IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'D': NEW DELHI

BEFORESHRI VIKAS AWASTHY, JUDICIAL MEMBER
AND
SHRI AVDHESH KUMAR MISHRA, ACCOUNTANT MEMBER

ITA No.2389/Del/2022, (A.Y.2019-20)

Crocs Inc. 7477 East Dry, Niwot, CFEEKL Parkway, USA, PAN: AAICC3068P	Vs.	Assistant Commissioner of Income Tax, Circle Int. Taxation 1(2)(1), E-2, Civic Centre, J. L. Nehru Road, New Delhi
(Appellant)		**(Respondent)**

Appellant by	Sh.K.M.Gupta, Advocate, Ms. Shruti Khimta, AR
Respondent by	Sh. Rajesh Kumar Dhanesta, Sr. DR

Date of Hearing	17/01/2025
Date of Pronouncement	16/04/2025

ORDER

PER AVDHESH KUMAR MISHRA, AM

This appeal of the assessee for the Assessment Year (hereinafter, the 'AY') 2019-20is directed against the order dated 29.07.2022of the Assistant Commissioner of Income Tax, Circle Int. Tax-1(2)(1), New Delhi passed under section 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 (hereinafter 'the Act').

2. Following grounds were raised in this appeal: -

1: That on the facts and in the circumstances of the case and in law, the assessment proceedings are bad in law and invalid as the notice under section 143(2) of the Income-tax Act, 1961 ('the Act') was issued by Learned Assistant Commissioner of Income Tax, National e-Assessment Centre-1(2)(2), which is not in accordance with law and

amounts to unlawful exercise of jurisdiction, rendering the assessment proceedings as invalid.

2: That on the facts and in the circumstances of the case and in law, the directions issued by the Learned Dispute Resolution Panel ('Ld. DRP') dated June 14, 2022 and the order dated July 29, 2022 passed by the Learned Assistant Commissioner of Income-tax, Circle International Taxation 1(2)(1), Delhi ('Ld. AO') under section 143(3) r.w.s. 144C of the Act assessing the income of the appellant at INR 7,73,11,738/- is based on assumptions, surmises and conjectures, and has been passed without proper consideration of the factual and legal submissions made by the Appellant During the course of assessment proceedings.

3: On the facts and in the circumstances of the case and in law, the Ld. AO has erred in computing the total income of the Appellant at INR 7,73,11,738 as against Nil return of income filed by the Company.

4: That on the facts and in the circumstances of the case and in law, the Ld. AO has erred in law in holding that service fee accrued to the Company is in the nature of Fee for Technical services and taxable in India.

4.1: That on the facts and in the circumstances of the case and in law, the Ld. AO has erred in treating the service charges accrued to the Company as 'technical in nature' which makes available technical knowledge, experience, skill, know-how, or processes without considering the fact that the services rendered by the Appellant are general administration and support services and does not make available any technology, skill, know-how etc. to the recipient.

5: That on the facts and in the circumstances of the case and in law, the Ld. AO erred in providing the TDS credit to the extent of INR 81,66,717 as against the TDS credit of INR 82,01,229 claimed by the appellant in its return of income.

6: That on the facts and in the circumstances of the case and in law, the Ld. AO erred in charging interest under section 234B and section 234D of the Act.

7: That on the facts and in the circumstances of the case and in law, the Ld. AO erred in initiating penalty proceedings under Section 270A of the Act against the Appellant on account of the above adjustments made in the impugned final assessment order.
All the above grounds are without prejudice t each other. The appellant craves leave to add, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of the appeal.

The Appellant prays that appropriate relief be granted based on the said grounds of appeal and the facts and circumstances of the case."

2.1 Later, following additional grounds were alsoraised in this case:-

"8- On the facts and in the circumstances of the case and in law, the Hon'ble Dispute Resolution Panel (Hon'ble DRP) erred in issuing the directions under section 144C(5) of the Act dated May 27, 2022 without quoting the mandatory computer-generated DIN on the body of DRP directions in conformity with the Para 2 & 3 of the Circular No. 19 of 2019 dated August 14, 2019, thus rendering such an order/direction to be invalid and never to have been issued as per para 4 to the said Circular.

9-On the facts and in the circumstances of the case and in law, the final assessment order dated July 29, 2022, passed under section 143(3) read with section 144C (13) of the Act by the Assistant Commissioner of Income Tax, Circle (International Taxation) 1(2)(1), Delhi pursuant to such invalid and non-est directions passed by Hon'ble DRP, is bad in law, null and void and liable to be quashed.

Further, the Appellant craves leave to add, alter, amend or withdraw all or any of the Grounds of Appeal and to submit such statements, documents and papers as may be considered necessary either at or before the appeal hearing. Further, this ground of appeal is independent of the grounds of appeal already filed by the Appellant."

2.2 Before us, the above-mentioned additional grounds have not been pressed; hence, all additional grounds stand dismissed. Grounds

numbered 1 and 3, being general in nature, do not require specific adjudication. Ground No. 6, being consequential, also stands dismissed. Ground No. 7 is in respect of initiation of penalty proceedings, which is premature; hence, it is also dismissed.

2.3 Vide ground numbered 5, the appellant assessee has requested for allowance of credit of TDS of INR 8,201,229/-. After hearing both parties, we hereby direct the AO to allow the credit of TDS of INR8,201,229/-as per law (subject to the Rule 37BA of the I. T. Rules read with section 199(1) of the Act) after proper verifications.

2.4 Grounds numbered 2, 4 and 4.1 requiring specific adjudication will be dealt hereinafter.

3. The relevant facts giving rise to this appeal are that the assessee, incorporated under the laws of United States of America (USA), is engaged in the business of designing, developing and marketing of footwear & accessories. Further, it also provides services to its affiliates worldwide. During the relevant year, the appellant assessee has rendered services to Crocs India Pvt. Ltd. (hereinafter, the 'Crocs India') as per terms and conditions of the Service Agreement dated 01.01.2009 entered into between the assessee and Crocs India. The assessee filed its Income Tax Return (hereinafter, the 'ITR') on 30.11.2019 declaring NIL income by claiming its income not chargeable to tax in India in view of the Article 12 of Double Tax Avoidance Agreement (hereinafter, the 'DTAA') entered into

between India and USA. The case was picked up for scrutiny. The Assessing Officer (hereinafter, the 'AO'), in draft assessment order, held that the assessee's receipt of INR 137,478,148/- in lieu of services rendered to the Crocs India was nothing but Fee for Technical Services (hereinafter, the 'FTS'); hence, the same was chargeable to tax in India. Aggrieved, the assessee filed objections before the Dispute Resolution Penal (hereinafter, the 'DRP'), which was disposed of as under:

> *"4.1.3 The Panel has carefully considered the journey of the assessment proceedings in view of the facts mentioned above. The Panel takes a note that the assessing officer has passed the draft order in haste without recording the factual analysis of the details filed by the assessee. The assessee had filed two submissions on 15.04.2021 and 24.08.2021 prior to show-cause notice dated 17.09.2021 was issued by the AO. The AO has not recorded his observation and any discussion thereon as to what submissions were adduced by the assessee in the above submissions in fact the AO, has not recorded his observation or any analysis of the reply filed by the assessee in response to show-cause notice dated 17.09.2021 also. Finally, the AO has passed the draft order without making any factual discussion on the submissions filed by the assessee and also without incorporating the merits of the case.*
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> *Under the above circumstances, the Panel considers the impugned draft order having passed without following the principles of the natural justice. Accordingly, the AO is directed to consider all the submissions filed by the assessee including the submissions filed before the Panel. The AO is directed to make a factual verification of the assessee's contentions in terms of all the extant rules and regulations including the below-*
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> - *Taxability as per sections 5(2) & 9(1)(iii),*
> - *Taxability under the DTAA, article 12(4) of India-USA DTAA,*
> - *on issue of Services are not technical in nature,*

- *on issue of Services do not 'make available' any technical knowledge, know- how, skill etc. to the recipient,*
- *the Memorandum of Understanding entered between India and USA,*
- *judicial precedents cited by the assessee,*
- *Circular no. 14 (XL-35) dated 11th April 1955 issued by the Central Board of Direct Taxes*

By considering the above, the AO is directed to pass a reasoned and speaking order to complete the assessment proceedings. Hence, the grounds of objections in this regard are disposed of accordingly."

3.1 In pursuance of the above directions of the DRP, the AO passed the final assessment order determining income ofINR77,311,738/- as against the income of INR 137,478,148/- as per the draft assessment order. This final assessment order is in appeal before us.

4. The Ld. Counsel submitted that the appellant assessee, a tax-resident of USA, was entitled to avail the benefit of DTAA. The Ld. Counsel contended that the services rendered by the appellant assessee was general administrative & support services as against FTS held by the AO. The Ld. Counsel placing emphasis on sections 5(2) and 9(1)(vii) of the Act, submitted that the appellant assessee had not rendered any technical services which could be categorized as FTS falling under "make available clause";hence, the assessee's receipts of INR 137,478,148/- from Crocs India could not be charged to tax in India.

4.1 The Ld. Counsel drawing our attention to page 16, 139 and 140 of the Paper-Book, which contained the residency certificate and Form No. 10F of the appellant assessee, submitted that the appellant assessee was eligible for claiming benefit under the DTAA. Further, he placing emphasis on Article 12(4) of DTAA, contended that the FTS could be charged to tax only when such FTS was rendered with the make available clause. The services rendered by the appellant assessee was not provided with make available technical knowledge, experience, skill, know-how or process to the Crocs India. It was specifically submitted that the appellant assessee had never rendered such services with intent of transfer the technical plan/design to the Crocs India in any manner, which could enable it to perform independently without having any support of such services by the appellant assessee. He further submitted that the Crocs India, recipient of services could not perform such services on its own in due course of the time without taking any assistance from the appellant assessee. It was contended that the appellant assessee rendered services to Crocs India on year-to-year basis without imparting or making available technical knowledge, experience, skill, know-how or process consisting of the development& transfer of a technical plan or technical design to Crocs India. It was categorically submitted that the Crocs India was distributor of products of Crocs brand in India in the relevant year and for that it did not require any technical or consultancy services. It was submitted that the appellant assessee had provided services in the nature of

administrative or support services, which could not be termed/categorized as FTS.

4.2 In support of his contention/submission/arguments, the Ld. Counsel placed reliance on following case laws: -

i. Infobip Limited [TS-384-ITAT-2023 (Del.)

ii. Bio Rad Laboratories Inc. [TS-1009-ITAT-2022 (Del.)

iii. Guy Carpenter & Co. Ltd. [2012] 346 ITR 504 (Del)

iv. De Beers India Minerals (P.) Ltd. [2012] 346 ITR 467 (Karnataka)

v. Intertek Testing Services India (P.) Ltd. [2008] 307 ITR 418 (AAR)

4.3 The Ld. Counsel further submitted that the appellant assessee provided only general administrative and support services and being holding company of the Crocs India discharged its functions for capacity planning, demand planning, financial planning, analysis and merchandizing. These services provided by the appellant assessee were not in the nature of one-time service where the service provider; i.e. the appellant assessee performed its job and moved away. Here, in this case, the appellant assessee was providing services year after year in continuous manner which got evident from the details mentioned in the agreement dated 1st January, 2009. These services were not taxable in India pursuant to the provision of DTAA which would prevail over the provisions of the domestic tax law of India, to the extent beneficial to the assessee (P.V.A.L. Kulandangan Chettiar [2004] 267 ITR 654).

4.4 The Ld. Counsel submitted that the AO had held the services rendered by the assessee as technical services. The reliance placed by the Ld. AO on the case of Mahindra and Mahindra (Mumbai) (SB) 313 ITR 263 (AT) to evaluate the meaning of the phrase 'make available' with reference to DTAA between India and UK and not the DTAA between India and USA. The relevant part of the said decision distinguishing the fact of the present case with those of Mahindra &Mahindra (supra) emphasized by the Ld. Counsel is as under:

> *"19.18... The assessee has ab initio contended before the authorities below that even if the services rendered by the lead managers were held to be technical services but those were not "made available" to the assessee. "Rendering of any technical or consultancy services" is followed by "which make available technical knowledge, experience, skill, know-how". In this context it becomes imperative to understand the meaning of the expression "make available" as used in this Article. Make available means to provide something to one, which is capable of use by the other. Such use may be for once only or on a continuous basis. In our context to make available the technical services mean that such technical information or advice is transmitted by the non-resident to the assessee, which remains at its disposal for taking the benefit there from by use. Even the use of such technical services by the recipient for once only will satisfy the test of making available the technical services to the assessee."*

4.5 The Ld. Counsel further submitted that the case of Mahindra &Mahindra (supra) was distinguishable on the facts. In the case of Mahindra & Mahindra (supra), the payments were in the nature of

management commission and selling commission in respect of global depository receipts whereas in the case of the appellant assessee, it was in the nature of administrative and support services. It did not include management and selling commission. Further, the Hon'ble High Court held that the clause of 'make available' was not in the treaty which was applicable in the case of Mahindra & Mahindra (India and UK). The said 'make available' clause was made part of 2nd DTAA excluding the commission on 1st GDR global depositary receipts. Whereas in the case of the appellant assessee, the clause 'make available' was present in the DTAA for the relevant year. Further, the Ld. Counsel distinguished the case law Foster Wheeler France S.A. [TS 62-ITAT-2016 (Chen.) by submitting that the Foster Wheeler had provided technical& engineering services, whereas the appellant assessee had provided general administrative &support services. The Foster Wheeler was expertise in engineering and construction works. It provided technical and engineering services, whereas the appellant assessee was engaged in Crocs Brand footwear & accessories and providing services of general administrative & support services. The technical knowledge given by the Foster Wheeler could be used subsequently by the recipient, whereas in the case of the appellant assessee, it was not same and thus, exploitable later and further by the Crocs India. Similarly, the case of US technology resources Pvt. Ltd. (TS-511-ITAT-2013) was distinguished by the Ld. Counsel.

4.6 The Ld. Counsel, with the help of following receipts of the assessee from the Crocs India in lieu of services rendered by it, contended that the receipts from Crocs India clearly demonstrated that there was no element of 'make available' clause embedded in the services rendered by the assessee; otherwise the recipient of the services; i.e. Crocs India should have become able to perform the services at its own without taking recourse to the assessee and had not made payments over the years for similar services. The receipts of the assessee from Crocs India are as under:

S. No.	AY	Receipts from Crocs India (INR)
1	2017-18	20,737,336
2.	2018-19	76,750,045
3.	2019-20	77,311,738
4.	2020-21	139,179,069
5.	2021-22	33,415,952
6.	2022-23	98,974,816
7.	2023-24	90,102,875

4.7 The Ld. Counsel submitted the break-up of services provided by it to the Crocs India along with the costs; Planning, Distribution & Logistics, Customs & Compliances, Corporate tax, Corporate treasury, Shared services, Legal, Corporate accounting, Human resources, Operations finance, Master data management, Business intelligence, Corporate IT,

SAP, Global insurance coverage. It was submitted that the assessee had charged 5% mark-up over the actual cost of these services.

5. The Ld. CIT-DR, placing emphasis on article 12 of the DTAA entered into between India and USA submitted that the services rendered by the appellant assessee were in the nature of make available only. He placed emphasis on the decision of co-ordinate Bench:

i. CEVA Asia Pacific Holdings Company Pte. Ltd. ITA No. 1503/Del/2014,

ii. H.J. Heinz Company vs. ADIT, Circle -1(2), ITA No. 6252/Del/2012.

Further, the Ld. CIT(DR) contended that the ratio laid down in the cases of Mahindra and Mahindra Ltd. (supra), Foster Wheeler France S.A. (supra), US Technology Resources Pvt. Ltd. (supra), had rightly been applied by the AOas the principle laid down in these cases had been relied upon. It was submitted that the facts highlighted by the Ld. Counsel did not alter the principles laid down in these decisions.

5.1 The Ld. CIT-DR further submitted that the appellant assessee rendered technical services only. The nomenclature of 'administrative & support services' clearly fell under the head 'technical services'. To buttress his contention, the Ld. CIT-DR placed emphasis on Para 6 of CEVA Asia Pacific Holdings Company Pte. Ltd. ITA No. 1503/Del/2014, which defines the administrative support services as under:-

"6. We have carefully considered the rival contentions and perused the orders of the lower authorities. The assessee is providing following services which are under dispute:-

Nature of Administrative Support.

1. Marketing and advertising support including service relating to marketing materials, brochures, bids and sales proposals.

2. MIS and accounting support including internal accounting standards and procedures, US GAAP reporting procedures, and formulation of budgetary control systems along with appropriate standard costing procedures.

3. Treasury function support including advice and assistance on financing business operations, credit and collections management, risk and investment management, and treasury and banking management.

4. information technology support including but not limited to systems applications assistance, management Page | 9 information reporting and facilitating and worldwide network connectivity."

5.2. Further the Ld. CIT-DR drew our attention to the reply of appellant assessee before the AO as mentioned on page 21 and 22 of paper book reproduced as below:-

"The assessee is a company incorporated under the laws of United States of America (USA) and is a tax resident of USA. Crocs Inc. is engaged in the design, development, marketing, distribution and sale of casual lifestyle footwear and accessories for men, women, and children and also provides support services on need basis to its affiliates worldwide.

It is submitted that during the year under consideration the Company has not undertaken/executed any work in India and rendered general support services to Crocs India Private Limited from outside India. Under general support services, the company provided services on

accounting, business operations, capacity planning, custom compliance, demand planning, FP&A, legal, logistics, human resource, information technology, internal audit, merchandising and other related services etc."

5.3 The Ld. CIT-DR drew our attention to paragraph 3, 4 and 5 of the Article 12 of DTAA between India and USA. The relevant Paras of this DTAA are reproduced here under:-

"3. The term "royalties" as used in this Article means:

(a)payments of any kind received as a consideration for the use of, or the right to use, any copyright of a literary, artistic, or scientific work, including cinematograph films or work on film, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience, including gains derived from the alienation of any such right or property which are contingent on the productivity, use, or disposition thereof, und

(b) payments of any kind received as consideration for the use of, or the right to use, any industrial, commercial, or scientific equipment, other than payments derived by an enterprise described in paragraph 1 of Article 8 (Shipping and Air Transport) from activities described in paragraph 2(c) or 3 of Article 8

4.For purposes of this Article, "fees for included services" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services:

(a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received, or

(b) make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design

5. Notwithstanding paragraph 4, "fees for included services" does not include amounts paid:

(a) for services that are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of property other than a sale described in paragraph 3(a),

(b) for services that are ancillary and subsidiary to the rental of ships, aircraft, containers or other equipment used in connection with the operation of ships or aircraft in international traffic:

(c) for teaching in or by educational institutions:

(d) for services for the personal use of the individual or individuals making the payments; or

(e) to an employee of the person making the payments or to any individual or firm of individuals (other than a company) for professional services as defined in Article 15 (Independent Personal Services).”

6. We have heard both parties and have perused the material available on record. We have gone through the above case laws relied upon by both parties. The core issue is that whether the service charges of INR 77,311,738/- received by the appellant assessee is chargeable to tax in India as FTS. Section 5(2) of the Act provides that the income of a non-resident tax payer can be taxed in India if it is received or is deemed to be received in India or accrues or arises in India. Section 9(1)(vii) of the Act provides that income by way of FTS payable by any resident assessee of India shall be deemed to accrue and arise in India in the hands of non-

resident assessee. The explanation 2 of Section 9(1)(vii) of the Act defines Fee for Technical Services as

> *"Explanation [2] - For the purposes of this clause, "fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries".*

7. The Hon'ble Delhi High Court in the case of International Management Group (UK); ITA 1013/2018 (date of order: 03.07.2024) has delved into the meaning of 'technical' and 'consultancy' services. The Hon'ble Delhi High Court has observed that 'technical' can no longer be understood in its archaic sense as being confined to traditional sciences; application of specialized knowledge, skill or expertise with respect to any art, science, profession or occupation would be covered within the expression 'technical' services. As regards 'consultancy', it was observed that the same would imply the provision of advice or service of a specialized nature. The relevant part of the decision in the case of IMG (supra) is as under:

> *"G. THE FTS ISSUE*
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> *84. That takes us to the principal question which arises and concerns itself with whether the services rendered by IMG could be validly classified as FTS. As we view Article 13 of the DTAA, it becomes apparent that the expression —Fee for Technical Services‖ stands defined as being consideration received for the rendering of any technical or consultancy services. However, and as would be evident*

from a close reading of Para 4 thereof, the mere rendition of technical or consultancy service would in itself be insufficient. This since Para 4(c) places an added condition of the furnishing of such service, ultimately leading to technical knowledge, experience, skill, know-how or processes being made available.

85. Article 13 of the DTAA reads as under: -

—1. Royalties and fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, such royalties and fees for technical services may also be taxed in the Contracting State in which they arise and according to the law of that State; but if the beneficial owner of the royalties or fees for technical services is a resident of the other Contracting State, the tax so charged shall not exceed:

(a) in the case of royalties within paragraph 3(a) of this Articles, and fees for technical services within paragraphs 4(a) and (c) of this Article, --

(i) during the first five years for which this Convention has effect; (aa) 15 per cent of the gross amount of such royalties or fees for technical services when the payer of the royalties or fees for technical services is the Government of the first-mentioned Contracting State or a political sub-division of that State, and (bb) 20 per cent of the gross amount of such royalties or fees for technical services in all other

(ii) during subsequent years, 15 per cent of the gross amount of such royalties or fees for technical services; and

(b) in the case of royalties within paragraph 3(b) of this Article and fees for technical services defined in paragraph 4(b) of this Article, 10 per cent of the gross amount of such royalties and fees for technical services.

3. For the purposes of this Article, the term "royalties" means:

(a) payments of any kind received as a consideration for the use of, or the right to use, any copyright of a literary, artistic or

scientific work, including cinematography films or work on films, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience; and

(b) payments of any kind received as consideration for the use of, or the right to use, any industrial, commercial or scientific equipment, other than income derived by an enterprise of a Contracting State from the operation of ships or aircraft in international traffic.

4. For the purposes of paragraph 2 of this Article, and subject to paragraph 5, of this Article, the term "fees for technical services"

means payments of any kind of any person in consideration for the rendering of any technical or consultancy services (including the provision of services of a technical or other personnel) which:

(a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3(a) of this article is received; or

(b) are ancillary and subsidiary to the enjoyment of the property for which a payment described in paragraph 3(b) of this Article is received; or

(c) make available technical knowledge, experience, skill know-how or processes, or consist of the development and transfer of a technical plan or technical design.

5. The definition of fees for technical services in paragraph 4 of this Article shall not include amounts paid:

(a) for services that are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of property, other than property described in paragraph 3(a) of this Article;

(b) for services that are ancillary and subsidiary to the rental of ships, aircraft, containers or other equipment used in connection with the operation of ships, or aircraft in international traffic;

(c) for teaching in or by educational institutions;

(d) for services for the private use of the individual or individuals making the payment; or

(e) to an employee of the person making the payments or to any individual or partnership for professional services as defined in Article 15 (Independent personal services) of this Convention.

6. The provisions of paragraphs 1 and 2 of this Article shall not apply if the beneficial owner of the royalties or fees for technical services, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties or fees for technical services arise through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the right, property or contract in respect of which the royalties or fees for technical services are paid is effectively connected with such permanent establishment or fixed base. In such case, the provisions of Article 7 (Business profits) or Article 15 (Independent personal services) of this Convention, as the case may be, shall apply.

7. Royalties and fees for technical services shall be deemed to arise in a Contracting State where the payer is that State itself, a political sub-division, a local authority or a resident of that State. Where, however, the person paying the royalties or fees for technical services, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the obligation to make payments was incurred and the payments are borned by that permanent establishment or fixed base then the royalties or fees for technical services shall be deemed to arise in the Contracting State in which the permanent establishment or fixed base is situated.

8. Where, owing to a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the royalties or fees for technical services paid exceeds for whatever reason the amount which would have been paid in the absence of such relationship, the provisions of

this Article shall apply only to the last-mentioned amount. In that case, the excess part of the payments shall remain taxable according to the law of each Contracting State, due regard being had to the other provisions of this Convention.

9. The provisions of this Article shall not apply if it was the main purposes or one of the main purposes of any person concerned with the creation or assignment of the rights in respect of which the royalties or fees for technical services are paid to take advantage of this Article by means of that creation or assignment.

86. It is therefore apparent that the mere rendition of technical or consultancy service would not lead to revenue, income or profits being placed under the broad head of FTS unless the taxing authority additionally finds that technical knowledge, skill, know-how or processes were made available. What we seek to emphasize is the impetrative of the 'make available' condition being met and the imperative of the knowledge, skill, know how being made available to the payer.

87. The authoritative Commentary on the UN Model Convention while explaining the ambit of Article 12A carries the following instructive exposition on the meaning to be ascribed to the words —technical and —consultancy: -

Paragraph 3 —61. This paragraph specifies the meaning of the phrase —fees for technical services" for purposes of Article 12A. The definition of —fees for technical services" in paragraph 3 is exhaustive. —Fees for technical services‖ are limited to the payments described in paragraph 3; other payments for services are not included in the definition and are not dealt with in Article 12A (see the examples in paragraphs 87 to 103 below).

62. Article 12A applies only to fees for technical services, and not to all payments for services. Paragraph 3 defines "fees for technical services" as payments for managerial, technical or consultancy services. Given the ordinary meanings of the terms —managerial, —technical and —consultancy' the fundamental concept underlying the definition of fees for technical services is that the services must involve the application by the service provider of specialized knowledge, skill or expertise on behalf of a

client or the transfer of knowledge, skill or expertise to the client, other than a transfer of information covered by the definition of ―royalties‖ in paragraph 3 of Article 12. Services of a routine nature that do not involve the application of such specialized knowledge, skill or expertise are not within the scope of Article 12A.

63. The ordinary meaning of the term ―management‖ involves the application of knowledge, skill or expertise in the control or administration of the conduct of a commercial enterprise or organization. Thus, if the management of all or a significant part of an enterprise is contracted out to persons other than the directors, officers or employees of the enterprise, payments made by the enterprise for those management services would be fees for technical services within the meaning of paragraph 3. Similarly, payments made to a consultant for advice related to the management of an enterprise (or of the business of an enterprise) would be fees for technical services.

64. The ordinary meaning of the term ―technical‖ involves the application of specialized knowledge, skill or expertise with respect to a particular art, science, profession or occupation, therefore, fees received for services provided by regulated professions such as law, accounting, architecture, medicine, engineering and dentistry would be fees for technical services within the meaning of paragraph 3.

Thus, if an individual receives payments for professional services referred to in paragraph 2 of Article 14 from a resident of a Contracting State, those payments would be fees for technical services. If the payments arise in that Contracting State because they are made by a resident of that State or borne by a permanent establishment or fixed base in that State, the payments would be subject to tax by that State in accordance with paragraph 2 irrespective of the fact that the services arc not performed in that State through a fixed base in that State.

65. Technical services are not limited to the professional services referred to in paragraph 2 of Article 14. Services performed by other professionals, such as pharmacists, and other occupations, such as scientists, academics, etc. may also constitute technical

services if those services involve the provision of specialized knowledge, skill and expertise.

66. The ordinary meaning of ―consultancy‖ involves the provision of advice or services of a specialized nature. Professionals usually provide advice or services that fit within the general meaning of consultancy services although, as noted in paragraphs 63 and 64 above, they may also constitute management or technical services.

67. The terms ―management‖, ―technical‖ and ―consultancy‖ do not have precise meanings and may overlap. Thus, for example, services of a technical nature may also be services of a consultancy nature and management services may also be considered to be services of a consultancy nature.

88. Vogel explains the concept of technical services in the following terms (at page 1184):-

―IV. Article 12A(3) UN MC

1. The Model a. Rule The term 'fees for technical services' is defined as:

- any payment in consideration for

- any service of managerial, technical, or consultancy nature,

- unless the payment is made:

a. to an employee of the person making the payment; b. for teaching in an educational institution or for teaching by an educational institution; or c. by an individual for services for the personal use of an individual.

Article 12A(3) UN MC contains the definition of 'fees for technical services'. In so far that the UN MC itself provides an autonomous definition of 'fees for technical services', national law cannot be used for its interpretation (cf. Article 3(2) UN MC, see supra m.no. 71). In contrast to Article 12(2) OECD MC which refers to the national law for the interpretation of the different terms in the catalogue of the paragraph, the terms 'management', 'technical',

and 'consultancy' of Article 12A(3) UN MC have an autonomous meaning in the UN MC.

b. Any Payment The term 'payment' has a broad meaning that is comparable to 'paid to' in Articles 10, 11, and 12 UN MC. It is defined as 'fulfilment of the obligation to put funds at the disposal of the service provider in the manner required by contract or custom' (no. 40 UN MC Comm. on Article 12A referring to no. 3 UN MC Comm. on Article 10 and no. 6 UN MC Comm. on Article 11 quoting no. 7 OECD MC on Article 10 and no. 5 OECD MC on Article 11). For detailed information, see supra m.no. 252.

c. In Consideration For The payments must be made in consideration for any service of a managerial, technical, or consultancy nature. Comparable to Article 12 UN MC, any economic exchange connection is sufficient including, i.e., payments for damages (see supra m.no. 89).

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d. Any Service (Managerial, Technical or Consultancy Nature) Article 12A UN MC is not applicable to every payment in consideration for services. The services have to be of a managerial, technical, or consultancy nature as the services qualify as 'technical services' only in these cases. The attribute "technical" is used twice:

once in a wider sense to describe all of the services covered by Article 12A and once in a narrow sense in a 'technical nature' as opposed to 'managerial' or 'consultancy nature". aa. Different Definitions of Technical Service in the Divergent Country Practice of Article 12 MCs. While Article 12A UN MC is a standalone article, it has been developed from the divergent country practice of including fees for technical services in Article 12 MC. This historic development leads to a contextual bond between Article 12 UN MC and Article 12A UN MC that explains some of the peculiarities of the definition of Article 12A UN MC and aids in its interpretation. Further context is scarce: The term 'service' can also be found in other provisions dealing with different types of services like Articles 5(3)(1), 14, and 19 UN MC. Article 14(2) suggests that any activity suffices, but there is no general definition. The

General Agreement on Trade in Services also does not contain a definition (no. 83 UN MC Comm. on Article 12A).

The category of technical services has developed from the problematic delimitation between IP licensing and service contracts. While the protected information that constitutes IP has to be divulged to the licensee as part of the licensing contract, there is often the need for further training of the licensee and the employees; this constitutes a service. Similar problems arise with consulting:

The service provider does not transmit its special knowledge, skill, and expertise as such but uses them to make statements on customers' issues.

These services are dubbed as 'technical' because they relate to the application of IP and not to fundamental research. Furthermore, in the context of Article 12 OECD and UN MC and their catalogue of IP, the term 'technical' must initially be understood in a traditional way such as 'applied and industrial science' or 'engineering sciences." It excludes social sciences, the arts and humanities, and arts and crafts as well as commercial managerial or professional services such as managers, intermediators, lawyers, and doctors.

This narrow understanding of a technical nature was not in every country's interest and, therefore, some DTCs explicitly add managerial services, general consulting, or cover services of all kinds. Article 12A UN MC follows this tradition in including services of managerial and consulting services.

This raises the issue of whether these additions form a separate category that does not need a link to the traditional technical nature in the context of Article 12. In that wide understanding, any 'applied science' in whatever field or, even further, any 'professional service imbued with expertise' qualifies for a 'technical service' under Article 12A UN MC. From this perspective, almost every consulting service would be deemed as 'technical'.

Yet, if this was the intention, the Contracting States should have chosen 'consulting' or another more general term instead of 'technical service'. Furthermore, the context of Article 12 strongly

suggests that technical assistance refers to industrial IP rights and industrial secrets and know-how that dominate the catalogue of Article 12 OECD and UN MC. Therefore, to take the title of 'technical services' seriously, all 'technical services', even those of a 'managerial nature' or 'consultancy nature, need a link to the traditional field of technique to 'applied and industrial science' or 'engineering sciences'. The combination of technical with managerial and consultancy services leads to an increased importance of the 'human element' in an Indian court decision, excluding almost fully automatized standard procedures.

bb. The Definition of Article 12A UN MC. While the headline of Article 12A UN MC still reads 'technical services', its structure shows that it follows a wide understanding and, in principle, covers every professional service that is imbued with expertise. The introduction of the category of 'technical services of a consultancy nature' besides the 'technical services of technical nature' shows that consulting that is not related to the traditional field of technique should also be covered. The UN Model Commentary confirms this wide understanding by defining services as activities carried out by one person for the benefit of another person in consideration for a payment whereas the manner of providing services was not decisive (no. 84 UN MC Comm. on Article 12A). Examples in the commentary also follow the wide understanding by, e.g., including a heart surgeon (no. 89 UN MC Comm, on Article 12A).

Traditionally, technical services have been defined by the provisions of Special Knowledge, skill, and expertise to make statements on the special issues of the customer. The UN MC apparently draws on this understanding as it excludes services of a routine nature (no. 62 UN MC Comm. on Article 12A). Technical services have to be discerned from routine services with a case-by- case analysis.

One important aspect is whether the service is individually customized to the specific needs of the customer. A standard scope of services under a standard contract is a strong argument for routine services. Yet, if a service provider determines the need of a customer in-depth and then chooses from several standardized

services in order to offer the one that fits best, they cannot qualify as being of a routine nature. Thus, it is not possible to avoid a qualification as a technical service by simply drafting the contract in a standard manner or using standard service elements.

The UN Model Commentary provides some examples. The access to a database will, in most cases, be of a routine nature while the creation of a customized database qualifies as technical services (no. 90, 91 UN MC Comm. on Article 12A). Yet, the selective access to some databases according to the established needs of clients is equivalent to the creation of a custom database and can thus also be qualified as a technical service. Financial services such as payment and transmission services, banker's drafts, foreign exchange, debt and credit card services, and negotiable instruments are general products that are routinely made available to clients by financial institutions (no. 95 UN MC Comm. on Article 12A). Payments for services rendered to a specific customer upon request in addition to transaction processing services such as warning bulletin fees for listing invalid or fraudulent accounts, cardholder service fees, fees for programme management services, account and transaction enhancement services fees, hologram and publication fees, and fees for advisory services are not a standard facility and constitute fees for technical services. If the financial institution provides, e.g., advice to a company that is resident in the other Contracting State with respect to a potential merger or acquisition involving this company, then Article 12A UN MC is applicable (no. 96 UN MC Comm. on Article 12A).

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cc. Services of Managerial Nature. The ordinary meaning of the term 'management' refers to the application of knowledge, skill, or expertise in the control or administration of the conduct of a commercial enterprise or organization (no. 63 UN MC Comm. on Article 12A). The UN MC Comm. on Article 12A provides two examples: firstly, payments by an enterprise for management services in cases when the management of all or significant parts of the enterprise are contracted out to other persons, and these persons are not related to the enterprise (not directors, officers,

employees) and, secondly, payments in consideration for advice of consultants related to the management or business of an enterprise.

dd. Services of Technical Nature. "Technical services involve the application of specialized knowledge, skill, or expertise with respect to a particular art, science, profession, or occupation (no. 64 UN MC Comm. on Article 12A). The UN Comm. further refers to regulated professions such as law, accounting, architecture, medicine, engineering, and dentistry as examples covered by Article 12A(3) UN MC. These examples are not exhaustive.

89. It becomes apparent upon a consideration of the views expressed above that the word ―technical‖ is no longer liable to be understood in its archaic sense as being confined to the traditional sciences. What authorities commend for consideration is an ascertainment of whether the services rendered involved the application of a specialised skill, knowledge or expertise. It is this shift in understanding which has led to the application of specialised knowledge, skill or expertise with respect to any art, science, profession or occupation being recognised as falling within the ambit of the expression ―technical‖ services. Similarly, the word ―consultancy‖ would entail the provision of advice or service of a specialised nature. There could also be the possibility where technical and consultancy services may also overlap or where the nature of service furnished may be discerned as falling under both those heads.

90. We thus broadly concur with the views expressed and noticed above. However, we note that insofar as these appeals are concerned, there appears to be no contestation on the nature of activities which were rendered by IMG and the respondents have not questioned those services falling within the scope of the expression ―technical and consultancy services. The principal issue of disputation was whether the ―make available test was satisfied."

8. In view of the above decision in the case of IMG (supra), we analyze the facts that whether the service rendered by the assessee fall under the head FTS. The Ld. Counsel did not bring any material on the record to

contradict the finding of the AO (page-10 of the assessment order) that '*the service provider (the assessee) is using the human resource with technical experience and expertise. Further, the nature of service provided by the service provider (the assessee) are not limited to the general and administrative services as contended by the assessee. This suggests that the service provided by the assessee are technical in nature within the meaning of Section 9(1)(vii) of the Act'.*

9. The Article-3 of the service agreement between Crocs India and the assessee reads as under:

> *" 3.1 General- Service provider hereby represents and warrants that (a) it has qualified personnel, appropriate facilities and adequate resources in order to discharge the services reasonable anticipated to be requested from the company in a timely and efficient manner, and (b) it has the administrative, business and technical experience and expertise required to perform such services in a competent and professional manner."*

By plain reading of the Article-3 of the above mentioned service agreement, the prima-facie inference emerged is that the services rendered by the assessee to the Crocs India are not purely general in nature as evident from this Article that the services had been provided by the competent technical expertise and qualified professionals. Thus, this Article buttresses the AO's inference that the service provided by the assessee are technical in nature within the meaning of Section 9(1)(vii) of the Act'.

10. The Hon'ble Supreme Court in the case Kotak Securities Ltd. 67 taxmann.com 356 had held that where a service is not customized to the needs of the customer and is indistinguishable from a common "facility" provided to all customers of the service provider. Here, the specialized/ customized services as per the requirements of domestic tax laws, etc. had been provided by the assessee. Here, the services had been customized to cater to the specific needs of the service recipient; Crocs India and the same were not made available globally to each service recipient. In the present case, the services rendered were tailor made and were core work of the assessee. Therefore, the same cannot be termed as ancillary services.

11. In view of the above, we are of the considered opinion that the services rendered by the assessee to the Crocs India are in the nature of FTS.

12. Now the next question arises before us is that whether the 'make available' condition can be said to have been satisfied. Further, FTS with "make available" clause restricts the interpretation of what would fall within the meaning of FTS. It is not just technical knowledge being transferred but also the recipient being able to utilise the same without any assistance from the service provider; i.e. the assessee. Section 90(2) of the Act along with well-settled jurisprudence allows assessee's to take the Act or the DTAA whichever is beneficial to them. In the present case the

assessee has preferred DTAA over the Act. Given this background, we now look at Section 9(1)(vii) of the Act and then the DTAA's with the make available clause interpretation of Section 9(1)(vii) of the Act.

13. In Paragraph 4 of the Article 12 of the India-US DTAA: ""fees for included services" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services: a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received; or b) Make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design." As per this definition, services would fall within the scope of FTS only if they make available technical knowledge, experience, skill, know-how, or processes and a technology is made available when there is a person is acquiring services. A line of difference has been drawn between services that possess some technical aspects and technology that is made available. This line of difference has also been iterated in the MoU to the India-US DTAA wherein it is stated that a technology is made available when the recipient of the service has been enabled to apply the technology, and the MoU. In the case of US Technology Resources Pvt. 407 ITR 327, the Hon'ble Kerala High Court reaffirmed the meaning of the term 'make available' with reference to fees for included services. The High

Court made a distinction between fees for included services as per the DTAA and 'technical and consultancy services' as under the Act. In the present case, the services rendered were of core work of the assessee and the same cannot be termed as ancillary services.

14. Here, in the present case, the contract in the matter was only for provision of services and not for supply of technical designs or plans. The assessee has not made available the technical knowledge and its expertise to the Crocs India. Several judicial decisions have clearly outlined the ambit of the "make available". The Hon'ble Delhi High Court in the case of IMG (supra) has held that the real test for "make available" clause is to ascertain that whether the recipient of service has absorbed the skills and expertise of the service provider and have the capability to deploy that knowledge or skill without reference to the original service provider. The transfer of capabilities and not just temporary use of the provider's knowledge, skill or expertise was held to be the decisive factor for satisfaction of 'make available' clause.

15. The impugned assessment order has not mentioned any fact, which may demonstrate that the condition of "make available" clause gets satisfied. Applying the above tests to the facts of the case at hand, we find that there was no expertise, skill or know-how which could be said to have been made available by the assessee to the Crocs India, inasmuch as various services provided by the assessee were absorbed by the Crocs

India to enable or equip it with the special knowledge underlying the service provided. The relatively long tenure of 15 years of the agreement weighed in favour of the assessee that it was not a case of transfer of knowledge or skill to the Crocs India. Thus, we held that the condition of "make available" is not fulfilled in the present case. Therefore, the service charges received by the assessee from Crocs India, though FTS, is not chargeable to tax as per the India-US DTAA. We therefore, delete the income of INR 77,311,738/-.

16. In the result, the appeal of the assessee is allowed as above.

Order pronounced in the open Court on 16th April, 2025.

Sd/-	**Sd/-**
(VIKAS AWASTHY)	**(AVDHESH KUMAR MISHRA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 16/04/2025
Binita/Kavita, Sr. PS

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. CIT-DR: ITAT

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