 framed u/s 143(3) r.w.s. 144C(13) of the Act pertaining to AY 2021-22.

2. Since the grievance of the assessee is identical in both the appeals, they were heard together and are being disposed off by this common order for the sake of convenience and brevity.

3. The common grievance in both the appeals relate to the treatment of network fees earned during the year by the assessee as fees for technical services and royalty under the Income-tax Act and under Article 13 of the India Netherland DTAA. Though, the quantum may differ.

4. Briefly stated the facts of the case are that the assessee company is engaged in the business of logistics and freight forwarding across the globe. The assessee has various business infrastructures such as IT network, E-commerce portal facilitating interface with customers, network pool of various service providers, such as freight insurance etc.. During the course of scrutiny assessment proceedings the AO noticed that, the assessee has earned its income from services provided to its Indian AE i.e., Damco India Private Limited (DIPL), as network transportation fee. The transportation fee received from DIPL, was subjected to TDS treating the remittance as FTS but in the return of income was not offered to tax treating the same as business income on the ground that there was no PE in India. Since the payment was in the nature of FTS, a showcause notice was issued proposing to treat the transportation fee as FTS. The assessee filed a detailed reply explaining

that it is overall responsible for operation and maintenance of the business at global level and since DIPL is part of such network it makes use of facilities like integrated supply chain management, freight forwarding network, Group IT for common platform for integrated and efficient operations. It was explained that, the assessee does not charge any separate charge for use of such facilities. The assessee explained the year-wise split of network fees and network income as per financials of DIPL as under:-

Sr. No.	Financial Year	Network Fee	Network Income
1	2012-13	8,46,91,990	-
2	2013-14	-	32,41,27,789
3	2014-15	-	4,71,16,250
4	2015-16	1,03,25,977	-
5	2016-17	29,53,69,631	-
6	2017-18	33,36,28,382	-
7	2018-19	48,50,40,762	-
8	2019-20	64,97,23,323	-
9	2020-21	41,06,79,169	-

5. From the above chart it was explained that the gross margin in excess of operational costs + arm's length markup, if any, is remitted to the assessee as network fee. The network fee is designed to levy DIPL with the return which would be earned by a local stand-alone freight forwarding and logistics provider. At the same time, the network fee is intended to ensure that if profit of DIPL is less than the arm's length margin, the network income will be paid to DIPL which ensures that DIPL is insulated from the shortfall. From the above chart it was explained that in FY 2013-14 and 2014-15, DIPL has received network income in which it failed to earn profits less than arm's length margin. It was clarified that network fee/network income is not a charge and hence it thus comes under the purview of FTS under Article 12 of India Netherlands Tax Treaty. It was strongly contended that such network fee receipts from DIPL are business income under Article 7 of India Netherlands Tax Treaty and in business of a PE, such network fee receipts are not taxable in India.

6. The explanation of the assessee did not find favour with the AO who was of the firm belief that as per Explanation 2 to Section 9(1)(vii) of the Act, FTS has been defined as any consideration for rendering any managerial, technical or consultancy services and the taxability of the FTS is also applicable in view of the treaty. Accordingly, the network fees of Rs.41,06,79,169/- was taxed as fees for technical services and royalty.

7. Objections were raised before the DRP and the DRP after considering the facts and the submissions, was of the opinion that the DRP in AY 2016-17 had upheld the additions made by the AO to the total income of the assessee treating the impugned receipts as FTS. The DRP further observed that the issues at hand is similar to those which were dealt by the DRP in AY 2012-13 and 2013-14.

8. Though the DRP fairly conceded that identical additions were made in assessee's own case for AY 2013-14, 2017-18, 2019-20 and 2020-21 and the said additions were deleted by the Tribunal and since the decisions of the Tribunal were not accepted by the revenue, the DRP confirmed the action of the AO.

9. We have given a thoughtful consideration to the orders of the authorities below. The Co-ordinate Bench in ITA No. 7447/Mum/2017 for AY 2013-14; ITA No. 545/Mum/2022 & ITA No. 2240/Mum/2022, for AYs 2018-19 & 2019-20 and ITA No. 909 & 937/Mum/2023, AYs 2017-18 and 2020-21, has deleted the impugned addition. The latest order being that for AY 2017-18 and 2020-21 in ITA Nos. 909 & 937/Mum/2023, the relevant finding of which read as under:-

"7. Heard both the sides and perused the material on record. With the assistance of the ld. 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:

Network Fee = CMI - (Company Costs+ 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,

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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."

10. Respectfully following the order of the Co-ordinate Bench (*supra*), we direct the AO to delete the impugned addition on account of receipt of network fees from DIPL.

11. As regards ITA No. 4325/Mum/2023, the Co-ordinate Bench in ITA No. 933/Mum/2017 & ITA No. 6465/Mum/2017 for AY 2012-13 and 2013-14, has decided the issue in favour of the assessee and against the revenue. We hold accordingly.

12. In both the appeals, assessee has also challenged the validity of the assessment order claiming that the same has been passed beyond the limitation period provided in terms of Section 144C r.w.s. 153 of the Act. Vide letter dt. 30/07/2024, the assessee has conceded that it does not want to press the said ground, therefore, the same is dismissed as not pressed.

13. In the result, both the appeals of the assessee are partly allowed.

Order pronounced in the Court on 14th August, 2024 at Mumbai.

Sd/-

(RAHUL CHAUDHARY)
JUDICIAL MEMBER

Sd/-

(NARENDRA KUMAR BILLAIYA)
ACCOUNTANT MEMBER

Mumbai, Dated 14/08/2024

**S.C.S.P.*

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

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

आदेशानुसार/ BY ORDER,
TRUE COPY

Assistant Registrar
आयकर अपीलीय अधिकरण
ITAT, Mumbai