

Sum received for hiring out dredgers wasn't taxable as royalty under Article 12 of India-Netherlands DTAA

Summary – The High Court of Madras in a recent case of Van Oord ACZ Equipment BV, (the Assessee) held that sum received by Dutch Company for hiring out dredgers to its Indian AE would not be taxable in India as 'Royalty' as Article 12 of India-Netherlands DTAA does not include such payments within its ambit.

The issue that arose for consideration and decided by the High Court was:

- Whether sum received by Dutch Company for hiring out dredgers to its Indian AE could be taxed in India as 'Royalty' under India-Netherlands treaty ('DTAA')?
- The High Court held in favour of assessee as under:
 - (1) Originally, sub clause (1) of Article 12 of DTAA stood as follows:

"Royalties, fees for technical services and payments for the use of equipment arising in one of the States and paid to a resident of the other State may be taxed in that other State."
 - (2) Originally, sub clause (4b) of Article 12 of DTAA stood as follows:

"Payments of any kind receive as consideration for the use of, for the right to use industrial, commercial or scientific equipment, other than payments....."
 - (3) Subsequently there were amendments and sub-clause (1) and sub-clause (4) of Article 12 of DTAA were amended. Clause (1) originally covered 'Royalties, 'fees for technical services' and 'payments for the use of equipments'. However, the category of "payments for the use of equipment" was deleted in new clause (1). In the modified sub-clause (4) payment for the use of equipment or any consideration for the use of, for the right to use industrial, commercial or scientific equipment was deleted and it would not be taxable in contracting State in which they would arise in viz., in the given case India.
 - (4) Clause (iva) of Explanation 2 to Section 9(1) defines royalty but that clause was not applicable as the payments for the use of equipment would not be taxable under DTAA and the provisions of DTAA would prevail over the provisions of the income-tax Act.
 - (5) Thus, the sum received by assessee for hiring out dredgers to an Indian AE would not be taxable in India.