

आयकर अपीलीय अधिकरण, "ए" न्यायपीठ, चेन्नई।  
IN THE INCOME TAX APPELLATE TRIBUNAL  
'A' BENCH: CHENNAI

श्री एबी टी. वर्की, न्यायिक सदस्य एवं श्री अमिताभ शुक्ला, लेखा सदस्य के समक्ष  
BEFORE SHRI ABY T VARKEY, JUDICIAL MEMBER AND  
SHRI AMITABH SHUKLA, ACCOUNTANT MEMBER

आयकर अपील सं./ITA No.2962 /Chny/2024  
निर्धारण वर्ष /Assessment Years: 2015-16

Visteon Corporation  
Grace Lake Corporation Centre,  
Van Buren Township,  
Michigan-48111  
[PAN: AADCV5660K]

Asst. Commissioner of Income Tax,  
International Taxation,  
Circle-2(2),  
Chennai.

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/ Assessee by

: Shri Ajay Vohra, Sr. Advocate Mr.Aditya  
Vohra, Advocate (Virtual)

प्रत्यर्थी की ओर से /Revenue by

: Shri R. Raghupathy, Addl. CIT

सुनवाई की तारीख/Date of Hearing

: 17.02.2025

घोषणा की तारीख /Date of Pronouncement

: 26.03.2025

**आदेश / ORDER**

**PER AMITABH SHUKLA, A.M :**

This appeal is filed by the assessee against the directions of the  
DRP given vide ITBA/DRP/M/144C(5)/2024-25/1068182956(1) dated  
30.08.2024 to the Ld. AO for passing the order dated 26.09.2024.

2.0 Ground of appeal No.1 is general in nature and does not require  
any specific adjudication.

3.0 The first issue raised by the assessee through ground of appeal  
No.2 and 2.1 are regarding the action of the DRP in not following the  
order of this tribunal, in assessee's case, passed vide ITA

No.260/Chny/2023 dated 26.07.2024. It is the case of the assessee that the lower authorities have exceeded their jurisdiction by travelling beyond and taking a decision in direct valuation of order of this tribunal dated 26.07.2024 supra. The Ld. Counsel for the assessee submitted that this is the second round of litigation in this case. It has been submitted that in the first round of litigation, PCIT had, for AY-2015-16, exercised its revisionary powers u/s 263 vide its order dated 30.03.2021 the matter travelled to this tribunal which passed order in ITA No.434/Chny/2021 dated 21/02/2022, whereby the impugned order dated 30.03.2021 was set aside to the PCIT for readjudication. The PCIT then proceeded to pass another revisionary powers u/s 263 vide its order dated 06.01.2023 directing the Ld. AO "*...that the assessment may be framed after examining the character and taxability of all the receipts w.r.t. article-12 and 23 of India – USA DTAA, after giving fresh opportunity to the assessee...*". The Ld. Counsel submitted that meanwhile this tribunal passed a common order dated 26.07.2024 in ITA Nos.259, 260, 261 and 262 / Chny/ 2023 for AYs-2014-15, 2015-16, 2016-17 & 2017-18. It was submitted that through ITA Nos.260/Chny/ 2023 for AYs-2015-16 the second revisionary order u/s 263 dated 06.01.2023 was challenged.

4.0 The Ld. Counsel submitted that in the impugned order this tribunal at para 12 on page 23 held that order u/s 263 for AYs-2015-16 is non-maintainable. The relevant part cited by Ld. Counsel is extracted herein below:-

*“.....12. As regards to appeal for assessment year 2015-16, which is an appeal against revision order passed by the PCIT u/s.263 of the Act in ITA No.260/CHNY/2023 for the assessment year 2015-16, the issue on merits is exactly identical as we have deal with in ITA No.659/CHNY/2023 for the assessment year 2014-15 above. Hence, taking a consistent view, we adopt the decision of assessment year 2014-15 and accordingly delete the addition. ....”*

The Ld. Counsel that vehemently argued the DRP has violated the provisions of law by not-complying with the directions of this tribunal on the issue of revision order passed by the PCIT u/s.263 of the Act. Accordingly it was argued that as this tribunal has quashed the very 263 proceedings, therefore the assessment order dated 26.09.2024 of the Learned Assistant Commissioner of Income Tax (International Taxation) Circle-2(2), Chennai for the assessment years 2015-16 becomes void ab initio. It was urged that once the foundation goes the super structure cannot survive. The Ld. Counsel also informed that, by way of an additional ground it had brought the matter to the notice of DRP before whom proceedings were pending qua a draft order passed by the Ld. AO as a consequence to order u/s 263 dated 06.01.2023. The Ld. Counsel submitted that the DRP has summarily rejected the arguments of the assessee.

5.0 The Ld. DR on his part placed heavy reliance upon the order of lower authorities. It was argued that the decision of the DRP is based

upon correct understanding of the facts of the case and cannot faulted upon. Request accordingly was made to confirm the order.

6.0 We have heard rival submissions in the light of material available on records. We have noted that the principal controversy is of non-compliance by the DRP to the order of this tribunal dated 26.07.2024 in ITA No.260/Chny/2023. At the outset, we deem it necessary to reproduce the comments of the DRP in its order dated 30.08.2024, as available on page 5 & 6 of its order:-

*“.....4.0 The assessee has also taken an additional ground that the Hon’ble ITAT, vide its order dated 26.07.2024, has set aside the revisionary order passed by the Commissioner of Income Tax u/s 263 of the Act dated 06.01.2023 and hence the subject draft assessment order passed has become infructuous. However, it is pertinent to refer to the subject para of the Hon’ble Tribunals’s order wherein ITA No.260/Chny/2023 relating to AY-2015-16 has been addressed. The relevant para (par number 12) is reproduced hereunder:*

*“12. As regards to appeal for assessment year 2015-16, which is an appeal against revision order passed by the PCIT u/s.263 of the Act in ITA No.260/Chny/2023 for the assessment year 2015-16, the issue on merits is exactly identical as we have deal with in ITA No.659/Chny/2023 for the assessment year 2014-15 above. Hence, taking a consistent view, we adopt the decision of assessment year 2014-15 and **accordingly delete the addition**”.*

*4.1 Herein, it can be clearly noted that the Hon’ble Tribunal has not determined the validity of the order u/s 263. The CIT had established in his order dated 06.01.2023 that the AO’s order was erroneous and prejudicial to the revenue to the extent that the necessary enquiries were not conducted and taxability of the subject receipt was not duly examined by the AO in the original assessment proceedings. Now, we note that the Hon’ble Tribunal has not quashed the said order, rather the tribunal has purportedly ordered deletion of the additions. However, **the Panel is of the considered opinion that additions to the income does not arise from the order u/s 263 of the Act which is rther a direction issued to the AO to reframe the assessment.***

4.2 Furthermore, we note that the subject appeal i.e. ITA No.260/Chny/2023 is against the order u/s 263 dated 06.01.2023 challenging the legal validity of the said order and not on the merits of the facts of the case or against the additions proposed in the draft order. Relevant para 1 of the Hon'ble ITAT's order discussed as under;

“.....The appeal by the assessee in ITA No.260/Chny/2023 for the assessment year 2015-16 is arising out of the order of the Commissioner of Income Tax (international Taxation), Chennai passed u/s 263 of the income Tax Act 1961(hereinafter the 'Act') vide order dated 06.01.2023....”

4.3 As noted earlier, there is nothing in the Hon'ble Tribunal's order which renders either the order u/s 263 legally invalid or order quashing of the same.

4.4 In view of the above, we are of the considered opinion that the order u/s 263 is not quashed as such and hence the draft assessment order is not infructuous as claimed by the assessee.....”

7.0 The observations of the DRP hereinabove clearly allude that it is not subscribing to the view point of assessee holding that this tribunal in its impugned order has not determined the validity of order u/s 263. The DRP had observed that tribunal had not quashed the impugned order u/s 263 and actually had ordered deletion of additions, which actually were not made in the impugned order u/s 263. We find force in the said observations of the DRP. The directions of PCIT in his order u/s 263 dated 06.01.2023 extracted herein above, to the Ld.AO, were to examine the taxability of certain receipts. No directions qua any additions were given. We have also noted that the impugned order of this tribunal does not 'quashes' the 263 proceedings in so many words. Consequently, we are of the considered that there is no case for assailing the order of Ld DRP on this. **Accordingly the grounds of appeal number 2 & 2.1 raised by the assessee are dismissed.**

8.0 The appellant assessee has alternatively raised next issue by the grounds of appeal no.3 & 3.1 stating that even on the merits of the case the addition of Rs.30,26,13,530/- made by the Ld. AO as fees for included services u/s 9(1)(vii) of the act r.w. article 12(4) of India USA DTAA is not maintainable. In support of its claim the assessee has placed reliance upon the order of Hon'ble Coordinate Bench of this tribunal in assessee's own case passed vide common order dated 26.07.2024 in ITA Nos.259, 261 and 262 / Chny/ 2023 for AYs-2014-15, 2016-17 & 2017-18. The Ld. Counsel submitted that addition on identical lines was made by the Revenue in the impugned years which was deleted by the Hon'ble Tribunal. In support of its claims the Ld. Counsel invited our attention to para 7 to 10.4 of the said order on pages 13 to 22 extracted herein below. The Ld. Counsel for the assessee submitted that the facts of the present case are identical to those existing in AY-2014-15 to AY-2017-18:-

Extract 7 to 10.4 pages 13 to 22

*".....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, nonsub 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 IndoUSA 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, knowhow 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 assesseees 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 assesseees 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...."*

9.0 The Ld. DR would like to rely upon the order of the lower authorities.

10.0 We have heard rival submissions in the light of material available on records. We have noted that facts of the present case have not been distinguished viz-a-viz those for AY-2014-15 to 2017-18 and therefore are same. Accordingly, in respectful compliance to the decision of Hon'ble Coordinate Bench of this tribunal in assessee's own case for AY-2014-15 to 2017-18, supra as also for the purposes of consistency we hold that amount received cannot be treated as taxable within the meanings of section 9(1)(vii) as they do not constitute technical services. Accordingly, we set aside the order of lower authorities and direct the Ld.AO to delete the impugned addition. **Accordingly, the assessee for grounds of appeal no.3 & 3.1 succeeds on their merits.**

11.0 The Next issue raised by the assessee through the ground of appeal no.4 is regarding an addition of Rs.5,17,95,146/- made by the Ld. AO. It is the case of the assessee that the addition made by the Ld. AO is totally impermissible as the impugned receipts do not relate to the assessment year under consideration. It has been submitted that the Ld. AO has made the impugned addition in the wrong year. The Ld. Counsel submitted that the DRP has also rejected its claims summarily without any specific findings. The Ld. DR placed reliance upon the order of authorities down below.

12.0 We have heard rival submissions in the light of material available on records. We have noted from the page 2 / 3 of the impugned order of the Ld. DRP that the addition has been made by Ld. AO for want of requisite evidences provided by the assessee. It is the case of the assessee that the said expenses do not relate to the year under consideration. Be that as it may be we are of the view that interest of justice would be met if the matter is remitted back to the Ld. AO for limited verification of the issue at hand. The Ld. AO is therefore directed to decide the issue after giving proper opportunity of being heard to the assessee. **Accordingly the ground of appeal no.4 raised by the assessee is allowed for statistical purposes.**

13.0 The next issue raised by the assessee vide ground of appeal no.5 is regarding charging of interest u/s 234A and section 234B of the act. The charging of interest under the provisions of the act is consequential in nature. **The ground of appeal no.5 raised by the assessee is therefore dismissed.**

14.0 In the result, the appeal of the assessee is partly allowed.

Order pronounced on 26<sup>th</sup>, March-2025 at Chennai.

Sd/-

( एबी टी. वर्की )

(ABY T VARKEY)

न्यायिक सदस्य / Judicial Member

Sd/-

(अमिताभ शुक्ला)

(AMITABH SHUKLA)

लेखा सदस्य /Accountant Member

चेन्नई/Chennai, दिनांक/Dated: 26<sup>th</sup>, March-2025.

KB/-

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Assessee:
2. प्रत्यर्थी/Revenue
3. आयकर आयुक्त/CIT - Chennai
4. विभागीय प्रतिनिधि/DR
5. गार्ड फाईल/GF