IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "I" MUMBAI

BEFORE SHRI RAVISH SOOD (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)

ITA No. 933/MUM/2017
Assessment Year: 2012-13
&
ITA No. 6465/MUM/2017
Assessment Year: 2013-14

Damco International A/S, C/O. Damco India Private Limited, 13th Floor, Tower A, Urmi Estate Ganpatrao Kadam Marg, Lower Parel, Mumbai-400 013. **PAN No. AAECD1262G**	Vs.	Deputy Commissioner of Income Tax (International taxation)-2(1)(1), Room No. 1713, 17th Floor, Air India Building, Nariman Point, Mumbai-400 021.
Appellant		**Respondent**

Assessee by	:	Mr. Porus Kaka, Sr. Advocate
Revenue by	:	Mr. V. Sreekar, CIT-DR

Last Date of Hearing	:	10/01/2020
Date of Pronouncement	:	20/07/2020

ORDER

PER N.K. PRADHAN, AM

The captioned appeals filed by the assessee are directed against the order dated 09.12.2016 passed u/s 144C(13) r.w.s. 143(3) of the Income Tax Act, 1961 (the Act) by the Dy. Commissioner of Income Tax (International

Taxation)-2(1)(1), Mumbai (hereinafter the 'AO'). As common grounds are involved in these appeals, we are proceeding to dispose them off through a consolidated order for the sake of convenience. We begin with the AY 2012-13.

ITA No. 933/MUM/2017
Assessment Year: 2012-13

2. The grounds raised by the assessee read as under :

1. On the facts and in circumstances of the case and in law, the AO erred and the Dispute Resolution Panel ('DRP') further erred in upholding/confirming the action of AO in holding that the Business Support Charges of Rs.26,25,81,349/- received during the year by the Appellant are in the nature of Royalty/ Fees for Technical Services under the Act.

   1.1 The AO / DRP failed to appreciate that what has been recovered from DIPL is the general maintenance and running cost of various global systems which does not amount to the definition of Royalty as prescribed under Explanation 2 to Section 9(1)(vi) of the Act.

   1.2 The AO/ DRP failed to appreciate that the Appellant is a central coordinator for various support services to all Damco entities across the globe and does not render any technical, managerial or consultancy services to Damco India Private Limited ('DIPL') as mentioned in the definition of Fees for Technical services under Explanation 2 to Section 9(1)(vii) of the Act.

   1.3 The AO / DRP erred in taking reference to the visit in India of Appellant's personnel without appreciating that such visit has no link to the recovery of business support charges.

   1.4 The AO / DRP erred in concluding on the basis of various erroneous surmises that the personnel of the Appellant visiting India rendered managerial and technical services to Damco India Private Limited. The above conclusion is unreasonable, unsubstantiated and contrary to submission of facts on record.

2. On the facts and in circumstances of the case and in law, the AO erred and DRP further erred in upholding / confirming the action of AO in holding that the Business Support Charges of Rs.26,25,81,349/- received during the year by the Company are in nature of Royalty/ FTS under the DTAA.
3. On the facts and circumstances of the case and in law, the AO / DRP erred in holding that the entire Business Support Charges of Rs.26,25,81,349/- are in the nature of Royalty/ FTS by disregarding various submissions filed by the Appellant showing the actual nature of Business Support Charges and its bifurcation along with the respective allocation keys for each cost component being allocated to/ reimbursed by Damco India Private Limited. The DRP further erred in noting that "No bifurcation is available in respect of payment towards each of these items....." which is factually incorrect and contrary to submissions on record.
4. On the facts and circumstances of the case and in law, the AO / DRP erred in holding that the Business Support Charges of Rs.26,25,81,349/- are chargeable to tax in India as Royalty/ FTS in total disregard to the fact that the Appellant is not charging any mark-up over the cost being allocated to Damco India Private Limited and the receipt is in the nature of reimbursement not chargeable to tax.
5. On the facts and in circumstances of the case and in law, the AO erred in initiating penalty proceedings under Sec 271(1)(c) of the Act.
6. On the facts and in circumstances of the case and in law, the AO has erred in levy of interest under Section 234B and 234C of the Act.
7. On the facts and in circumstances of the case and in law, and without prejudice to any of the Grounds of Appeal as raised above, the AO has erred in calculating Tax @ 10.8% instead of 10%.

3. Briefly stated, the facts of the case are that the appellant filed its return of income for the assessment year (AY) 2012-13 on 29.11.2013 declaring total

income of Rs.14,29,580/-. The appellant is a company incorporated in Denmark and is a part of A.P. Moller Maersk ('APMM') group, which was engaged in the business of Shipping & Logistics. In 2009, the Logistics business of APMM group was hived off into Damco group. Pursuant to this, Damco India Pvt. Ltd. ('DIPL') was formed having full fledged board for earning its business.

During the year under consideration, the appellant received reimbursement of cost towards business support charges of Rs.26,25,81,349/- which was claimed as not liable to tax due to absence of a Permanent Establishment (PE) in India.

The appellant had incurred certain costs towards procurement of insurance, accounting software, travel, fixed assets (computer servers) etc. at group level which were subsequently recovered from various group entities. The above breakup of costs were categorized into the following :

i. Costs related to running and maintaining Maersk Line IT, Operational IT & FACT
ii. Procurement of various products (fixed assets etc.) and services (travel, insurance etc.)
iii. BPO processing
iv. Administrative cost

However, the AO arrived at a finding from examination of the 'Management & Service Agreement' entered into by the appellant with DIPL that the services provided by the appellant were in the nature of technical services. Accordingly, the AO brought to tax the same as royalty and fees for technical services. The reasons given by the AO are that under the IT support services, DIPL was getting access to the group IT network systems as well as related maintenance and support services. As per the AO, the systems to which DIPL was getting access included Logistics Information Systems; Ocean, Air and Supply Management Products ; Outlook as Services ; Maersk Line IT ; INTTRA & FACT etc. Thus the AO observed that the payment received by the appellant was towards IT Network Systems (Software) as well as related maintenance and support services. As the support services were ancillary and subsidiary to providing access to IT Network Systems of the group, the AO by following the order of the Dispute Resolution Panel-1, Mumbai ('DRP') held the amount of Rs.26,25,81,349/- received by the appellant as fees for technical services and royalty under the IT Act as well as under Article 13 of the India Denmark DTAA.

The AO also followed the order of the DRP and held that (i) the appellant had no direct business interest in India and all Indian business is to be looked after by DIPL, (ii) as per sub-clause (a) of clause 4.1 of the 'Management & Service Agreement' between the appellant and DIPL, it is the responsibility of the appellant to develop and communicate the global strategy, global business plans as per products and targets aligned with the overall Damco strategy.

Therefore, the AO concluded that the employees of the appellant visiting India in fact rendered managerial and technical services to DIPL.

Thus the AO made an addition of Rs.26,25,81,349/-.

4. Before us, the Ld. counsel for the assessee submits that (i) the appellant acts as the central coordinator for all Damco entities across the globe, (ii) as a

central coordinator, the appellant procures from various service providers *viz.* insurance, procurement of various products and information technology related support services etc. needed by Damco entities across the globe, (iii) these services are procured centrally by the appellant to benefit from economies of scale and homogeneous services offered globally to whole Damco entities, (iv) the appellant enters into Management and Service Agreement ('MSA') with Damco operating entities and thereafter, recovers the cost of procurement/provision from these entities; all these costs are only reimbursed to the appellant and there is no mark-up, (v) the appellant had incurred certain costs towards procurement of insurance, accounting software, travel, fixed assets (computer servers) etc. at group level which were subsequently recovered from various group entities including DIPL without any mark-up, (vi) the BPO processing are low end services outsourced by the appellant and done through Maersk Global Service Centre India (P.) Ltd. ('Maersk GSC') in India which included processing of bill of lading, customs documents etc., (vii) the administrative costs are basically salary cost of administrative employees of the appellant who are coordinating for procurement of various products and services.

Thus the Ld. counsel submits that the abovementioned services/procurement rendered by the appellant are in the nature of coordinating services, whereby various costs incurred are pooled together and charged/recovered as reimbursement of costs on the basis of various allocation keys like number of Headcount/Headcount usage/Number of users/Country operational cost/Country revenue etc. which is uniformly applied across the group. It is stated that the Independent Auditor's Report shows the various allocation fees for each category of costs reimbursed to the appellant.

Thus it is explained that the total receipt of Rs.26,25,81,349/- could not be termed as managerial/technical/consultancy services.

Reliance is placed on the decision by the Hon'ble Supreme Court in the case of *DIT v. A.P. Moller Maersk AS* (2017) 392 ITR 186 (SC). Also it is explained that reimbursement of cost of a similar nature, related to FACT, is also specifically covered in the above case.

Stating that the services provided by the appellant are basically in the nature of administrative/procurement of products/coordinating services and not managerial, technical or consultancy in nature, the Ld. counsel relies on the decision in the case of *TUV Bayren (India) Ltd. v. DCIT* (2012) 23 taxmann.com 127 (Mum).

Further stating that the services are provided to other group entities as well and the pooling of cost is for benefit of all and 'Privity of Contract' is therefore absent in this case, which is otherwise required in any contract for managerial/technical/consultancy services, the Ld. counsel relies on the decision the Hon'ble Supreme Court in *CIT v. Kotak Securities Ltd*. (2016) 383 ITR 1 (SC).

Regarding procurement cost of BPO services, the Ld. counsel explains that reimbursement of costs relate to Global Service Centre which is in effect provided to the group by Maersk Global Services Centre and is in the nature of low end BPO and hence cannot come under the purview of managerial, technical and consultancy. In this regard, reference is made by him to the order of the Special Bench of the ITAT, Mumbai in the case *of Maersk Global Service Centre (India) Pvt. Ltd. v. ACIT* (ITA No. 7466/Mum/2012) for AY 2008-09. On the proposition that reimbursement of marketing fees are not to be FTS, reference is made to the decision in *CIT v. Creative Infocity Ltd*. (2017) 82 taxmann.com 356 (Guj).

Also it is stated that reimbursement of cost towards administrative services cannot be held to be in the nature of technical, managerial and consultancy in nature. In this regard, reliance is placed on the decision in *DCIT v. Ernst & Young (P.) Ltd.* (2014) 49 taxmann.com 386 (Kol-Trib.), *Exxon Mobil Company India (P.) Ltd. v. Addl. CIT* (2018) 92 taxmann.com 5 (Mum-Trib.), *WNS Global Services (UK) Ltd. v. ADIT (International Taxation)* (2012) 22 taxmann.com 65 (Mum), *Yash Raj Films (P.) Ltd. v. ITO (International Taxation)* (2012) 28 taxmann.com 247 (Mum-Trib.).

Further, stating that the cost recovered from DIPL is at cost without any mark-up, the Ld. counsel draws our attention to the certificate obtained from an Independent Auditor. Relying on the decision in *A.P. Moller Maersk AS* (supra), it is explained that in the above judgment, which is in the case of appellant's group company, similar case of reimbursement of cost related to IT systems was dealt, whereby prior to 2009 i.e. before the separation of logistic business, costs in relation to procurement were reimbursed to A.P. Moller Maersk and on these similar facts, the Hon'ble Supreme Court held that reimbursement of cost cannot be taxable in India being devoid of any profit element/income.

Thus stating that all receipts in relation to business support charges being in the nature of reimbursement of cost, devoid of any income element/profit embedded into it, the Ld. counsel concludes that the receipt of business support charge of Rs.26,25,81,349/- ought not to be taxable as fees for technical services/royalty under the Act or relevant DTAA.

5. On the other hand, the Ld. Departmental Representative (DR) refers to clause 4.1 of the "Management & Service Agreement' which reads as under :

1. Develop and communicate the global strategy, global business plans per product and targets aligned with the overall Damco strategic objectives.
2. Provide and arrange access to Information technology systems and related maintenance and support services, on the terms and as set out in clause 5.1(a).
3. Arrange certain liability insurance for the company, on the terms and as set out in clause 5.1(b), unless otherwise agreed from time to time.

Referring to above clause, it is stated by him that under the IT support services, DIPL is getting access to the group IT network Systems (Software) as well as related maintenance and support services. Elaborating further, it is stated by him that the Systems to which DIPL is getting access include Logistics Information System; Ocean, Air and Supply Chain Management Products; Outlook as Services; Maersk Line IT ; INTTRA & FACT etc.

Thus the Ld. DR submits that the payment received by the appellant is towards IT Network Systems (Software) as well as related maintenance and support services and no bifurcation is available in respect of payment towards each of these items and a composite bill is being raised. Further, stating that the support services are ancillary and subsidiary to providing access to IT Network Systems of the group and payment towards license to the software is taxable as royalty, the Ld. DR submits that the AO has rightly brought to tax the amount of Rs.26,25,81,349/- received by the appellant as business support charges treating it as royalty and fees for technical services under the IT Act as well as under Article 13 of the DTAA between India and Denmark.

6. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decisions are given below.

The issue involved in the instant appeal falls in a narrow compass, which is as under :

(i) Whether business support charge receipt of Rs.26,25,81,349/- as held by the AO is royalty/fees for technical service ?;

(ii) Whether appellant's contention that business support charge receipt of Rs.26,25,81,349/- is reimbursement of cost incurred and hence not chargeable to tax ?.

In the instant case, the appellant acts as the central coordinator for all Damco entities across the globe. As a central coordinator, the appellant procures from various service providers viz. insurance, procurement of various product and information technology related support services etc. needed by Damco entities across the globe. The appellant enters into 'MSA' with Damco operating entities and therefore, recovers the cost of procurement/provision from these entities. We find that all these costs are only reimbursed to the appellant and there is no mark-up.

The costs comprise of (i) costs related to running and maintaining Maersk Line IT, Operational IT and FACT, (ii) procurement of various products (fixed assets etc.) and services (travel, insurance etc.), (iii) BPO processing and (iv) administrative cost.

We find that the abovementioned services/procurement rendered by the appellant are in the nature of coordinating services whereby various costs incurred are pooled together and charged/recovered as reimbursement costs on the basis of various allocation keys like number of Headcount/Headcount usages/Number of users/Country operational cost/Country revenue etc., which is uniformly applied across the group.

We also observe that reimbursement of cost related to Global Service Centre is in effect provided to the group by Maersk Global Services Centre and is in the nature of low end BPO and hence cannot come in the field of managerial, technical and consultancy. Similarly, the business support services related to procurement and issuance are also reimbursement of cost incurred for the benefit of the group companies and not technical, managerial or consultancy in nature. Similarly, reimbursement of cost towards administrative services cannot be held to be in the nature of technical, managerial and consultancy in nature.

Having said so, we shall now proceed to delve into the legal aspects below.

In the case of *A.P. Moller Maersk AS* (supra), the assessee was a foreign company engaged in the shipping business and was a tax resident of Denmark. It had agents in India working for it, those agents booked cargo and acted as clearing agents for the assessee. In order to help all its agents, across the globe, the assessee had set up and was maintaining a global telecommunication facility called Maersk Net System which was a vertically integrated communication system. The agents were paying for said system on *pro rata* basis. According to the assessee, it was merely a system of cost sharing and the payments received by the assessee from its agents were in the nature of reimbursement of expenses. The AO did not accept said contention and held that the amounts paid by the agents to the assessee was consideration/fees for technical services rendered by the assessee and, accordingly, held same to be taxable in India under Article 13(4) of the DTAA. The Tribunal opined that the utilization of the Maersk Net Communication System was an automated software based communication system which did not require the assessee to render any technical services. It was merely a cost sharing arrangement between the assessee and its agents to efficiently conduct its shipping business and accordingly the Tribunal allowed assessee's claim. The High Court also held that income from the use of Global Telecommunication Facility called 'Maersk Net' would be classified as income arising out of shipping business and not as fees for technical services. On appeal, the Hon'ble Supreme Court held that "where assessee, a foreign shipping company, set up a telecommunication system, in order to enable its agents across globe including India to perform their role more effectively, payment received for providing said facility was not taxable as fees for technical services.

In the case of *TUV Bayren (India) Ltd*. (supra), the Hon'ble Bombay High Court held that "audit work and certification would not come within the realm of fees for technical services u/s 9(1)(vii) and under Article 12(4) of Indo-German DTAA".

In *Kotak Securities Ltd*. (supra), the Hon'ble Supreme Court explained that :

> "Technical services' like 'Managerial and Consultancy service' would denote seeking of services to cater to the special needs of the consumer/user as may be felt necessary and the making of the same available by the service provider. It is the above feature that would distinguish/identify a service provided from a facility offered. While the former is special and exclusive to the seeker of the service, the latter, even if termed as a service, is available to all and would, therefore, stand out in distinction to the former."

In the case of *Maersk Global Service Centres (India) Pvt. Ltd*. (supra), the Special Bench of the Tribunal has held the nature of services/activities performed by Maersk GSC to be in the nature of low-end BPO.

In the case of *Linde AG* (supra), in Indian concern entered into an agreement with the assessee, a West German company, for establishing a new fertilizer project in India. Under the said agreement, the assessee purchased bulk material and spares required for setting up of a plant. These purchases were charged from the Indian concern at cost plus 4% charges as mentioned in the agreement. The assessee claimed that said receipt was industrial and commercial profit within the meaning of DTAA between West Germany and India and the same was not taxable under DTAA. The AO treated the receipt of 4% procurement fee as royalty stating that procurement requires industrial and scientific experience and the assessee was imparting information concerning industrial and scientific experience by assisting the Indian concern and procuring these materials. He, therefore, assessed it as royalty by invoking section 9(1)(vii). On appeal, the CIT(A) held that the said receipt was 'fees for technical services' to the extent of 50% being related to inspection etc. and 50% as industrial and commercial profit. On further appeal, the ITAT held that :

> "The assessee was remunerated for its efforts and time spent in making these simple purchases on behalf of the Indian concern and had nothing to do with rendering of any technical, managerial or consultancy service to the Indian concern. In these circumstances, the entire amount of the procurement fees received was in the nature of commercial profit and was neither a royalty nor fees for technical services. It was, therefore, exempt fully from the income-tax in India by virtue of Article III of Double Taxation Agreement, which provided that profits of an enterprise of a contracting State shall be taxable in that State unless the enterprise carries on business in other contracting State through a permanent establishment situated therein. The assessee was not carrying on a business in India through a permanent establishment and, therefore, the profits in arranging and procuring equipments for the Indian concern would not be taxable in India."

In *Adidas Sourcing Ltd*. (supra), the Tribunal has held that income from services rendered by assessee non-resident company to Indian company for sourcing of goods from outside India is 'commission' and not 'fee for technical services'.

In *Creative Infocity Ltd*. (supra), the assessee-company engaged US company (CII) to market its projects in US market and reimbursed expenses incurred by CII. The AO observed that the said expenses were part of technical services related to income earned in India. Expenses incurred by CII were fully supported by vouchers and certified by the Certified Public Accountant of USA as well as CA of India, certifying the said expenses were in fact reimbursement. Further CII had no business activity or PE in India. The Hon'ble High Court held that provision of section 9(1)(vi)/(vii) would not have any implication as amount paid was neither royalty nor fees for technical services but simple reimbursement of expenses.

In *Ernst & Young (P.) Ltd*. (supra), the assessee-company was a member of an international organization. Two foreign group concerns developed and provided administrative and management support services in connection with technology updates, system and methodology and upgrades, training through webs etc. The assessee reimbursed its share of cost for services utilized in its business. The Tribunal held that assessee was not liable to deduct TDS u/s 195 on amount paid to foreign group concerns towards reimbursement of cost of administrative and management support services.

In *Exxon Mobil Company India (P.) Ltd.* (supra), the Tribunal held that "where assessee paid certain amount to a Singapore based company for providing global support services which included management consulting, functional advice, administrative, technical, professional and other support services since foreign company had not made available any technical knowledge, experience, skill, know-how, or process which enable the assessee to apply technology contained therein on its own, payment made by assessee could not be considered as fees for technical services as defined under Article 12(4)(b) of India-Singapore DTAA".

In *Yash Raj Films (P.) Ltd.* (supra), the Tribunal has held that "services provided by overseas entity in connection with making logistic arrangement for shooting of different films of assessee outside India were in nature of commercial services and amount received for such services constituted business profit of service provider which could not be taxed in India in absence any PE in India of said service providers".

In view of the factual scenario and position of law narrated hereinabove, we hold that the receipt of business support charge of Rs.26,25,81,349/- is not taxable as fees for technical services/royalty under the Act or the relevant DTAA as the same is purely in the nature of reimbursement of cost. In view of the above, the other grounds of appeal become academic in nature.

Thus we set aside the order of the Ld. CIT(A) and allow the appeal filed by the assessee.

Facts being identical, our decision for the AY 2012-13 applies *mutatis mutandis* to AY 2013-14.

7. However, before we part with the matter, we must deal with one procedural issue as well. While hearing of these appeals was concluded on 10.01.2020, this order thereon is being pronounced today, much after the expiry of 90 days from the date of conclusion of hearing. We are also alive to the fact that rule 34(5) of the Income Tax Appellate Tribunal Rules 1963, which deals with pronouncement of orders. Let us in this light revert to the prevailing situation in the country. On 24th March, 2020, Hon'ble Prime Minister of India took the bold step of imposing a nationwide lockdown, for 21 days, to prevent the spread of Covid-19 epidemic, and this lockdown was extended from time to time. As a matter of fact, even before this formal nationwide lockdown, the functioning of the Income Tax Appellate Tribunal at Mumbai was severely restricted on account of lockdown by the Maharashtra Government, and on account of strict enforcement of health advisories with a view of checking spread of Covid-19. The epidemic situation in Mumbai being grave, there was not much of a relaxation in subsequent lockdowns also. In any case, there was unprecedented disruption of judicial work all over the country. As a matter of fact, it has been such an unprecedented situation, causing disruption in the functioning of judicial machinery, that Hon'ble

Supreme Court of India, in an unprecedented order in the history of India and *vide* order dated 6.5.2020 read with order dated 23.3.2020, extended the limitation to exclude not only this lockdown period but also a few more days prior to, and after, the lockdown by observing that "In case the limitation has expired after 15.03.2020 then the period from 15.03.2020 till the date on which the lockdown is lifted in the jurisdictional area where the dispute lies or where the cause of action arises shall be extended for a period of 15 days after the lifting of lockdown". Hon'ble Bombay High Court, in an order dated 15th April 2020, has, besides extending the validity of all interim orders, has also observed that, "It is also clarified that while calculating time for disposal of matters made time-bound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly", and also observed that "arrangement continued by an order dated 26th March 2020 till 30th April 2020 shall continue further till 15th June 2020".

The Hon'ble Bombay High Court itself has, *vide* judgment dated 15th April 2020, held that "while calculating the time for disposal of matters made time-bound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly".

Viewed thus, the exception to 90 day time limit for pronouncement of orders inherent in Rule 34(5)(c) clearly comes into play in the present case.

8. In the result, the appeals filed by the assessee for AY 2012-13 & 2013-14 are allowed.

Order pronounced under rule 34(4) of the Income Tax (Appellate Tribunal) Rules, 1962, by placing the details on the notice board.

Sd/- Sd/-

(RAVISH SOOD) **(N.K. PRADHAN)**
JUDICIAL MEMBER **ACCOUNTANT MEMBER**

Mumbai;
Dated: 20/07/2020
Rahul Sharma Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

//True Copy//

(Assistant Registrar)
ITAT, Mumbai