IN THE INCOME TAX APPELLATE TRIBUNAL, 'I' BENCH MUMBAI

BEFORE: SHRI M.BALAGANESH, ACCOUNTANT MEMBER
&
SHRI KULDIP SINGH, JUDICIAL MEMBER

ITA No.3130/Mum/2019
(**Assessment Year :2015-16**)

M/s. Interactive Avenues Private Limited 3rd Floor, Chhibber House M. Vasanji Road Sakinaka, Andheri-East Mumbai – 400 072	Vs.	Deputy Commissioner of Income Tax-14(2)(1) Room No.432, 4th Floor Aayakar Bhavan M.K.Road, Mumbai – 400 020
PAN/GIR No.AACCI0954J		
(Appellant)	..	**(Respondent)**

Assessee by	Shri P.J. Pardiwala
Revenue by	Shri Rajneesh Yadav
Date of Hearing	**26/04/2022**
Date of Pronouncement	**07/07/2022**

आदेश / O R D E R

***PER M. BALAGANESH (A.M)*:**

This appeal in ITA No.3130/Mum/2019 for A.Y.2015-16 arises out of the order by the ld. Commissioner of Income Tax (Appeals)-22, Mumbai in appeal No.CIT(A)-22/DCIT-14(2)(1)/IT-10397/2017-18 dated 25/02/2019 (ld. CIT(A) in short) against the order of assessment passed u/s.143(3) of the Income Tax Act,

1961 (hereinafter referred to as Act) dated 29/12/2017 by the ld. Dy. Commissioner of Income Tax-14(2)(1), Mumbai (hereinafter referred to as ld. AO).

2. The only issue to be decided in this appeal is as to whether the ld. CIT(A) was justified in confirming the disallowance made u/s 40(a)(i) of the Act by the ld. AO in respect of payment made to Facebook Ireland Limited without deduction of tax at source.

3. We have heard the rival submissions and perused the materials available on record. The assessee is an internet advertising agency and as such advertisements are placed by the assessee on behalf of its clients. The clients (advertisers) in order to place their advertisements on digital media, avail the services of the assessee to approach various website owners and to display advertisement on their websites. We find that the assessee during the course of hearing placed on record the following flow of transactions , which remain uncontroverted by the revenue before us :-

a) The advertiser approaches the assessee to place its advertisements on the digital medium, say Facebook. The assessee prepares advertising media plan based on the advertiser's requirements, after which, an advertising services work order is issued, and a period of campaign is determined. The advertiser approves the work order stating that the advertisement will be published or displayed on particular website for a particular time period or for a particular occasion. The advertiser signs the work order with the assessee.

b) Post approval of the work order, the assessee on behalf of the advertiser, provides details of advertisement to Facebook.

c) Basis such details, Facebook issues an Insertion Order to the assessee setting out the details of advertisement (viz. product type, start and end date, target audience, bid amount and type i.e cost per click, cost per impression, etc.) . The assessee accepts the Insertion Order along with the advertising terms and conditions as laid down in the Insertion Order.

d) After acceptance of Insertion Order, the assessee provides the advertisement material to Facebook and Facebook displays such advertisement of the advertiser on its website.

e) On completion of the agreed period, the actual details of advertisement published are gathered and Facebook raises invoice on the assessee. The assessee in turn raises invoice on the Advertiser, which includes the cost of advertisement charged by Facebook along with its commission.

3.1. During the year under consideration, the assessee had made certain payments to Facebook Ireland Limited towards the cost of advertisements, carried by facebook, for its clients. The ld. AO noticed that the assessee has not deducted tax at source from these payments to Facebook Ireland Limited and accordingly sought to disallow the payments made to Facebook Ireland Limited in the sum of Rs 16,23,82,466/- u/s 40(a)(i) of the Act. This action of the ld. AO was upheld by the ld. CIT(A).

3.2. We find that the assessee, being an advertising agency, had merely helped its clients to place their advertisements on digital media. The assessee utilizes the internet search engine such as Google, Yahoo, Facebook etc to buy space in

advertising on the internet on behalf of its client and the search engine renders this service outside India through internet. Once the agreed time frame is over, the actual details of advertisements published are gathered based on which a report is made and the service provider/ publisher/website owners issues the invoices to the assessee for gross media spends and assessee in turn charges the client after adding its commission on the same. Hence it could be safely concluded that the assessee just acts as an advertisement agency between its clients and publishers/website owners/ service providers. Normally, there would be no occasion for the assessee to claim the cost of advertisement as deduction in the computation of its business income, as the revenue of an advertisement agency (i.e the assessee herein) would only be the commission received in respect of advertisements so placed. Infact the commission income is determined as a percentage of the gross media spends of the advertiser. Hence the payments made to the media company would be on behalf of the advertisers. Accordingly, neither the amount received from the advertiser towards payment to the media company is income of the advertising agency, nor the payment made to the media company on behalf of the advertiser is its expense. However, for the year under consideration, the assessee had reflected in its profit and loss account, the amount received from the advertiser as its income and claimed deduction towards payment made to media company on behalf of its advertiser, as an expenditure. The net result of this accounting treatment would only be the commission income of the assessee subjected to tax.

3.3. We find that in response to the details called for by the ld. AO in the assessment proceedings, the assessee submitted the details of transactions with Facebook Ireland Limited. In order to determine the taxability of the transactions between the assessee and Facebook Ireland Limited, the ld. AO has understood the

technology behind Facebook Ad platform from the materials available on the Internet, which are heavily relied upon him in the assessment order. Infact we hold that these are Articles written by various people , which are only personal views of the persons giving those articles. In our considered opinion, the same cannot be relied upon and be the basis for disallowance in the hands of the assessee herein. By placing reliance on various articles, the ld. AO concluded that Facebook Ad Platform is driven by a complex algorithm that captures data from various users and allows the advertiser to effectively reach its target audience. Based on the same, the ld. AO concluded that Facebook Ireland Limited allows the assessee , 'the right to use or access the Facebook Ad Platform', thereby constituting payment made by assessee to Facebook Ireland Limited as 'Royalty' u/s 9(1)(vi) of the Act as well as under Article 12 of the India Ireland DTAA. We find that the ld. AO had placed heavy reliance on the following decisions in support of his contentions:-

a) Decision of Bangalore Tribunal in the case of Google India Private Limited vs ADIT reported in 86 taxmann.com 237
b) Decision of Hon'ble Karnataka High Court in the case of CIT vs Samsung Electronics Co. Ltd reported in 345 ITR 494 (Kar)
c) Decision of Mumbai Tribunal in the case of DDIT vs Reliance Infocom Ltd reported in 64 SOT 137

3.4. We find that the assessee had pleaded that payment made by it to Facebook Ireland Limited was for services rendered for uploading and display of banner advertisement. The banner hosting and uploading advertisement did not involve use by the assessee of any industrial, commercial or scientific equipment, copyright and no such use was granted by Facebook Ireland Limited to the assessee. The uploading and display of advertisement on its portal was entirely responsibility of

Facebook Ireland Limited and assessee has no right to access the portal of Facebook Ireland Limited. The assessee was to provide only the advertisement content to Facebook Ireland Limited. The assessee vehemently pleaded that payment made towards digital advertising to Facebook Ireland Limited are in the nature of business income in the hands of Facebook Ireland Limited and in the absence of any Permanent Establishment of Facebook Ireland Limited in India, the said payments are not taxable in India. In view thereof, there cannot be any obligation that could be cast on the assessee to deduct tax at source in terms of section 195(1) of the Act. Hence disallowance u/s 40(a)(i) of the Act could not be invoked.

3.5. We find that the reliance placed on the various decisions by the ld. AO would not advance the case of the revenue due to the following facts :-

a) Bangalore Tribunal decision in the case of Google India reported in 86 taxmann.com 237 , has been remanded back by the Hon'ble Karnataka High Court to the Tribunal for fresh consideration in accordance with law vide ITA Nos. 502 to 505 and 507/2018 , 549-550/2018, 560 -564/2018, 879/2017, 882-883/2017, 897-899/2017 dated 17.4.2021.

b) Hon'ble Karnataka High Court decision in Samsung Electronics Co. Ltd (345 ITR 494) has been set aside by the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence (P) Ltd vs CIT reported in 125 taxmann.com 42 (SC)

c) Mumbai Tribunal decision in the case of DDIT vs Reliance Infocom Ltd (64 SOT 137) has been subsequently recalled by the Mumbai Tribunal itself.

3.6. We find that the ld. CIT(A) concedes to the fact that the assessee had received 15% commission on the aforesaid transaction and thereafter concludes that assessee has to deduct tax at source. This, in our considered opinion, is totally baseless. Once the commission income alone is chargeable to tax in the hands of the assessee and that is the only entitlement to the assessee in the facts and circumstances of the aforesaid case, it clearly proves that the payments made to Facebook Ireland Limited by the assessee are only on behalf of the clients. Had the assessee merely reflected the commission income in its profit and loss account, it would have been in a better and safe position. Merely because it has reflected in its profit and loss account on gross basis (i.e amounts received in the credit side and payments made to Facebook Ireland Limited as an expenditure in the debit side of profit and loss account), it had invited the present trouble of deduction of tax at source. It is trite law that the entries in the books of accounts are not determinative of taxable income of an assessee. Reliance in this regard is placed on the celebrated decision of the Hon'ble Supreme Court in the case of Kedarnath Jute Manufacturing Co. Ltd vs CIT reported in 82 ITR 363 (SC) ; Taparia Tools Ltd vs JCIT reported in 372 ITR 605 (SC), among others.

3.7. We find that the ld. CIT(A) says that assessee is a dependent agent of Facebook and hence there is an obligation to deduct tax at source. We find that assessee is an agent of Indian advertisers and assessee is not an agent of Facebook Ireland. We are unable to persuade ourselves to accept to this contention of the ld. CIT(A) because , in our considered opinion, Facebook Ireland Limited cannot be deemed to be having Permanent Establishment in India merely based on existence of assessee in India. We further find that assessee is not concluding any contracts on behalf of Facebook Ireland Limited. If it is so, this fact is to be proved by the revenue, as held by the Hon'ble Supreme Court in the case of E-Funds

reported in 399 ITR 34 (SC), which has not been admittedly done in the instant case. If assessee is treated as an agent, then the question of Facebook Ireland Limited selling the adspace to assessee for hosting Micromax advertisement, does not arise at all. Ultimately it is only payment made for advertisement. In our considered opinion, the same could not be considered as Royalty. Hence the decision relied upon by the ld. AR on Mumbai Tribunal in the case of Play Games 24X7 Private Limited vs DCIT in ITA No. 1533/Mum/2019 for Asst Year 2015-16 dated 23.3.2022, would apply to the instant case. For the sake of convenience, the operative portion of the said decision is reproduced below:-

> *7. We have heard both the parties and perused all the relevant material available on record. The assessee company is engaged in the business of providing a platform for online gaming, more particularly that of Rummy. The assessee company incurred advertisement expenses amounting to Rs.10,46,35,355/- for banner advertisement on the website of Facebook. It is pertinent to note that for the purpose of uploading the banner advertisement on Facebook the advertisement related information is put up at the interface provided by the Facebook, Ireland in the required format. Facebook, Ireland, after due verification of the advertisements, upload the advertisement on its server. While uploading the advertisement on Facebook it is an admitted position that the assessee company does not have any control over the functioning of the interface provided by the Facebook, Ireland. The entire operation and maintenance of the server while providing the advertisement platform is under the control of Facebook, Ireland. It is an admitted fact that the assessee company makes use of standard facility which is provided for displaying advertisement on the website of Facebook, Ireland which was also provided to its other global customers in the like manner. Equipment/installations are all owned by Facebook, Ireland and the assessee company does not have any role to play in either maintaining or involving into any managerial activities with the Facebook, Ireland. There is no dedicated equipment/installation/any portion of equipment/installation is earmarked/provided by the Facebook, Ireland by the assessee company. As per the payment agreement between the Assessee company and Facebook, Ireland, the assessee company does not have any economic or possessory right with regard to the server of the Facebook and the server is not at the disposal of the assessee company. The assessee company does not get any right to modify/deal with the server in any manner. The server through which the advertisement is uploaded is not at all located in India. Further, there is no role played by the Facebook India*

Online Pvt. Ltd. in assessee's case and thus there is no element of permanent establishment of Facebook, Ireland in India. The assessee company during the assessment proceedings has provided the tax resident certificate of Facebook, Ireland and as well as copy of remittance of the certificate (form 15CB) to the Assessing Officer. The Assessing Officer has proceeded on the basis that as per the provisions of Section 195 of the Act any amount paid to non-resident will attract this provision and the assessee is liable to make TDS except as provided under Section 195(2) or under Section 197 where such deductee obtain nil deduction certificate from the Assessing Officer and furnish the same to the deductor before receiving the credit of such amount. In the present case, the relevant sub-section 2 to Section 195 has specifically stated that a person responsible for deducting any such sum chargeable under this Act who is a non-resident considers that the whole sum would not be income chargeable in the case of recipient the said person "may make an application" in such form and manner to the Assessing Officer to determine in such a manner as may be a prescribed. The said application though in the present case has not been made by the assessee cannot be treated as a mandate because the Section clearly states that such person "may make an application" as may be prescribed. In the present case, the assessee was very well aware that Facebook, Ireland is a non-resident and the advertisement payment made to Facebook, Ireland will not come under the purview of TDS and, therefore, has chosen not to deduct tax at source. The assessee has relied upon the decision of Urban Ladder Home Decor Solutions Pvt. Ltd. - ITA No.615 to 620/Bang/2020 - order dated 17.08.2021, Google India Pvt. Ltd. - 127 Taxmann.com 36 - Karnataka High Court, M/s. Inception Business Services - ITA No.2674/Chny/2016 - order dated 18.02.2019, Carat Lane Trading (P) Ltd., 89 Taxmann.com 434 as well as decision in the case of ITO vs. Right Florist Pvt. Ltd., 25 ITR (T) 639 (Kolkata Tribunal). All these decisions are though factually identical yet the observations made in these decisions are applicable in the present case. These decisions also highlight that advertisement expenses in respect of non-resident. It is pertinent to note that the assessee has given specific task of advertisement banner to the Facebook Ireland. The element of fees for technical services is determined if there is any technical aspect involved by providing services by the company from whom the services are rendered. As per letter dated 19.01.2015, Facebook Ireland stated that no servers that host the Facebook.com product are located in India. In the present case, the assessee has demonstrated before us that the assessee is taking the privilege of platform of Facebook, Ireland which is not either in the nature of royalty or technical services. The payment terms were specifically defined in the payment agreement with Facebook Ireland which clearly indicates that the Facebook Ireland will provide platform banner for advertisement to the assessee-company. Thus there is no element of fees for technical services or royalty is involved in this case. Thus, the Assessing Officer as well as the CIT(A) has totally ignored the actual fact of

> *the present case without demonstrating that the services are coming under the purview of FTS or royalty. Therefore, the appeal filed by the assessee is allowed."*

3.8. We find that the ld. CIT(A) in page 21 of his order had referred to certain Email IDs and telephone numbers of 3 executives. Those are employees of Facebook and not the assessee herein. The assessee has merely raised an Invoice on Micromax. There is no use of facebook logo by the assessee as argued by the revenue. We hold that the assessee's ultimate income is only the commission component of 15%. If assessee is a dependent agent, then where is the question of claiming any deduction for expenditure incurred on behalf of Principal and in that case, how the provisions of section 40(a)(i) of the Act would even come into operation. Hence the reasoning given by the ld. CIT(A) that assessee is an Agency PE cannot be accepted.

3.9. We find that the entire issue in dispute is no longer res integra in view of the elaborate decision of the Co-ordinate Bench of Bangalore Tribunal in the case of Urban Ladder Home Décor Solutions Pvt Ltd vs ACIT International Taxation in IT(IT)A Nos. 615 to 620/Bang/2020 for Asst Years 2015-16 to 2017-18 dated 17.8.2021. This tribunal decision has duly considered other tribunal decisions and also the decision of Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Private Limited vs CIT reported in 125 taxmann.com 42 (SC). The primary facts of the case before the Bangalore Tribunal and view of the AO there are reproduced as under:-

> 2. *The facts relating to the issue are stated in brief. The assessee company is engaged in the business of dealing in home décor products. It sells its products mainly through online marketing. Hence, the assessee has placed its advertisement in the platform of Facebook, Ireland. It has also used bulk mail facility offered by M/s Rocket Science group, USA. The assessee has also used Amazon Web Services (AWS) offered by M/s Amazon Inc., USA, which is in the*

nature of providing information technology infrastructure on rental basis. All the three payees are non- residents.

(A) Payments made to Facebook, Ireland:-

6.1. The assessee company uses Facebook platform to display its products on the wall of Facebook users. Hence the assessee makes payments to Facebook for the advertisements hosted on the web for seeking attention of facebook users.

6.2. The case of the AO is described in paragraph 3.2.7 to 3.2.9 of the order passed for AY 2015-16. Identical reasoning is given for other two years also. The discussion made by the AO in AY 2015-16 are extracted below:

"3.2.7 Facebook provides many options to the businesses/advertisers to reach its database of users. To touch upon a few of the alternatives that Facebook provides – the businesses could choose their target market based on the age group, location, gender etc. The advertisement made in the Facebook platform is not dormant or passive or broad-based advertisement as made in TVs or newspapers or public hoardings. Unlike the traditional medium of advertisements, what facebook offers is – dynamic, highly target-group specific, real time monitored advertising……. Given the immense scope and possibilities that the platform offers, it would be myopic to categorise the advertisements made on Facebook as mere dormant, regular ad campaigns or banner services as mentioned in the submission.

3.2.8. It is evident that Facebook advertisements are nothing but the usage of Facebook technology and process to advance the business in the e-commerce era. *The technology, design, process and equipment of Facebook are being used, in a complex manner, with very high efficiency levels, to reach out the target audience, within a fraction of the second of the target user logging in his/her account. The advertiser A1 (in the schematic) communicates its requirements (in terms of its target market, and the profile of the consumer it wants to serve) through its advertiser's account with Facebook. In turn, using complex algorithms and advanced processors and equipment, the network of servers that Facebook maintains throughout the world locates the users that are being targeted by the advertiser A1. And as soon as the target user logs in, the ads/banners/web links, as determined by A1 will be displayed to the user near instantaneously. It can be termed as the most evolved form of online, target advertising.*

3.2.9. In short, the technology and/or design and/or process and/or equipment of Facebook that enable the advertisers to reach their target audience in the most efficient way is the crux of the business. The assessee has been using the same to develop its business. Accordingly, the payments made to Facebook get squarely covered under the provision – Explanation 2(iii) to Section 9(1)(vi) : the use of any patent, invention, model, design, secret formula or process or trade mark or similar property and also the provisions of Explanation 2(iva) to section 9(1)(vi) : the use or right to use any industrial, commercial or scientific equipment. Therefore, the payments made to Facebook amounting to Rs.26,29,79,222/- is treated as Royalty and hence tax should have been deducted u/s 195 at the time of payment/credit of Royalty.

(B) Payments made to Rocket Science Group, LLC, USA ("Mail Chimp"):-

6.3. M/s Rocket Science group LLC has got "Mail Chimp" platform, which allows its users to send bulk email advertisements/marketing content to their customers using its marketing automation tools.

6.4. The case of the AO is stated in paragraphs 3.2.14 to 3.2.15 of the assessment order for AY 2015-16. Identical reasoning has been given for other years also. The relevant portion of AO's order is extracted below:-

"3.2.15 For the detailed discussions made from Paragraphs 2.1 to 3.2.14, it is held that the services availed by the Assessee company from the non- residents is in the nature of usage of technology, model or process and/or equipment and the same is covered by Explanation 2(iii) to Section 9(1)(vi): the use of any patent, invention, model, design, secret formula or process or trade mark or similar property and also the provisions of Explanation 2(iva) to section 9(1)(vi) : the use or right to use any industrial, commercial or scientific equipment and the payments so made amount to royalty payments. Therefore, the provisions TDS are applicable on royalty payments to non-residents, Rocket Science Group, LLC, US. As the Assessee Company has failed to deduct tax at source as stipulated u/s 195 on the payments made towards email advertisement through Mail Chimp's Market automation tool for the F.Y 2014-15 relevant to Assessment year 2015-16, the Assessee company is held to be an assessee in default as per the provisions of sec.201(1) of the Income tax Act, 1961 for non deduction of tax at source. The Assessee company should have deducted tax at the rate of 10% on these payments. However, the Assessee company has failed to deduct tax at source. Hence, the default for non deduction on the payments made and consequential interest leviable u/s

201(1A) for the above said assessment year, are computed at the last page of this order.

(C) Payments made to Amazon Web Services Inc., US

6.5. The assessee company has availed cloud computing services from Amazon Web Services Inc (AWS) for its online business needs. Cloud computing is an arrangement in which the cloud provider hosts the shared computing resources such as hardware, software applications etc., and the cloud user accesses them for storage, data processing etc., via internet on a need basis. In view of Cloud computing technology, Enterprises need not make investment in IT infrastructure (hardware, storage space, Application softwares, other IT resources etc.) and they can use the required IT resources on payment of charges.

6.6. The case of the AO is stated in paragraphs 4.1.1 to 4.1.11 & 5 of the assessment order for AY 2015-16. Identical reasoning has been given for other years also. For this payment, the AO has also referred to the definition given in India – US DTAA for "Royalty" and "fees for included services". The relevant portion of AO's order is extracted below:-

> *4.1.5.There will be sites of the Assessee Company, wherein the data connectivity and networking is provided by the ("AWS"). Generally, every site has a 'router' being placed in the premises for the data communication purposes. It is clear that the services provided by ("AWS") also includes providing the routers and the data connectivity and networking.*
>
> *4.1.6. The Assessee Company, by relying on the decisions of the ITATs, is wrong in claiming that there is no involvement of any human intervention at any stage and that the entire process is fully automated technique. Had such been the case, there would not have been any separate mention for the Provider to ensure that the facility is adequately staffed for the provision of all services and that the provider employees, agents and subcontractors have sufficient skill, expertise and ability to perform their duties in a competent and professional manner. This shows that the assessee is in fact not only aware of the technical expertise required in obtaining Data Hosting Services, but also appreciative of the quality of manpower to be employed for such technical services.*
>
> *……*
>
> *4.1.8. The AO extracts Explanation 2 to sec. 9(1)(vi) of Income tax Act*

4.1.9. The AO extracts the definition of "Royalty" as per paragraph 3(a) Of Article 12 of India –US DTAA.

4.1.10. The AO extracts the definition of "fess for included services" as per Paragraph 4 of Article 12 of India – US DTAA.

Then the AO concludes as under:-

4.1.11. In view of the above discussion, even if the cloud computing services are taking the character of Fees for Technical Services (FTS), it is chargeable to tax in India as per the IT Act and also as per the India – US DTAA.

5. As elaborated above, the payments of Rs.18,71,643/- made by the Assessee Company during the FY 2014-15 to ("AWS") for cloud computing services is clearly taxable in India as Royalty. As the Assessee Company has failed to deduct tax at source as stipulated u/s 195 on the payments made towards cloud computing services for the F.Y 2014-15 relevant to Assessment year 2015-16, the assessee is held to be an assessee in default as per the provisions of section 201(1) of the Income tax Act, 1961 for non- deduction of tax at source. The Assessee Company should have deducted tax at the rate of 10% on these payments. However the assessee has failed to deduct tax at source. Hence, the default for non deduction of tax on the payments made and consequential interest leviable u/s 201(1A) for the above said assessment year are computed in this last page.

Thus, the AO held that the payments made to all the three companies is in the nature of "Royalty" liable for deduction of tax at source u/s 195 of the Act."

The findings of the Bangalore Tribunal are as under:-

10. We heard the parties and perused the record. We notice that the AO has mainly invoked the provisions of sec. 9(1)(vi) of the Act in respect of payments made to M/s Facebook and M/s Rocket Science Group (MailChimp) to hold that the same is "royalty". In respect of payments made for Amazon Web Services, the AO has also referred to the provisions of DTAA entered into India and USA in addition to sec.9(1)(vi) of the Act. However, the AO has held that these payments are "royalty" mainly considering the provisions of sec.9(1)(vi) of the Act.

11. M/s Facebook is located in Ireland and other two are

companies located in USA. We notice that India has entered into Double Taxation Avoidance Agreement (DTAA) with Republic of Ireland and also with United States of America. The question whether the provisions of Income tax Act could be referred to ignoring DTAA provisions, has been settled by Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Private Limited vs. CIT (Civil Appeal Nos. 8733-8734 of 2018 dated March 02, 2021) (125 taxmann.com 42). The Hon'ble Supreme Court examined the question whether the payments made to non- resident software suppliers is "royalty" and TDS u/s 195 of the Act was required to be deducted on those payments. The Hon'ble Supreme Court examined this question considering four types of situation, which has been narrated as under:-

***"4.** The appeals before us may be grouped into four categories:*

i) The first category deals with cases in which computer software is purchased directly by an end-user, resident in India, from a foreign, non- resident supplier or manufacturer.

ii) The second category of cases deals with resident Indian companies that act as distributors or resellers, by purchasing computer software from foreign, non-resident suppliers or manufacturers and then reselling the same to resident Indian end-users.

iii) The third category concerns cases wherein the distributor happens to be a foreign, non-resident vendor, who, after purchasing software from a foreign, non-resident seller, resells the same to resident Indian distributors or end-users.

iv) The fourth category includes cases wherein computer software is affixed onto hardware and is sold as an integrated unit/equipment by foreign, non-resident suppliers to resident Indian distributors or end-users."

12. After analysing the provisions of Income tax Act, provisions of DTAA, the relevant agreements entered by the assessees with non-resident software suppliers, provisions of Copy right Acts, the circulars issued by CBDT, various case laws relied upon by the parties, the Hon'ble Supreme Court concluded as under:-

"CONCLUSION

***168.** Given the definition of royalties contained in Article 12 of the DTAAs mentioned in paragraph 41 of this judgment, it is clear that there is no obligation on the persons mentioned in section 195 of the Income-tax Act to deduct tax at source, as the distribution agreements/EULAs in the facts of these cases do not create any*

interest or right in such distributors/end- users, which would amount to the use of or right to use any copyright. ***The provisions contained in the Income-tax Act (section 9(1)(vi), along with explanations 2 and 4 thereof), which deal with royalty, not being more beneficial to the assessees, have no application in the facts of these cases.***

169. *Our answer to the question posed before us, is that the amounts paid by resident Indian end-users/distributors to non-resident computer software manufacturers/suppliers, as consideration for the resale/use of the computer software through EULAs/distribution agreements, is not the payment of royalty for the use of copyright in the computer software, and that the same does not give rise to any income taxable in India, as a result of which the persons referred to in section 195 of the Income-tax Act were not liable to deduct any TDS under section 195 of the Income-tax Act. The answer to this question will apply to all four categories of cases enumerated by us in paragraph 4 of this judgment."*

13. Hence the relevant DTAA provisions should be considered in the cases before us also for determining the question whether the payments made by the assessee to the above said three non- resident companies are in the nature of Royalty or not. Hence there is no necessity to refer to the provisions of sec. 9(1)(vi) of the Act for the payments made to the three non-resident persons, referred above.

14. The term "royalties" is defined as under in Article 12(3) of India – USA DTAA:-

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

(a) *payments of any kind received as a consideration for the use of, or the right to use, any copyright of a literary, artistic, or scientific work, including cinematograph films or work on film, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience, including gains derived from the alienation of any such right or property which are contingent on the productivity, use, or disposition thereof ; 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 1 of Article 8 (Shipping and Air Transport) from activities described in paragraph 2(c) or 3 of Article 8.*

15. We shall not advert to the Agreements entered by the assessee with the three non-resident companies mentioned above, in order to understand the nature of services rendered by these companies and also to understand whether the payments made to the three non-residents are royalty or not in terms of the provisions of DTAA. The relevant clauses are extracted below for the sake of convenience:-

(A) FACEBOOK

4. License Grant

In consideration of your compliance with this Agreement for the duration of your subscription to Facebook at Work (unless terminated earlier) we hereby grant you and your Users:

(a) A non-exclusive, personal, non-transferrable, limited, revocable license to access and use Facebook at Work in accordance with this Agreement; and

(b) a non-exclusive, personal, non-transferrable, limited, revocable license to use any tool we may make available to you to create and manage Your Contents.

This License is not sub-licensable and is subject always to this Agreement.

5. Our Content

We own or license all Intellectual Property rights in Facebook at Work and Our Content. Facebook at Work and Our Content is protected by copyright laws and other Intellectual Property Laws. All such rights are reserved to us.

You may, and you must ensure that your Users will;

(a) only use Facebook at Work for its intended purpose within the scope of the License.

(b) not make alterations, copies, extractions, modifications or additions to Facebook at Work and Our Content or any part of it, or sell, copy, disclose, distribute, disseminate or license it or any part of it or misuse it or any part of it in any way or reverse engineer, decompile, disassemble or decipher it or evade technical limitations on the use of Facebook at Work;

(c) not re-publish, sell, extract, reproduce, disseminate or otherwise use Facebook at Work and Our content, except as expressly permitted by this Agreement or with our prior written permission; and

(d) not use our copyrights, trademarks, protected designs and

trade dress (including but not limited to Facebook, Facebook at Work, or any of the trademarks listed here (currently available at www.facebookbrand.com/trademarks), or any confusingly similar marks, except with our prior written permission.

You acknowledge and agree that any breach of this Section 5 may cause us irreparable harm for which damages are not an adequate remedy and that we may seek interim, preliminary or protective relief from any competent court to restrain your or your Users anticipated or actual breach of this Section 5.

Our Content made available on Facebook at Work is provided for information purposes only, is subject to change and will be updated from time to time without notice to you.

…….

17 Definitions.

In this Agreement, unless otherwise stated

……

"Facebook at Work" means the features and services we make available, including but not limited to through the Facebook at Works websites, apps, and online services that we operate.

……..

"Our Content" means Facebook at Work and its content including without limitation, software, its "look and feel", images, text, graphics, illustrations, trademarks, photographs, audio, videos and sound but excluding Your content.

(B) Rocket Science Group (MailChimp)

MailChimp ("MailChimp,""we,"or"us") is an online marketing platform (the "Service") offered through the URL www.mailchimp.com (we'll refer to it as the "Website") that allows you to, among other things, create, send, and manage certain marketing campaigns, including, without limitation, emails, advertisements, and mailings (each a "Campaign", and collectively, "Campaigns").

……..

13. Proprietary Rights Owned by Us

You will respect our proprietary rights in the Website and the software used to provide the Service (Proprietary rights include, but aren't limited to, patents, trademarks, service marks, trade secrets, copyrights, and other

intellectual property). You may only use our brand assets according to our Brand Guidelines.

……..

19. Bandwidth Abuse/Throttling

You may only use our bandwidth for your MailChimp Campaigns. We provide image and data hosting only for your MailChimp Campaigns, so you may not host images on our servers for anything else (like a website). We may throttle your sending or connection through our API at our discretion.

……..

30. Assignments

You may not assign any of your rights under this agreement to anyone else. We may assign our rights to any other individual or entity at our discretion.

(C) AMAZON WEB SERVICES:-

1. Use of the Service Offerings

Generally, you may access and use the Service Offerings in accordance with this Agreement. Service Level Agreements and Service Terms apply to certain Service Offerings. You will comply with the terms of this Agreement and all laws, rules and regulations applicable to your use of the Service Offerings.

Your account. To access the Services, you must have an AWS account associated with a valid email address and a valid form of payment. Unless explicitly permitted by the Service Terms, you will only create one account per email address.

Third-Party content. Third-Party content may be used by you at your election. Third-Party Content is governed by this Agreement and, if applicable, separate terms and conditions accompanying such Third-Party Content, which terms and conditions may include separate fees and charges.

……..

8.3 Service offerings License. We or our licensors own all right, title and interest in and to the Service Offerings, and all related technology and intellectual property rights. Subject to the terms of this Agreement, we grant you a limited, revocable, non-exclusive, non-sublicenseable, non-transferrable license to do the following: (a) access and use the Services solely in accordance with this Agreement; and (b) copy and use the AWS Content solely in connection with your permitted use of the Services. Except as provided in this Section 8.3, you obtain no rights under this Agreement from us, our affiliates or our licensors to the Service Offerings, including any related intellectual property rights. Some AWS Content and Third-Party Content may be provided to you under a separate license, such

as Apache License, Version 2.0, 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 the AWS content or Third-Party Content that is the subject of such separate license.

……..

14. Definitions.

"API" means an application programme interface.

……..

"AWS Content" means Content we or any of our affiliates make available in connection with the Services or on the AWS Site to allow access to and use of the Services, including APIs; WSDLs; Documentation; sample code; software libraries; command line tools; proofs of concept; templates; and other related technology (including any of the foregoing that are provided by our personnel). AWS Content does not include the Services or Third Party content.

……..

"AWS Marks" means any trademark, service marks, service or trade names, logos and other designations of AWS and its affiliates that we may make available to you in connection with the Agreement.

……..

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

16. *A careful perusal of the relevant provisions of the agreement entered by the assessee with Facebook and Rocket Science Group (Mailchimp) would show that both these non-resident companies are allowing the assessee to use the facilities provided in their sites, which includes, inter alia, software facilities also. The purpose of compelling the assessee to use those facilities, as could be inferred by us, is to create an environment of ease in creating the "advertisement content" to suit the platforms of Facebook or Mailchimp. The environment of ease is beneficial and time saving to both the advertiser and the advertising platform. Thus the facilities have been created by the non-resident companies for mutual benefit. However, a person shall get the right to use those facilities only when he enters into an agreement with them for hosting his advertisement or for sending bulk mails, meaning thereby, the use of facilities is intertwined with the activity of placing advertisement in web portal of Facebook or sending bulk*

mails. In case of web hosting charges paid to AWS, the assessee is allowed to use the information technology infrastructure facilities.

17. We shall now refer to some of the decisions relied upon by Ld AR before us. The Kolkata bench of Tribunal, in the case of ITO vs. Right Florists (2013) (32 taxmann.com 99) (Kol-Trib.), has considered an issue – whether the payments made to foreign search engine portals for online advertising services resulted in accrual of income in India in their hands in terms of sec.9(1) of the Act. The co-ordinate bench referred to the following decisions rendered by other co-ordinate benches:-

(a) Pinstorm Technologies (P) Ltd vs. ITO (24 taxmann.com 345)(Mum)

(b) Yahoo India (P) Ltd vs. DCIT (2011)(11 taxmann.com 431)(Mum)

In the above said two cases, the Tribunal held that the amount paid by the assessee to M/s Google Ireland Ltd for the services rendered for uploading and display of banner advertisement on its portal was in the nature of business profit on which no tax is deductible at source, since the same was not chargeable to tax in India in the absence of PE of Google Ireland Ltd in India. Finally, the co- ordinate bench held as under in the case of Right Florists:-

> ***"28.** In view of the above discussions, we are of the considered view, on the limited facts of the case as produced before us, the receipts in respect of online advertising on Google and Yahoo cannot be brought to tax in India under the provisions of the Income Tax Act, **as also under the provisions of India US and India Ireland tax treaty**. This observation is subject to the rider that so far as the PE issue is concerned, we have examined the existence of PE only on the basis of website simplicitor, and no other additional basis, as no case was made out for the same. In any case, revenue has not brought anything on record, either at assessment stage or even before us, to suggest that Google or Yahoo had a PE in India, and as held by a Special Bench of this Tribunal in the case of Motorola Inc v. Dy. CIT[2005] 95 ITD 269/147 Taxman 39 (Mag.) (Delhi) "DTAA is only an alternate tax regime and not an exemption regime" and, therefore, "the burden is first on the Revenue to show that the assessee has a taxable income under the DTAA, and then the burden is on the assessee to show that that its income is exempt under DTAA". No such burden is discharged by the Revenue. Accordingly, there is no material before us to come to the conclusion that Google or Yahoo had a PE in India, which, in turn, could constitute the basis of their taxability in India."*

18. The taxability of Web hosting charges paid to Amazon Web Services LLC in its hands was examined by Pune bench of Tribunal in the case of EPRSS Prepaid Recharge Services India P Ltd (ITA No.828/Pun/2016 dated 24.10.2018) (2018) (100 taxmann.com 52)

(Pune), which was relied upon by Ld A.R. The relevant discussions made and decision taken by Pune Tribunal are extracted 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 AWS. 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, non-transferrable 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.

12. *It is further provided that no rights under this agreement are obtained by you (assessee) from Amazon or its licensor to the Service Offerings, including any related intellectual property rights. The 'terms' between the parties are defined as per clause 14 and the terms which are relatable to the issue raised are as under:—*

"AWS Content" means Content we or any of its affiliates make available in connection with the Services or on the AWS Site to allow access to and use of the Services, including WSDLs; Documentation; sample code; software libraries; command line tools; and other related technology. AWS Content does not include the Services.

"AWS Marks" means any trademarks, service marks, service or trade names, logos, and other designations or AWS and its affiliates that we may make available to you in connection with thisAgreement.'

13. *The assessee has used services and has made monthly payments to Amazon. The assessee has attached sample invoice of Amazon at pages 23 to 41 of Paper Book and ledger extract of Amazon in its books at pages 1 and 2 of Paper Book. The assessee had filed submissions before the Assessing Officer giving detailed note on web hosting charges, which was as under:—*

"Web Hosting Charges:

(a) Primarily EPRSS requires servers to run the various online recharges. Due to this there is a very high requirement of Servers. Since 'purchase/maintenance of servers and its upkeep require skilled manpower, BPRS does not have the same. Hence servers are taken on hire from Amazon, in is cloud units. Ledger copy attached Extract of web agreement also attached."

14. *Further, the assessee has also pointed out the nature of its business vide written note before the Assessing Officer and explained as under:—*

'1. Primarily the "a" requires servers to run the various online recharges. Due to this there is a very high requirement of servers. Since purchase/maintenance of servers and its upkeep require skilled manpower, the "a" does not have the same. Hence servers are taken on hire from Amazon, in its cloud units. Information about Amazon Web Services and its

benefits as provided on website http://aws.amazon.com/what-is-aws is enclosed for your reference.'

…….

18. *Now, coming to the next aspect raised by assessee which is linked to as to whether retrospective amendment in Income Tax would override the Treaty Laws where no amendment has been made. It is clear that retrospective amendment has changed the definition of 'royalty' from the year 2012 under the Income Tax Act, but the position of DTAA between two countries has not been effected. No such amendment has been made to the Treaty Laws and in DTAA, position similar to Explanation 5 is not envisaged at all. This is the plea raised by the learned Authorized Representative for the assessee. He further pleaded that in order to construe meaning of royalty as per DTAA, since the provisions of DTAA takes precedent over the provisions of Income Tax Act, where the assessee does not possess and does not have any control over the server or servers space, being deployed by Amazon, while providing e-services as per agreement, then there is no scope to construe that e-service charges paid to Amazon could be described as royalty. There is merit in the plea of assessee. If we construe the meaning of royalty as per DTAA, then we have to consider the possibility of position and control of server/server space, which admittedly, is not possessed by the assessee. Hence, as per Treaty Laws, the assessee cannot be held to have paid royalty to Amazon. Consequently, the payment made by assessee for web hosting services is not taxable in accordance with DTAA and the same cannot be held to be taxable, only because there was retrospective amendment to section 9(1)(vi) of the Act. In any case, the Courts have held that when there is no amendment to the Treaty Laws, then the said Treaty Laws would override the amendment, if any, whether retrospective or otherwise to the Income Tax Act. Such a view has been taken in New Skies Satelite BV (supra). Consequently, there is no merit in holding that the assessee was liable to deduct withholding tax out of such payments made to Amazon and for such non-deduction or withholding of tax, the assessee can be held to be at default and the payment made by assessee being not allowed as deduction in its hands, in view of provisions of section 40(a)(i) of the Act. We reverse the orders of authorities below in this regard. We are not going into the issue raised by assessee that Amazon is not having PE in India and hence, no liability to deduct tax in India.*

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 1.2, Windows and as per clause 1.3, Windows & SQL Server stanard 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.*

20. *The Hon'ble High Court of Madras in Skycell Communications Ltd. (supra) have held that web hosting charges are not in the nature of royalty. The said principle has further been applied in various decisions of the Tribunal as relied upon by the learned Authorized Representative for the assessee. (sic.)***

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. The 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……"

19. (**) The decision in the case of Skycell Communications Ltd (251 ITR 53) has been rendered by Hon'ble Madras High Court in the context of "Fees for Technical Services" on applicability of sec. 194J r.w. Explanation 2 to 9(1)(vii) of the Act. However, following observations made by Hon'ble Madras High Court are relevant in this case also:-

***"7.** In the modern day world, almost every facet of one's life is linked to science and technology inasmuch as numerous things used or relied upon in every day life is the result of scientific and technological development. Every instrument or gadget that is used to make life easier is the result of scientific invention or development and involves the use of technology. On that score, every provider of every instrument or facility used by a person cannot be regarded as providing technical service.*

***8.** When a person hires a taxi to move from one place to another, he uses a product of science and technology, viz., an automobile. It cannot on that ground be said that the taxi driver who controls the vehicle and monitors its movement is rendering a technical service to the person who uses the automobile. Similarly, when a person travels by train or in an aeroplane, it cannot be said that the railways or airlines is rendering a technical service to the passenger and, therefore, the passenger is under an obligation to deduct tax at source on the payments made to the railway or the airline for having used it for travelling from one destination to another. When a person travels by bus, it cannot be said that the undertaking which owns the bus service is rendering technical service to the passenger and, therefore, the passenger must deduct tax at source on the payment made to the bus service provider for having used the bus. The electricity supplied to a consumer cannot, on the ground that generators are used to generate electricity, transmission lines to carry the power, transformers to regulate the flow of current, meters to measure the consumption, be regarded as amounting to provision of technical services to the consumer resulting in the consumer having to deduct tax at source on the payment made for the power consumed and remit the same to the*

revenue.

9. *Satellite television has become ubiquitous and is spreading its area and coverage, and covers millions of homes. When a person receives such transmission of television signals through the cable provided by the cable operator, it cannot be said that the home owner who has such a cable connection is receiving a technical service for which he is required to deduct tax at source on the payments made to the cable operator.*

10. *Installation and operation of sophisticated equipments with a view to earn income by allowing customers to avail of the benefit of the user of such equipment, does not result in the provision of technical service to the customer for a fee.*

11. *When a person decides to subscribe to a cellular telephone service in order to have the facility of being able to communicate with others, he does not contract to receive a technical service. What he does agree to is to pay for the use of the airtime for which he pays a charge. The fact that the telephone service provider has installed sophisticated technical equipment in the exchange to ensure connectivity to its subscriber, does not on that score, make it provision of a technical service to the subscriber. The subscriber is not concerned with the complexity of the equipment installed in the exchange, or the location of the base station. All that he wants is the facility of using the telephone when he wishes to, and being able to, get connected to the person at the number to which he desires to be connected. What applies to cellular mobile telephone is also applicable to fixed telephone service. Neither service can be regarded as 'technical service' for the purpose of section 194J"*

The above said decision clarifies the point that mere usage of a facility does not give rise to provision of any technical service. Under same analogy, mere usage of facility provided by the above said non-residents does not render the payments as "royalty payments", since the core point of parting of any "copy right" attached to the said facilities does not arise at all.

20. In the case of Engineering Analysis Centre of Excellence (P) Ltd (supra), the issue related to "issuing of

license to use software", i.e., the software purchased by a person shall be used by the buyer for his own business purposes. Since the license was granted without parting the copy rights attached to the software, the Hon'ble Supreme Court held that the payments received by the non-resident software companies cannot be taxed as "royalty" under the provisions of DTAA and hence there is no requirement to deduct tax at source from the payment made to them by a resident assessee.

21. In the instant case, the recipients, i.e, M/s Facebook and Rocket Science group only allow the assessee to use their facilities for the purpose of creating advertisement content. The payment made to Amazon Web Services (AWS) 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 Facebook 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 thatthe payments made to the above said three non-resident companies do not fall within the meaning of "royalty" as defined in DTAA. The AO has not made out an alternative case that these payments

are taxable as business income in India. Hence, there is no necessity for us to deal with that aspect.

23. We have noticed earlier that the Ld CIT(A) has followed the decision rendered by Hon'ble Karnataka High Court in the case of Samsung Electronics Co Ltd (supra). In the case of Engineering Analysis Centre of Excellence Private Ltd (supra), the decision rendered by Hon'ble Karnataka High Court in the above said case has been overruled by Hon'ble Supreme Court. Hence on this reasoning also, the decision rendered by Ld CIT(A) would fail.

24. In view of the foregoing discussions, we are of the view that the payments made by the assessee to the three non-resident companies referred above cannot be considered ad "royalty payments" and hence they do not give rise any income chargeable in India under Indian Income tax Act in all the three years under consideration. In that view of the matter, there is no requirement to deduct tax at source from those payments u/s 195 of the Act. Hence the assessee herein cannot be considered as an assessee in default u/s 201(1) of the Act."

3.10. In view of the aforesaid observations and respectfully following the various judicial precedents relied upon hereinabove, we hold that the payments made to Facebook Ireland Limited cannot be disallowed u/s 40(a)(i) of the Act in the facts and circumstances of the instant case. Accordingly, the ground raised by the assessee is allowed.

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

Order pronounced on 07/07/2022 by way of proper mentioning in the notice board.

Sd/-	**Sd/-**
(KULDIP SINGH)	**(M.BALAGANESH)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai; Dated 07/07/2022

KARUNA, *sr.ps*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Sr. Private Secretary / Asstt. Registrar)
ITAT, Mumbai