IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.01.2026

CORAM :

THE HONOURABLE DR.JUSTICEANITA SUMANTH
and
THE HONOURABLE MR.JUSTICE MUMMINENI SUDHEER KUMAR

T.C.A.No. 473 of 2012

Van Oord ACZ Marine Contractors
BV Schaardijk 211, 3063 NH Rotterdam,
PO Box 8574 3009 AN Rotterdam,
The Netherlands. .. Appellant

vs

The Assistant Director of Income Tax,
International Taxation,
Chennai. .. Respondent

Prayer : Appeal filed under Section 260A of the Income-Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Chennai Bench 'B' dated 11.05.2012 in ITA No. 1733/Mds/2011.

For Appellant	:	Mr.R.V.Easwar, Senior Counsel For Mr.R.Sivaraman
For Respondent	:	Mr.B.Ramanakumar Senior Standing Counsel

JUDGMENT
(Delivered by Dr. ANITA SUMANTH.,J)

The assessee is in appeal as against an order of the Income Tax Appellate Tribunal ('ITAT'/'Tribunal') dated 11.05.2012. As against the aforesaid order, the assessee had initially filed a miscellaneous petition seeking rectification of mistakes which was also rejected vide order dated 07.09.2012.

2. The appeal has been admitted on 18.12.2012 on the following substantial questions of law:-

> *1.Whether on the facts and circumstances of the case, the Tribunal erred in law in upholding the re-assessment order passed by the assessing office under Section 144C(13)/143(3) read with Section 147 of the Act as legally valid?*
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> *2. Whether on the facts and circumstances of the case, the Tribunal erred in law in holding the appellant as liable to tax in India in respect of sum of Rs.11,53,52,883/- being expenses incurred by the appellant which were reimbursed by VOACZ, considering the same to be income in the nature of 'fees for technical services' under Section 9(1)(vii) of the Act and Article 12(5)(b) of the provisions of the India-Netherlands DTAA?*
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> *3. Whether on the facts and circumstances of the case, the Tribunal erred in law in not appreciating that reimbursement of expenses could in no circumstances, be regarded as income of the recipient?*
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> *4. Whether on the facts and circumstances of the case, the Tribunal erred in law in observing that the aforesaid amounts reimbursed were towards allocation of costs for services rendered by the appellant to VOACZ., under the "Cost Allocation Agreement", not appreciating that the same were specific expenses directly incurred in connection with the project executed by the latter entity in India and did not relate to services referred to under Cost Allocation Agreement?*
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> *5. Whether on the facts and circumstances of the case, the Tribunal erred in law alleging that VOACZ, constituted dependent agent permanent establishment of the appellant in India under Article 5 of the Double Taxation Avoidance Agreement between India and the Netherlands without providing any basis for holding as aforesaid?*
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> *6. Whether on the facts and circumstances of the case, the Tribunal erred in law in not allowing the ground of appeal raised by the appellant assailing the levy of*

interest under Sections 234A, 234B and 234D of the Ac; instead in setting aside the same to the file of the assessing officer?

3. Mr.Easwar, learned Senior Counsel, for Mr.Sivaraman, for the assessee outlines the facts involved in this appeal. The assessee is a foreign company based in the Netherlands. It had been awarded a contract for dredging and reclamation at Port Mundra, Gujarat and had assigned the same to its Indian subsidiary, Van Oord ACZ Private Limited (Subsidiary).

4. In the course of execution of the contract, the assessee had rendered services relating to mobilisation and demobilisation of dredgers, accommodation, meals and travelling of the expatriate personnel to the site. The assessee had raised invoices in respect of the expenditure incurred by it and had received reimbursements. Since, according to it, there was no profit embedded therein, no tax had been deducted at source.

5. The assessee had filed a return of income that had been accepted by way of intimation under Section 143(1) of the Income-Tax Act, 1961 (Act). The assessment was reopened by issuance of notice under Section 148 and overruling the objections of assessment, a draft assessment order had been passed by the assessing officer on 31.03.2003, bringing to tax the entirety of the remittances of Rs.11,53,52,883/- (11.53 crores approx) to tax, as fees for technical services.

6. As against the same, the assessee approached the Dispute Resolution Panel (DRP) that concurred with the conclusion in the draft assessment order,

which conclusion was also confirmed by the ITAT as against which, the present appeal has been filed.

7. In fact, a disallowance under Section 40a(i) of the Act had been made in the case of the Indian entity that had been the subject matter of litigation before the Delhi High Court, and thereafter the Supreme Court. The Delhi High Court vide decision dated 15.03.2010, had held that the Indian Company was not required to deduct tax at source.

8. However, since the assessment of the appellant had been subject to re-assessment at that juncture, such conclusion in the hands of the Indian entity was made subject to the decision to be taken in the hands of the appellant in reassessment.

9. The High Court made it clear that if the appellant was assessable to tax on the remittances received, the Indian subsidiary would consequently be treated as an assessee-in-default. The aforesaid order was confirmed by the Supreme Court by judgment dated 23.03.2023 in C.A.No.5089 of 2011. Hence the questions raised in the present appeal would have a bearing both on the taxability of the appellant and the Indian company.

10. Mr.Easwar would submit that the remittances constitute pure reimbursement of the expenses incurred by the appellant. All particulars to establish the fact that the reimbursements were back to back, had been provided before the assessing authority. Hence, there is no question of any income arsing to the appellant to justify the deduction of tax at source.

11. Alternatively, the conclusion of the assessing authority to the effect that the remittances are in the nature of fees for technical services is incorrect as no technical services have been provided by the appellant. Even if the services were technical in nature, the amount would still stand outside the ambit of taxation by application of Article 12(5)(b) of the Double Taxation Avoidance Agreement (DTAA/Treaty) between India and Netherlands. Reference is made to the decisions in *Commissioner of Income-Tax and another v De Beers India Minerals P Ltd*[1] and *US Technology Resources (Pvt) Ltd v Commissioner of Income-Tax*[2]. In light of the submissions, the appellant would pray that the appeal be allowed, and the questions answered in its favour.

12. Mr.Ramanakumar, learned Senior Standing Counsel, appearing for the Department defends the orders of the authorities raising the following arguments. On the first question relation to jurisdiction, he relies on the judgement in *Assistant Commissioner of Income tax v. Rajesh Javeri Stock Brokers (P) Ltd*[3]. Further, no materials had been furnished to the authorities to justify the claim of back to back reimbursement. Hence, and in such circumstances, the question of reimbursement assumes one of fact and no referable question arises for the consideration of the Court.

13. Referring to the draft assessment order and the categories under which the remittances fall, he would point out that the nature of services

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[1] 346 ITR 467 (Karn)
[2] 407 ITR 327 (Ker)
[3] 161 Taxman 316

provided by the assessee are evidently technical in nature. Moreover, the services have been made available to the Indian subsidiary for its use at any point in the future. Hence, there is no merit, according to him, in either argument, relating to the classification of services and application of the treaty.

14. In fact, he would attempt to enhance the quantum of remittances brought to tax, drawing attention to the income and expenditure accounts that are part of the record. He points out that while the invoices raised are for expenses of Rs. 35,04,51,405/-, what has been brought to tax is only a sum of 11,53,52,883/-, and the classification of the same ought to have been 'business profits' and not 'fees for technical services'.

15. Both the above arguments are categorically rejected as being misconceived, more so, in an assessee's appeal under Section 260A where we are concerned solely with the substantial questions admitted for consideration.

16. A reading of the draft assessment order makes it very clear that the classification of the amount as a business profit treating the Indian subsidiary as an agent is not lost sight of by the assessing authority, who has, in the course of the order, referred to both aspects.

17. Having done so, he concludes at paragraph 5.14 after having examined the possibility of taxation under various heads that the proper head to bring the amounts to tax would be 'fees for technical services'. In the computation of tax also, he categorizes the amount of Rs.11.53 crores only as fees for technical services. Hence there arises no avenue for the Department to

consider the same under any other head at this juncture of time.

18. The mere fact that the appellant has raised grounds relating to dependent agent and business profits before the DRP and ITAT would not entitle the Department to rewrite the assessment at this stage. This would pave the way for closure of Question No. 5 relating to dependent agent permanent establishment, as this issue does not emanate from the orders of the authorities.

19. Finally, Mr.Ramanakumar relies upon *Sedco Forex International INC v CIT, Meerut*[4] and *CIT v Halliburton Offshore Services Inc*[5] in support of the classification of the receipts as fees for technical services.

20. We have heard both learned counsel and have perused the material papers and cases cited.

21. The present appeal relates to assessment year 2003 – 04. A return had been filed by the assessee in time, which was the subject matter of intimation under Section 143(1), accepting the return. Thereafter, a notice under Section 148 was issued by the assessing authority and the reasons recorded on the basis of which the re-assessment was initiated are as follows:-

> *"Annexure*
> *Reason recorded for initiating action under section 148 in the case of M/s Van Oord ACZ Marine Contractors BV, the Netherlands for Assessment year 2003 – 2004.*
> *The assessee is a foreign company. It filed a return of income declaring 'Nil' income and claiming a refund of Rs.70,88,567. The return was processed under section 143(1) on the basis of 'nil' income on 11.5.2004. On the*

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[4] (2017) 87 taxmann.com 29 (SC)
[5] (2008) 169 taxmann 138 Uttranchal

basis of the information on record the following points are apparent:

(i) The assessee was awarded a contract for dredging and reclamation work to be carried out at Port Mundra at Gujarat. The contract was assigned to M/s. Van Oord ACZ Pvt Limited, an Indian Company. An agreement was made between the assessee and M/s. Van Oord ACZ India Pvt Limited. The assessee agreed to facilitate the execution of the Contract by providing technical assistances and services in fields of production, marketing, management support, administration, financial and other services to the Indian Company.

(ii) The agreement titled 'Cost Allocation Agreement' has been filed with the return. In the accompanying statement of income the assessee has claimed that the invoices raised in connection with the service provided for the Indian Company is nothing but actual reimbursement of third parties and there is no element of profit included in this. The tax deducted at source by the Indian Company being Rs.70,88,567(from the bill amount of Rs.15,34,32,185) has been claimed as a return.

(ii) The Indian Company had filed an application under section 195(2) to the DDIT, International taxation, New Delhi for 'Nil' deduction Certificate. However, the application was rejected and the applicant was directed to deduct tax at 42% on estimated profit of 11% on the Contract.

(iii) From a perusal of the documents accompanying the return of income, it is seen that during the relevant previous year the assessee had a project office in India. The contract was executed in India. The cost allocation agreement filed by the assessee that the Indian Company, the assignee of the Contract, though engaged in the Business of Marine Construction, are not sufficiently staffed and equipped to carry out certain activities deemed necessary for efficient and profitable conduct of their business. The involvement of the assessee in the project is sufficient to establish 'business connection' as per section 9 of the Income Tax Act and the assessee is liable to tax for its business income in India. The assessee, in the facts of the case has a business connection and permanent establishment in India. Though cost allocation agreement indicate the payments as 'direct reimbursable

expenses' and 'pooled reimbursable expenses', the nomenclature of 'reimbursement' per se does not establish that there is no profit element in the receipts of the company.
(iv) On the other hand, the business connection leads to the belief that the assessee carried out business in India during the relevant previous year. In addition, the tax deduction certificate filed by the assessee reflects the bill amount as Rs.1,53,432,185 while the Income and Expenditure Statement filed by the assessee shows the bill amount in the nature of reimbursements as Rs.35,04,51,405. There is mismatch on the receipts as per the TDS Certificate and the Income and Expenditure Account.
On the basis of the above, I have reason to believe that income chargeable to tax has escaped assessment within the meaning of Section 147."

22. The appellant filed its objections both on the assumption of jurisdiction as well on the merits, and a speaking order was passed by the assessing authority on 23.09.2010 based on the judgment of the Supreme Court in *GKN Driveshafts (India) Ltd v Income-Tax Officer*[6]. The matter was taken up for assessment thereafter and an order of draft assessment was passed.

23. The first question raised by the appellant assails the proceedings for reassessment on the ground of lack of jurisdiction on the part of the assessing authority. However, we disagree. Though the notice for reassessment was issued beyond the period of four years, there was no scrutiny of the Return originally.

24. Hence, and based on Explanation (2) to Section 147 of the Act, we uphold the jurisdiction of the Authority to initiate reassessment, drawing support from the judgment of the Supreme Court in *Rajesh Jhaveri Stock*

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[6] 259 ITR 18

Brokers[7].Question No.1 is answered in favour of the revenue.

25. The assessing authority had brought to tax a sum of Rs.11.53 crores under the following four heads:-

Mobilization and Demobilization : 8,42,62,240
Freight & Hire Charges : 2,48,18,171
Meals and accommodation charges: 17,62,726
Travelling : 45,09,746
Total :11,53,52,883

26. The appellant has argued that the amount constitutes pure reimbursement of costs whereas it is the case of the Revenue that no materials are available on record to establish this factual position. The appellant has produced a Cost Allocation Agreement dated 01.04.2001 between itself, styled as 'Service Group', and Van Oord Acz Private Company, styled as the 'Related Company'.

27. The Cost Allocation Agreement generally identifies the nature and extent of services under Article 2 as follows:-

> *2.Nature and Extent of Services*
>
> *a) All services to be rendered by the SERVICE GROUP will be advisory and consultative, and the RELATED COMPANY shall have the final responsibility for the implementation of all advice and assistance received;*
> *b) The SERVICE GROUP may, at its election, engage other firms or persons to assist it in the rendition of services hereunder or to perform all or any part of such services;*

28. Under Article 4, dealing with 'Compensation', the parties agree that

[7] Footnote Supra 3

as compensation for the services rendered by the Service Group, the Related Company shall pay their pro-rata share of the reimbursable expenses as determined and allocated under Article 3. Article 3 dealing with reimbursement expenses states that expenses identified to be reimbursable expenses shall be allocated in the manner set out under clauses (a) to (d) of that Article.

29. We do not wish to refer any further to the Cost Allocation Agreement, as that Agreement is, in our view, not relevant to the present case, being a general Agreement that deals with allocation of costs incurred by the holding company. Though learned Senior Counsel has referred to the CAA, and the assessee has also referred to the same before the authorities, nothing turns on this Agreement, as the assessee is unable to corelate the subject expenditures to this Agreement.

30. Moreover, the Agreement is undated, and is in very general terms. It is not specific to the subject transaction or expenditures in respect of which reimbursement is stated to have been made. In fact, if the appellant had been in a position to establish a one-to-one match between the amounts received and costs incurred, that would have sufficed, even in the absence of any Cost Allocation Agreement. However, in the present case, we do not find any material that would persuade us to intervene on what we believe is a pure question of fact.

31. Furthermore, we have carefully perused the exchange of notices and responses between the parties. Vide letters dated 12.11.2003 and 27.03.2008, the

appellant has enclosed the supporting evidences being, (i) return of income, (ii) TDS certificate, (iii) copy of cost allocation agreement dated 1.4.01 and (iv) copy of the order DCIT, New Delhi dated 22.11.2000 passed in the case of the Indian entity.

32. The appellant had stated before the authorities that debit notes were raised on the basis of actual invoices raised by the third parties, reiterating that there was no element of profit or mark-up added to the costs incurred. In conclusion, the appellant states that the *'copies of the invoices of third parties are not being attached herewith in order to avoid too much bulky information. However, the same shall be furnished as and when required'*.

33. The breakup of the receipts with invoice details / summary had been produced by the appellant before the assessing authority in the course of reassessment proceedings, and before us as well. The assessing authority has however not chosen to discuss in detail the factual details supplied by the assessee as he states at paragraph 5.7 that *'without going into the factual details' the reimbursement of expenses may be taxed as fees for technical services.*

34. Though it appears that the authority has accepted that the amounts constitute reimbursement of expenses, there is no categoric finding in this regard. Pertinently, in the objections filed before the DRP, the petitioner has not pursued the argument relating to reimbursement of costs, but has proceeded solely on the argument that the receipts do not constitute fees for technical services. We are hence not inclined to intervene at this stage in regard to the

aspect of reimbursement of costs and accordingly, Question nos. 3 and 4 are answered in favour of the revenue, barring our conclusion in regard to the expenses on freight, travel, accommodation and meals, at paragraph 36 of this order.

35. Coming to Question No.2 relating to the classification of services in consideration of which the remittances were made, the assessing authority has proceeded on the basis that the services rendered are of the nature of fees for technical services.

36. We are of the view that the expenses on freight, meals, accommodation and travelling can, by no stretch of the imagination, be classified as technical services. In all probability, such expenditures were incurred, and have been reimbursed by the Indian entity. Some material has been furnished by the Appellant before the assessing authority in the course of the reassessment proceedings. Hence, and to this limited extent, in relation to the aforesaid items of expenditure only, we answer Question Nos. 3 and 4 in favour of the Assessee.

37. Mr.Ramanakumar has referred to the judgments in the case of *Halliburton (supra)* and *Sedco* (supra) in support of his argument that all expenditures, even of the nature of freight, other charges and mobilization / demobilization, would constitute technical services.

38. We have carefully perused those judgments, that have been rendered in the context of Section 44BB of the Act. Section 44BB deals with business of

exploration etc., of mineral oils, and provides for a special methodology of assessment wherein, notwithstanding anything contained in Sections 28 to 41, 43 and 43A, in the case of a non-resident assessee engaged in the provision of services or facilities in connection with, or supplying plant and machinery on hire for production of mineral oils, assessment shall be made on presumptive basis deeming a sum equal to 10% of the aggregate amounts of receipts, as profits and gains of business, chargeable to tax under the head 'profits and gains of business'.

39. As it is nobody's case that either the assessee or the Indian company are entitled to the benefit of Section 44BB or the method of taxability set out therein, those judgments are not applicable to the case on hand. We thus reiterate that in the present case, the expenses incurred on freight, hire charges, meals, accommodation and travel would not constitute fees for technical services and we accept the submission that have been reimbursed at cost.

40. Coming to the mobilization/demobilization charges, the nature of services relates to the identification of an appropriate third party that has supplied the dredger for such mobilization/demobilization. Article 12 of the DTAA deals with royalties and fees for technical services.

41. Article 12 (5) defines technical services to mean payments of any kind, to any person, in consideration of the rendition of technical or consultancy services (including through the provision of services of technical or other personnel) if such services make available, technical knowledge, experience,

skill, know-how or processes, or consist of the development and transfer of a technical plan or technical design.

42. The appellant has specifically sought the benefit of the 'make available' clause before the Tribunal and the same has been rejected, albeit without any reasoning as to why. We are however not inclined to remit the matter to the Tribunal at this distance of time, to make good the deficiency. What is 'make available' has been discussed by the Karnataka High Court in the case of *DeBeers (supra)* in the following terms:-

> *'What is the meaning of "make available". The technical or consultancy service rendered should be of such a nature that it "makes available" to the recipient technical knowledge, know-how and the like. The service should be aimed at and result in transmitting technical knowledge, etc., so that the payer of the service could derive an enduring benefit and utilize the knowledge or know-how on his own in future without the aid of the service provider. In other words, to fit into the terminology "making available", the technical knowledge, skills, etc., must remain with the person receiving the services even after the particular contract comes to an end. It is not enough that the services offered are the product of intense technological effort and a lot of technical knowledge and experience of the service provider have gone into it. The technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that the receiver can deploy similar technology or techniques in the future without depending upon the provider. Technology will be considered "made available" when the person acquiring the service is enabled to apply the technology. The fact that the provision of the service that may require technical knowledge, skills, etc., does not mean that technology is made available to the person purchasing the service, within the meaning of paragraph (4)(b). Similarly, the use of a product which embodies technology shall not per se be considered to make the technology available. In other words, payment of*

> *consideration would be regarded as "fee for technical/included services" only if the twin test of rendering services and making technical knowledge available at the same time is satisfied.'*

43. Hence in order to attract liability under Article 12, the technology or process in respect of which the consideration has been received, ought to have itself, been made available to the assessee.

44. We are of the considered view that mere identification of third parties to provide services of mobilization and demobilization, does not constitute a technical service. At best, it would amount to a consultancy/managerial service. Then again, though the definition of Fee for Technical Service includes consultancy services, clause (b) states that it is only if such technical knowledge, experience, skill, know-how, process, development and transfer of technical plan or technical design is *made available* to the assessee, that the receipts would be taxable.

45. In light of the discussion above, where no services have been 'made available' to the Indian subsidiary, the assessee has the benefit of the treaty and Question No. 2 is hence answered in favour of the assessee. Question No.6 is consequential to our decision in regard to Questions Nos.1 to 5.

46. This Tax Case (Appeal) is disposed in terms of this order. No costs.

[A.S.M, J.] [M.S.K, J.]
27.01.2026

Index:Yes
Neutral Citation:Yes
ssm

To

1. The Assistant Director of Income Tax,
   International Taxation, Chennai.

2. The Income Tax Appellate Tribunal, Chennai Bench 'B',
   Chennai.

DR. ANITA SUMANTH,J.
and
MUMMINENI SUDHEER KUMAR,J.

ssm

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