आयकर अपीलीय अधिकरण,'ए' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL, 'A' BENCH, CHENNAI

श्री मनु कुमार गिरि ,न्यायिक सदस्य एवं श्री अमिताभ शुक्ला लेखा सदस्य के समक्ष

BEFORE SHRI MANU KUMAR GIRI, JUDICIAL MEMBER AND SHRI AMITABH SHUKLA, ACCOUNTANT MEMBER

आयकरअपीलसं./I.T.A.No.1503/Chny/2024

(निर्धारणवर्ष / Assessment Year: 2007-08)

M/s.Saint Gobain India Private Ltd, Level 7, Sigapi Achi Building, 18/3, Rukmani Lakshmipathi Road, Egmore, Chennai-600 008.	Vs	**DCIT,** Non-Corporate Circle-8(1) Chennai.
PAN : AABCS-4338-M		
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थीकीओरसे/ Appellant by	:	Mr.R.Vijayaraghavan, Advocate
प्रत्यर्थीकीओरसे/Respondent by	:	Mr. Shivanand K Kalakeri,CIT

सुनवाईकीतारीख/Date of hearing	:	26.03.2025
घोषणाकीतारीख /Date of Pronouncement	:	07.04.2025

आदेश / O R D E R

PER MANU KUMAR GIRI, JM:

The captioned appeal filed by the assessee is directed against the order of the Ld. Principal Commissioner of Income Tax, Chennai-4 [PCIT] u/s. 263 of the Act dated 29.03.2024 for Assessment Year 2007-08.

2. This is an appeal against the order of Commissioner of Incometax passed Under Section 263. The issue is whether tax has to be deducted in respect of payments made to M/s. Exprover in Belgium.

Brief facts:

3. In the earlier round of proceedings, the Tribunal in its Order dated 29th October 2018 in ITA No.2394/Mds/2017, had directed the AO to consider whether the fees for technical services paid to M/s Exprover is not taxable in India particularly with reference to the

provision regarding Most Favoured Nation Clause ("MFN") in the DTAA_with Belgium. **(Pages 77-82 @ pg 81 of the Paper Book).**

4. The Assessing Officer ('AO' in short), while giving effect to the order of the ITAT ***(Page 83 of PB),*** had held that the most favoured nation clause of the DTAA will apply. Consequently, for fees for technical services to be taxable in India, it should make available technical knowledge to the payer in India. In the present case, the services rendered by exprover were only marketing services and hence it will not constitute fees for technical services under the DTAA between India and Belgium. The AO has based his conclusion on the basis of various decisions available at the time he passed the order.

The AO concluded in the order that the amounts paid to M/s. Exprover is not taxable in India and therefore no disallowance can be made under section 40(a) (i) for non-deduction of tax at source.

5.The ld.CIT first issued the notice stating that the assessing officer should have referred to TPO. But the issue regarding deduction of tax at source is not a transfer Pricing issue and the CIT had accepted that it need not be referred to the transfer pricing officer. Over he felt that in view of the subsequent decision of the Supreme Court in the case of Nestle, the most favoured nation clause in the Belgium DTAA will not be applicable in as much as there was no notification by the Government of India authorising application of the most favoured nation clause. The ld.CIT therefore, set aside the assessment order to AO for considering the issue denovo in accordance with law.

6. The ld. counsel for the assesee submitted that the issue whether subsequent order of the Apex Court would render an earlier order erroneous is a debatable issue. The Chennai tribunal in the case of Mis. Hayland Exports Private Limited (in the Paper Book) At page 10 of their order has held that a subsequent decision of the Supreme Court would not render an earlier decision of AO erroneous provided the earlier decision was made as per the law prevailing at the time of making the order. In this case, when the AO passed the order, there were High Court decisions in favour of the claim of the Assessee.

7. The ld. counsel further submitted that without entering into the controversy regarding the subsequent decision of an Apex Court which would render the earlier decision erroneous, it is submitted that order of the AO is not erroneous and evenif it is set aside it will be only academic as the payment to M/s. Exprover is not taxable in India, with or without Most favoured Nation clause. Hence giving effect to the order of CIT is academic in nature.

8. The ld. counsel furthermore submitted thatthe CIT is of the opinion that the decision of the AO holding that payment to M/s Exprover is not taxable inIndia is erroneous. However, on the basis of the Supreme Court decision in the case of lshikawajima Harima Heavy Industries Co Ltd (212 TAXMAN 273- included in Paper Book for case laws at Pg 74), the Chennai Tribunal India in Assessee's own case in IT A 1976, 1977 dated 28th July 2023 for the assessment years 2008-09, 2009-10 and 2010-11 (subsequent to the assessment year under appeal) had the occasion to consider the

taxability of payment to the verysame M/s Exprover and held that till such time section 9(1)(vii)/9(2) was amended by the Finance Act 2010, fees for technical services rendered outside India is not taxable in India. ***(Page 3 to 7 of Paper Book of decisions).***

9. The ld. counsel further apprised that even though the amendment in clause 9(2)made in 2010was made with retrospective effect from 1976, it has been held that prior to the amendment year payer cannot anticipate such an amendment and therefore, he could not deduct tax at source anticipating such amendment. Impossibility of performance has been held to be the reason for not applying retrospective amendment for the purpose of TDS. This submission was made before CIT and in Para 11.4 of the order wherein he has mentioned thatAssessee should have applied/s 195(2). But it is not necessary to apply to AO u/s.195(2) for lower deduction if the Payer is of the opinion that no tax is deductible from the remittance (G.E Technology Centre P Ltd 327 ITR 456 SC).Therefore, the conclusion of the AO that payment to M/s Exproveris not subject to tax in India and hence no tax need be deducted therefrom is not erroneous in view of the decision of ITAT on same issue in Assessee's own and henceld.CIT does not have jurisdictionto revise under section 263. He stated that even otherwise it is only academic, because if it is set aside lo AO, the AO has to follow the order ofthe Tribunal for subsequent years and hold that payment to M/sExproveris not taxable in India whether the Most Favored Clause of DTAA is applicable or not.

10. The ld. counsel also pointed that in Para 11.5 of his order,the ld. CIT has also directed the AO to verify additions made on account of interest on borrowings and foreign exchange loss relating to acquisition of assets. As pointed out by AO in Para 11.5 of the CIT's order, these issues do not arise out of the directions of the ITAT. If at all these are errors, these are errors in the first assessment order dated 19.10.2011. In which case the order u/s 263 is time barred in respect of these issues.

11. Per contra, the ld.DR Mr. Shivanand K Kalakeri, CIT relied upon the impugned order. He also referred the case law citation [1986] 159 ITR 812 (MP) titled CIT Vs Shriram Development Co..

12. We have heard the rival submissions and perused the case laws paper book.

13. We have deliberated on the entire conspectus of matter and we are of the view that the order of the ld. CIT under section 263 it has to be set aside for the following reasons:

The ld. CIT has no jurisdiction to revision the order giving effect dated 23.03.2022. It is the Tribunal or Higher forums has jurisdiction to see the order giving effect pursuant to the direction of the Tribunal. The CIT who is lower in hierarchy than the Tribunal cannot sit in appeal on the order giving effect ('OGE' in short) dated 23.03.2022 under revisionary powers u/s 263 of the Act by saying that the OGE is erroneous and prejudicial to the interest of the revenue. In the order giving effect (OGE) pursuant to direction of

the higher authorities, the AO (JAO) has limited scope. In fact, he has to follow the direction of the higher forum in letter and spirit. In fact, the AO has followed the law what was there at that point of time. The CIT under revisionary powers u/s 263 of the Act cannot extend the scope of AO beyond the direction of the Tribunal. Hence, we are of the considered opinion that the revisionary jurisdiction/power invoked by the CIT in this case is patently wrong and void ab-initio. Therefore, order of the CIT dated 29.03.2024 u/s 263 is quashed on this ground.

14. In result, appeal of the assessee is allowed.

Order pronounced in the open court on 7th April , 2025

Sd/-	Sd/-
(**अमिताभ शुक्ला)**	**(मनु कुमार गिरि)**
(Amitabh Shukla)	(Manu Kumar Giri)
लेखासदस्य / Accountant Member	**न्यायिकसदस्य**/ Judicial Member

चेन्नई/Chennai,
दिनांक/Date: 07.04.2025
DS

आदेश की प्रतिलिपि अग्रेषित/Copy to:
1.Appellant
2.Respondent
3.आयकर आयुक्त/CIT Chennai/Madurai/Salem
4. विभागीय प्रतिनिधि/DR
5. गार्ड फाईल/GF.