

आयकर अपीलिय अधिकरण, 'डी' न्यायपीठ, चेन्नई।  
**IN THE INCOME TAX APPELLATE TRIBUNAL  
'D' BENCH: CHENNAI**

श्रीएबीटी. वर्की, न्यायिक सदस्य एवं  
श्रीजगदीश, लेखासदस्यकेसमक्ष

**BEFORE SHRI ABY T. VARKEY, JUDICIAL MEMBER AND  
SHRI JAGADISH, ACCOUNTANT MEMBER**

**IT (TP) A No.3/Chny/2018**

निर्धारणवर्ष/Assessment Year: 2011-12

M/s.Vestas Wind Technology- India Pvt. Ltd., No.298, Rajiv Gandhi Salai, Sholinganallur, Chennai-600 119.	v.	The Dy. Commissioner- of Income Tax, Corporate Circle-3(2), Chennai.
[PAN: AAACA 9274 F]		
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

आयकरअपीलसं./ITA No.3024/Chny/2019  
निर्धारणवर्ष/Assessment Year: 2012-13

The Dy. Commissioner- of Income Tax, Corporate Circle-3(2), Chennai.	v.	M/s.Vestas Wind Technology- India Pvt. Ltd., No.298, Rajiv Gandhi Salai, Sholinganallur, Chennai-600 119.
		[PAN: AAACA 9274 F]
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

Assessee by	:	Shri N.V.Balaji, Adv.
Department by	:	Shri A. Sasikumar, CIT
सुनवाईकीतारीख/Date of Hearing	:	08.10.2024
घोषणाकीतारीख /Date of Pronouncement	:	31.12.2024





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**आदेश / ORDER**

**PER ABY T. VARKEY, JM:**

The assessee has preferred an appeal against the final order passed by the Deputy Commissioner of Income-tax, Circle 3(2), Chennai ('AO') u/s 144C/143(3) of the Act dated 31.12.2017, pursuant to the directions issued by the Ld. Dispute Resolution Panel ('DRP') vide order dated 27.12.2017 for AY 2011-12. In AY 2012-13, the Revenue has preferred an appeal against the order of the Commissioner of Income Tax (Appeals)-11, Chennai, dated 20.08.2019 arising out of the order passed u/s 144C/143(3) of the Act dated 31.12.2018 by the AO. Since the issues involved in both these appeals were common, both the appeals were heard together and are being disposed off by this consolidated order.

**2.** We first take up the appeal in ITA No.3/Chny/2018 for AY 2011-12 as the lead case. The following Ground Nos. 1 & 2 of the appeal are noted to be inter-linked and therefore are being taken up together.

*"The grounds mentioned herein are without prejudice to one another.*

*Ground 1 - The Learned Assessing Officer ('Ld. AO') and Honourable Dispute Resolution Panel ('Hon'ble DRP') exceeded the direction of the Honourable Income Tax Appellate Tribunal ('Hon'ble ITAT')*

*1.1 The Ld. AO and the Hon'ble DRP erred in law and in facts by not following specific directions issued by the Hon'ble ITAT for assessing the nature of payment made by the Appellant.*





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*1.2 The Ld. AO and the Hon'ble DRP failed to appreciate that the Hon'ble ITAT remitted the issue back to the Ld. AO only to examine whether the agreement for performance guarantee is for the purpose of its business and whether the recipient can be considered to have permanent establishment in India.*

*1.3 The Ld. AO and the Hon'ble DRP exceeded the jurisdiction by examining whether the payment made by the Appellant is Fees for Technical Services.*

*Ground 2 - Disallowance of performance guarantee fee under section 40(a)(i) of the Act*

*The Ld. AO and the Hon'ble DRP erred in law and in facts by holding the payment made by the Appellant towards performance guarantee as "Fees for technical services" under Section 9(1)(vii) of the income-tax Act, 1961 (the Act) Consequently, the Ld. AO and the Hon'ble DRP erred in holding that the Appellant ought to have deducted tax at source under section 195 of the Act and disallowing the expenditure under section 40(a)(i) of the Act."*

**3.** The facts as noted are that, the AO in the course of original assessment had observed that, the parent company of the assessee, namely, M/s. Vestas Denmark had given guarantee to the customers of the assessee who purchased windmill in India. In relation thereto, the assessee was noted to have paid guarantee fees of Rs.3,89,91,750/- to M/s. Vestas Demark on which no taxes were deducted at source. According to the AO, the payment made by the assessee partook the nature of *interest* and therefore held the assessee to be in default for not deducting tax thereon and as a consequence disallowed the impugned sum u/s 40(a)(i) of the Act. The action of the AO was confirmed by the DRP against which the assessee preferred an appeal in ITA No.177/Mds/2016 before this Tribunal. In the first round of proceedings,





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the assessee is noted to have argued that the impugned payment was in the nature of '*business profits*' for the parent company and therefore in the absence of a permanent establishment ('PE') in India, the payment was not liable to tax and accordingly the disallowance made u/s 40(a)(i) of the Act was unwarranted. In light of this argument, we find that, this Tribunal had enquired into the nature and business purpose of the guarantee extended by the parent company to its customers. The assessee is noted to have submitted that, it was in the nature of '*performance guarantee*' whereby the parent company guarantees to perform the contract of warranty and service, in case the assessee-company fails to perform. The assessee is noted to have explained that, this was done by parent company to give comfort to the assessee's customers and increase the market credibility of the assessee. The relevant query raised by the earlier Bench and the clarification given by the assessee, are noted to be as under: -

"On a query from the Bench, when the assessee has paid to the parent company on the basis of guarantee performance given to the customers, why such payment shall not be treated as business profits in the hands of the parent company? The Ld. representative submitted that in case the payment was considered as business profit, then naturally there should be a permanent establishment for parent company in India. In this case, there is no permanent establishment, therefore, payment made to the parent company is not chargeable under the Indian income-tax. The Ld. representative further submitted that a copy of the guarantee performance given by the parent company is available at page 49 of the paper-book. The parent company guarantees to perform





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the contract of warranty and service in case the assessee-company fails to perform. In view of this guarantee, according to the Ld. representative, the image of the assessee company in the market increases, therefore, the assessee was able to sell its product in the Indian market. On a query from the Bench, the Ld. representative clarified that the guarantee was given to the Indian customers by the assessee's parent company. The Ld. representative further clarified that there is no provision in the guarantee performance agreement for a dispute resolution in case it arises between the Indian customers and the assessee. On a query from the Bench, when the Indian customer is aggrieved over the performance of wind turbine generators, where he can raise the dispute either in India or in Denmark? The Ld. Representative submitted that the agreement is silent on this aspect. The Ld. representative further submitted that in view of the guarantee given by the parent company, the payment was made, therefore, it is a business expenditure."

4. Based on the above understanding given by the assessee, this Tribunal noted that, what was paid by the assessee was not interest, as inferred by the AO. At the same time however, since the nature of services rendered by the parent company, enforceability of so-called performance guarantee etc. was unclear from the terms of the contract, this Tribunal is noted to have questioned the very business purpose of this document. The Tribunal is noted to have raised several queries in this regard, which were not answered by the assessee at that material time, in as much as, several aspects were found to have not been examined by the lower authorities. This Tribunal accordingly is noted to have set aside this issue back to the file of the AO to examine the same in light of material available on record after giving due opportunity of hearing to the





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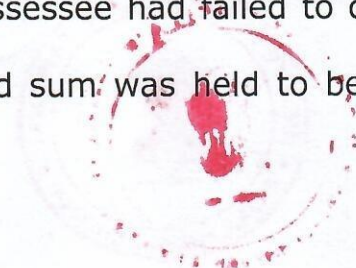
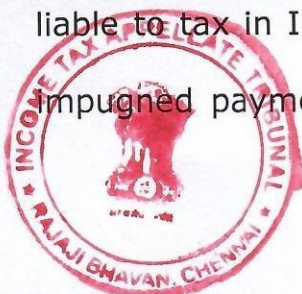
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assessee. The relevant findings of this Tribunal taken note of by us is as follows: -

"In the course of its business activity, the parent company of the assessee gives guarantee to Indian customers for performance in case the assessee-company fails to perform its obligations. The agreement, namely, performance guarantee agreement, is silent in respect of dispute resolution. An Indian company or customer naturally cannot be expected to travel all the way to Denmark for enforcing this guarantee. This guarantee agreement does not provide for any arbitration in India. **Therefore, it has to be examined whether the guarantee said to be given by the parent company is enforceable in India? If it is not enforceable in India, whether such kind of agreement is for business purpose or not?** It also needs to be examined when the parent company gives guarantee to Indian customers in respect of the product sold by the assessee-company in India, **whether the assessee-company can be considered as permanent establishment in India in respect of the income earned by the assessee in the form of guarantee performance fee?** These aspects were not considered either by the Transfer Pricing Officer or by the Dispute Resolution Panel. Therefore, **this Tribunal is of the considered opinion that the matter needs to be re-examined. Accordingly, the orders of the lower authorities are set aside. The issue of performance guarantee fee is remitted back to the file of the Assessing Officer. The Assessing Officer shall refer the matter to the DRP. The DRP shall examine the issue in the light of the material available on record and thereafter decide the issue after giving reasonable opportunity to the assessee.** Thereafter, the Assessing Officer shall pass necessary order under Section 144C(13) of the Act."

**(emphasis supplied)**

5. The Ld. DRP, in the second round of proceedings, is noted to have followed their views expressed while deciding identical dispute in subsequent AY 2012-13, and concluded that the fees paid for so-called guarantee was in nature of 'fees for technical services' and therefore liable to tax in India. Since the assessee had failed to deduct tax on the impugned payment, the impugned sum was held to be disallowable u/s





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40(a)(i) of the Act. Aggrieved by the order of the DRP, the assessee is now in appeal before us.

**6.** Assailing the action of Ld. DRP, the Ld. AR for the assessee argued that, the DRP without examining the specified aspects set out in the appellate order passed by this Tribunal in ITA No. 177/Mds/2016, had acted in excess of jurisdiction, by holding that the guarantee fee payments are in the nature of 'fees for technical services', by relying upon the orders for the subsequent AY 2012-13. According to the Ld. AR, this Tribunal had already concluded that, the payment was in the nature of 'business profits' and therefore the only issue which required examination was whether the parent company had a permanent establishment in India or not and, consequentially whether the payment was liable to tax in India or not, and basis this decide the applicability of Section 40(a)(i) of the Act. The Ld. AR submitted that, it was no longer open for the DRP to re-characterize the payment as 'fees for technical services', when this Tribunal had held it to be in the nature of 'business profits'. The Ld. AR accordingly urged that, the action of Ld. DRP was in excess of jurisdiction and in violation of the directions of the Tribunal and on this score alone, the impugned order deserves to be quashed. Per contra the Ld. CIT, DR appearing for the Revenue supported the order of the lower authorities. He argued that, the action of the Ld. DRP cannot be said to be in violation





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of the directions of the Tribunal and therefore contended that the impugned order was valid.

7. Having perused the findings given by this Tribunal in their order dated 22.04.2016 in ITA No. 177/Mds/2016, we find that the Ld. AR has selectively chosen to pick few lines from the said order and contended that, the impugned issue was set aside for a limited purpose with specific directions. It is noted that, the impugned issue relates to disallowance of guarantee fee u/s 40(a)(i) of the Act for non-deduction of TDS. Accordingly, whether or not the impugned payment was subject to withholding tax provisions, can be decided only when the nature of payment is ascertained and its taxability in India. In the first round of proceedings, the AO is noted to have understood this guarantee to be in the nature of financial guarantee and hence characterized the payment of fees as 'interest'. On appeal before this Tribunal, the counsel of the assessee had submitted that, the impugned payment was towards performance guarantee and not any financial guarantee and therefore it couldn't be construed as 'interest' but was in nature of 'business profits'. The assessee had also furnished a sample parent company guarantee to support its contention. Based on these submissions, this Tribunal is noted to have given its initial finding that the impugned payment was not in the nature of 'interest'. This finding is noted to have been based on the



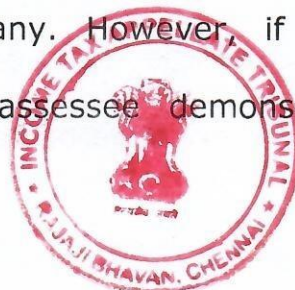


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understanding given by the counsel of the assessee that, the payment was towards performance guarantee and not any financial guarantee.

**8.** Having held so, this Tribunal proceeded to examine as to whether this parent company guarantee was indeed a performance guarantee or not. It is at this juncture that, this Tribunal took note of the terms of the performance guarantee contract and found the same to be lacking on several fronts and several of their questions posed to the assessee remained unanswered. The Tribunal is noted to have also questioned as to whether at all this payment would qualify as 'business profits' or not. If so, then whether the parent company had any permanent establishment in India viz., fixed place PE, agency PE, service PE etc. or not. The Tribunal accordingly noted that these factual aspects had not been looked into by the lower authorities. The Tribunal was of the view that, the nature and purpose of this performance guarantee contract was unclear as the same appeared to be un-enforceable and therefore the business expediency itself was found to be in doubt. Understandably, if the contract is found to be un-enforceable or void, then the payment released to parent company under such a void contract would constitute distribution of profits and hence shall stand re-characterized as 'dividend' paid to parent company. However, if the contract is found to be enforceable and the assessee demonstrates the nature of services



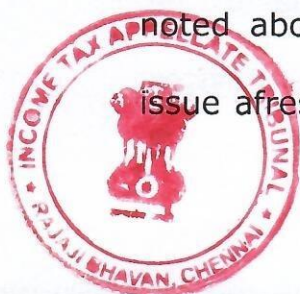


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rendered pursuant thereto, then it will have to be ascertained whether it is 'business profits' and taxable or not in terms of Article 7 of the DTAA. Likewise, if the nature of services, shown by the assessee to have been performed by the parent company, involves rendering of any technical knowledge or knowhow, then it may constitute 'fees for technical services' depending upon the definition and scope as provided in respective DTAA.

**9.** It is noted that all the above discussed factual aspects including the nature & purpose of the agreement with parent company were not clear and discernible from the material placed on record, and for this reason, this Tribunal is noted to have set aside the issue to the lower authorities to verify the same from records and accordingly pass appropriate order. We find that the remand was un-hindered and without any limitation or specifics. The very purpose of remanding the matter was to ensure that all the facts, records and relevant factors are to be objectively considered and that the correct factual position is ascertained. The directions of this Tribunal are noted to be unambiguous in this regard. The argument of the Ld. AR that, the direction of this Tribunal was specific and to the limited extent as to whether the impugned payment constituted 'business profits' or not, is not found to emanate from the directions of the Tribunal, as noted above. Instead, we note that the direction was to examine this issue afresh in light of the material available on record and therefore the





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entire issue was set aside to be re-considered. Accordingly, the legal plea raised by the assessee objecting to legal validity of the impugned addition is found to be untenable.

**10.** The decisions cited by the assessee are found to be factually distinguishable. In the case of **LI & Fung India (P.) Ltd. (79 taxmann.com 451)**, the Tribunal is noted to have set aside the quantification of transfer pricing adjustment with the specific direction to undertake fresh determination of arm's length price on the basis of correct cost base of the assessee. It was in violation of this specific direction that, the TPO had also rejected and included several comparables, and this action of the TPO was found to be in violation of the directions of the Tribunal by the Hon'ble Delhi High Court. However, this is not the case before us. Likewise, the decision of Hon'ble Bombay High Court in case of **Indo- Aden Salt works co (36 ITR 429)** is also found to be completely distinguishable both on issue as well as on facts.

**11.** Instead, we find the following findings rendered by the jurisdictional Hon'ble Madras High Court in the case of **Hyundai Motor India Limited Vs DCIT (WP No. 22508 of 2017) dated 16.07.2018** to be of relevance to the issue involved in the present case before us.





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"13. This Court is of an opinion that certain factual details based on the records can be re-adjudicated or verified once again when the matter was remanded back for re-consideration. Though there is a finding recorded by the ITAT during the course of presenting the case, ultimately the case was remanded to the original authority for re-consideration by the ITAT. **When the case was remanded back for re-adjudication, the findings made by the ITAT cannot be taken or relied upon as it is. The very purpose of remanding the matter to the original authority by the Courts/Tribunals are to ensure that all the records and relevant factors are to be re-considered, re-adjudicated and a revised order is to be passed. When the order of the ITAT is unambiguous and when the case of the writ petitioner was remanded back for reconsideration in the hands of the original authorities, then the original authorities are bound to conduct an enquiry by verifying the original records once again and re-adjudicate the matter, re-consider the factual aspects and accordingly, pass a final order. The said exercise was done in the present case. Thus, this Court do not find any error on the part of the Transfer Pricing Officer(TPO) in reconsidering the entire books of accounts submitted by the writ petitioner for the purpose of assessing the average rate of royalty payment in the industry. The findings made by the ITAT in the order need not be directly taken into account for the purpose of considering the average rate of royalty payment in the industry in view of the fact that, if that is taken into account, then there is no point in remanding the matter for reconsideration. The very purpose and object of the Courts/Tribunals to remand the matter is that the authorities must reconsider the case in all respects independently and pass a revised order on merits and in accordance with law. This being the scope of the order of remanding the contentions raised on behalf of the writ petitioner that the average rate of royalty payment in the industry was already fixed by the ITAT can have no sanctity. These all are the points raised by the respective parties before the ITAT and the same was recorded in the order passed by the ITAT. When the ITAT itself was not decided the issues raised before the Tribunal and remanded the case back for reconsideration, then there is no point in recording the findings of the ITAT by the Transfer Pricing Officer(TPO) at the time of exercising the powers of reconsideration of the entire issues. The very contention raised in this regard also deserves no merit consideration."**





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**12.** For the above reasons therefore, we do not find any merit in Ground No. 1 raised by the assessee and the same is hereby rejected.

**13.** We now come to Ground No. 2 raised by the assessee objecting to the merits of the disallowance made u/s 40(a)(i) of the Act. At the time of hearing, the Ld. AR for the assessee initially urged that, the guarantee given by the parent company was towards the performance of the contracts entered into by the assessee with the customers and therefore bore the nature of 'business profits'. According to Ld. AR, in absence of any permanent establishment in India, the impugned payment was not liable to tax and accordingly no disallowance was warranted u/s 40(a)(i) of the Act. Having taken note of the earlier findings of this Tribunal in the first round of proceedings, the assessee was required to furnish the copy of the guarantee agreement which was placed on record before the lower authorities. The Ld. AR had accordingly furnished copy of the parent company guarantee executed by M/s Vestas Denmark in relation to the contract with M/s Gujarat Paguthan Energy Corporation Private Limited which was subsequently novated to M/s CLP Wind Farms (India) Private Limited ('customer'), which for the sake of convenience is extracted below:-





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"This PARENT COMPANY GUARANTEE (the "Guarantee") is made as of the 6<sup>th</sup> of November 2009 by VESTAS WIND SYSTEMS A/S, a company duly organized and existing under the laws of Denmark, with its head office situated at Alsvej 21, 8940 Randers SV, Denmark (herein called "Guarantor"), for the benefit of CLP Wind Farms (India) Private Limited, duly organized and existing under the laws of India, with registered office located at 6th Floor, Chanakya Building, Off Ashram Road, Ahmedabad, Gujarat 380009, India (herein called "Employer"). (Guarantor and Employer are individually referred to as a "Party" and collectively as the "Parties".)

#### **RECITALS**

WHEREAS, Vestas Wind Technology India Private Limited, a company duly organised and existing under the laws of India with its head office situated at registered office located at 298, Rajiv Gandhi Salai, Sholinganallur, Chennai, India, is a wholly-owned subsidiary of Guarantor (herein called "Contractor");

WHEREAS, Gujarat Paguthan Energy Corporation Private Limited has entered into agreements (i.e., Supply Agreement, Erection and Commissioning Contract, Development and Facilitation Agreement and Wrap Agreement) with Contractor dated 31<sup>st</sup> August 2009 including its Addendums for the supply, erection, testing and commissioning of 60 (sixty) wind turbine generators of the model Vestas V82-1650 kWh as well as related goods and/or services;

WHEREAS pursuant to the Supply Novation Agreement, Development Novation Agreement, Erection and Commissioning Novation Agreement and Wrap Novation Agreement, Gujarat Paguthan Energy Corporation Private Limited has novated the Supply Agreement, Erection and Commissioning Contract, Development and Facilitation Agreement and Wrap Agreement in favour of the Employer such that all the rights and obligations of Gujarat Paguthan Energy Corporation Private Limited have upon novation, become the rights and obligations of Employer.

(Supply Agreement, Erection and Commissioning Contract, Development and Facilitation Agreement, Wrap Agreement and the Supply Novation Agreement, Development Novation Agreement, Erection and Commissioning Novation Agreement and Wrap Novation Agreement, hereinafter collectively referred to as "**Contracts**").

WHEREAS, Employer requests the Guarantor to guarantee the Contractors performance under the Contracts;





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WHEREAS, Guarantor as a sole shareholder of the Contractor is willing to enter into this Guarantee to satisfy Employer's request;

NOW, THEREFORE, in consideration of the premises and mutual covenants set forth herein, the Parties hereto AGREE AS FOLLOWS:

1. Guarantor guarantees, in the event of Contractor failing to perform or observe the terms and provisions of the Contracts, that Guarantor will perform or take such steps as are necessary to achieve performance or observance of such terms and provisions of the Contracts.
2. Notwithstanding anything in this Guarantee to the contrary, the obligations of the Guarantor to perform under this Guarantee are and shall be expressly conditioned upon and shall not come into effect until all of the following have occurred (i) Employer has made a demand on Contractor for payment and/or performance of Contractor's obligations under any or all of the Contracts, ii) Contractor has failed to pay or perform its obligations following all applicable cure periods under the respective Contracts, and (iii) such Employer's demands have not been disputed by the Contractor, and (iv) Guarantor has received a written confirmation from the Employer that the Contractor has not disputed such demands of the Employer.
3. Notwithstanding anything in this Guarantee to the contrary, Guarantor shall not, under this Guarantee or any of its provisions have any greater obligations or liability than Contractor under the Contracts and the limitations and exclusions of obligations and liability included in the Contracts shall equally limit and exclude liability and obligations of Guarantor under this Guarantee.
4. The discharge by the Guarantor of any of its obligations under this Guarantee or by any third party shall effectively and to similar extent discharge the obligations of Contractor under the Contracts and the discharge by Contractor or any third party of any of Contractor's obligations under the Contracts shall effectively and to similar extent discharge the Guarantor of its similar obligations under this Guarantee.
5. The liability of Guarantor hereunder shall not be reduced or discharged by (i) any forbearance or indulgence by Employer towards Contractor or Guarantor whether as to payment, time, performance, or otherwise. (ii) any amendment to, or any variation, waiver or release of, (any part of) the Contracts or any security or other guarantee or indemnity in respect thereof (whether or not such amendment, variation, waiver or release shall increase the liabilities of the Contractor





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there under or the Guarantor hereunder); (iii) any extension of time, or waiver; (iv) anything the Contractor may do or omit or neglect to do; or (v) the bankruptcy, insolvency, liquidation, reorganisation, winding up, dissolution, amalgamation or reconstruction of, or any analogous proceeding in any jurisdiction relating to, the Contractors or any change in the status, function, control or ownership of the Contractor.

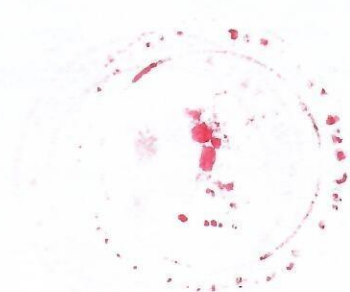
6. The obligations of Guarantor hereunder shall continue in full force until all of Contractor's obligations and liabilities under the Contracts have been fully discharged.

7. The Employer shall be entitled at any time to assign, pledge or otherwise transfer the benefit of, all or any of its rights, title or interests in, this Guarantee to its lender, to which the Guarantor hereby agrees and consents in advance. Notice of any such assignment or pledge shall be delivered to the Guarantor. Until and unless Guarantor receives such notice of assignment, Guarantor may discharge its obligations under this guarantee by discharging with the Employer. The Guarantor may not assign or otherwise transfer its benefit of, or any of its rights, title, interests or obligations hereunder, to any party without the prior written consent of the Employer, which consent may be granted or withheld in the Employer's sole and absolute discretion. This Guarantee and the undertakings herein contained shall be binding upon the successors and assigns of Guarantor and shall extend to and inure for the benefit of the successors or permitted assignees of Employer.

8. All payments made hereunder shall be made free, without set-off, and clear of, and without deduction for or on account of any present or future stamp or other taxes, levies, imposts, duties, charges, fees, deductions or withholdings of any nature now or hereafter applicable by payment to the account of the Employer, or as the Employer may direct.

9. Notwithstanding anything to the contrary above, in the event of any claim under this Guarantee, Guarantor shall be entitled to assert any defence, set-off or counterclaim that Contractor could assert had such claim been made directly against any person/party under the Contracts.

IN WITNESS WHEREOF, the Guarantor has caused this Guarantee to be executed by its authorised representatives as of the date first written above.



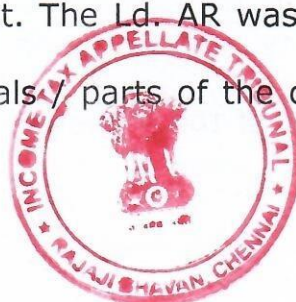


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**14.** The above so-called performance guarantee is noted to be an unregistered document. The recitals in the said document states that, the Employer i.e. the customer, has sought guarantee of the contractor's performance i.e. the assessee's performance of the contract, but surprisingly the customer is not a party to the agreement. There is also no consideration prescribed in this agreement for issuance of this guarantee. Even the assessee is not a party to the agreement. This so-called guarantee document is noted to have been signed as and by way of a declaration by the authorized signatory of M/s Vestas Wind Systems A/S and no one else. It is thus evident that neither the assessee nor the customer were parties to the so-called guarantee document. The Ld. AR of the assessee was also unable to explain as to how the customer would come to know about this so-called guarantee when the customer was not even a party to it and that how would the customer enforce the same in India. The business rationale and valid enforceability of this document was found to be completely lacking. Accordingly, the validity and enforceability of this document is noted to be in serious doubt.

**15.** In light of the foregoing, this Bench had required the assessee to explain the above apparent deficiencies and infirmities in the so-called guarantee document. The Ld. AR was *inter alia* required to explain as to whether the materials / parts of the contract which were supplied to the



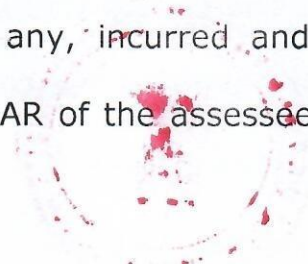
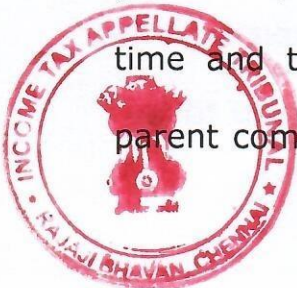


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customer was being procured from the parent company due to which it had given this so-called guarantee. If that be so, then why shouldn't this so-called performance guarantee be a necessary corollary like any other supply of goods, which comes with a warranty or guarantee, without any charge. The Ld. AR was also required to explain as to, whether by doing so, the assessee had created a smokescreen to breakdown the actual aggregate cost of procurement of parts/supplies from parent company into two components viz., (i) cost of pure supply plus (ii) guarantee for performance of the supplies.

**16.** Alternatively, and in case, the parent company was not supplying any materials in relation to the contract with the customer and that the assessee was performing it independently or that the guarantee given had no relation to the materials supplied, then the Ld. AR was required to explain the business rationale behind giving such so-called guarantee, which was clearly unenforceable in as much as it was not registered with any statutory authorities nor was any customer party to it nor was it clear as to where would the suit be filed, in case of invocation of guarantee. The assessee was also required to provide details of performance guarantee, if any, invoked by any customers upon the assessee at any time and the costs/expenses, if any, incurred and reimbursed by the parent company. To this, the Ld. AR of the assessee had explained that,





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this guarantee by the parent company would give substantial comfort to customers which would increase the sales/image of the assessee as well. If that be so, it was pointed out to the Ld. AR of the assessee that, then this so-called guarantee was only a paper comfort, as it was not legally enforceable and hence the nomenclature used for payment of 'guarantee fee' itself was incorrect.

**17.** The Ld. AR for the assessee, in response to the above queries, has filed an additional paper book comprising of 514 pages. The said paper book does not contain a certificate that these documents were available before the lower authorities and therefore presumably these are in the nature of additional evidences. The Ld. AR has also filed a written submission responding to our above queries, which has been taken on record.

**18.** The Ld. AR of the assessee has explained that, the assessee was importing gear boxes, yaw gears, yaw brakes, yaw motors, brake systems, cooling systems, top boxes, CPU panels, phase compensation panels, power panels from Vestas Group, which constituted approximately 45% of the total raw material cost. It further clarified that, the imports constituted 35% (in AY 2011-12) and 76% (in AY 2012-13) of the overall products sold. The assessee would assemble these imported parts at its





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production facilities at Chennai and Puduchery, which would then be supplied to the customers. The submissions of the assessee are silent as to whether the so-called guarantee was given in relation to these imports. Instead, with regard to the nature of guarantee, the assessee is noted to have submitted as follows:-

- The PCG is given by Vestas Denmark to the customers of Vestas India towards security for the advances given by them to Vestas India and for the performance of the specified contracts by Vestas India.
- On sale and payment for a Wind Turbine, some of the Customers require bank guarantee from Vestas India as a security for the timely execution of the project. Further, customers also expect guarantee performance of the Wind Turbine Generator (WTG) purchased from Vestas India.
- Considering the constraints in bank limit and high commission rates, Vestas Denmark provides the PCG to the customers of Vestas India in lieu of a bank guarantee from Vestas India. The customers of Vestas India accept the PCG from Vestas Denmark based on the brand value of Vestas Group and its global presence, as a security for their advance and for the performance of Vestas India.
- It may be noted that the PCG issued by Vestas Denmark, is arising from a commercial need and contractual obligation of the parties (viz, Vestas India and the customer). The Appellant, in this regard, submits a copy of the supply-agreement between Vestas India and Acciona Energy Private Limited dated September 13, 2010 and the PCG as Page 17 and 337 of the Additional Typed Set respectively. A synopsis of the agreement with reference to the Parent Company Guarantee is provided below for your reference."

**19.** The assessee is noted to have again skirted from answering the pointed questions raised and has made sweeping remark that, the parent company guarantee is given by M/s. Vestas Denmark to the customers of





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assessee towards security for the advances given by them to assessee and for the performance of the specified contracts by assessee. However again nothing on the nature of services rendered, enforceability of performance guarantee, etc. which was enquired into, has been answered by the assessee. Apart from placing on record the relevant contract with the customer, M/s. Gujarat Paguthan Energy Corporation Private Limited relating to which the parent company guarantee, was extracted at Para 13 above, the assessee has now placed on record new details concerning a different contract with a different customer, M/s.Acciona Energy Private Limited.

**20.** In order to understand the nature & purpose of the so-called guarantee, we first take up the contract with the customer, M/s Gujarat Paguthan Energy Corporation Private Limited. Having carefully perused the said contract, we find that the parent company, M/s. Vestas Denmark had not extended any guarantee for the payment or performance of the contract to the customer. It is noted that M/s. Vestas Denmark has been defined as 'Supplier's Parent Company' in the recitals of the agreement. However there is no reference of any guarantee by supplier's parent company, in Clauses (4.8) - Supply Payment Security and (5) Performance Security of the agreement, which is extracted below, for the sake of convenience.





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#### **"4.8 Supply Payment Security**

4.8.1 The Employer shall within 7 (seven) Business Days of the date of execution of this Agreement provide the Supplier with the Supply Payment Security in the aggregate sum of INR893,000,000.00 (Indian rupees eight hundred and ninety three million) as follows:

Supply Payment Security	INR Million	Valid Till
1	750.50	28-Feb-10
2	142.50	31-Mar-10
Total	893.00	

4.8.2 The Supplier shall, upon the failure of the Employer to pay the Supplier any undisputed amounts payable against a milestone payment under Clause 4.4 of this Agreement, within 5 (five) Business Days of receiving a Notice of the Supplier for payment, in the manner set out in Schedule 4 hereto, have the right to drawdown on the Supply Payment Security as applicable to such milestone payment under this Agreement on the day immediately following the respective date upon which payment was due.

4.8.3 Upon the Supplier drawing down any part of the Supply Payment Security with respect to this Agreement in accordance with Clause 4.8.2 above, the Employer shall within 7 (seven) Business Days of such drawdown replenish the Supply Payment Security with such amounts drawn down by the Supplier so as to maintain the Supply Payment Security to the sum of INR 893,000,000.00 (Indian rupees eight hundred and ninety three million) provided that:

(i) atleast 2 (two) Lots of Equipment remains to be Supplied; or

(i) atleast 2 (two) Lots of Equipment have been Supplied but the Supplier has not received the due milestone payments with respect to such Lots under this Agreement.

4.8.4 Provided however in the event that: i) the final Lot of Equipment remains to be Supplied; or (ii) the final Lot of Equipment is Supplied but the Supplier has not received the due milestone payments with respect to such Lot under this Agreement and upon the Supplier drawing down any part of the Supply Payment Security in accordance with Clause 4.8.2 above, the Employer shall within 7 (seven) Business Days of such drawdown replenish the Supply Payment Security to the extent of the actual value of any amount remaining unpaid under this Agreement with respect to such final Lot and the payment against Phase Completion excluding for such final Lot as mentioned in Clause 4.4 (d), but in any event not exceeding INR 565,250,000.00 (Indian rupees five hundred and sixty five million two hundred and fifty thousand only).

4.8.5 In the event Employer fails to replenish the Supply Payment Security in accordance with Clause 4.8.3 and/or Clause 4.8.4 above, the Supplier shall have the right to suspend its obligations under Clause 26 of this Agreement to the extent such obligation of the Supplier is not secured by such part of the Supply Payment Security that is not replenished.





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4.8.6 In the event that the Contractor under the Erection and Commissioning Contracts fails to achieve the Facility Commissioning Date, the Employer shall extend the validity of the Supply Payment Security by such periods as may be correspondingly extended to the dates set out in Clause 4.8.1 above (i.e two months from the extended dates).

Provided however that the Payment Security on and from the date of extension under this

Clause 4.8.6 shall be for an amount equivalent to the Price of:

- (a) such Lots of Equipment not Supplied; or
- (b) such Lots of Equipment that have been Supplied but in relation to which the Supplier has not received the due milestone payments with respect to such Lots under this Agreement.

Notwithstanding anything contained in this Clause 4.8.6 the amounts with respect to the Supply Payment Security during the period of extension shall not exceed INR 893,000,000.00 (Indian rupees eight hundred and ninety three million only).

## **5 Performance Security**

5.1 Omitted

5.2 Omitted"

**21.** From the above it is noted that, there was no parent company guarantee given as security for performance by M/s. Vestas Denmark to the customer. In fact, the requirement of performance security was completely omitted. Similarly, the supply payment security is noted to have been given by the Employer i.e. customer and not the Supplier i.e. the assessee. It is further noted that, at Clause 13.11, the Supplier i.e. the assessee has provided power curve guarantee to the Employer i.e. the customer. The relevant Schedule 11 referred to Clause 13.11 has not been placed on record. Before us, the Ld. AR for the assessee was thus



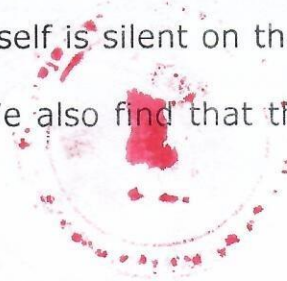


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unable to point out the specific clause in which the assessee's parent company was bound by any guarantee given to the customer. Likewise, even in the Erection and Commissioning Agreement between the assessee and this customer, placed at Pages 459 to 514 of Paper Book, there is no mention of the assessee's parent company or its so-called payment & performance guarantee. On these facts therefore, we find that, the impugned payment made by way of so-called performance guarantee fee based on a self-declaration by M/s. Vestas Denmark appears to be prima facie smokescreen.

**22.** Before us the Ld. AR however vehemently relied on the agreement concerning the customer, M/s. Acciona Energy Private Limited and urged that this agreement contained reference to parent company guarantee and therefore payment of the impugned fees was pursuant to the same. As noted earlier, this agreement was not before the lower authorities and it is also not accompanied with any prayer for admission in accordance with Rule 29 of the ITAT Rules. Be that as it may, having perused the agreement placed before us, it is noted that, this agreement has a reference to parent company guarantee but the same is only towards the value of advance payments received by the assessee and not the entire contract value. The assessee's submission itself is silent on the guarantee towards the performance of the contract. We also find that there was no





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performance guarantee given by M/s. Vestas Denmark in this regard. It is further noted that, Schedule-6 of the agreement refers to a proforma parent company guarantee, which is noted to have been provided by M/s Vestas Denmark. However, the question which remains unanswered is the enforceability of this so-called guarantee. For this, the Ld. AR has referred to Clause (7) of the guarantee document which sets out the requirements of arbitration. Having perused the same, it is unclear as to how and where would the guarantee be legally enforceable. Moreover, the requirements of the arbitration and the so-called possibility of invocation of the guarantee is found to be skewed in favour of M/s. Vestas Denmark and it appears to be only a paper comfort and nothing else. It only refers to arbitration for advance payment, where the assessee has defaulted the contract and that the disputes between the assessee and customer has been decided by an arbitrator. The contract is silent as to how and in which manner would the parent company pay, if the guarantee is invoked.

**23.** The Ld. AR in his written submissions has further claimed that, the customers would ordinarily ask for bank guarantees for the advance payments, but due to the constraints in the bank limits and high commission rates, the assessee would provide parent company guarantees to the customers in lieu of the bank guarantee. This particular





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contention of the Ld. AR is noted to be not backed by any evidence or material. The Ld. AR has not shown any such correspondence or communication with any of its customers where the customers had sought for a bank guarantee and the same was negotiated to a parent company guarantee. Hence, this particular argument to justify the business rationale of the parent company guarantee is also found to be unjustified.

**24.** In light of the above findings, the so-called performance guarantee is noted to be lacking any business rationale. Rather, it appears to be a smokescreen to remit the surplus of the assessee subsidiary to its parent company in guise of fees. Overall therefore, we note that, the genuineness, validity and enforceability of the so-called performance guarantee claimed to have been extended by the parent company, M/s Vestas Denmark to the assessee's customers is questionable in as much as several aspects still remains unanswered, despite the assessee having brought on record additional evidences, as discussed above, in support of its claim. It is noted that all these aspects were not looked into or enquired into by the lower authorities, which was *inter alia* required to be done by this Tribunal in the first round of proceedings.

**25.** Further, it is also not the case that the so-called parent company guarantee declaration has been given for all customers. Also, the sample





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guarantee in relation to M/s. Acciona Energy Private Limited only relates to advance payment and not the entire contract value. Accordingly, even if it is ultimately found that there was an enforceable guarantee given, the quantification of such guarantee fee is also required to be looked into.

**26.** For the above reasons and in the fitness of matters and to ensure fairness to both the parties, we set aside this issue to the file of Ld. DRP, for fresh adjudication, in accordance with law, after giving the assessee adequate opportunity of being heard. While doing so, the Ld. DRP may, if they think fit or necessary, call for a remand report, so as to bring all the facts of the issue on record. The Ld. DRP shall, adjudicate the matter *de-novo*, in accordance with law, and on all aspects concerning the guarantee fee payment viz., whether the impugned payment is in nature of 'business profits' or 'FTS' or 'dividend' etc. remains open for verification, so as to decide the applicability of Section 40(a)(i) of the Act and pass a speaking order. It is further clarified that, the Ld. DRP shall decide the impugned issue uninfluenced by the observations and statements made by us in this order. Ground No. 2 is therefore allowed for statistical purposes.





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**27.** Ground No. 3 of the appeal relates to non-granting of TDS credit. The AO is directed to verify whether the income corresponding to the impugned TDS has been offered to tax or not and accordingly grant credit for the taxes deducted at source in accordance with the provisions of law. The assessee is directed to submit all relevant supporting in this regard before the AO, who needless to say, shall provide sufficient opportunity of hearing to the assessee, in this regard. This ground is therefore allowed for statistical purposes.

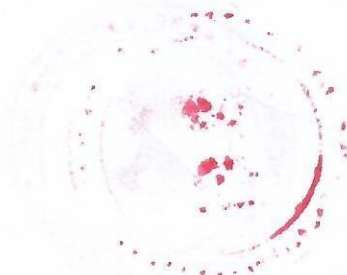
**28.** We now take up the appeal of the Revenue in ITA No. 3024/Chny/2019 for AY 2012-13. The grounds raised in this appeal is as follows:-

*1. The order of the learned CIT(A) is contrary to law and facts and circumstances of the case.*

*2. The Id.CIT(A) erred in not appreciating the fact that parent company had also Vs received license fees from the assessee company towards technological assistance in each part of production and commissioning activity including a customization and hence, had business connection in India.*

*3. The Id.CIT(A) erred in holding that there are no elements to constitute any service PE of M/s.Vestas Denmark in India even when giving of a performance guarantee by the Denmark parent company (guarantor) is by itself a contemplation of rendering of service, which clearly falls under the ambit of service PE in India.*

*4. The Id.CIT(A) ought to have considered the fact that performance guarantee fee was paid to the parent company by the assessee company for the business of the parent company in India and hence the same is taxable in India and liable for TDS."*





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**29.** Ground No. 1 is general in nature and therefore does not call for any separate adjudication. Both the parties fairly agreed that Ground No. 2 does not emanate from the order of the AO and is therefore dismissed.

**30.** Ground Nos. 3 & 4 of the Revenue's appeal relate to disallowance of performance guarantee fees paid to M/s. Vestas Denmark u/s 40(a)(i) of the Act. In this AY as well, in the first round of proceedings, this Tribunal had remitted the matter back to the AO for fresh examination. Thereafter, in the second round of proceedings, the AO had held the parent company had a PE in India and therefore the imagined payment was liable to tax. Since the assessee had failed to deduct tax on the same, the impugned sum was disallowed u/s 40(a)(i) of the Act. On appeal, the Ld. CIT(A) is noted to have deleted the disallowance.

**31.** After considering the rival submissions and perusing the relevant material available on record, we find that the material facts relevant to this issue, involved in the year under consideration as well as the arguments raised by both the sides are similar to that of Ground No. 2 raised in the assessee's appeal for AY2011-12. Following our conclusions drawn on this issue in the preceding paragraphs, and as directed in Para 26 above, we set aside this issue to the file of Ld. CIT(A), for fresh adjudication, in accordance with law, after giving the assessee adequate



