INCOME TAX APPELLATE TRIBUNAL DELHI BENCH "D": NEW DELHI

BEFORE

SHRI G.S. PANNU, HON'BLE PRESIDENT AND MS. ASTHA CHANDRA, JUDICIAL MEMBER

ITA Nos. 522 & 523/Del/2023 Asstt. Years: 2014-15 & 2016-17

Amazon Web Services, Inc.	Vs.	ACIT
251, Little Falls Drive,		Circle-1(1)(1)
Wilmington Delaware, USA,		New Delhi.
USA 19808		
PAN AATCA699SL		
(Appellant)		(Respondent)

Assessee by:	Shri Porus Kaka, Sr. Advocate	
	Shri Manish Kanth, Advocate	
	Ms. Deepashree Rao, Advocate and	
	Shri Hardeep Singh Chawla, Advocate	
Department by:	Shri Vizay B. Vasanta, CIT-DR	
Date of Hearing:	03.05.2023	
Date of	01.08.2023	
pronouncement:		

ORDER

PER ASTHA CHANDRA, JM

The two appeals filed by the assessee are directed against the order dated 27.01.2023 and 24.01.2023 of the Ld. Assessing Officer ("AO") passed under section 147 r.w.s.144C(13) of the Income Tax Act, 1961 (the "Act") pertaining to Assessment Year ("AY") 2014-15 and AY 2016-17 respectively. Since the issues involved in both the appeals are common, the same were heard together and are being disposed of by this common order.

2. The assessee has raised the following grounds of appeal:

AY 2014-15

- "1. That on the facts and circumstances of the case and in law, the impugned order of Assessing Officer ("AO") dated 27.01.2023, passed under section 144C read with section 147 of the Income-tax Act, 1961 (the Act), is without jurisdiction, illegal, bad in law, unsustainable and liable to be quashed
- 1:1 That on the facts and circumstances of the case and in law, the proceedings under section 147 of the Act ("Reassessment Proceedings) having been initiated on the basis of incorrect facts and without there being reason to believe that income of the appellant had escaped assessment, the impugned order is without jurisdiction, illegal. bad in law and liable to be quashed.
- 1.2 That on the facts and circumstances of the case and in law, the Reassessment Proceedings having been initiated merely on the basis of ex-parte information received, without any independent application of mind by the AO to such information and forming opinion thereof, is illegal, bad in law and liable to be quashed.
- 1.3 That on the facts and circumstances of the case and in law, order dated 28.02.2022 passed by the AO dismissing the legal objections to reasons for reopening of the assessment of the appellant is not sustainable in law.
- 1.4 That on the facts and circumstances of the case and in law, reassessment order is illegal and bad in law, since: (a) reasons recorded do not bear any Document Identification Number (DIN) and was not communicated along with the notice; and (b) proper and valid sanction for issuance of notice was not obtained under section 151 of the Act.
- 1.5 That on the facts and circumstances of the case and in law, the AO/DRP failed to appreciate that once proceedings under section 201 of the Act had already been initiated against the payer (Snapdeal), there was no warrant to initiate Reassessment Proceedings against the appellant for recovery of the same tax; resulting in double taxation.

On Merits-without prejudice

2. That on the facts and circumstances of the case and in tow, the AC/DRP ended in holding that payments received by the appellant from Indian customers amounting to Rs.2,47,68,23,222 is liable to sex in India as both royalty and fee for technical/included services ('FTS/FIS') und the provisions of the Act as well as the India-USA Double Tax Avoidance Agreement ('Tax Treaty')

Receipts not in the nature at FTS/FIS

- 2.1 That on the facts and circumstances of the case and in law, the AO/DRP erred in not appreciating that standard and automated cloud computing services are not taxable as FTS under the Act or the Tax Treaty.
- 2.2 That on the facts and circumstances of the case and in law, the AO/DRP erred in not appreciating that the appellant merely provides standard and automated cloud computing services to its customers which do not make available technical knowledge, know how, skill, experience, etc., to the service recipient so as to fall within the ambit of FTS/ FIS under Article 12(4) of the Tax Treaty.

Receipts not in the nature of Royalty

- 3. That the AO/DRP erred in holding that the payments received by the appellant from Indian customers for standard and automated services were in the nature of Royalty in terms of section 9(1)(vi) of the Act and under Article 12 of the Tax Treaty.
- 3.1 That the AO/DRP erred in concluding that the appellant's receipts are towards use of hardware/ infrastructure comprising of server, software, data storage space, networking equipment, databases, etc., and hence constitutes 'royalty', being towards usage of equipment by the customers.
- 3.2 That the AO/DRP erred in concluding that the appellant's receipts from customers in India result in 'right to use of equipment' as specified under clause (iva) of Explanation 2 to section 9(1)(vi) of the Act, read with Explanation 5 to section 9(1)(vi) of the Act

- 3.3 That on the facts and circumstances of the case and in law, the AO/DRP failed to appreciate that the payments do not qualify as royalty under Article 12 of the Tax Treaty since the customer does not have control or possession on any hardware/infrastructure comprising of server, software, data storage space, networking equipment, databases used by the appellant to provide the services to such customers.
- 3.4 That the AO/DRP erred in not appreciating that there is no equipment/dedicated facility/ space provided by the appellant to Indian customers.
- 4. That the AO/DRP erred in not following this binding precedents of the Hon'ble Tribunal) [Refer: Urban Ladder Home Decor Solutions Pvt. Ltd vs ACIT (IT) TS-773-ITAT-2021(Bang), Reasoning Global E-Application Lid ITA No.2028/Hyd./2017 (Hyderabad) and EPRSS Prepaid Recharge Services India Private Limited: [2018] 100 taxmann.com 52 (Pune)))
- 5. That the AO/DRP erred in not appreciating facts of the case and proceeded, on totally incorrect, perverse, erroneous basis contrary to the record, to allege that
 - (a) the appellant provides technical support to its customers.
 - (b) under the standard terms of the customer agreement the appellant is providing copyright and trademarks services to its Indian customers for commercial exploitation:
 - (c) the Indian customers use or obtain right to use the copyright from appellant as opposed to the Indian customers merely access standard and automated services offered by the appellant [refer Engineering Analysis Centre of Excellence (P.) Ltd vs. CIT: 432 ITR 471];
 - (d) the appellant provides information concerning industrial, commercial or scientific experience to Indian customers and hence constitutes royalty:
- 5.1 That the AO/DRP erred in levelling false and baseless allegations, on mere conjectures and surmises, by making selective reference to contents on AWS website, support plans etc., without appreciating the facts of the case.
 - 6. That, without prejudice to the above, on the facts and circumstances of the case and in law, the AO/DRP erred in levying incorrect tax rate of

25% on payments received by the appellant from Indian customers and has failed to apply the beneficial rates.

- 7. That, without prejudice to the above, the impugned order of AO dated 27.01.2023, passed under section 144C read with section 147 of the Act, being barred by limitation, is bad in law and void-ab-initio
- 8. That, without prejudice to the above, on the facts and circumstances of the case and in law, the AO erred in charging interest under sections 234A, 234B of the Act.
- 9. That on the facts and circumstances of the case and in law, the AO erred in mechanically vaguely initiating penalty proceedings under section 271(1)(c) of the Act."

AY 2016-17

- "1. That on the facts and circumstances of the case and in law, the impugned order of Assessing Officer ("AO") dated 24.01.2023, passed under section 144C read with section 147 of the Income-tax Act, 1961 (the Act), is without jurisdiction, illegal, bad in law, unsustainable and liable to be quashed
- 1:1 That on the facts and circumstances of the case and in law, the proceedings under section 147 of the Act ("Reassessment Proceedings) having been initiated on the basis of incorrect facts and without there being reason to believe that income of the appellant had escaped assessment, the impugned order is without jurisdiction, illegal. bad in law and liable to be quashed.
- 1.2 That on the facts and circumstances of the case and in law, the Reassessment Proceedings having been initiated merely on the basis of ex-parte information received, without any independent application of mind by the AO to such information and forming opinion thereof, is illegal, bad in law and liable to be quashed.
- 1.3 That on the facts and circumstances of the case and in law, order dated 28.02.2022 passed by the AO dismissing the legal objections to reasons for reopening of the assessment of the appellant is not sustainable in law.
- 1.4 That on the facts and circumstances of the case and in law, reassessment order is illegal and bad in law, since: (a) reasons recorded

- do not bear any Document Identification Number (DIN) and was not communicated along with the notice; and (b) proper and valid sanction for issuance of notice was not obtained under section 151 of the Act.
- 1.5 That on the facts and circumstances of the case and in law, the AO/DRP failed to appreciate that once proceedings under section 201 of the Act had already been initiated against the payer (Snapdeal), there was no warrant to initiate Reassessment Proceedings against the appellant for recovery of the same tax; resulting in double taxation.

On Merits-without prejudice

2. That on the facts and circumstances of the case and in tow, the AO/DRP ended in holding that payments received by the appellant from Indian customers amounting to Rs.1007,81,05,172 is liable to sex in India as both royalty and fee for technical/included services ('FTS/FIS') und the provisions of the Act as well as the India-USA Double Tax Avoidance Agreement ('Tax Treaty')

Receipts not in the nature at FTS/FIS

- 2.1 That on the facts and circumstances of the case and in law, the AO/DRP erred in not appreciating that standard and automated cloud computing services are not taxable as FTS under the Act or the Tax Treaty.
- 2.2 That on the facts and circumstances of the case and in law, the AO/DRP erred in not appreciating that the appellant merely provides standard and automated cloud computing services to its customers which do not make available technical knowledge, know how, skill, experience, etc., to the service recipient so as to fall within the ambit of FTS/ FIS under Article 12(4) of the Tax Treaty.

Receipts not in the nature of Royalty

- 3. That the AO/DRP erred in holding that the payments received by the appellant from Indian customers for standard and automated services were in the nature of Royalty in terms of section 9(1)(vi) of the Act and under Article 12 of the Tax Treaty.
- 3.1 That the AO/DRP erred in concluding that the appellant's receipts are towards use of hardware/ infrastructure comprising of server, software, data storage space, networking equipment, databases, etc., and hence

- constitutes 'royalty', being towards usage of equipment by the customers.
- 3.2 That the AO/DRP erred in concluding that the appellant's receipts from customers in India result in 'right to use of equipment' as specified under clause (iva) of Explanation 2 to section 9(1)(vi) of the Act, read with Explanation 5 to section 9(1)(vi) of the Act
- 3.3 That on the facts and circumstances of the case and in law, the AO/DRP failed to appreciate that the payments do not qualify as royalty under Article 12 of the Tax Treaty since the customer does not have control or possession on any hardware/infrastructure comprising of server, software, data storage space, networking equipment, databases used by the appellant to provide the services to such customers.
- 3.4 That the AO/DRP erred in not appreciating that there is no equipment/dedicated facility/ space provided by the appellant to Indian customers.
 - 4. That the AO/DRP erred in not following this binding precedents of the Hon'ble Tribunal) [Refer: Urban Ladder Home Decor Solutions Pvt. Ltd vs ACIT (IT) TS-773-ITAT-2021(Bang), Reasoning Global E-Application Lid ITA No.2028/Hyd./2017 (Hyderabad) and EPRSS Prepaid Recharge Services India Private Limited: [2018] 100 taxmann.com 52 (Pune)))
- 5. That the AO/DRP erred in not appreciating facts of the case and proceeded, on totally incorrect, perverse, erroneous basis contrary to the record, to allege that
 - (a) the appellant provides technical support to its customers.
 - (b) under the standard terms of the customer agreement the appellant is providing copyright and trademarks services to its Indian customers for commercial exploitation:
 - (c) the Indian customers use or obtain right to use the copyright from appellant as opposed to the Indian customers merely access standard and automated services offered by the appellant [refer Engineering Analysis Centre of Excellence (P.) Ltd vs. CIT: 432 ITR 471];
 - (d) the appellant provides information concerning industrial, commercial or scientific experience to Indian customers and hence constitutes royalty:

- 5.1 That the AO/DRP erred in levelling false and baseless allegations, on mere conjectures and surmises, by making selective reference to contents on AWS website, support plans etc., without appreciating the facts of the case.
 - 6. That, without prejudice to the above, on the facts and circumstances of the case and in law, the AO/DRP erred in levying incorrect tax rate of 15% on payments received by the appellant from Indian customers and has failed to apply the beneficial rates.
 - 7. That, without prejudice to the above, the impugned order of AO dated 24.01.2023, passed under section 144C read with section 147 of the Act, being barred by limitation, is bad in law and void-ab-initio
 - 8. That, without prejudice to the above, on the facts and circumstances of the case and in law, the AO erred in charging interest under sections 234A, 234B of the Act.
 - 9. That on the facts and circumstances of the case and in law, the AO erred in mechanically vaguely initiating penalty proceedings under section 271(1)(c) of the Act."
- 3. Briefly stated, the assessee is a foreign company and a tax resident of USA. The assessee provides 'standard and automated' cloud computing services/AWS Services to its customers around the globe. The customers are required to enter into a standard contract electronically with the assessee. For the relevant AYs the Department received an information from the office of ITO Ward-3(1)(2), International Taxation, New Delhi that during the verification proceedings under section 201/201(1A) in the case of M/s. Snapdeal Private Limited, it is observed that the assessee had received an amount of Rs. 30,94,81,489/- without TDS thereon under section 195 even though the consideration so received is chargeable to tax both under the definition of royalty under the provisions of section 9(1)(vi) of the Act and under the provisions of the India-USA Double Taxation Avoidance Agreement ("India-USA DTAA"). M/s. Snapdeal Private Limited had made foreign remittances towards "Hosting and Bandwidth Charges" and no tax has been withheld on this remittance which clearly falls under the purview of royalty as per the Act as well as India-USA DTAA. However, neither TDS has been

deducted by the remitter nor the assessee filed ITR for the relevant AYs. Accordingly, notice under section 148 of the Act was issued to the assessee on 31.03.2021 in response to which the assessee filed its return of income for both the AYs under consideration on 28.04.2021 declaring income of Rs. Nil. Thereafter statutory notices were issued to the assessee to which the assessee furnished responses from time to time.

- 3.1 Vide its reply dated 09.03.2022, the assessee submitted that it is based in the US and is engaged in the business of providing standard and automated cloud computing services to customers around the world. During the AY 2014-15 and AY 2016-17 the assessee received an amount of Rs. 2,47,68,23,222/- and Rs. 10,07,81,05,172/- respectively from its customers in India. These receipts relate to providing standard and automated cloud computing services to its customers.
- 3.2 Thereafter, a Show Cause Notice **("SCN")** dated 17.03.2022 was issued and served upon the assessee which read as under:-

"In relation to receipts from rendering cloud computing services, you are requested to show cause as to why the entire receipts from India should not be treated as royalty under the provisions of the Act, as well as the DTAA. Further, without prejudice to the above, you are requested to show cause as to why the entire receipts from India should not be treated as fee for technical services under the provisions of the Act, as well as the DTAA."

3.3 In response to the above SCN, the assessee filed detailed submissions alleging that the receipts are neither royalty nor fee for technical services both under the Act as well as the India-USA DTAA. The submissions of the assessee were considered but not found tenable by the Ld. AO. The Ld. AO proceeded to pass the draft assessment order on 31.03.2022 proposing to tax the entire receipts of Rs. 2,47,68,23,222/- in AY 2014-15 and Rs. 10,07,81,05,172/- in AY 2016-17 treating such receipts to be taxable in India as royalty as well as Fees for Technical Services ("FTS")/Fees for Included Services ("FIS") both under the Act as well as India-USA DTAA.

- 4. The assessee filed objections before the Ld. Dispute Resolution Panel ("DRP") against the draft assessment order passed by the Ld. AO. The Ld. DRP upheld the initiation of re-assessment proceedings and confirmed the additions proposed in the draft assessment order.
- 5. Pursuant to the directions of the Ld. DRP, the Ld. AO passed the final assessment order on 27.01.2023 for AY 2014-15 and on 24.01.2023 for AY 2016-17 under section 147 r.w. section 144C(13) of the Act assessing the total income of the assessee at Rs. 2,47,68,23,222/- and Rs. 10,07,81,05,172/- respectively being amount received as "cloud service fee" from customers in India towards cloud computing services rendered by the assessee from outside India treating the same as royalty and FTS/FIS under the provisions of the Act and the India-USA DTAA.
- 6. Aggrieved, the assessee is in appeal before the Tribunal challenging the final assessment order of the Ld. AO and all the grounds of appeal relate thereto.
- 6.1 Ground No. 1 along with its sub-grounds 1.1 to 1.5 and ground No. 7 challenging the initiation of reassessment proceedings under Act has not been pressed. In view of this, the only issue that needs to be adjudicated is whether the "cloud service fee" received by the assessee from customers in India is liable to tax in India being in the nature of royalty and FTS/FIS under the provisions of the Act and the India-USA DTAA as well.
- 6.2 It is an undisputed fact that the assessee is a tax resident of USA and hence it has opted to be governed by the provisions of India-USA DTAA, being more beneficial to it in terms of section 90(2) of the Act. Accordingly, we have examined and considered the taxability of the impugned receipts in the hands of the assessee under the provisions of India-USA DTAA.
- 7. At the outset, the Ld. AR explained the nature of services and the manner in which the cloud computing services are provided by the assessee globally.

The Ld. AR submitted that the cloud computing services provided by the assessee are merely standard and automated services. The facility of different category of cloud computing services provided by the assessee as well as pricing, are all publically available online to anyone. Customers choose from the suite of services available what they need, when they need them. Instead of buying, owning and maintaining own data centres and servers, organisations can access standard and automated facilities as compute power, storage, data basis and other services on an as-needed basis. In this context, he explained that cloud computing services offered to the customers by the assessee are all standardised and there is no customisation for any one particular customer. While providing the standard and automated services / facility, AWS group / affiliates maintains its technology infrastructure in a secure environment and businesses / customers access these standard / common facility via the internet to develop and run their own applications. Capacity can grow or shrink instantly on demand and organisations only pay for what they use as per the terms of standard subscription plans / services offered.

- 7.1 In order to avail cloud computing services, the customer enters into a standard AWS customer agreement which authorises the customer to access the cloud computing services they opt for. The customers themselves are responsible for the development, content, operation, maintenance and use of the customer's content while availing the standard and automated cloud computing services. At no point, the customers have any physical access to or control over the equipment used in delivering these services.
- 7.2 The Ld. AR drew our attention to the findings of the Ld. AO in his final assessment order and stated that the Ld. AO has held the impugned receipts to be in the nature of royalty and FTS/FIS alleging that:
 - i) the assessee is providing highly technical services and support to its customers and also 'making available' technology and

- thus the impugned receipts are taxable as FTS under the Act and FIS under Article 12 of the India-USA DTAA;
- ii) the assessee is providing its copyright and trademarks/service marks to its customers for commercial exploitation and sharing information concerning industrial, commercial or scientific experience with customers which qualify as royalty under the provisions of the Act and also under the India-USA DTAA; and
- iii) the assessee receives payment towards 'cloud computing product and services' which is essentially towards usage of hardware/infrastructure comprising of server, software, data storage space, networking equipment data basis etc. Hence the impugned receipts would qualify as 'equipment royalty' under the Act and the India-USA DTAA.
- 7.3 The Ld. AR then referred to the relevant clauses of the sample agreement entered into by the assessee with its customers ("Customer Agreement") which is on record and submitted that the terms of the said Customer Agreement clearly shows that the assessee is primarily providing automated cloud computing services which are in the nature of standard and automated computing services and that none of the above findings/allegations of the Ld. AO stands correct in view of the following factual reasoning: —
- a. The customers do not receive any exclusive or commercial right to use the copyrights or other intellectual property involved in AWS Services but, instead, only receive a right to access and use the AWS Services itself and consequently, the payments made to the assessee in relation to the AWS Services would not be consideration in exchange for right to use any copyright. [Clause 8.4 of the Customer Agreement, pages 178/540 of Paper Book read with clauses 3 and 17 of AWS Trademark Guidelines, pages 549 to 553 of the Paper Book]
- b. The assessee only grants access to use various standard AWS Services delivered online to its customers. The customers are only granted a

non-exclusive and non-transferable license to access the standard automated services offered by the assessee. The source code of the license which could provide information of the working of the applications/ software would never be shared with the customers. [Clause 8.4 and 8.5 pages 178/540 Service Offerings and License of AWS Customer Agreement, pages 540 of the Paper Book]

- c. As per the Customer Agreement, the assessee has not provided any dedicated facility/ space to the customers in India. Further, the customers do not acquire any right to use any industrial commercial or scientific equipment nor take possession of or control of or otherwise deal in infrastructure used for the cloud computing services in any manner. There is no equipment of any nature or at any time placed at the disposal of the customers by the assessee.
- d. The customer does not have right to use or commercially exploit the intellectual property (IP). It cannot copy, modify or create or derivate work or reverse engineer any part of the software/platform through which it inputs data and retrieves processed information. They only get an access to the standard and automated services / facility subscribed from the list of various such services available. [Clause 8.5 of the Customer Agreement, pages 178/540 of the Paper Book]
- e. Under the Trademark Guidelines, the assessee has granted a limited, non-exclusive revocable, non-transferable permission to use AWS marks, to the customer, only to the limited extent to identify that the said customer is using AWS Services for their computing needs. [Clauses 3, 8, 9 of AWS Trademark Guidelines, pages 548 to 553 of the Paper Book]
- f. Under the Support Services guidelines, incidental/ancillary support is provided by the assessee depending on the support plans subscribed by the customers with varied response time [AWS Support Guidelines, pages 557 to 567 of the Paper Book]

- g. Under the Support Services Guidelines, support is limited to answering queries of customers and / or troubleshooting in order to utilize AWS Services subscribed by them to the fullest extent. It is pertinent to note that AWS Support is not provided to anyone else except a customer of AWS Services. The Support Services Guidelines specifically provide that the technical support provided/ included in AWS Services does not include code development, debugging, performing administrative tasks etc. [AWS Support Guidelines, pages 557 to 567 of the Paper Book]
- 7.4 As regards the issue of taxability of the impugned receipts by the assessee from rendering cloud services as royalty, the Ld. AR submitted that the impugned issue is covered in favour of the assessee by the decision of the Delhi Tribunal in the case of Microsoft Regional Sales Pte. Ltd./MOL Corporation which has been affirmed by the Hon'ble Delhi High Court in the case of CIT vs. MOL Corporation 99/2023 dated 16.02.2023 (Del).
- 7.5 He further submitted that the assessee's case is also squarely covered by the decision of the various benches of the Tribunal wherein after examining and considering the nature of services and clauses of the same AWS's Customer Agreement which has the identical terms, the Tribunal held that payments made by Indian customers to the assessee for usage of the same cloud computing services /AWS Services is not taxable as royalty. The following decisions were relied upon by the Ld. AR:-
- i) EPRSS Prepaid Recharge Services India P. Ltd. vs. ITO (2018) 100 taxmann.com 52 (Pune-Trib)
- ii) Urban Ladder Home Decor Solutions Pvt. Ltd. vs. ACIT (IT) TS-773-ITAT-2021(Bang); which was rendered in the context of AY 2016-17 which is also one of the AYs under consideration in the present appeal.
- iii) Reasoning Global E-Application Ltd. vs. DCIT (2022) 145 taxmann.com 464 (Hyd-Trib)

8. The Ld. DR, on the other hand, filed detailed written submissions alleging that the impugned receipts are taxable as royalty both under the Act as well as India-USA DTAA which are reproduced below:-

"Royalty:

- 5. The service offerings of the assessee also covers AWS Marks that covers trademarks, service marks, service or trade names, logos and other designations of AWS. The Trademark use guidelines provide the customers with permission to use the AWS Marks in connection with use of the Services or in connection with software products designed to be used with the Services.
- 6. The above clearly shows that assessee is also providing its copyright and trademarks/ services marks to its customers for commercial exploitation. Further, the assessee is also sharing information concerning industrial, commercial or scientific experience with customers. Thus, the income received by the assessee would also qualify as Royalty under the provisions of Indian Income Tax Act, 1961 and also under Article 12 of India USA DTAA.

Equipment Royalty:

- 7. Further the assessee by way of providing cloud computing services provides essentially towards the usage of the hardware / infrastructure comprising of server, software, data storage space, networking equipment, databases, etc. as well as it provides tools and environment which supports the entire product development cycle right from build, operate and testing of the web applications and services.
- 8. Tax treatment of the Receipts for Cloud Computing Services Under the Income Tax Act, 1961 (IT Act), the definition of royalty covers both consideration paid for the right to use certain IP rights (such as copyrights, patents, secret formulae, etc.) and the right to use scientific equipment. Further the definition of royalty in India-US tax treaty [Article 12(3)(a)] interalia includes payments of any kind received as a consideration for the use, or the right to use, any commercial or scientific equipment.

The access to server constitutes an Equipment Royalty. The Hon'ble Madras High Court in Poompuhar Shipping Corporation Ltd. v ITO [2013] 38 taxmann.com 150 (Madras) highlighted the need for construing 'equipment' widely, so as to embrace every article employed by the employer for the purposes of his business. 'Equipment', in whatever name called either as an

apparatus or as plant or machinery, so long as they are employed for the purposes of one's income.

9. The agreement with the customers explicitly lays down that the customer / user has sole access / sole authority to use the account, Further, the assessee would not bear any responsibility in case of any unauthorized access. Furthermore, third party has a free hand to display its content to the users, signifying that the user has a significant control over the space allotted to him. Hence the payment made to the assessee for cloud computing products and services is essentially towards the usage of the hardware/infrastructure comprising of server, software, data storage space, networking equipment, databases, etc. as well as it provides tools and environment which supports the entire product development cycle right from build, operate and testing of the web applications and services. The above facts clearly point to usage of equipment by the customer-hence satisfying the definition of royalty as laid down in the IT Act as well the India-US Tax Treaty.

10. Further, in relation to 'equipment', Article 12(3)(a) neither defines "use of, or right to use" nor does it explicitly confine 'use, or right to use, industrial, commercial or scientific equipment' to cases where physical possession or control of the equipment is obtained. Also, the term 'use' is nowhere limited to the legal concepts of rent or lease, which do require obtaining the power to dispose over an item and to use it exclusively.

This was also the notion adopted by AAR in its ruling Dishnet Wireless Limited, AAR no. 863 of 2010 where it was seen as sufficient in order to qualify as 'use' to access a particular segment of a larger system and to use the capacity of this system. In fact, equipment can be used in many different ways and behind every use of equipment is the desire to use its capacity and functions. Logically, the use of equipment cannot be separated from the use of its capacity and functions. In some cases, the use of an item's capacity and function will require physical possession of the item (e.g. in order to use a car's transportation function, the physical possession of the car is required), but in other cases, an item and thus an item's capacity and functions can be used without physical possession of the item, as in the case with satellites. Hence, the use of equipment's capacity and functions equals the use of 'equipment'. The word "use" in relation to equipment occurring in clause (iv a) of explanation 2 to section 9(1)(vi) needs to be understood in a broad sense for availing the benefit of an equipment in the present digital era. The context and combined use of the two expressions "use" and " right to use" followed by the word equipment indicates that there must be some positive act of utilisation, application or employment of equipment for the desired purpose. Further, an

interpretation of the term 'use, or right to use, of industrial, commercial or scientific equipment" as also covering payments for the use of an equipment's capacity and functions is consistent with the interpretation of the term 'use, or right to use" as used throughout Article 12(3). After all, the physical possession and control of the other items covered by the provisions such as copyrights, patents, trademarks, designs or models plans, secret formulas or processes, is not key to qualifying payments for their use a royalties. In fact, the concept of physical possession and control is alien to many such items.

11. In this regard, reliance is placed on the decision of Delhi Tribunal in Asia Satellite Communication Co. Ltd. vs DCIT [2003] 85 ITD 478 (Delhi), wherein the Tribunal held follows:

"So far as applicability of section 9(1)(vi) was concerned, a view was canvassed by the assessee that the term 'use', as contained in said provisions should be confined to physical user and as in the instant case nothing was physically used by the customers, so there was no use of any properties as referred to in the clause (iii) of Explanation 2 and resultantly the considerations paid by the customer would not be called royalty. The word 'use' is not defined under section 9. Under these circumstances, the meaning which is understand in common parlance should be adopted In the present age of modernization where numerous developed applications of science have become part of life and the extent of development of technology is so fast, would really be fair to restrict the meaning of the word use to only physical use The plain construction of the word use refers to the deriving advantage out of it by employing for a set purpose. That apart there was physical contact of the signals of the TV channels with the process in the transponder provided by the assessee It was only when those signals came in contact with the process in the transponder that the desired results were produced."

12. Further, reliance is placed on the decision of AAR in Cargo Community Network (P.) Ltd. [2007] 289 ITR 355 (AAR), wherein the assessee, a non-resident company having its registered office at Singapore, was engaged in business of providing access to an Internet-based Air cargo portal. The agents could clarify doubts through the help desk support in India. The income was generated for the assessee by way of subscriptions made by the agents for the use of the portal to book tickets. The assessee contended that the use of equipment involves some degree of domain or control over the equipment. However, the AAR ruled that since the portal is displayed on the computer screen of the cargo agent through which he can access various airlines for booking of cargo, and the acceptance of the concerned airline is conveyed in

India and it, thus, it amounts to the use of the scientific equipment in India. Relevant extract of the judgement has been reproduced below:

"The system connect fee that includes training charges (for 2 persons), monthly subscription fee for concurrent access, fee for additional access and helpdesk charges are all payments essentially being made by a cargo agent in India for use of the Ezycargo portal developed by the applicant and hosted on his server in Singapore. Portal is displayed on the computer screen of the Cargo agent through which he can access various airlines for booking of cargo, and the acceptance of the concerned airlines is conveyed in India. Therefore, it would be correct to say that the use of the commercial equipment is made in India and the 'payments' also arise in India. The complex portal designed by the applicant is the result of long standing commercial experience and research in the line of cargo booking It offers a sophisticated platform for a complete range of services that enable the clients (forwarders) to manage their time-critical transactions with major carriers. It offers global online-access convenience to a comprehensive range of functions and complete management solution for cargo booking and subsequent multi-carrier track and trace facility. The portal designed by the applicant is hosted on its server in Singapore with Internet accessibility on one side to different airways. The portal which is a complex, commercial, Internet site provides a gateway for processing request for cargo booking to different airlines, and obtaining their acceptance. The use of portal is not possible without the use of server that provides internet access to the cargo agents/subscribers, on the one hand, and to different airlines, on the other hand, for to and fro communication. Therefore, the portal and the server together constitute integrated commercial-cum-scientific equipment and for obtaining Internet access to airlines the use of portal without server is unthinkable. Whereas the portal performs complex functions of providing access to different airlines and translation of messages from English to IMP language, the server provides connectivity and internet access for processing request for booking of cargo and subsequent multicarrier trace and track facility, etc. Therefore, the plea of the applicant that cargo booking agent never uses the server of the applicant for processing or obtaining any data, and that the use of the equipment involves at least some degree of domain or control over the equipment, or suit the business needs of the user, is not tenable. The factual position is that a cargo booking agent/subscriber depending on his business needs, can use the portal at will on the server platform of the applicant, at any time according to his needs for processing his request for booking cargo with various

airlines and obtaining benefits of other sophisticated services offered by Ezycargo Para (3) of article 12 defines the term 'Royalties and fees for technical services. The term 'Royalties as wed in sub-clause (b) of Para (3) of article 12 means payments of any kind received as consideration for the we for the right to use, any industrial, commercial or scientific equipment. Ezycargo portal on the applicant Server Platform is scientific equipment, authorized to be used for commercial purposes. Therefore, payments made for concurrent access to utilize the sophisticated services offered by the portal, would be covered by the expression royalties' as used in article 12. Further, the technical and consultancy services being rendered by the employees of the applicant in training the subscribers and providing helpdesk support, in India are covered by the description of 'Fees for technical services These are ancillary and subsidiary to the application and enjoyment of the use of, or the right to use, the scientific equipment for commercial purposes. What remains to be seen is whether the payments being made to the applicant fall within the meaning of 'Royalty' and 'Fees for technical services' as defined in section 9(1) After carefully going through the provisions of section 9(1), it is clear that meaning of the term 'Royalty' as used in Explanation (2) to clause (v) of sub-section (1) of section 9, is at par with the term 'Royalties' as used in article 12(3)(b). The term 'Fees for technical services' as used in Explanation (2) of clause (vii) of subsection (1) of section 9, is analogous to the term 'Fees for technical services' as used in article 12(4)(a). In view of this position, the payments being made by the agents/subscribers (residents) to the applicant (a non-resident) are chargeable to tax in India, under article 12 as also under section 9. [Paras 8 and 9] Inasmuch as it is concluded that the payments made by the subscribers to the applicant are in the nature of 'Royalties and fees for technical services' and taxable under article 12, the said payments cannot, therefore, be treated as business income. [Para 10] In the light of the foregoing discussion, it is ruled that the payments made by the Indian subscriber to the applicant at Singapore, for providing a password to access and use the portal hosted from Singapore, are taxable in India and subject to deduction of tax at source. [Para 14]"

In the present case the assessee has provided a dedicated facility / space in the servers to the customers in India. Further, there have been various judicial precedents wherein the Courts have held that that 'right to use' is the right to access the particular segment of a larger system, to use the capacity of the system powered by the equipments of the whole system. Further, the judgments have provided that the consideration paid for this right to access and the right to use and exploit the system, is royalty. Therefore a right to

access and exploit a part of segment of a larger system to use the capacity of the system and the consideration paid therefore clearly falls under Clause (iva) of Explanation 2 to Section 9(1)(vi) of the Income Tax Act and hence 'royalty'. The Courts have upheld that use of dedicated facility would invariably amount to usage of equipment. Hence, the receipts from cloud computing services by the assessee would tantamount for consideration for the use of equipment - being taxable as royalty under the IT Act as well as the Tax Treaty.

- 13. Without prejudice to the above argument, reliance is also placed on Explanation 5 to section 9(1)(vi) of the IT Act. The Finance Act, 2012, has included Explanation 5 to Section 9(1)(vi) which states that royalty includes and has always included consideration in respect of any right, property or information, whether or not-
- a the possession or control of such right, property or information is with the payer.
- b. such right, property or information is used directly by the payer;
- c. the location of such right, property or information is in India

As seen from the above, the Explanation 5 specifically provides that for determination as to what constitutes Royalty, the possession or control of right / property / information or direct use of such right / property / information by the payer or location of such right/property/information in India are not relevant consideration. Therefore, the Legislature has made its view very clear that even a remote use of right/property/information would also constitute royalty. Hence, the receipts of the assessee would clearly fall under the ambit of royalty.

14. Further, reliance is placed on the Position stated by India on Article 12 of the OECD Model Convention. It is stated in the stated Positions to the Model Convention, that India reserves the right to: tax royalties and fees for technical services at source; define these, particularly by reference to its domestic law; define the source of such payments, which may extend beyond the source defined in paragraph 5 of Article 11, and modify paragraphs 3 and 4 accordingly. In view of the above, India's position on the OECD Model has always been clear that India does not agree with the definition of royalty as provided in the OECD Model Convention. Therefore, the definition of 'royalty' as provided in the Act clearly demonstrates India's position on royalty and has to be read into the treaty as well."

9. In rebuttal to the specific contentions raised in the written submissions of the Ld. DR, the Ld. AR submitted a para-wise brief rejoinder which is reproduced below:-

"Para 5 and 6

The appellant has filed detailed submissions/rebuttal on this aspect at **pages 05 to 06** of the broad proposition dated 16.05 2023, which is not reiterated here for the sake of brevity. However, the specific conventions of the Ld. DR are rebutted as under:

- Under the Trademark Guidelines, the appellant has granted a limited, non-exclusive, revocable, non-transferable permission to use AWS marks, to the customer, only to the limited extent to identify that the said customer is using AWS Services for their computing needs (Refer: Clauses 3, 8, 9 of AWS Trademark Guidelines-Refer pgs 545 to 548)
- The customer does not have right to use or commercially exploit the IP. It cannot copy, modify or create or derivate work or reverse engineer any part of the software/platform through which it inputs data and retrieves processed information. They only get an access to the standard and automated services/facility subscribed from the list of various such services available. [Refer: Clause 8.5 of AWS Customer Agreements]
- The Ld. DR has failed to pin point how the appellant is sharing information concerning industrial, commercial scientific experience with customers, which is without any basis and not borne from records. There is no technical knowhow transferred in relation to cloud computing services.

Para 7 to Para 12

- o AWS services do not contemplate of involve the supply of any equipment.
- The terms of the Customer Agreement clearly provide that the customers have sole access/sole authority for their content stored in the account and not the space allotted-Refer Clause 4.1.-Your Responsibility of the Customer Agreement @pg 532 of the PB)
- The customers do not acquire any right to use any industrial commercial or scientific equipment nor take possession of or control of or otherwise deal in infrastructure used for the cloud computing services in any manner.
- The appellant has not provided any dedicated facility to the customers in India in so far as the customers are not aware of the nature, capacity

- and specifications or even the exact equipment/server on which their data/content is stored.
- Merely authorizing or enabling a customer to have the benefit of data or instructions contained in the software without any further right to deal with it independently does not constitute royalty [Refer Engineering Analysis Centre of Excellence Private Limited vs. CIT: 432 TTR 471 (SC)

In view of the above, it is submitted that since the equipment (server) are not under the possession or control or exclusive use of the customers, the payment made by the customer for cloud computing cannot, in our submission, be considered to be for the use of equipment and hence, would not be taxable as 'equipment royalty' in view of the Article 12(3) of the Indo-US Tax Treaty.

Further, even otherwise, there is no tangible equipment of any nature or at any time placed at the disposal of the customers, which is also evident from the terms of the Customer Agreement in so far as no tangible equipment has been adverted to or referred in the Customer Agreements which the appellant can be associated with Customers are merely able to access a standard off the shelf software. They neither have any right or domain over any hardware nor any copyright in any software at any time.

Para 13 and Para 14

In this regard, it is respectfully submitted that retrospective amendment made in section 9(1)(vi) of the Act by way of insertion of Explanation 5 thereto cannot be read into the Tax Treaty. The jurisdictional Delhi High Court in the case of **DIT vs New Skies Satellite BV: 382 ITR 114 (Del)**, held in context with retrospective amendment in section 91Xvi) of the Act that any amendment in the Act would not override the provisions of a Tax Treaty unless respective changes are also made in such Tax Treaty. (Also refer. **DIT vs Ericsson AB** 343 ITR 470 (Del HC) & DIT vs Nokia Network OY: 358 ITR 259 (Del HC) The said principle of law has also been affirmed by the Supreme Court in the case of **Engineering Analysis Centre of Excellence Private Limited vs CIT**: 432 ITR 471 (SC))

In view of the above, it is submitted that the unilateral amendment made by the Legislature vide Finance Act, 2012 in section 9(1)(vi) of the Act with retrospective effect shall have no bearing on the definition of "royalties" provided under Article 12 of the India-US DTAA

In so far as the contention of the Ld. DR on India's position on Article 12 of the OECD Model Convention, it is submitted that mere positions taken with respect to the OECD Commentary do not alter the Tax Treaty previsions, unless it is actually amended by way of bilateral re-negotiation [Refer: **Engineering Analysis Centre of Excellence Private Limited vs. CIT**: 432 ITR 471 (SC) and DIT vs. New Skies Satellite BV:382 ITR 114 (De). It may also be pertinent to note that there is no bilateral amendment in the India-US DTAA to change the definition of royalty contained in the DTAA after India took such positions qua the OECD Commentary.

Para 8 and Para 10 to 12

In so far as the case laws relied upon by the Ld. DR, it is respectfully submitted that the same are not at all relevant, in facts of appellants case, also reversed by subsequent decisions and distinguishable on facts as explained hereunder:

Re: Asia Satellite Communications DCIT: 85 ITD 478 Del @ para 12 of the submission)

The aforesaid decision has since been <u>reversed</u> by the Delhi High Court in **Asia Satellite Telecommunications Co. Ltd. v. DIT 332 ITR 340 (Del)**, wherein the Court held that receipts earned from providing data transmission services through satellites do not constitute royalty within the meaning of section 9(1)(vi) of the Act.

Re: Cargo Community Network (P) Ltd.: 289 ITR 355 (AAR) para 12 of the submission) It is at the outset submitted that the aforesaid decision was rendered by Authority of Advanced Ruling (AAR) in the peculiar facts of the said case, which is not at all binding. It may be appreciated that rulings of AAR are binding only on the applicant who had sought it and that too in respect of the transaction in relation to which the ruling had been sought. Without prejudice, the aforesaid decision is distinguishable in so far as in the facts of the said case, the AAR observed that there was a positive right to use the equipment and on these facts it was held that the services offered by the assessee therein was covered within the expression royalty. In the present case, the amount received by the appellant is solely for provision of services and there was no right to use of the appellant's equipment by any of its customers.

Re: Dishnet Wireless Limited: AAR No 863 of 2010 @ para 10 of submission)

This is also a decision of the AAR, which as submitted above, is not at all binding on the appellant. That apart, the said decision is distinguishable on facts in so far as in the said case, payment made to UAE company for right to use a high-capacity submarine telecommunication fiber-optic cable system was held to constitute royalty taxable in India. Further, the binding decision of the Delhi High Court in the case of **Asia Satellite (supra)** has not at all been considered in the said case. Further, the said decision is no longer good law in view of the ruling of the Delhi High Court in the case of New Skies (supra).

Re: Poompuhar Shipping Corporation Ltd, vs. ITO: 38 baxmann.com 150 (Mad) @ para 8 of submission)

The aforesaid decision is distinguishable on facts in so far as the issue for adjudication in the said case was whether payments made under time charter agreement amounted to royalty falling under clause (iva) of Explanation 2 to section 9(1)(vi). In this context, the Court rendered certain observations in context with whether a ship can be regarded as 'equipment as covered section 9(1)(vi) of the Act. The said observations are not at all relevant to the facts in

the case of the appellant where there is no tangible equipment, per se, at the disposal of the customer. That apart, the aforesaid decision has also been distinguished by the Madras High Court in the case of CIT vs. Van Oord ACZ Equipment BV: T.C.(A) No. 1202 of 2007 (Mad)

In view of the above, it is submitted that the aforesaid cases being on its peculiar facts and rendered prior to the decision of the apex Court in the case of **Engineering Analysis (supra)** and Delhi High Court in the case of New Skies (supra), is not at all applicable in the case of the appellant and deserves to be ignored from consideration."

- 10. We have heard the Ld. Representatives of the parties, considered their submissions, various judicial precedents relied upon and the material on record. It is an undisputed fact that the assessee is a tax resident of USA and hence has opted to be governed by the beneficial provisions of the India-USA DTAA. Accordingly, we deal with the taxability of the impugned income in India as per the provisions of the India-USA DTAA.
- 11. Article 12(3) of the India-USA DTAA defines the term 'royalties' to mean-
- "(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; 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 payments derived by an enterprise described in paragraph I of Article 8 (Shipping and Air Transport) from activities described in paragraph 2(c) or 3 of Article 8."
- 12. It is the case of the assessee that AWS Services provided by the assessee are merely standard and automated services which are all publically available online to anyone. These services are all standardised and there is no customisation done for any particular customer. We have perused

the sample Customer Agreement and the relevant extracts of the Customer Agreement (pages 173 – 185 and 535- 547 of the Paper Book) which are reproduced below:-

Relevant excerpts from Clause-1 of the Customer Agreement (page 173/535 of Paper Book)

1.3 Support to you. If you would like support for the Services other than the support we generally provide to other users of the Service without charge, you may enroll for customer support in accordance with the terms of the **AWS Support Guidelines**.

"AWS Support Guidelines" means the guidelines currently available at http: co\s. amazon.com/premiumsupport/guidelines, as they may be updated by us from time to time. (a pgs. 183/545 of PB)

Relevant excerpts from Clause 4 of the Customer Agreement (pages 174/536 of Paper Book)

- **4.1 Your Content**. You are solely responsible for the development. content, operation, maintenance, and use of Your Content.
- **4.2 Other Security and Backup.** You are responsible for properly configuring and using the Service Offerings and taking your own steps to maintain appropriate security, protection and backup of Your Content, which may include use of encryption technology to protect Your Content from unauthorized access and routine archiving Your Content. AWS log-in credentials and private keys generated by the Services are for your internal use only and you may not sell, transfer or sub-license them to any other entity or person, except that you may disclose your private key to your agents and subcontractors performing work on your behalf.

Relevant terms on Service Offerings and License: (pages 178/ 540 of Paper Book)

8.4 Service Offerings License. As between you and us, we or our affiliates or licensors own and reserve all right, title, and interest in and to the Service Offerings. We grant you a limited, revocable, non-exclusive, non-sublicensable, non-transferrable license to do the following during the Term: (i) access and use the Services solely in accordance with this Agreement; and (ii) cow and use the AWS Content solely in connection with your permitted use of the Services. Except as provided in this Section 8.4, you obtain no rights under this Agreement from us or our licensors to the Service Offerings, including any related intellectual

- **property rights.** Some AWS Content may be provided to you under a separate license, such as the Apache Software License or other open source license. In the event of a conflict between this Agreement and any separate license, the separate license will prevail with respect to that AWS Content.
- **8.5 License Restrictions**. Neither you nor any End User may use the Service Offerings in any manner or for any purpose other than as expressly permitted by this Agreement. Neither you nor any End User may, or may attempt to, (a) modify, alter, tamper with, repair, or otherwise create derivative works of any software included in the Service Offerings (except to the extent software included in the Service Offerings are provided to you under a separate license that expressly permits the creation of derivative works), (b) reverse engineer, disassemble, or decompile the Service Offerings or apply any other process or procedure to derive the source code of any software included in the Service Offerings, (c) access or use the Service Offerings in a way intended to avoid incurring fees or exceeding usage limits or quotas, or (d) resell or sublicense the Service Offerings. All licenses granted to you in this Agreement are conditional on your continued compliance this Agreement, and will immediately and automatically terminate if you do not comply with any term or condition of this Agreement. During and after the Term, you will not assert, nor will you authorize, assist, or encourage any third party to assert, against us or any of our affiliates, customers, vendors, business partners, or licensors, any patent infringement or other intellectual property infringement claim regarding any Service Offerings you have used. You may only use the AWS Marks in accordance with the Trademark Use Guidelines.
- 12.1 The relevant terms on AWS Trademark Guidelines is reproduced below: (pages 548-556 of Paper Book, relevant at 548-550 and 553)
- "1. Introduction. These Amazon Web Services ("AWS") Trademark Guidelines (the "Trademark Guidelines") form an integral part of the AWS Customer Agreement (the "Agreement") between Amazon Web Services, Inc. or its affiliates (AWS," "we," "us" or "our") and you or the entity you represent ("you"). These Trademark Guidelines provide you a limited permission to use the AWS Marks (as defined in Section 2 below) The AWS Marks are some our most valuable assets and these Trademark Guidelines are intended to preserve the value attached to the AWS Marks
- **3. Limited Permission**. Provided that you are (a) an AWS developer in good standing with a current and valid account for use of the Services or (b) otherwise authorized by AWS in writing and provided, further, that you

comply at all time with the terms of both the Agreement and the Trademark Guidelines, we grant you a limited, non-exclusive, revocable, nontransferable permission, under our intellectual property rights in and to the AWS Marks, and only to the limited extent of our intellectual property rights in and to the AWS Marks, to use the AWS Marks for the following limited purpose, and only for such limited purpose; you may utilize the Logo or the appropriate form(s) of the "for" or equivalent naming convention or URL naming convention, as set forth in Section 9 below, to: (i) identify Your Content (as defined in the Agreement) as using the Services, or (1) to identify software tools or applications that you create and distribute that are intended for use in connection with the Services. Without limitation of any provision in the Agreement, you acknowledge that any use that you elect to make of the AWS Marks, even if permitted hereunder, is at your sole risk and that we shall have no liability or responsibility in connection therewith Your limited permission to we the AWS Marks is a limited permission and you may not use the AWS Marks for any other purpose. You may not transfer, assign or sublicense your limited permission to use the AWS Marks to any other person or entity.

Your limited permission to use the <u>AWS Marks hereunder shall automatically</u> terminate and you must immediately stop using the AWS Marks if at any time: (1) the Agreement is terminated; (ii) Your Content no longer uses any of the Services, or your software product cannot be used with any of the Services, as applicable; or (iii) you cease to be a registered AWS developer."

8. Formatting Requirements with Respect to the "Powered by AWS" Logo.

- a. No Modification. We will make the Logo image available to you from the comarketing page in the AWS Site located at http://aws.amazon.com/comarketing. You may not remove, distort or modify any element of the Logo
- b. Color. The Logo may be represented in the following formats: FULL COLOR (1) light backgrounds-squid ink type with Amazon Orange smile; (ii) dark backgrounds-white type with Amazon Orange smile; or for single-color applications; SINGLE COLOR (i) light backgrounds Squid Ink type with Squid Ink smile (preferred): GRAYSCALE (iv) light backgrounds-Black type with Black smile; (v) dark backgrounds-white type with white smile. No alternate color representation or combination will be acceptable.
- **9. Permissible Uses of the AWS Marks.** Except for the Logo (with respect to which the formatting requirements are set forth above), you may only use the AWS Marks: (1) in a relational phrase using "for" or one of the limited number of equivalent naming conventions, as set forth below; or (ii) to the right of the top level domain name in a URL in the format set forth below...

- 13. **Attribution.** You must include the following statement in any materials that include the AWS Marks: "Amazon Web Services, the "Powered by AWS" logo, [and name of any other AWS Marks used in such materials] are trademarks of Amazon.com, Inc. or its affiliates in the United States and/or other countries.
- 17. **Reservation of Rights.** Except for the limited permission specified in Section 3 above, nothing in the Agreement or these Trademark Guidelines shall grant or be deemed to grant you any right, licenses, title or interest in or to any AWS Mark or any of our or our affiliates' other trademarks, service marks, trade names, logos, product names, services names, legends, other designations, or abbreviations of any of the foregoing. You acknowledge and agree that we and our affiliates retain any and all intellectual property and other proprietary rights."
- 12.2 The relevant extract of the webpage for AWS Support Services is as under:-

"Our AWS Technical Support tiers cover development and production issues for AWS products and services, along with other key stack components:

AWS Support does not include:

- Code development
- Debugging custom software
- Performing system administration tasks
- Database query tuning
- Cross-Account Support"
- 13. On perusal of the terms of the above Customer Agreement, Trademark Guidelines and Support Services Guidelines, it is clearly evident that the prerequisites for the impugned receipts to be treated as royalty income in terms of Article 12(3) of the India-USA DTAA are not met as the customer do not receive any right to use the copyright or other IP involved in AWS service; the customers are granted only a non-exclusive and non-transferable licence to access the standard automated services offered by the assessee without the source code of the licence being shared with the customer; the

customers have no right to use or commercially exploit the IP; there is no equipment of any nature or at any time placed at the disposal of the customers by the assessee. Further, it is to be noted that under the Trademark Guidelines customer has been granted a limited, non-exclusive, revocable, non-transferable right to use AWS marks only to the limited extent for identification of the customer who is using AWS Services for their computing needs. Similarly, under the Support Service Guidelines, only incidental/ancillary support is provided to the customers which includes answering queries/troubleshooting for use of AWS Services subscribed by them. The Support Service Guidelines specifically provide that the technical support included in AWS services does not include code development, debugging, forming administrative task etc.

- 14. Now, coming to various judicial precedents relied upon by the Ld. AR, we observe that the impugned issue is squarely covered by decision of the various benches of the Tribunal wherein the Tribunal considered the identical terms of the standard customer agreement that the assessee enters into with its customers (terms of agreement specially referred to and analysed in the orders of the Tribunal) and held that the payments made to the assessee are not in the nature of royalty.
- 14.1 In the case of EPRSS Prepaid Recharge Services India (P.) Ltd v. ITO [2018] 100 taxmann.com 52 (Pune Trib.), the Pune Tribunal, relying on the order of the Hon'ble Madras High Court in the case of Skycell Communications Ltd. v. DCIT 251 ITR 53 held that payments made to the assessee for cloud computing services do not qualify as royalty under the India-USA DTAA. The relevant findings and observations of the Tribunal are reproduced below:
 - "11. We have heard the rival contentions and perused the record. The issue which arises in the present appeal is in respect of charges paid by assessee to A WS The assessee was engaged in sale of recharge pens and did not have the facility available with it of high technology equipments i.e. servers. So, in order to carry on its activity of distributorship of recharge pens, it used servers of Amazon, for which it

paid web hosting charges. Before using the services available of Amazon online, it entered into an agreement, under which fees structure was provided. Copy of agreement is placed at pages 3 to 22 of Paper Book. The agreement is called AWS Customer Agreement, which contains the terms and conditions that governs assessee's access to and use of Service Offerings. It was agreement between Amazon Web Services, Inc. and you i.e. assessee. It is provided that agreement takes effect when you click an "I Accept" button. Clause 1.1 lays down that 'you' (assessee) may access and use the Service Offerings in accordance with agreement. In clause 1.2, it is provided that to access services, 'you' (assessee) must create an AWS account associated with a valid e-mail address. Clause 1.3 provides that if you (assessee) would like support for the services other than the support we generally provide to other users of the services without charge, then you can enroll for customer support in accordance with the terms of AWS Support Guidelines. Clause 2.1 lays down that Amazon could change, discontinue, or deprecate any of the Service Offerings or change or remove features or functionality of the Service Offerings from time to time. As per clause 4.1, you (assessee) are solely responsible for the development, content, operation, maintenance and use of Your Content. Now, coming to clause 5.5, which provides the Service Fees to be paid, agreement provided that Amazon would calculate and bill fees and charges monthly. It is further agreed that you (assessee) have to pay applicable fees and charges for use of Service Offerings as described on AWS site using one of the payment modes they support. We may refer to clause 8.4 which lays down the Service Offerings License, under which it is provided that Amazon or its affiliates or licensors own and reserve all right, title and interest in and to the Service Offerings. However, limited, revocable, non-exclusive, non-sublicensable, nontransferrable license is granted to you (assessee) to do the following *during the term:—*

- (i) access and use the Service solely in accordance with this agreement; and
- (ii) copy and use the AWS Content solely in connection with your permitted use of the Services."
- "19. Now, another issue which needs to be seen is whether charges paid to Amazon for various services provided by it are in the nature of royalty, if any, or not. The assessee has placed on record the copy of agreement with Amazon, which we have referred in the paras hereinabove. He has also placed on record the copies of bills raised by Amazon online. The perusal of details filed by assessee of monthly

charges paid, it transpires that the same are fluctuating from month to month and there is no regular payment being made to Amazon. In case of provision of royalty to a person, then as seen from the terms and conditions of various agreements, there is fixation of price to be paid and there may be variation on account of use of certain services but first there has to be basic price fixed. However, in the facts of Present case looking at the documentation, the billing is segregated into various services i.e. AWS services, storage services, etc. and the assessee before us has filed a chart of summary of services availed. The first such services are on account of service charges for Elastic Compute Cloud. As per clause 1, it is on account of use of service provider Linux; as per clause as per clause 1.3, Windows & SQL Server standard and clause 1.4 of Bandwidth. The total service charges for Elastic Compute Cloud are USD 40,253.17. The month-wise details of said payments made by assessee from September, 2009 to March, 2010 reflected that in the first month, charges totaled to USD 4269.02, in October at USD 5599.36 and there on.

21 'The aspect which needs to be seen is whether the assessee is paying consideration for getting any right in respect of any property. The assessee claims that it does not pay for such right but it only pays for the services. The claim of assessee before us was that it was only using services provided by Amazon and was not concerned with the rights in technology, ie fees paid by assessee was for use of technology and cannot be said to be for use of royalty, which stands proved by the factum of charges being not fixed but variable i.e. it varies with the use of technology driven services and also use of such services does not give rise to any right in property of Amazon and consequently, Explanation under section 9(1)(vi) of the Act is not attracted. It may be pointed out herein itself that the Assessing Officer had applied Explanation 2(iva) under section 9(1)(vi) of the Act in order to hold the assessee as having defaulted for non deducting withholding tax. First of all, main provisions of section 9(1)(vi) of the Act are not attracted as the payment made by assessee is not in the nature of royalty. In any case Explanation 2(iva) of section 9(1)(vi) of the Act covers cases of royalty i.e. consideration paid for the use or right to use any industrial, commercial or scientific equipment but not including the amount referred to in section 44BB of the Act. The assessee in the present case did not use or acquire any right to use any industrial, commercial or scientific equipment while using the technology services provided by Amazon and hence, the payment made by assessee cannot be said to be covered under clause (iva) to Explanation 2 of section 9(1) (vi) of the Act. In other words, even if the retrospective amendment is held to be applicable, the

case of assessee of payment to Amazon being outside the scope of said Explanation 2(iva) to section 9(1)(vi) of the Act, cannot make the assessee liable to deduct tax at source. In other words, the assessee is not liable to deduct withholding tax and such non deduction of withholding tax does not render the assessee in default and consequently, no disallowance of amount paid as web hosting charges is to be made in the hands of assessee for such non deduction of withholding tax and hence, provisions of section 40(a)(i) of the Act are not attracted. The grounds of appeal raised by assessee are thus, allowed."

- 14.2 In the case of Urban Ladder Home Decor Solutions Pvt. Ltd vs ACIT (IT) TS-773-ITAT- 2021(Bang), the Bangalore Bench of the Tribunal, in appeal against proceedings under section 201 of the Act, analyzed payments made by the assessee therein, to three major IT companies, which included Amazon Web Services, Inc., assessee in the present case, the Tribunal while referring to the decision in the case of EPRSS (supra) held as under:
 - "21....The payment made to Amazon Web Services (A WSJ is only for using the information technology facilities provided by it, that too the billing would depend upon the extent of usage of those facilities. In fact, these non-resident companies do not give any specific license for use or right to of any of the facilities (which include software) and those facilities are not going to be used for the use in the business of the assessee. The right to use those facilities, as stated earlier, is intertwined with the main objective of placing advertisements in the case of Face book and Mailchimp. In the case of AWS, the payment is made only for using of information technology infrastructure facilities on rental basis. Hence the question of transferring the copy right over those facilities does not arise at all. The agreements extracted above also make it clear that the copyright over those facilitating software is not shared with the assessee. In any case, the main purpose of making payment is to place advertisements only and not to use the facilities provided by the non-resident companies. Thus the facilities provided by the non-resident companies are only enabling facilities, which help a person to place his advertisement contents on the platform of Facebook or to use MailChimp facility effectively. In case of AWS, the payment is in the nature of rent payments for use of infrastructure facilities
 - 22. Accordingly, we are of the view that the these non-resident recipients stand on a better footing than those assessees before the

Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Private Ltd (supra). Accordingly, following the ratio laid down by Hon'ble Supreme Court, we hold that the payments made to the above said three non-resident companies do not fall within the meaning of "royalty" as defined in DTAA."

- 14.3 Also, in the case of Reasoning Global E-Application Ltd [2022] 145 taxmann.com 464 (Hyd Trib.), the Hon'ble Tribunal relying on EPRSS (supra) qua payments made for use of AWS Services, inter alia, held as under:
 - "22. We find some force in the above argument of the learned Counsel for the assessee. From the various clauses of the agreement which are already reproduced in the preceding paragraphs and the copies of invoices raised, it can be safely concluded that cloud base services do not involve any transfer of rights to the assessee in any process. The grant of right to install and use the software included with the subscription does not include providing any copy of the said software to the assessee. The assessee in the instant case does not set any right of reproduction. The services, in our opinion, merely facilitate the flow of user data from the front run user through internet to the providers system and back. Therefore, the subscription fee in our opinion is merely a consideration for the online access of the cloud computing services for process and storage of data or run the applications but cannot be considered as Royalty within the meaning of section 9(l)(vi) of the Act."
- 15. It is seen that the issue of taxability of receipts from cloud services is also covered by the order of the Delhi Tribunal in the case of Microsoft Regional Sales Pte. Ltd. vs. ACIT (2022) 145 taxmann.com 29 (Del) wherein the Hon'ble Tribunal recorded its finding in para 6-7 and held as under:-
- "6-7 Next coming to Ground no. I read with Ground no. 3 with its sub grounds, it can be observed that in assessee's own case for AY 2012-13, vide ITA no. 1553/Del/2016 the issue has culminated in favour of assessee by following relevant findings:
 - "7 It was submitted for the assessee that Ld. Tax Authorities below have failed to appreciate the functional aspects of Cloud base service while holding the subscription to cloud base service as royalty. In this context, the co-ordinate bench judgment in M/s. Salesforce.com Singapore Pie v. Dy. DIT Circle2(2) ITA No. 4915/DEL/2016 [AY 2010-

- 11] with six other connected was relied to contend that subscription to the cloud computing services do not give rise royalty income. The Ld DR supported the findings of Tax authorities below.
- 7.1 Giving thoughtful consideration to the matter on record, the bench is of considered view that the cloud base services do not involve any transfer of rights to the customers in any process. The grant of right to install and use the software included with the subscription does not include providing any copy of the said software to the customer. The assessee's cloud base services are though based on patents/copyright but the subscriber does not get any right of reproduction. The services are provided online via data centre located outside India. The Cloud services merely facilitate the flow of user data from the front end users through internet to the provider's system and back. The Id. AO has fallen in error in interpreting it as licensing of the right to use the above Cloud Computing Infrastructure and Software (para 10.5 of the Ld. AO order). Thus the subscription fee is not royalty but merely a consideration for online access of the cloud computing services for process and storage of data or run the applications.
- 7.2 While dealing with similar question in regard to the case of M/s. Salesforce.com Singapore Pte. (supra) where the said assessee was provider of comprehensive customer relationship management servicing to its customer by using Cloud Computing Services/Web Casting Services, the Bench in its order dated 25-3-2022 held as under:
- 28. Considering the facts of the case in totality, in light of the Master Subscription Agreement, we are of the considered view that the customers do not have any access to the process of the service provider 1.e. the assessee, and the assessee does not any access except otherwise provided in the master subscription agreement to the data of the subscriber.
- 29. In our considered opinion, all the equipments and machines relating to the service provided by the assessee are under its control and are outside India and the subscribers do not have any physical access to the equipment providing system service which means that the subscribers are only using the services provided by the assessee
- 7.3 The Mumbai Tribunal in the case of TT v. Savvis Communication Corporation [2016] 69 laxmann.com 106.(Mumbai Trib.) has held that payment received for providing web hosting services though involving use of certain scientific equipment cannot be treated as 'consideration for use of, or right to use of, scientific equipment which is a wine qua non for taxability under section 9(1)(vi), read with Explanation 2 (ive)

thereto as also article 12 of Indo-US DTAA. The Chennai Tribunal in the case of ACIT vs. Vishwak Solutions Pvt. Ltd. ITA Nos. 1935 & 1936/MDS/2010 dated 30-1-2015 has upheld the findings of CIT(A) that "the amount paid to the non-resident is towards hiring of storage space." The aforesaid squarely covers the controversy in regard to the present assessee also. In the light aforesaid, the Bench is of considered view that the Id. Tax Authorities below had fallen in error in considering the subscription received towards Cloud Services to be royalty income."

No distinction on facts or law could be pointed by Ld. DR. Therefore, following aforesaid findings in favor of the assessee these grounds are determined in favour of the assessee."

- 16. Recently, the Hon'ble Delhi High Court in the case of CIT vs. MOL Corporation ITA 99/2023 dated 16.02.2023 dismissed the appeal of the Revenue and confirmed the order of the Delhi Tribunal on the impugned issue by observing as under:
 - "3. The following questions of law are proposed by the appellant/revenue:

A....

B....

- C. Whether on the facts and circumstances of the case and in law, the LA ITAT erred in holding that the subscription received towards Cloud Services is not taxable at Royalty Income under the provisions of Income Tax Act, 19617"
- 4. As would be evident the first two questions of law [i.e., A and B] relate to income earned from licensing/sale of software, while the third question [i.e., C) relates to subscription received against cloud services offered by the respondent/assessee.
- 5. The Tribunal has ruled that neither income earned from licensing/sale of software products nor subscription fee earned for providing cloud services, could be construed as royalty.
- 6. Mr Sanjay Kumar, senior standing counsel, who appears on behalf of the appellant/revenue, says that the proposed questions are covered by the

judgment of the Supreme Court rendered in Engineering Analysis Centre of Excellence (P.) Ltd. v. CIT 432 ITR 471 (SC).

- 6.1. We are also informed by Mr Kumar that a review petition has been filed which is pending consideration.
- 7. Accordingly, the appeal is closed as no substantial question of law arises for our consideration, albeit, with the caveat that in case the appellant/revenue were to succeed in the review petition, the parties will abide by the decision rendered therein."
- 17. We have considered the submissions of the Ld. DR on the impugned issue. However, we note that the Ld. DR has not made any reference or submissions with regard to the decision of the Hon'ble Delhi High Court (supra) and several decisions of the Hon'ble Tribunal (supra) relied upon by the assessee wherein it has been categorically held that consideration for cloud computing services is not chargeable to tax in India. We have also considered various decisions relied upon by the Ld. DR and in our considered view these decisions do not support the Revenue's contentions being distinguishable on facts than that of the assessee.
- 18. In the light of the above factual matrix and legal propositions and in view of the various judicial precedents cited above, we hold that the payments received by the assessee from Indian Customer(s) from rendering AWS Services do not qualify as royalty under Article 12(3) of the India-USA DTAA and hence are not taxable in India. Accordingly, ground No. 3 along with its sub-grounds 3.1 to 3.4, ground No. 4 and ground No. 5 along with its sub-ground 5.1 r.w ground No. 2 are allowed.
- 19. Coming to the other allegation of the Ld. AO that the impugned receipts are taxable as FIS under the provisions of Article 12(4)(b) of the India-USA DTAA, the Ld. AR submitted that in terms of Article 12(4)(b) of the India-USA DTAA, payment made towards technical or consultancy services constitutes "fees for technical services" only if such services "make"

available" technical knowledge, experience, skill, know-how or processes, etc. In this regard he also invited our attention to the Protocol contained in the India-US DTAA which provides useful guidance with respect to the clauses contained in the DTAA, including the "make available" clause.

19.1 The Ld. AR submitted that the AWS Services provided by the assessee are standardised automated services that do not provide technical services to its customers nor does it satisfy the 'make available' clause as the customer will not be able to make use of the technical knowledge, skill, process etc. used by the assessee in providing cloud computing services, by itself in its business or for its own benefit, without recourse to the assessee in future.

19.2 Citing the decisions in the case of DIT vs Guy Carpenter & Co Ltd. 346 ITR 504 (Del); CIT vs De Beers India Minerals (P) Ltd. 346 ITR 467 (Kar); NQA Quality Systems Registrar vs DCIT 92 TTJ 946 (Del Trib.), the Ld. AR submitted that the courts in these decisions have held that in order for payments in respect of 'managerial, technical or consultancy services to fall within the meaning of FTS/ FIS, such services should "make available" to the assessee, such technical knowledge, experience, skill, know-how or processes, which enables the recipient of service to utilize the same in future on its own accord without provisioning such similar services from the service provider.

19.3 He further submitted that in so far as the allegation of the Ld. AO that the services provided by the assessee are in the nature of FIS, the impugned issue stands covered by the decision of the Pune Tribunal in the case of ITO vs. Sunguard Availability Services LLP ITA No. 258/Pun/2021 dated 28.11.2022 wherein in context of the similar cloud services, the Hon'ble Tribunal held such cloud services not taxable as FTS in the absence of satisfaction of the 'make available' clause under Article 12(4)(b) of the India-USA DTAA. In another case of Rackspace, US Inc. vs. DCIT (2020) 113

taxmann.com 382(Mum) the Mumbai Tribunal held that rendering cloud computing service cannot be held to be liable to tax in India as FTS.

19.4 The Ld. AR submitted that the AWS services provided by the assessee is merely a standard and automated facility commonly available to all without any specialised, exclusive or individual requirement of its customers. There is nothing special, exclusive or customised service that is rendered by the assessee. In support thereof, he relied on the decision of the Hon'ble Supreme Court in CIT vs. Kotak Securities 383 ITR 1 (SC) followed in DIT vs. A.P. Mollar Maersk AS 392 ITR 186 (SC) and Skycell Communication Ltd. vs. DCIT 251 ITR 53 (Mad).

19.5 He further submitted that the Ld. AO has alleged that the assessee by providing support and troubleshooting etc. is providing technical services to its customers. He submitted that such services provided by the assessee are general support services not involving any transfer of technology or knowledge thereby resulting in FTS/FIS. The support services were provided to the customers to enable them to effectively access the AWS services offered by the assessee in an appropriate and efficient manner. These support services in no way resulted in transfer of technology which enabled the customers to develop and provide cloud computing services on their own in future. Thus, in the absence of any transfer of technology, the incidental support by way of troubleshooting, answering queries etc. provided by the assessee to its customers in India cannot be considered to be in the nature of technical services.

19.6 The Ld. AR referred to the copy of the webpage for AWS support at pages 553 to 563 of the Paper Book and submitted that these webpages show how to use services meaning thereby how to use services is the support that is being provided by the assessee and no technical service is imparted. He drew our attention to the document placed at page 553 of the Paper Book to show that the assessee is providing basic level service support free of charge. He also drew our attention to page 556 of the Paper Book to show the nature of support services provided by the assessee for which payment is

made. Further drawing our attention to page 561 of the Paper Book the Ld. AR submitted that though these are technical services, these are standard automated services which are available to anyone who subscribes to it and uses it.

- 19.7 In support of its above contention, the Ld. AR relied on the following cases:-
- 1. DIT vs. Sheraton International Inc. 313 ITR 267 (Del HC)
- 2. ITO vs. Veeda Clinical Research (P.) Ltd. 35 taxmann.com 577 (Ahmd Trib)
- 3. Vand Oord Dredging and Marine Contractors vs. ADIT ITA No. 7589/Mum/2012 dated 07.10.2016
- 20. The Ld. DR, on the other hand, strongly contended that the assessee is providing technical support services to its customers and is also making available technology and thus the impugned receipts are taxable as FTS/FIS under the Act as well as under the India-USA DTAA. He placed his written submissions on record on this issue which are reproduced below:-
- "3. As seen from the "AWS Customer Agreement", the Service offerings that the assessee provides to the customers is defined as under:

"Service Offerings" means the Services (including associated APIs), the AWS Content, the AWS Marks, the AWS Site, and any other product or service provided by us under this Agreement Service Offerings do not include Third Party Content."

As seen from the above, the assessee is providing a host of services / intellectual property to its customers. Customer is provided with services offerings and Application Program Interface (API) to enable the customers to develop further contents and use existing content for its business.

Further the agreement provides for support services to be rendered by the assessee and the relevant clauses of support guidelines shows that -

4. The content of services provided by the assessee make available to allow access to use of services including WSDLs; Documentation; sample code; software libraries; command line tools; and other related technology. The assessee company provides experts to build up knowledge and expertise and also architectural guidance for the applications and solutions that the customers develop and build. The assessee provides with highly trained

engineers, large network of subject matter experts that are well versed in DevOps technologies, automation, infrastructure orchestration, configuration management and continuous integration. These engineers stay with Support cases from the start all the way through to resolution. Under support plans, the assessee provides for various types of technical supports such as developer support, business support, enterprise support. The Customers testimonials clearly show that support is provided in development of content and architectural guidance on development of content. The Scope of service mentioned also shows support in development and production of content.

Thus, from the above, it is abundantly clear that assessee is providing technical support to its customers and also making available technology and thus the amount received is taxable as Fee for Technical Services under the Indian Income Tax Act and as Fee for Included Services under Article 12 of the India USA DTAA. In view of the same, the receipts of the assessee are considered to be FTS, both under the Act as well the DTAA."

21. In rebuttal to the above written submissions of the Ld. DR, the Ld. AR submitted a para-wise brief rejoinder which is reproduced below:-

Para 3 and 4

"The appellant only provides automated and standard cloud computing services ie., AWS Services for which is receives consideration from the customer. There is no right in any intellectual property (IP) provided to the customers Application program interfaces ("APIs") is an interface that allows two software programs to communicate with each other. This is provided to enable customer systems to interact with AWS Cloud and hence assist in provision of AWS Services.

Various terms used in the definition of Service Offerings, that have been misconstrued by the Ld. DR to different/'host of' services are explained below-

- **AWS Site:** as defined in the Customer Agreement, the same is nothing but the AWS website- http://aws.amazon.com Refer page 542 of the PB)
- AWS Marks: A customer is authorized to use AWS Marks only for the limited purpose of indicating that it is a customer of the appellant and using AWS services. Such right to use AWS Marks is limited, non-exclusive revocable, non-transferable permission. [Refer Clause 8.5 of Customer Agreement and Classes 3,8,9 of AWS
 - **Trademark Guideline** Also refer submissions already made in this contest @ Para 11(d)-page 6 of broad proposition dated 16.05.2023.
- **AWS Content** As evident from the definition of AWS Content (which includes WSDL, Documentation, Sample codes etc.), the same is

provided to enable the access and use of AWS Services only. AWS content helps the customer to understand the manner in which AWS Services may be used, Useful reference in this regard may be made to the definition of 'documentation' contained in Customer Agreement (refer **page 542 of PB**) that reads as under:

"Documentation" means the developer guides, getting started guides, user guides, quick reference guides, and other technical and operations manuals and specifications for the Services located at http://aws.amazon.com/documentation as such documentation may be updated by us from time to time.

- These are primarily akin to 'user manuals' to guide customers how to use the services.
- O It is therefore amply clear that AWS Content, Documentation etc. serve the purpose of helping/guiding a customer on how to use AWS Services. The provision of AWS content is purely incidental to the provision of AWS services and does not involve the transfer of technical plans or designs to the customers. No technology/underlying code or IP is 'made available' to the customers.
- Every customer of AWS Services is offered a free 'Basic Support (Refer clause 1.3 of the Customer Agreement). Other support plans viz. developer support, business support and enterprise support are merely enhanced AWS Support tiers available as an option to the customer. These enhanced support tiers provide customers a shorter response time to their queries. All tiers of support services are provided to customers to enable them to effectively use the standard services offered by the appellant in an appropriate and efficient manner. Support is primarily answering queries of customers and/or troubleshooting in order to utilize AWS Services subscribed by them to the fullest extent.
- o These support services in no way "make available" any technical knowledge, skills, knowhow, etc., in relation to cloud computing, in as much as the customer is not able to recreate or provide the service itself, and therefore this key requirement is not met.
- o Support services in the form of general support, troubleshooting etc., in no way resulted in transfer of technology or knowledge which enabled the customers to develop and provide cloud computing services on their own in future and does not result in FTS/FIS [Refer Van Oord Dredging and Marine Contractors BV vs. ADIT: ITA No. 7589/Mum/2012, Murex Southeast Asia Pvt. Ltd vs. DCIT: ITA No. 2338/Mum/2022. ITO vs. Veeda Clinical Research (P) Ltd: 35 taxmann.com 577 (Ahmd Trib.)]
- o AWS experts and highly trained engineers would use their expertise and knowledge to assist in troubleshooting errors

experienced when customers are using the services and answering queries regarding features of AWS services, however it does not result in transmitting any technical knowledge. etc. to the customer.

- It may be pertinent to note that development of code is specifically <u>excluded</u> from the scope of support services @page 561 of PB which provides as follows
 - <u>"AWS Support does not include :</u>
 - Code development
 - Debugging custom software
 - Performing system administration tasks
 - Accessing control of customer managed accounts or systems"
- Thus, it is clearly mentioned on the website that AWS support does not include any code development, debugging software, performing system administration tasks or accessing control of customer's AWS account/systems. Therefore, the appellant is not involved in development and production of any content/code for the customers.
- Support services assist the customers in troubleshooting errors while using AWS services, informing best practices for use of AWS services and answering queries regarding features of AWS services
- Regarding "Architectural guidance", the Ld. DR has merely picked up a phrase without understanding the meaning of the phrase itself. As explained during the hearing, architectural guidance simply means providing guidance on how to use AWS products, features and services together and providing guidance on optimizing AWS services and configuration to meet customer's specific needs. Thus, architectural guidance in no way results in transfer/making available any technical knowledge or know-how to the customers.

In view of the above, it is submitted that the support services provided by the appellant cannot be regarded as FTS/FIS under the Act or the India-US DTAA"

22. We have carefully considered the rival submissions of both the parties and perused the material on record. Article 12(4)(b) of the India-USA DTAA reads as under:-

"Article 12

- 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."
- 23. The term 'make available' is not defined under the India-USA DTAA. The relevant extract of the Protocol contained in the India-USA DTAA providing guidance on the 'make available' clause is reproduced below:-

"Paragraph 4(b)

Paragraph 4(b) of Article 12 refers to technical or consultancy services that make available to the person acquiring the services, technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plant or technical design to such person. (For this purpose, the person acquiring the service shall be deemed to include an agent, nominee, or transferee of such person). This category is narrower than the category described in paragraph 4(a) because it excludes any service that does not make technology available to the person acquiring the service. Generally speaking, technology will be considered "made available" when the person acquiring the service is enabled to apply the technology. The fact that the provision of the service may require technical input by the person providing the service does not per se mean that technical knowledge, skills. etc.. are made available to the person purchasing the service, within the meaning of paragraph 4(b). Similarly, the use of a product which embodies technology shall not per se be considered to make the technology available."

24. The bare reading of Article 12(4)(b) of the India-USA DTAA clearly indicates that payment made towards technical or consultancy services has two limbs meaning thereby payment made towards technical or consultancy

services constitutes FIS only if such services 'make available' technical knowledge, experience, skill, know-how or processes etc. There are umpteen number of cases relied upon by the assessee (supra) wherein the courts have held that in order for payments in respect of 'managerial, technical or consultancy services' to fall within the meaning of FTS/ FIS, such services should "make available" to the assessee such technical knowledge, experience, skill, know-how or processes, which enables the recipient of service to utilize the same in future on its own accord without provisioning such similar services from the service provider.

- 25. It is the case of the Ld. DR that the assessee is providing technical services to its customer particularly in the light of the terms used in the definition of "Service Offerings (AWS Site, AWS Marks, AWS Content)" and the support services provided by the assessee and also making available technology to its customers and hence the payments received by the assessee is taxable as FIS under Article 12(4) of the India-USA DTAA.
- 26. On the other hand, the Ld. AR has filed detailed rejoinder to the above allegations of the revenue inter alia submitting that the AWS content, documentation etc. are primarily akin to 'user manuals' to guide customers how to use AWS services which is purely incidental to the provision of AWS services and does not involve transfer of technology/technical plans/designs to the customers. Similarly, support services offered by the assessee do not enable the customer to recreate or provide the service itself and thus these services in no way make available any technical knowledge, skills, know-how etc. in relation to cloud computing. These services are in the form of general support, trouble shooting etc. which in no way resulted in transfer of technology or knowledge which enabled the customer to develop and provide cloud computing services on their own in future. AWS experts and highly trained engineers would use their expertise and knowledge to assist in troubleshooting errors experienced when customers are using the services and answering queries regarding features of AWS services, however it does not result in transmitting any technical knowledge to the customers. The

meaning of the term architectural guidance as envisaged by the Ld. DR is totally misplaced as it simply means providing guidance on how to use AWS products, features and services together and providing guidance on optimising AWS services and configuration to meet customer's specific means and thus in no way results in making available any technical knowledge or know how to the customers.

- 27. Further, the AWS Services provided by the assessee is merely a standard and automated facility commonly available to all, without any customisation. In CIT vs. Kotak Securities 383 ITR 1 (SC) which was further followed in DIT vs. A.P. Moller Maersk A S 392 ITR 186 (SC)], the Hon'ble Supreme Court has categorically held that the use of standard facility does not amount to technical services, as technical services denote services catering to the special needs of the person using them and not a facility provided to all. Similarly, in Skycell (Supra), the Hon'ble Madras High Court held that mere collection of a fee for use of a standard facility provided to all those willing to pay for it does not amount to the fee having been received for the technical services.
- 28. As regards the contention of the Ld. DR that the assessee by providing support and troubleshooting etc is providing technical services to its customers, in our considered view, these are the general /incidental support services provided by the assessee to its customers and does not involve any transfer of technology or knowledge but only enables them to effectively access the AWS Services in an appropriate and efficient manner. These support services in no way resulted in transfer of technology which enabled the customers to develop and provide cloud computing services on their own in future and thus would not tantamount to FTS/FIS as held by the courts in the case of Sheraton International Inc. (supra), Veeda Clinical Research (P) Ltd. (supra) and Van Oord Dredging and Marine Contractors BV (supra).
- 29. The above facts on record clearly establish that the AWS services provided by the assessee are standardised services that do not provide any

technical services to its customers nor satisfy the 'make available' test as the customer will not be able to make use of the technical knowledge, skill, process etc. used by the assessee in providing cloud services by itself in its business or for its own benefit without recourse to the assessee in future.

- 30. We are in agreement with the submission of the Ld. AR that the impugned issue also stands covered by the decision of the Pune Tribunal which was rendered in the context of similar cloud services in the case of M/s Sunguard Availability Services LLP (supra) and Rackspace, US Inc. (supra) wherein it has been held that rendering cloud computing service cannot be held to be liable to tax in India as FTS/FIS.
- 31. In view of the above factual matrix of the case and placing reliance on the various judicial precedents cited above, we are of the view that the impugned receipts of the assessee for AWS services/cloud computing services rendered to the customers in India do not fall within the purview of "FIS" under Article 12(4)(b) of the India-USA DTAA as the same do not satisfy the 'make available' clause envisaged therein. Accordingly, we allow the ground No. 2.1 and 2.2 r.w. ground No. 2 raised by the assessee in both the AYs.
- 32. Since we have held that the impugned receipts of the assessee are not taxable in India either as royalty or FTS/FIS, Ground No. 6 relating to the applicable rate of tax need not be adjudicated.
- 33. Ground No. 8 relating to levy of interest under section 234A & 234B is consequential in nature.
- 34. Ground No. 9 relating to initiation of penalty proceedings under section 271(1)(c) of the Act need not be adjudicated being pre-mature.

35. In the result, the appeals of the assessee for both the AYs 2014-15 and 2016-17 are allowed.

Order pronounced in the open court on 1st August, 2023.

sd/-(G.S. PANNU) PRESIDENT sd/-(ASTHA CHANDRA) JUDICIAL MEMBER

Dated: 01/08/2023

Veena

Copy forwarded to -

- 1. Applicant
- 2. Respondent
- 3. CIT
- 4. CIT (A)
- 5. DR:ITAT

ASSISTANT REGISTRAR ITAT, New Delhi

	_
Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for	
pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature	
on the order	
Date of dispatch of the Order	