

आयकर अपीलीय अधिकरण "सी" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH, PUNE

BEFORE SHRI R.S.SYAL, VP AND
SHRI PARTHA SARATHI CHAUDHURY, JM

आयकर अपील सं. / ITA No. 768/PUN/2018

निर्धारण वर्ष / Assessment Year : 2014-15

Trigo SAS
101-103, Fortune Business Center,
Baner, Pune-411 007
PAN : AAFCT1290F

.....अपीलार्थी / Appellant

बनाम / V/s.

The Deputy Commissioner of Income Tax,
(International Taxation)-2, Pune.

.....प्रत्यर्थी / Respondent

Assessee by : Shri Ketan Ved
Revenue by : Shri Mahadevan A M Krishnan

सुनवाई की तारीख / Date of Hearing : 09.09.2021
घोषणा की तारीख / Date of Pronouncement : 14.09.2021

आदेश / ORDER

PER PARTHA SARATHI CHAUDHURY, JM:

This appeal preferred by the assessee emanates from the order of the Ld. CIT(Appeal)-13, Pune dated 05.03.2018 for the assessment year 2014-15 as per the grounds of appeal on record :

"The appellant objects to the order of the learned Commissioner of Income Tax (Appeals)-13, Pune [CIT(A)] dated March 5, 2018 for the aforesaid assessment year on the following among other grounds:

- 1. The learned CIT(A) erred in confirming the addition of software usage charges amounting to Rs.13,51,464/- received by the appellant by treating it as royalty.*
- 2. The learned CIT(A) erred in holding that the software developed by the appellant would fall in the category of 'process'. The learned*

CIT(A) further erred in holding that there is no difference between right to use copyright and right to use copyrighted article.

3. *The learned CIT(A) erred in confirming the addition of management service fees amounting to Rs.88,21,345/- received by the appellant by treating it as fees for technical services.*
4. *The learned CIT(A) erred in holding that the services rendered by the appellant includes elements of both 'consultancy' and 'technical' services and therefore falls within the purview of definition of fees for technical services as per Article 13(4) of the India France DTAA as well as under the restrictive scope of definition of fees for technical services under Article 13(4) of the India UK DTAA.*
5. *The learned CIT(A) erred in confirming the levy of education cess of Rs.57,528/- on the tax liability computed under the provisions of the India France DTAA.*
6. *Each one of the above grounds of appeal is without prejudice to the other.*
7. *The appellant reserves the right to amend, alter or add to the grounds of appeal."*

2. **Grounds No. 1 & 2** pertains to confirming the addition of software usage charges amounting to Rs.13,51,464/- received by the assessee by treating it as royalty.

3. That before the Assessing Officer, the assessee had filed detailed submission as to why software charges received from Trigo India should not be considered taxable as royalty. It was submitted that the assessee company has entered into Software License Agreement with Trigo India wherein it grants Trigo India a right to use of software 'ANTIFOG' pursuant to which the assessee company has earned income of Rs.13,51,464/- from Trigo India. A copy of the agreement was submitted before the Department. The Company has developed the software program marketed under the name 'ANTIFOG'. This software is dedicated to the specific needs of the quality control in the automobile sector allowing a daily complete management of the follow up of the operations of sorting and retouch as well as the accounting of the working time. The assessee has also submitted regarding restrictions in the said

agreement wherein the licensee i.e. Trigo India shall not modify, copy, duplicate, reproduce, license or sublicense in whole or in part the software or transfer, rent, lease etc. without prior written consent of TRIGO SAS, the assessee herein.

4. The assessee also submitted that the software 'ANTIFOG' must be used according to the conditions of the present contract and for only personal and internal needs of the licensee, by its employee and not any third party. The grant of the rights of use is limited to the executable code of the software ANTIFOG. Any unauthorized use by the licensee regarding the present agreement would be illegal under Article L 122-6 and as per French Intellectual Property Code. That also any copy for backup is by full rights the property of TRIGO and it has to be mentioned all the property rights reserved in the software. That further according to the terms of the law, TRIGO reserves the right on an exclusive basis to correct the anomalies of the software which TRIGO will have been able to detect. TRIGO declines its liability in case of reparations, installation, maintenance works, modifications made by staffs not belonging to the licensor assessee or by a third party. The assessee also submitted regarding audit provisions, Intellectual Property Provisions. The arguments of the assessee was primarily based on that the consideration received from TRIGO India for right to use ANTIFOG software by it does not fall within the definition of copyright and thus should not be taxed as royalty, however, the Assessing Officer dealt with the issue from Para 4.2 onwards of his order and at Para 18, Page 56, the Assessing Officer held that the receipts derived by the assessee from sale of software licenses should be taxed as 'Royalty' @ 10% as per Article 13(2) of DTAA between India and France.

5. That before the Ld. CIT(Appeal), the assessee submitted that he has merely transferred the right to use copyrighted software ANTIFOG and that no transfer of copyright to Trigo India has taken place in this case and therefore, payments for the use of the software fall out of the definition of royalty. The Ld. CIT(Appeal) on this issue has held as follows:

“5.2..... I have carefully considered the facts, arguments of the AO and of the appellant and various judicial decisions relied on by the Appellant. I find that as far as the taxability of the payments under Income Tax Act is concerned, the right to use the software is made expressly taxable by the retrospective amendment to the act on the provision of royalty u/s.9 of the Income Tax Act. The appellant in his arguments before me has overlooked the retrospective amendment in the Act. He argues that while Section 9 has been amended, the DTAA has not been amended and thus, even if the payments made for use of software license are now taxable as royalty under the Act, they would still be out of the purview of taxation as the DTAA envisages taxing the payments arising from the right to use a copyright and not the right to use a copyrighted article. The appellant is thus drawing a distinction between the right to use the copyright and the right to use the copyrighted article. He states that as per the Software License, Agreement, he has granted the right to use the copyrighted article and not the copyright per se and therefore, as per DTAA with France, the payments received for the same are not taxable. Art. 13(3) of the Indo France DTAA defines ‘royalties’ as under:

“3. The ‘term “royalties” as used in this article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, or films or tapes used for 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. (Emphasis added).”

In my view the term ‘any copyright’ in this article applies to only literary, artistic or scientific work including cinematograph films. The term copyright does not apply to the other forms such as any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience. This is for the simple reason that there is no copyright of any patent, trade mark, design or model, secret formula or process and no copyright for information concerning industrial, commercial or scientific experience. Admittedly the appellant has allowed the Indian Company to use the software ANTIFOG developed by him for the industry. This software is specific to the industry and could be used by anyone else also in the industry. The ANTIFOG software developed by the appellant would fall in the category of ‘process’ also as defined in Art 13(3). Software is nothing but a process code developed according to an algorithm and thus, would constitute process also.

Be that as it may, I am also of the view that the contention of the appellant that there is a difference between the right to use the copyright and right to use the copy righted article is not tenable. This is for the simple reason that any copyright is always attached to an ‘article’ even

for intangible assets. There cannot, in my view, be a 'copyright' in isolation. In other words, if one separates the word 'article' from 'copyright' then there would be no copyright itself. In view of the overwhelming decision cited by the AO, I hold that these payments are taxable as 'royalty' under the Income Tax Act as well as under the DTAA. Accordingly, the Appellant ought to have offered to tax this receipt. Hence, the learned AO has taxed this amount. I confirm the taxability of Rs.13,51,464.....”

6. We observe that on the similar set of facts and circumstances on the issue whether receipts by the assessee are royalty, the Pune Bench of the Tribunal in the case of **Ansys Inc. Vs. ACIT (IT), Circle-1, Pune (2021) 127 taxmann.com 731 (Pune-Trib.)** has held and observed as follows:

“3. We have heard both the sides through Virtual Court and gone through the relevant material on record. Whereas the case of the assessee is that the receipt from M/s. Honeywell Technology Solutions Lab Pvt. Ltd. is 'Business Profits' covered under Article 7 of the DTAA, the Revenue has set up a case that it is in the nature of Royalties under the Article 12. The assessee is an American company and hence governed by the DTAA. Article 12 of the DTAA defines the term 'Royalties' in para 3 as under:

The term 'royalties' as used in this Article means :

(a) payments of any kind received as a consideration for the use of, or the right to use, any copyright of a literary, artistic, or scientific work, including cinematograph films or work on film, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trademark, 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) payment of any kind received as consideration for the use of, or the right to use, the industrial, commercial, or scientific equipment, other than payments derived by an enterprise described in paragraph 1 of Article 8 (Shipping and Air Transport) from activities described in paragraph 2(c) or 3 or Article 8.

4. The above paragraph clearly indicates that the Royalty means consideration for use or right to use any copyright of a literary, artistic or scientific work etc. The question whether the sale of computer software would partake of the character of Royalties or Business Profits, recently came up for consideration before the Hon'ble Supreme Court in Engineering Analysis Centre of Excellence Pvt. Ltd. Vs. CIT (2021) 432 ITR 472 (SC). After analyzing the identical issue in the backdrop of similar expression as used in Article 12(3), it came to hold that ownership of copyright in a work is different from the ownership of the physical material in which the copyrighted work may happen to be embodied. Parting with copyright entails parting with the right to do any of the acts mentioned in section 14 of the Copyright Act. Where the core of a transaction is to authorize the end-user to have access to and make

use of the "licensed" computer software, product over which the licensee has no exclusive rights, no copyright is parted with.

5. It is discernible from the impugned order that the AO invoked Explanation 4 to section 9(1)(vi) of the Act to hold the receipt as royalty under the Act. In this regard, the Hon'ble Supreme Court in the aforementioned case further held that Explanation 4 to section 9(1)(vi) inserted vide the Finance Act 2012 is not clarificatory as it expands the scope and hence prospective. The assessment year under consideration is 2009-10.

6. Adverting to the facts of the extant case, it is seen that the disputed receipt of Rs.2.42 crore from M/s. Honeywell Technology Solutions Lab Pvt. Ltd. is on account of sale of Software/license and not for parting with the copyright of the software. Since facts of the present case are similar to those considered and decided by the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Pvt. Ltd. (supra), respectfully following the precedent, we hold that the amount cannot be brought within the ambit of 'Royalties' under Article 12 of the DTAA.

7. Au contraire, the case of the assessee before the authorities below has been that the receipt is not in the nature of 'Royalty', but 'Business Profits'. In order to bring 'Business profits' of a resident of the other country to tax in India within the ambit of Article 7, it is sine qua non that the foreign enterprise must have a Permanent Establishment (PE) in India in terms of Article 5 of the DTAA. In the absence of a PE, the taxability under Article 7 does not trigger. The assessee categorically submitted before the DRP that it did not have any PE in India. The Dispute Resolution Panel (DRP) in para 6.6. of its Direction has unequivocally noted that: "We find that there seems no dispute on the fact that the Appellant does not have a PE in India." As the assessee did not have a PE in India during the relevant year, the mandate of Article 7 cannot activate. A fortiori, the receipt cannot be charged to tax in India as 'Business profits' either. In view of the foregoing discussion, we are satisfied that the amount of Rs.2.42 crore received by the assessee from sale of software/license to M/s. Honeywell Technology Solutions Lab Pvt. Ltd. ceases to chargeable to tax in India. This issue is, therefore, decided in assessee's favour."

7. That in the afore-stated case, the Tribunal had placed reliance on the decision of the Hon'ble Supreme Court in the case of **Engineering Analysis Centre of Excellence Pvt. Ltd. Vs. CIT, (2021) 432 ITR 472 (SC)** wherein it was held that ownership of copyright in a work is different from the ownership of the physical material in which the copyrighted work may happen to be embodied. Parting with copyright entails parting with the right to do any of the acts mentioned in section 14 of the Copyright Act. Where the core of a transaction is to authorize the end-user to have access to and make

use of the "licensed" computer software, product over which the licensee has no exclusive rights, no copyright is parted with.

8. Reverting to the facts of the present case, the assessee has merely transferred the right to use copyrighted software ANTIFOG and that it had not transferred the copyright itself to Trigo India. TRIGO India was authorized to have access to and make use of the copyrighted software ANTIFOG. In the Software License Agreement entered into, it is evident that the assessee i.e. Trigo SAS is 'Licensor' and TRIGO Quality Production Services Pvt. Ltd. which is Indian Company as a 'Licensee'. That the various clauses of this Software License Agreement verified the fact that copyright of the software ANTIFOG is very much with Trigo SAS (Licensor) and that the Trigo India (Licensee) has been authorized to use the software ANTIFOG as per various terms and conditions specified in this Software License Agreement. There is no difference in facts of the present case as compared to the facts of the judgment of the Hon'ble Supreme Court in the case of **Engineering Analysis Centre of Excellence Pvt. Ltd. Vs. CIT (supra.)** which was referred by the Tribunal in Ansys Inc. Vs. ACIT (supra.). There has been no parting with copyright as envisaged within the meaning of Section 14 of the Copyright Act by the Licensor (assessee) to Licensee who is given access to only use the copyrighted software against which assessee's receipts cannot be taxed as royalty. Therefore, respectfully following the judicial precedents mentioned aforesaid on this issue, **Grounds No.1 & 2 raised in appeal by the assessee are allowed.**

9. **Grounds No.3 & 4 pertains** to confirming of addition of management service fees amounting to Rs.88,21,345/- received by the assessee treating it as 'fees for technical services'.

10. The assessee has received management services fees of Rs.88,21,345/- from Trigo India. The Assessing Officer held that the assessee provided services in the nature of managerial, technical or consultancy services to the Indian Entity. He, therefore, held that the services provided by the assessee are in the nature of 'managerial, technical or consultancy services and hence, they are taxable as 'fees for technical services' u/s.9(1)(vii) of the Act.

11. That before the Ld. CIT(Appeal), the assessee had submitted that it had rendered various management services such as legal services, financial services, human resources services, IT and telecom services, operational support services, quality services etc. to Trigo India. This umbrella of services was claimed to be managerial services by the assessee. The case of the assessee is primarily that in his case, one has to apply the more beneficial Indo UK DTAA as mandated by the Protocol 7 of the Indo France DTAA. The assessee claimed that he is protected from taxation of the managerial fees received by the more beneficial Indo UK DTAA. The assessee also relied heavily on the decision of the Hon'ble Delhi High Court in the case of **Steria India Ltd., 72 taxmann.com 1(Del)** which according to the assessee is on identical facts.

12. The Ld. CIT(Appeal) on this issue whether more beneficial Indo UK DTAA would be applicable to the case of the assessee as mandated by Protocol 7 to the Indo France DTAA, held that in the light of explicit Protocol to the Indo France DTAA, the assessee is entitled to seek the benefit of a more beneficial Indo UK DTAA. That also, the Hon'ble Delhi High Court in the case of Steria India Ltd. (supra.) had held that assessee's claim covers under Article 13(4) of the Indo UK DTAA and after going through the relevant Article 13(4) of the Indo UK DTAA, it was evident found by the Ld. CIT(Appeal) that

the said article is more restrictive and does not include managerial services in the definition of FTS. However, the services would be termed as consultancy services. Therefore, the Ld. CIT(Appeal) opined that admitted services rendered by the assessee which are claimed to be managerial, were actually consultancy services. Thereafter, the Ld. CIT(Appeals) proceeded to examine the taxability of consultancy services under a more restrictive definition of FTS in the Indo UK Treaty. Finally, the Ld. CIT(Appeal) at Para 6.12 as per reasoning given in the prior paragraphs of his order observed that the bouquet of services rendered by the assessee include elements of both 'consultancy' and 'technical' services and therefore, not only are the payments received for the same FTS as per Article 13(4) of the Indo France DTAA, but are also FTS even in the more restrictive definition of FTS in Article 13(4) of the Indo UK DTAA. Therefore, the Ld. CIT(Appeal) held that services rendered by the assessee being consultancy in nature is taxable, both under the domestic law as well as under Article 13 of the Indo France DTAA and accordingly, the action of the Assessing Officer to tax fees for advisory services of Rs.88,21,345/- as FTS under the Income Tax Act and under the DTAA was confirmed.

13. The Ld. Counsel for the assessee at the time of hearing referred to a decision of Pune Bench of the Tribunal in the case of **M/s. Faurecia Automotive Holding Vs. DCIT, ITA No.784/PUN/2015** for the assessment year 2011-12 dated 08.07.2019 wherein in the list of services which the assessee, therein, had provided to the Indian Entity as appearing at Para 8 of the said order were almost identical to the services rendered by the assessee herein to Trigo India in the present case. In the said decision the Tribunal has dealt with Article 13(4) of the Indo UK DTAA and the observation of the Tribunal was that the realm of services provided by the foreign entities to the

Indian entity, it did not result in making available any technical knowhow etc. to the India entity. The term 'make available' had come up for consideration before the Hon'ble Karnataka High Court in the case of **CIT Vs. De Beers India Minerals Pvt. Ltd. (2012) 346 ITR 467 (kar.)**, wherein it has been held that this term means that the payer of the services should be able to utilize the acquired knowledge or knowhow at his own in future without the aid of the service provider. The Authority for Advance Ruling in Production resources group, in Re (2018) 401 ITR 56 AAR has also held that "make available" connotes something which results in transmitting the technical knowledge so that the recipient could derive an enduring benefit and utilise the same in future on his own without the aid and assistance of the provider.

14. Reverting to the facts of the present case, whatever services were provided by the assessee to Trigo India, no technical knowledge was made available by the assessee to the Indian Entity. Rather, it is a case of providing a service involving technical knowledge, which got consumed with its provision itself. Since such services simply involve use of technical knowledge and do not result into handing over some technical know-how to the recipient of the services. The Pune Bench of the Tribunal on this issue in the case of M/s. Faurecia Automotive Holding Vs. DCIT (supra.) has held as follows:

"18.10. When we advert to the nature of the Technical services rendered by the assessee, it gets axiomatic that no technical knowledge was made available by the assessee to Faurecia India for its use thereafter. Rather, it is a case of providing a service involving technical knowledge, which got consumed with its provision itself. Since such services simply involve use of technical knowledge and do not result into handing over some technical knowhow to Faurecia India, the same, in our considered opinion, cannot be termed as "Fees for technical services" under the DTAA.

18.11. Thus, it is overt that the total amount received by the assessee for rendition of services to Faurecia India, which is a mixed bag of Managerial and Technical services, does not eventually make available any technical knowledge, experience, skill, know-how etc. to the India entity and hence the same cannot in our considered opinion be considered as 'Fees for technical services' under Article 13(4) of the

DTAA with France when read with the Protocol and Article 13(4) of DTAA with the UK.

19. Reliance of the ld. AO on the Explanation below section 9(2) of the Act is of no consequence. This Explanation simply states that income of a non-resident shall be deemed to accrue or arise in India, inter alia, under clauses (vi) or (vii) of sub-section (1) of section 9 and shall be included in the total income of the nonresident, whether or not — (i) the non-resident has a residence or place of business or business connection in India; or (ii) the nonresident has rendered services in India. In the instant appeal, the issue is whether the services rendered by the assessee fall within the definition of 'Royalties' or 'Fees for technical services' u/s 9(1)(vi) or (vii) of the Act. We have held that section 9(1)(vi) is not attracted. Albeit section 9(1)(vii) is attracted, but the amount ceases to be 'Fees for technical services' in the light of the DTAA. Thus, there is no quarrel on whether or not the assessee has a place of business or business connection in India or it has rendered services in or outside India. The position would have been otherwise if the assessee had been covered u/s 9(1)(vi) or (vii) and not getting immunity under the DTAA and then claiming that no income on this score should be included in its total income as either it had no place of business in India etc. or the services were not rendered in India. As such, the reliance of the ld. AO on the Explanation below section 9(2) of the Act, for fortifying his point of view that the amount in question be charged to tax, is pointless.

20. As the extant payment received by the assessee can neither be construed as 'Royalty' u/s 9(1)(vi) of the Act nor as 'Fees for technical services' under the DTAA, the same cannot be included in the total income of the assessee. Ex consequenti, we overturn the impugned order on this score and order the deletion of the addition."

15. The Ld. DR could not bring on record any materials/evidences to suggest that the facts and circumstances in the case of the present assessee was different from the case of the M/s. Faurecia Automotive Holding Vs. DCIT (supra.). Moreover, on going through the services agreement, it is absolutely clear that whatever services were rendered by the assessee to the Trigo India was services of such nature which got immediately consumed on delivery. There is no part of technical know-how made available by which the Indian Entity could have used services later on its own.

Respectfully following the decision of the Pune Bench of the Tribunal in the case of M/s. Faurecia Automotive Holding Vs. DCIT (supra.), on the same parity of reasoning and taking guidance from the decision of the Hon'ble Karnataka High Court in the case of CIT Vs. De Beers India Minerals Pvt.Ltd (supra.), **we allow Grounds No. 3 & 4 of the assessee.**

16. **Ground No.5** pertains to confirming of the levy of education cess of Rs.57,528/- on the tax liability computed under the provisions of the India France DTAA.

17. This matter was not discussed in the assessment order as observed by the Ld. CIT(Appeal) in his order. The Ld. CIT(Appeal) relied on the decision of the Mumbai Bench of the Tribunal in the case of **Everrest Industries Ltd. (2018) 90 taxmann.com 330 (Mumbai-Trib.)** and thereafter, held that education cess is nothing but an additional levy to increase the income tax and therefore, pertakes the character of income tax. The contention of the assessee was that education cess cannot be levied when the tax is charged as per DTAA which is inclusive of surcharge and education cess. This contention of the assessee was not accepted by the Ld. CIT(Appeal) and he held that education cess is in the character of income tax as was held in the referred judicial decision of the Mumbai Bench of the Tribunal (supra.).

18. At the time of hearing, the Ld. Counsel for the assessee brought to our notice to the decision of the Mumbai Bench of the Tribunal in the case of **Sunil V. Motwani Vs. ITO, IT Appeal No.276 (MUM) 2012, (2013) 33 taxmann.com 252 (Mumbai-Trib)** wherein the issue was “*whether tax payable at 12.5 percent on interest income under article 11(2) of DTAA between India and UAE is inclusive of surcharge and education cess?*.” The Tribunal on this issue has held as follows:

“5. We have perused the records and considered the matter carefully. There is no dispute that the assessee is a non resident based in UAE. There is also no dispute that the assessee had received gross interest of Rs.7,55,187/- from the Indian firms in which he was a partner. The interest income is no doubt taxable as the same had arisen from the sources in India. However there is Double Taxation Avoidance Agreement (DTAA) between India and UAE and, therefore, tax has to be computed under the provisions of DTAA which is beneficial to the assessee. There are specific Articles in DTAA dealing with taxation of income under

different heads. The business profit is governed by Article-7 whereas interest income by Article-11. Under para-7 of Article-7 where business profit includes items of income which are dealt with separately in any other Article of the agreement, provisions of those Articles should not be affected by the provisions of this Article. In other words, in case there is provision for dealing with a particular type of income, such type of income has to be dealt with by those provisions. Therefore, though interest income may have been assessed as business income, there being specific Article to deal with interest income i.e. Article-11, taxation of interest will be governed by the said Article-11. Secondly interest income may be taxed in contracting State in which it arises, according to law of that State but if the recipient is beneficial owner of interest, tax so charged shall not exceed 5% of gross interest if the interest is received from bank and in other cases 12.5% of gross amount of interest. In this case, the assessee is the beneficial owner of interest and tax charged cannot exceed 12.5% of gross interest. Tax has been defined in Article-2(2)(b) as per which income tax included AY .08-09 surcharge. Therefore, tax referred to in Article 11(2) @ 12.5% also includes surcharge. Further, nature of education cess and surcharge being same as held by the Tribunal in the case of DIC Asia Pacific Pte Ltd.(supra), in our view education cess and surcharge cannot be levied separately and will be included in tax rate of 12.5%. The judgment of Hon'ble High Court of Uttarakhand in the case of Arthusa Offshore Co. (supra), is not applicable to the facts of the present case as the Hon'ble High Court was concerned with taxability of income under Article 14(2) of the DTA between India and USA. The Hon'ble High Court was not concerned with interpretation of tax payable on interest income under DTAA. The judgment of AAR in the case of Airports Authority of India, IN RE (supra), is also distinguishable as in that the court was concerned with taxability of business income and it was held that under Article 5(3) of DTAA with USA, preparatory and auxiliary type of work was excluded from the purview of PE and therefore, there being no PE it was held that income from software maintenance was liable to be taxed in India. The high Court was not concerned with taxability of interest income as per the treaty.

5.1 In view of the fore-going discussion, we hold that tax payable @ 12.5% under Article 11(2) of FTAA is inclusive of surcharge and education cess. We, therefore, set aside the order of CIT(A) and allow the claim of the assessee.”

19. The Ld. DR conceded that the facts and circumstances involved in the present issue are absolutely identical to the facts and circumstances in the case of Sunil V Motiani Vs. ITO (supra.).

20. Having heard the parties herein and considering the decision of the Mumbai Bench of the Tribunal in the case of Sunil V Motiani Vs. ITO (supra.), on the same parity of reasoning, we provide relief to the assessee. Thus,

Ground No.5 raised in the appeal by the assessee is allowed.

21. **Grounds No.6 and 7** are general in nature and hence, no adjudication is required.

22. In the result, **appeal of the assessee is allowed.**

Order pronounced on 14th day of September, 2021.

Sd/-
R.S.SYAL
VICE PRESIDENT

Sd/-
PARTHA SARATHI CHAUDHURY
JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 14th September, 2021.
SB

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(Appeals)-13, Pune.
4. The Pr. CIT-5, Pune.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "सी" बेंच, पुणे / DR, ITAT, "C" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

निजी सचिव / Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.

		Date	
1	Draft dictated on	09.09.2021	Sr.PS/PS
2	Draft placed before author	14.09.2021	Sr.PS/PS
3	Draft proposed and placed before the second Member		JM/AM
4	Draft discussed/approved by second Member		AM/JM
5	Approved draft comes to the Sr. PS/PS		Sr.PS/PS
6	Kept for pronouncement on		Sr.PS/PS
7	Date of uploading of order		Sr.PS/PS
8	File sent to Bench Clerk		Sr.PS/PS
9	Date on which the file goes to the Head Clerk		
10	Date on which file goes to the A.R		
11	Date of dispatch of order		