

आयकर अपीलीय अधिकरण “ए” न्यायपीठ चेन्नई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH, CHENNAI

माननीय श्री एबी टी. वर्की, न्यायिक सदस्य एवं
माननीय श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।
BEFORE HON’BLE SHRI ABY T. VARKEY, JM AND
HON’BLE SHRI MANOJ KUMAR AGGARWAL, AM

आयकरअपील सं./ ITA No.1347/Chny/2023
(निर्धारण वर्ष / Assessment Year: 2021-22)

M/s. Visteon Corporation Grace Lake Corporation Centre, Van Buren Township Michigan – 48111	बनाम/ Vs.	DCIT International Taxation Circle-2(2), Chennai.
स्थायी लेखासं./जीआइआरसं./PAN/TAN No. AADCV-5660-K		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से/ Appellant by	:	Ms. Jyotsna Sivakumar (Advocate) & Shri Ajay Vohra (Senior Advocate) – Ld. ARs (Through Virtual Mode)
प्रत्यर्थी की ओर से/ Respondent by	:	Shri Nilay Baran Som (CIT) -Ld. DR

सुनवाई की तारीख/ Date of Hearing	:	29-01-2025
घोषणा की तारीख / Date of Pronouncement	:	26-02-2025

आदेश / O R D E R

Manoj Kumar Aggarwal (Accountant Member)

1. Aforesaid appeal by assessee for Assessment Year (AY) 2021-22 arises out of final assessment order dated 25-09-2023 passed by Ld. ACIT, International taxation Circle 2(2), Chennai (AO) u/s 143(3) r.w.s. 144C(13) of the Act pursuant to the directions of Ld. Dispute Resolution Panel-2, Bengaluru (DRP) u/s 144C(5) dated 21-09-2023. The substantive grievance of the assessee is assessment of Rs.44.42 Crores

as fees for included services (FIS) as per Article 12(4) of India-USA Double Taxation Avoidance Agreement (DTAA).

2. The Ld. Sr. Counsel. Shri Ajay Vohra, at the outset, stated that the impugned issue is covered in assessee's favour by the decision of this Tribunal in assessee's own case for AYs 2014-15 to 2017-18, ITA Nos.259 to 262/Chny/2023 dated 26-07-2024 which has been rendered on identical facts. A copy of the order has been placed on record. It has been stated the same agreement is continuing and the nature of the services remain the same. The Ld. CIT-DR, though supported the stand of lower authorities, could not controvert this fact. Having heard rival submissions and perusal of case records, the appeal is disposed-off as under.

Proceedings before lower authorities

3.1 The assessee is a USA incorporated company. In the return of income, the assessee claimed exempt income for Rs.26.21 Crores and TDS credit of Rs.2.79 Crores. The income was in the shape of data management charges and reimbursement of expenses as received from M/s Visteon Electronics Pvt. Ltd. The assessee furnished copies of relevant agreements and invoices. The assessee submitted that the aforesaid services do not fall under fees for included services as per Article 12 of DTAA but it would be 'business income' which would be taxable only when the assessee has permanent establishment (PE) in India which was not the case.

3.2 The Ld. AO, upon perusal of relevant clauses of the agreement, rejected the aforesaid claim of the assessee. In the absence of reconciliation of figures, Ld. AO brought to tax entire remittances of Rs.44.42 Crores as reported by the remitter as fees for included services

u/s 9(1)(vii)(b) of the Act, being taxable @10%. The Ld. DRP confirmed the proposed assessment against which the assessee is in further appeal before us.

Our findings and Adjudication

4. We find that the impugned issue stood covered in assessee's favor by the cited decision of this Tribunal. The relevant findings of the bench were as under: -

7. We have heard rival contentions and gone through facts and circumstances of the case. We noted that the AO while passing draft assessment order u/s.144C of the Act, proposed addition on account of receipts from remittances during financial year 2013-14 relevant to this assessment year 2014-15 on account of providing IT support services, maintenance services, etc., to its sister concerns in India for the reason that the operations of the assessee company is highly complicated and systems have been codified and methods to be adopted as per business need. The AO has not accepted the assessee's explanation above that the services rendered by it is not taxable. According to him, there is a clear nexus between services rendered and the compensation received by assessee company after going through the recital of service agreement entered into between assessee and its sister concern M/s. Visteon Automotive Systems India Pvt. Ltd. He noted the following aspects on the basis of which, he treated the total remittances amounting to Rs.126,58,51,703/- as fee for technical services u/s.9(1)(vii)(b) of the Act and taxed the same u/s.115A of the Act at the rate of 10% and also by applying the beneficial provisions, services rendered treating it as 'fee for included services' as per Article 12(4) of India-US DTAA and taxed at the rate of 10%. The AO noted the following aspects:-

1. Services provided by the assessee to its client was as per the initial IT Service Description Statement of work as per Exhibit-A and the Services Agreement for IT Projects as per Exhibit-B;
2. Additional Services may be activities that are performed on an on-going basis for the remainder of the Term or activities that are performed on a one-time or a Project basis;
3. Base Fees are those fees, costs and expenses for each such service as set forth in the Agreement, as Base fees or Project Fees or Fees (Fees for Additional Services);
4. The assessee though shall be sole and exclusive owner of all Intellectual Property created by it, has also granted to its clients a non-exclusive, non sub licensable, non-transferable and limited license to use such Intellectual Property;
5. As per 9.2, the assessee has granted access to any hardware or software to its clients, who, though will not acquire any right, title or interest in or to any such hardware or software other than the right to use;
6. Further, in Exhibit A - IT Services Description, as per Section 3(7), the assessee will for rendering the services, under "Conditions and Assumptions" will maintain full authority and control for access to the computer room. And,

under the heads, Business Application Services, Manufacturing ITA Solutions Services, Data Management Services, End User Computing Services, Central IT Support, Security Services, Network services, Server services, Telecom Services and IT Staff Support Services, the assessee was rendered services to its clients. Except for the Security Services, Network services, Server services, Telecom Services and IT Staff Support Services, services rendered under Other heads is in the nature of Technical services and fall under the category of Fees for Technical Services under section 9(1)(vii)(b) of the IT Act, 1961 and as Fees for Included Services as per Article 12(4) of the India-US DTAA as the services rendered, as seen above, satisfied the 'make available' clause."

8. We noted that the DRP simpliciter confirmed the action of AO by observing that the assessee has not been able to demonstrate that the services rendered do not lead to 'make available' technical knowledge, experience, skill, know how or process to the assessee. Further, there is no information on what was the nature of services rendered and the information contained therein have to be head as 'fees for included services' as per Article 12(4)(a) of the Indo-USA DTAA. Hence, the panel confirmed the action of the AO in treating the payments received by the assessee during the year under consideration as 'fees for technical services u/s.9(1)(vii)(b) of the Act and 'fee for included services' under Article 12(4)(a) of the Indo USA DTAA. Finally, the DRP held that the claim of assessee that such services were not 'made available' does not hold any merit.

9. Before us, the main argument of the assessee was that merely providing highly complicated services, as understood by Revenue and the same having nexus with the compensation received by it, by itself will not result in taxing such receipts as 'fees for included services' unless it satisfies the definition of FIS under DTAA between India and US. The Id. counsel had referred to the details submitted and argued that it is not able trace / source the reference of service description schedule in any of the documents submitted. Even the reference to Form No.15CA, the Id. counsel stated that the tax withholding obligation is triggered at the time of payment or credit whichever is earlier, whereas the details were available with the Revenue, which is yet to be provided by the company, relates to proposed remittance which may happen at a later point of time. The Id. counsel has pointed out the provisions of India-US DTAA para 4 of Article 12 of the India-USA DTAA which defines the term 'fees for included services' [the same are reproduced above in our order at para 6]. 10. We are in agreement with the arguments of Id. counsel that in order to constitute a receipt 'fees for included services' [FIS] under Article 12 of India-US DTAA, services rendered must make available technical knowledge, expertise, skill, know how or processes or consist of the development and transfer of a technical plan or technical design. We have gone through the Memorandum of Understanding explained the phrase 'make available' and the paragraph 4 (b) clarifies that the use of a product which embodies technology shall not per se be considered to make the technology available in paragraph 4(b) of the protocol as critical categories of services that jointly involves the development and transfer of technical plants or technical designs or making technology available as described in paragraph 4(b). In our view, these services rendered by assessee to its sister concern and compensation received on account of the same does not fall in these typical categories mentioned in paragraph 4(b) which includes 'making technology available' nor to be taxable under Article 12 of the tax treaty as FIS, the payment should fit into the terminology 'make available' wherein the technical knowledge, skill

etc., must remain with the person receiving the services even after the particular contract comes to an end. Want to back of that, in the present case there is no such clause in the service agreement which we have gone through and substantially reproduced in our order. The nature of services provided by assessee which the company merely centralizes the IT related services to achieve a standardized IT environment and payment towards access to developed standard business / engineering applications, data management by providing disaster recovery / back up services, helpdesk support services, user administration, maintenance of IT infrastructure support services, telecom services do not make available any technical knowledge, experience, skills, etc., to the recipient, since the recipient cannot at any time independently manage the IT environment and requires continuous re-course to the company for the said services. Hence the service provided by the assessee company do not fall within the ambit of 'fee for included services' as defined under Article 12 of India US DTAA and hence, not taxable in India.

10.1 Admittedly, the assessee is a non-resident and having no PE in India. We have gone through the decision of Hon'ble Karnataka High Court in the case of CIT vs. De Beers India Minerals (P) Ltd., reported in 346 ITR 467, referred by the Id. counsel for the assessee and noted that the Hon'ble Supreme Court while interpreting the India US DTAA has held that the principle requirement of 'make available' technical services is made only if the service recipient is unable to independently apply the technical knowledge, skill, etc., in future without the aid of service provider, the same cannot be held as 'make available' and such technical services would not fall within the definition of technical services in term of DTAA and not liable to tax. The Hon'ble High Court of Karnataka observed as under:-

"14. Therefore, the clause in the Singapore agreement which explicitly makes it clear the meaning of the words "make available", the said clause has to be applied, and to be read into this agreement also. Therefore, it follows that for attracting the liability to pay tax not only the services should be of technical in nature, but it should be made available to the person receiving the technical services. The technology will be considered made available when the person, who received service is enabled to apply the technology. The service provider in order to render technical services uses technical knowledge, experience, skill, know-how or processes. To attract the tax liability, that technical knowledge, experience, skill, know how or process which is used by the service provider to render technical service should also be made available to the recipient of the services, so that the recipient also acquires technical knowledge, experience, skill, know-how or processes so as to render such technical services. Once all such technology is made available it is open to the recipient of the service to make use of the said technology. The tax is not dependent on the use of the technology by the recipient. The recipient after receiving of technology may use or may not use the technology. It has no bearing on the taxability aspect is concerned. When the technical service is provided, that technical service is to be made use of by the recipient of the service in further conduct of his business. Merely because his business is dependent on the technical service which he receives from the service provider, it does not follow that he is making use of the technology which the service provider utilises for rendering technical services. The crux of the matter is after rendering of such technical services by the service provider, whether the recipient is enabled to use the technology which the service

provider had used. Therefore, unless the service provider makes available his technical knowledge, experience, skill, know-how or process to the recipient of the technical service, in view of the clauses in the DTAA the liability to tax is not attracted.”

and finally at para 31 held as under:-

“31. Therefore, the assessee not being possessed with the technical knowhow to conduct this prospecting operations and reconnaissance operations, engaged the services of Fugro which is expert in the field. By way of technical services Fugro delivered to the assessee the data and information after such operations. The said data is certainly made use of by the assessee. Not only the said data and information was furnished in the digital form, it is also provided to the assessee in the form of maps and photographs. These maps and photographs which were made available to the assessee cannot be construed as technology made available. Fugro has not devised any technical plan or technical design. Therefore, the question of Fugro transferring any technical plan or technical design did not arise in the facts of these cases. The maps which are delivered are not of kind of any developmental activity. As such, earlier the information which is furnished to the assessee by way of technical services in the digital form is also given in the form of maps. Therefore, the case on hand do not fall in the second part of the aforesaid clause dealing with development and transfer of plans and designs. Therefore, the second substantial question of law is also answered in favour of the assessee and against the Revenue.

10.2 Similarly, the ITAT, Pune Bench in the case of Sandvik Australia Pty. Ltd., vs. DDIT in ITA No.93/PUNE/2011, order dated 31.01.2013, held that the services rendered consisted of IT helpdesk support, back up related services, maintenance and administrative support etc., and while providing these services the assessee did not impart / make available any technical knowhow, skill, process or transferred technology plan or design. The Tribunal in para 16 held as under:-

16. In the present case, as per the terms of the agreement between the assessee company and Sandvik Asia Ltd., does not support the case of the Revenue that the assessee's case is covered in clause (g) of para 3 to Article 12 of the India Australia Treaty as the assessee has not made available any technical knowledge or expertise to the recipient Indian company. In our opinion, the assessee has only provided the back-up services and IT support services for solving IT related problems to its Indian subsidiary. Hence, unless and until the services are not made available, same cannot be taxable in India. We, therefore hold that the services rendered by assessee company to its Indian group companies, though are in the nature of technical services, but is not covered in para (3)(g) to Article 12 of the India Australia Treaty and hence, the same is not taxable in India. We also hold that the amount received by the assessee cannot be treated as a Royalty even under the normal provisions of I.T. Act. But under the normal provision of the I.T. Act the same constitute consideration for rendering the technical services covered u/s.9(1)(vii) of the I.T.Act. Accordingly, Ground No.1 is allowed and issue is decided in favour of the assessee.

10.3 Another case cited by Id. counsel for the assessee of ITAT, Delhi Bench in the case of GE Energy Management Services Inc., vs. ADIT reported in [2022] 135 taxmann.com 173, wherein the Delhi Tribunal noted that the assessee company entered into an agreement with the Indian company to provide off-shore

maintenance and support services. As per agreement, the assessee's broad scope of work was to provide off-shore maintenance and support services from outside India and no part of services was defined under the agreement were rendered by the assessee from India. The Tribunal in these facts, held as under:-

27. From the above explanation provided in the MOU that forms an integral part of tax treaty that service only, if it makes available technical knowledge, experience, skill, know-how or processes to the service recipient. The receiver of this service can be said to acquire the relevant skills used by service provider only if he acquires those skills in such a way that he can himself use them independently without getting any assistance or being dependent on the service provider in future.

28. The facts of the present case clearly show that the offshore maintenance and support services provided by the assessee PGCIL are not geared towards making available any technical knowledge, experience, skills, know how or processes to PGCIL.

29. Our view is supported by the fact that the term of the agreement is five years and services provided by the assessee are repetitive and ongoing in nature. This means that PGCIL is not able to apply technical or skill use by the assessee for rendering such services. Given that repetitive nature of the services, it would be factually incorrect to allege that the services make available any technical knowledge, expertise, skill, knowhow or processes to PGCIL.

10.4 In our view, since the assessee is not having any PE in India and he is covered by India US DTAA and MOA, the nature of services rendered by the assessee on account of which received the remunerations cannot be described as 'fee for included services' and hence, not taxable in India. We also hold that the amount received cannot be treated as royalty even under the provisions of section 9(1)(vii), because the service rendered cannot constitute technical services so as to cover u/s.9(1)(vii) of the Act. Hence, we delete the addition and allow this issue of assessee's appeal on merits.

11. As regards to the point of reconciliation being difference in figures between Form No.26AS and Form No.15CA, as pointed out by Id. counsel for the assessee, we are of the view that Form No.15CA filed by the banker and the assessee was not in a position to verify the details forming part of Form No.15CA. The assessee has made claim as per Form No.26AS, this is subject to verification. The assessee will be provided necessary details as received by the AO in Form No.15CA and will confront the same to the assessee so that the assessee can peruse the same and provide suitable response and reconcile the figures. In term of the above, this particular verification is restored back to the file of the AO.

Facts being identical, we would take the same view and allow the appeal on merits subject to aforesaid verifications of figures by Ld. AO. The assessee shall reconcile the figures as reported in Form No.15CA and Form No.26AS or any other relevant form. The corresponding grounds stand allowed accordingly.

5. In Ground Nos.5 & 6, the assessee seeks correct TDS credit as reported in Form No.26AS. It has also been stated that the assessee has not received any refund and Ld. AO has erred in noting the correct fact. In this regard, it would suffice on our part to direct Ld. AO to grant TDS credit in accordance with law and determine the correct figures of refund as available to the assessee. These grounds stand allowed for statistical purposes.

6. The appeal stands partly allowed in terms of our above order.

Order pronounced on 26th February, 2025.

Sd/-
(ABY T. VARKEY)
न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-
(MANOJ KUMAR AGGARWAL)
लेखासदस्य / ACCOUNTANT MEMBER

चेन्नई Chennai; दिनांक Dated : 26-02-2025
DS

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकरआयुक्त/CIT Chennai.
4. विभागीयप्रतिनिधि/DR
5. गार्डफाईल/GF