**IN THE INCOME TAX APPELLATE TRIBUNAL**
**"I" BENCH, MUMBAI**

**BEFORE SHRI AMIT SHUKLA, HON'BLE JUDICIAL MEMBER AND SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER**

**ITA NO.6841/MUM/2017 (A.Y. 2014-15)**

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|---|---|---|
| Atos IT Solutions and Services Inc<br>C/o. Atos India Pvt. Ltd.,<br>Plant No. 5, Godrej & Boyce Mfg., Co. Ltd.<br>Pirojshanagar, LBS Marg, Vikhroli (W)<br>Mumbai - 400097<br><br>**PAN: AAJCA8823F** | *v.* | DCIT (IT)-1(1)(2)<br>Scindia House, Room No. 117<br>Mumbai-400038 |
| **(Appellant)** | | **(Respondent)** |

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|---|---|---|
| **Assessee Represented by** | **:** | **Shri Dhanesh Bafna<br>Ms. Chandani Shah<br>Kinjal Patel &<br>Yogesh Malpani** |
| **Department Represented by** | **:** | **Shri Richa Gulati** |
| | | |
| **Date of Hearing** | **:** | **02.12.2022** |
| **Date of Pronouncement** | **:** | **01.03.2023** |

**O R D E R**

**PER S. RIFAUR RAHMAN (AM)**

**1.** This appeal is filed by the assessee against order of the Learned Disputes Resolution Panel – 1, Mumbai [hereinafter in short "Ld.DRP"'] dated 22.08.2017 for the A.Y.2014-15, passed u/s. 144C(5) of the Income-tax Act, 1961 (in short "Act").

**2.** Brief facts of the case are, assessee is a company incorporated in USA, providing support services to its group companies in India namely, Atos India Private Limited (Atos India). During the year, assessee has received an amount of ₹.7,55,89,549 from the services rendered to Atos India as under:-

(i) Cost recharge of Microsoft license fees

(ii) Co-ordination services relating to Tower Watson project.

The above services are provided by the assessee in pursuance of the agreements entered with Atos India.

**3.** The return of income filed by the assessee and however, it has not reported the above receipts and offered to tax. The Assessing Officer observed that taxes are deducted at source at the time of payments. He also observed that as per the 26AS statement, the taxes were deducted on a total receipt of ₹.5,55,75,255 /- @10.55% on an average and the TDS of ₹.58,67,358 was claimed in the return of income as refund. The Assessing Officer observed that since no income was offered to tax, during the assessment proceedings, assessee was asked to explain why the same should not be taxed as royalty and / or Fee for Technical Service (FTS).

**4.** In reply, assessee submitted that it has received payments from Atos India towards (a) Recharge of costs pertaining to Microsoft licence fees, in this regard, it was informed that Atos group has entered into a central agreement with Microsoft to obtain licenses for the use of Microsoft products. As per this agreement assessee being USA based entity, invoices various Atos entities for their use of the Microsoft products. Accordingly, assessee has recovered payments from Atos India for the Microsoft products used by them. Further, it was informed that assessee has remunerated for its services (of purchasing delivery and administrative support for the benefit of Atos India) with handling fees based on the cost of the Microsoft licenses. (b) Co-ordination services relating to Tower Watson project, with regard to this, it was informed that Atos India has entered into a contract with Tower Watson India to provide Information Technology services to Tower Watson India. For this purpose, Atos India has engaged the assessee to provide certain support services. Under this arrangement, provides **'service desk'** for authorized users of Atos India. The service desk deals with all incidents, problems and service requests (including requests for data, system or application access) in the course of provision of services by Atos India to Tower Watson India.

**5.** It was submitted that Assessee has received payment from Atos India for the above transactions did not constitute either "Royalties" or "Fees for Technical Services ('FTS') or Fees for Included Services (FIS). The above services are in the nature of "Business Profits" and was thus, taxable in terms of the provisions of Article 7 of the Double Taxation Avoidance Agreement between India and USA ('India-USA DTAA'). As per Article 7 of the India-USA DTAA, "Business Profits" is taxable in India only if the non-resident has a Permanent Establishment (PE) in India. Since the assessee did not have a PE in India, the amount received from Atos India was not taxable in India. Further, assessee has submitted legal submissions defending its arguments relying on various explanations and judicial precedents.

**6.** The Assessing Officer rejected submissions made by the assessee and observed that the assessee has merely attempted a vague explanation of the services it has provided to Atos India without going into the context and the basis on which these services are rendered. This requires an analysis of the agreements on the basis of which these services are rendered. The Assessing Officer analyzed the services offered by the assessee in terms of the Article 12 of the 'India-USA

DTAA' for royalty, FTS and FIS. With regard to that following facts recorded by the Assessing Officer: -

> *(a) Group Atos Origin has become one of the leading European IT companies by 2004 after Atos SA acquired and integrated Sema Group. Origin, and*
>
> *(b) Due to the acquisition and integration that has taken place, the knowhow rights, and experience of the former Atos, Origin, Atos Origin and Sema Groups that have been acquired and developed by them due to their years of operation in the field of Information Technology are provided to the Group companies including Atos India who carry out contract works as a representative of Group Atos Origin.*

**7.** Accordingly, Assessing Officer proposed the addition of ₹.7,55,89,549/- as fees received from Atos India being royalty as well as FTS.

**8.** Aggrieved assessee filed the objections before DRP and filed the detailed submissions as under: -

> *"3.4.5 From the definition of the term "Royalty" as provided in Explanation 2 to section 9(1)(vi) of the Act and Article 12(3) of the India-USA DTAA, it is evident that the definition as given in the Acts much wider in scope as compared to the provisions of the India-USA DTAA. Therefore, the taxability or otherwise of the amounts paid by Atos India to the assessee is discussed/examined in terms of the provisions of the India-USA DTAA, the same being more beneficial to the assessee, in accordance with section 90(2) of the Act*
>
> *3.4.6 It is submitted that the under provisions of Article 12 of the India-USA DTAA, "Royalties" include payments for the use of the copyright of a literary, artistic or scientific work. Unless a copyright in the literary, artistic or scientific work is made available to the*

*payer, the "Royalties" definition does not get attracted. Thus, the crux of the issue is whether the payment is for a copyright or for a copyrighted article. If it is for copyright, it should be classified as royalty and it would be taxable in the hands of the seller on that basis. If the payment is for the copyrighted article, then it only represents the price for acquiring that article and therefore, would qualify as "Business Profit" under Article 5 of India USA DTAA and cannot be characterized as "Royalties.*

*3.4.7 The assessee has placed reliance on the Final Regulations issued by the Internal Revenue Services (IRS) of United States, governing royalty with regard to acquisition of computer software. In the said regulations, the US IRS have held that payments made for acquisition of rights in relation to the copyright which is limited to rights which are necessary to enable the user to operate the programs would be classified as business income and not royalty income. Further, the US IRS has laid down that where software is purchased for the purpose of resale the same would also be classified as business income. Further the IRS has distinguished Copyright rights from Copyrighted article as under:*

*"Copyright rights.*

*(i) The right to make copies of the computer program for purposes of distribution to the public by sale or other transfer of ownership, or by rental, lease or lending:*

*(ii) The right to prepare derivative computer programs based upon the copyrighted computer program;*

*(iii) The right to make a public performance of the computer program; or*

*(iv) The right to publicly display the computer program.*

*Copyrighted article.*

*A copyrighted article includes a copy of a computer program from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The copy of the program may be fixed in the magnetic medium of a floppy disk, or in the main memory or hard drive of a computer, or in any other medium."*

*3.4.8 The assessee would also like to support its above contention by placing reliance on the following decisions:*

*Baan Global B.V. [2016] (ITA No. 7048/M/2010) (Mum.)*
*Reliance Industries Limited [2016] (ITA No. 2529/M/2008) (Mum.)*
*DIT vs. Ericsson AB [2012] (343 ITR 470) (Del.)*
*DIT v. Nokia Networks OY [TS-700-HC-2012 (Del.)]*
*Infrasoft Ltd. Vs. ADIT [2009] (28 SOT 179) (Del.)*
*Sonata Information Technologies Ltd [2006] (103 ITD 324) (Bang.)*
*Motorola Inc. v. DCIT [2005] (95 ITD 269) (Del.) (SB)*
*Dassault Systems K.K., In Re [2010] (229 CTR 105) (AAR)*

*3.4.9 As per the assessee, the principle enunciated in the above decisions is that the payment for right to use the software was not for any copyright in the software but only acquisition of the copyrighted article and the same, therefore, could not be considered as Royalty within the meaning as provided in the DTAA. The above propositions also gain support from the Commentaries on the provisions contained in Article 12 of the OECD Model Convention*

*3.4.10 It has been claimed that regardless of whether this right is granted under law or under a license agreement with the copyright holder, copying the program onto the computer's hard drive or random access memory or making an archival copy is an essential step in utilising the program. Therefore, rights in relation to these acts of copying, where they do no more than enable the effective operation of the program by the user, should be disregarded in analysing the character of the transaction for tax purposes. Payments in these types of transactions would be dealt with as commercial income in accordance with Article 7.*

*3.4.11 In addition to the above, under the other Indian laws viz. Custom Tariff Act, 1975, Bombay Sales Tax Act, 1959 and Central Excise Tariff Act, 1985, software is classified as goods and sales tax, excise and custom duty has been levied on it as goods. Moreover, in the case of Tata Consultancy Services v/s State of Andhra Pradesh (2004) 271 ITR 401 (SC), it has been held that a transaction of sale of computer software packages as in the assessee's case is a sale of goods within the meaning of the Andhra Pradesh General Sales Tax Act, 1957. Attention is invited to the Notification No. 11233 [F.NO. 225/192/99/ITA.II] 5.0. 452, dated 8 February 2000, issued by CBDT, wherein the CBDT has notified software as being an article or thing for the purposes of section 35 of the Act.*

*3.4.12 In the present case, as per the assessee, it does not provide use of or right to use a copyright in any software or any other specified Intellectual Property Rights. Hence, the payments made to Atos India should not be qualified as 'royalties under the Article 12 of the India-USA DTAA.*

*Fees for Technical Services/ Fees for Included Services:*

*3.4.13 It is claimed that the definition of the term "FTS" as provided in Explanation 2 to section 9(1)(vii) of the Act is wider as compared to Article 12(4) of the India-USA DTAA. Therefore, the taxability or otherwise of the amounts paid by Atos India to the assessee is discussed/examined in terms of the provisions of the India USA DTAA, the same being more beneficial to the assessee, in accordance with section 90(2) of the Act.*

*3.4.14 In the instant case, the services provided by the assessee as mentioned in para 3 are not in the nature of technical or consultancy services.*

*3.4.15 Without prejudice to the above, it is further claimed that even if the services are considered to be in the nature of technical or consultancy services, the assessee does not make available any skill, know how, technical knowledge, etc. which enables Atos India to apply the technology contained therein on its own.*

*3.4.16 The assessee has relied on the Memorandum of Understanding (MoU) to the India-USA DTAA to explain Article 12 and its applicability in detail. Relevant paragraphs of this MoU are reproduced below:*

*"Paragraph 4 (in general)*

*…….*

*Under paragraph 4, technical and consultancy services are considered included services only to the following extent.... (2) as described in paragraph 4(b). if they make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design. Thus, under paragraph 4(b), consultancy services which are not of a technical nature cannot be included services.*

*…….(Emphasis supplied)*

*"Paragraph 4(b)*

*.....Generally speaking, technology will be considered "made available" when the person acquiring the service is enabled to apply the technology. The fact that the provision of the service may require technical input by the person providing the service does not per se mean that technical knowledge, skills, etc., are made available to the person purchasing the service, within the meaning of paragraph 4(b), Similarly, the use of a product which embodies technology shall not per se be considered to make the technology available.*

*…….. (Emphasis supplied)*

*3.4.17 It is claimed that as per the above MoU to the India USA DTAA, consultancy services should fall within the definition of FIS only if the same are technical in nature. In other words, when the recipient of services & able to make use of technical knowhow, experience, etc without recourse to the service provider in future, in such a case, such technical knowhow, experience, etc could be considered to be made available to the service recipient.*

*3.4.18 The concept of make available envisages enduring benefit to the recipient of services and continued dependence by the recipient on services of the service provider may indicate an absence of make available.*

*3.4.19 In light of the above, it is contended that payment of any kind in consideration for rendering services (in a case where there is no transfer of technical plan or design) should be regarded as FIS if the below conditions are satisfied cumulatively:*

*(i). Such services are technical or consultancy in nature ("first condition");*

*(ii). Such services make available technical knowledge, experience, etc to the recipient of the services ("second condition); and*

*(iii). Such knowledge, experience etc is technical ("third condition").*

*3.4.20 Reliance has been placed on the Mumbai Tribunal decision in case of Raymond Ltd vs. DCIT [2003] 86 ITD 791 (Mum). As per this decision, it has been observed that the addition of the phrase*

*which enables the person acquiring the services to apply the technology contained therein' in Article 12(4)(b) of the India-USA DTAA merely make it explicit what is embedded in the words 'make available. Reliance is also placed on the decision of the Hon'ble Karnataka High Court in the case of CIT & Ors vs De Beers India Minerals (P) Ltd [2012] 346 ITR 467 (Kar).*

*3.4.21 Reliance is also placed on the following decisions, wherein it has been held that payment for services similar to that of the assessee do not fall within the meaning of concept of 'make available under the DTAA:*

*ADIT vs. WNS North America Inc [2013] (ITA No. 2944/Mum/2012) (Mum)*
*Sandvik Australia Pty Ltd Vs DDIT (2013] (141 ITD 598) (Pune)*
*Ernst & Young Pvt. Ltd, in Re [2010] (323 ITR 184) (AAR)*
*Endemol India Pvt. Ltd, in Re [2013] 261 CTR 117 (AAR)*
*Bharati AXA General Insurance Co. Ltd, in Re [2010] (326 ITR 477) (AAR)*
*Invensys Systems Inc, in Re [2009] (317 ITR 438) (AAR)*

*3.4.22 The assessee submits that, in the instant case, the services provided by the assessee to Atos India do not make available technical knowledge, knowhow, experience, etc. Hence, they do not qualify as FIS under Article 12(4) of India-USADTAA.*

*3.4.23 In light of the above, payments received by the assessee from Atos India are neither in the nature of "Royalties" or "FIS" under the Article 12 of the India-USA DTAA. The said payments are in the nature of Business Profits under Article 7 of the India-USA DTAA. Such business profits would have been taxable only if the assessee had a PE in India. Since the assessee did not have PE in India, such receipts were not taxable in India.*

**9.** DRP after considering the submissions of the assessee observed that it is an established position that the taxability and character of an item has to be determined in accordance with the contents of the Indian Income Tax Act and the provisions of the Treaty between India and USA. Any internal guidance issued by a particular country cannot be a basis for deciding the character of service in India which is solely

governed by the Indian laws. Therefore, he rejected the reliance placed by the assessee on the IRS guidance notes. DRP decided the issue against the assessee with the following observations: -

> *"3.10 Purchase of Microsoft licenses:*
>
> *3.10.1 As per the invoice submitted by the assessee, the payment totalling to USS 931,759 has been categorised as cost recharge in respect of Microsoft license provided to Atos India. The invoice mentions the same as MS License June 2013 Dec 2013. The assessee has filed the agreement which is examined. It is seen that the agreement quantifies the amount as USS 614,116 towards cost of license and management fees. In the agreement, at Article 2, the amount is being paid towards provision of product and services.*
>
> *3.10.2 The agreement and the invoice make it clear that there is no outright sale of MS Office software products to Atos India. The assessee has allowed access to the software which is being managed by itself and hence, the control over the software is with the assessee company and not with Atos India which is paying license fee to assessee for such right to use. The transaction cannot be treated as outright sale of MS products as the assessee would not have right over these products as soon as the license period expires:*
>
> *3.10.3 In such a scenario, when Atos India is not granted rights over the product but is only granted a right to access the various software for a defined period, the debate as to whether this would constitute sale or royalty does not arise. The situation would have been different if Atos India had been given these software for its use permanently. At present, the consideration is for use or a right to use these software which are being maintained by the assessee itself and for which a separate charge is being levied on Atos India.*
>
> *3.10.4 In light of the above facts, the claim of the appellant that the above transaction does not fall under the definition of royalty as per Article 12(3) of the India US DTAA is not found acceptable. Even the reliance placed by the assessee on IRS guidelines of USA is not found relevant as the software have not been sold to Atos India. Same is the situation with reliance placed by the assessee on the decision in the case of Tata Consultancy Services (supra).*

*3.10.5 The consideration is not found to be with reference to sale of MS licenses. It is noted that the amount clearly falls within the realm of royalty, being an amount charged for access to the software which is being owned and maintained by the assessee company. It is held that the amount represents royalty, both as per Section 9(1)(vi) of the IT Act as well as Article 12(3) of the India US Treaty.*

*3.10.6 The objection raised by the assessee on this issue is not found to be correct and is dismissed.*

*3.11 Co-ordination services relating to Tower Watson project: The nature of service has been detailed above. Further, the agreement between the two parties with respect to this service has been examined. The assessee has claimed that the amount has been received for providing a service desk for authorised users of Atos India with reference to services rendered by Atos India to Tower Watson. Such service desk requests include request for data, system or application access.*

*3.11.1 The facts of the case have been carefully examined. The assessee has entered into a Master Services Agreement with M/s Tower Watson Pennsylvania Inc. (hence forth Tower Watson) on a global basis. Since both these companies operate at global level, the agreement contains a clause wherein the assessee also termed as AOUS in the agreement, can subcontract the work to be rendered in specific territories to its subsidiaries if needed. In India, such work has been subcontracted to Atos India vide subcontract agreement dated 1.5.2012. Atos India is required to enter into a local arrangement with the Indian unit of Tower Watson and is allowed to charge directly from the Indian affiliate for such services. The assessee has provided details of the agreement between itself and Atos india as well as the Master Services Agreement with Tower Watson.*

*3.11.2 It is noticed from the agreements that the assessee has developed sufficient competency and has necessary intellectual properties with itself to render the services under the MSA with Tower Watson. However, the subsidiaries who are rendering services as subcontractor neither have such level of competency nor have the necessary intellectual property to render these services which have been mandated to them on account of the global agreement. The global agreement also mandates that the services rendered by the group companies would involve*

*standardised processes and would be of the same standard as that rendered by the assessee.*

*3.11.3 In order to ensure standardised services and maintain a high standard of service as committed in the MSA, the assessee has allowed access to its own or the client intellectual properties. In addition, the company has provided dedicated personnel who will assist the Atos India manpower in rendering of the service as well as handling of such intellectual properties. As per para 5.2 of the Intercompany Subcontract Services Agreement;*

> *5.2 The company grants to the subcontractor for the duration of the agreement, a non-exclusive, non-transferable license to access and use the company and/or client intellectual property rights granted to company solely for the purpose of providing the services hereunder but only to the extent such license and rights are granted in the Prime Contract if performance of services requests the use of specific software or tools owned by company or its client, subcontractor (a) shall not modify, alter, change, adapt or create derivative works based upon such software and tools, or any part thereof; (b) shall not sell, assign, pledge, sub-license, lease, deliver or otherwise transfer such software and tools and (c) shall not disclose to any third party or permit any third party to have access to, or use or copy such software and tools.*

*3.11.4 Although the access to the assessee's intellectual property rights is limited to performance of the service with reference to contract with Tower Watson, it is admittedly utilised for the purpose of the Atos India's business. The fact remains that Atos India has been allowed use of the intellectual properties of the assessee company for its own business activities and such intangibles are clearly in the nature of "copyright of scientific work" or "patent, trademark, design, model, plan, secret formula or process, or information concerning industrial, commercial or scientific experience".*

*3.11.5 It is also noticed that the service desk setup by the assessee is with reference to enabling the employees of Atos India to render the services in the requisite manner. In addition to the access to the intellectual property rights of the assessee company, there is a*

*close interaction between the personnel of the assessee and the Atos India employees which result in making available of technical knowledge, skill, experience and process. It is the ultimate responsibility of the assessee to ensure standardised rendering of service to Tower Watson and clearly such standards are passed on to the Indian employees by the assessee personnel. The Atos India employees are clearly enabled to apply the technical knowledge, skill, process, experience independently in rendering their services to Tower Watson India. The assessee itself does not render any service to Tower Watson India.*

*3.11.6 In its submission before DRP as well as the assessing officer, the assessee has not made any further submission with reference to the actual services rendered by the assessee but has merely made standard submissions with reference to character of the software and what would constitute a 'make available' with reference to India US Treaty. The assessee has also not been able to demonstrate as to how the decisions relied on by it are applicable to the facts of its case. As such, the submission made by the assessee is not found applicable to the facts of this case and hence not tenable.*

*3.11.7 Another aspect which requires attention is the claim of the assessee that if there is a long term contract for rendering of service, it would mean that the services are not being made available as the services of the provider are regularly needed by the recipient of service. We are not agreeable to such reverse hypothesis. Merely because the parties are in a long term arrangement, it would not imply that there is no transfer of technical knowledge/skill/experience. In a long term arrangement, there may be a continuous upgradation of knowledge but it would definitely not imply that there is absence of 'making available of technical knowledge/experience/skill". In the case of international Management Group (UK) Ltd. [2016] 75 taxmann.com 250 (Delhi Trib.), when an assessee had hired a consultant for developing standardized processes for organizing an event, the Hon'ble ITAT held the payment to be fee for technical service in terms of India UK DTAA wherein the requirement of make available was satisfied. The Bench held that;*

> *In the instant case the assessee has hired for conducting research in respect of the appropriate structure for the IPL and makes recommendation to BCCI accordingly. It is required to provide the*

*Constitution of the IPL, the authority of the governing Council, the structure of IPL, tournament rules and regulation, the franchisee tender document, the franchisee agreement, necessary franchisee regulation and the IP implementation budget. According to the agreement the intellectual property rights remains with the board of control for Cricket in India. Even assessee could not point out that why make available test has not been satisfied in this event by providing all the rules and regulations of IPL, standard operating procedures of matches, copies of the franchisee agreement various documentation / contracts etc which shall remain with the BCCI Therefore, in the instant case the BCCI is enabled to absorb and apply the information and the advice provided by the appellant to it for conducting such sporting events. Thus, when all this documentation and material is provided to the BCCI it is able to use such know how and documentation generated from provision of the services of the appellant independent of the services of the appellant in future. It is too naive to say that in absence of IMG services BCCI on its own cannot hold IPL tournament. Merely because the BCCI has entered into a contract for conducting further events does not lead to the conclusion that the information documentation, agreements, contracts etc cannot be said to be made available to the appellant. In fact it is. In view of this the contention of the appellant that the sum of Rs. 23.77 crores cannot be taxed as fees for technical services as it does not satisfy make available condition provided in article 13(4)(c) of the DTAA is rejected. (Para 43)*

*3.11.8 The reliance placed by the appellant on the decision in the case of Raymond Ltd vs. DCIT [2003] 86 ITD 791 (Mum) has been examined. In that case before the Mumbai Bench, the assessee was engaged in manufacturing suitings, engineers' steel files and rasps and cement in India. With a view to muster funds it proposed to issue two types of Global Depository Receipts (GDRs) in the international market. The assessee company engaged a UK company as lead managers to the issue. The assessee paid necessary charges for the services rendered by the lead managers*

*and the managers. This was a case wherein there was no transfer of technical knowledge/skill/process between the two parties. The non-resident had been given a task of managing the GDR issue for which it was paid certain amount. Clearly, the service did not make available any technical knowledge/skill/knowhow to the assessee and hence the ITAT held that the amount did not fall within the ambit of FTS as contemplated under India UK DTAA. The facts are similar in other cases which have been cited by the appellant and hence not applicable to the facts of the present case.*

*3.11.9 Similarly, Hon'ble Karnataka High Court in the case of CIT &Ors vs De Beers India Minerals (P) Ltd [2012] 346 ITR 467 (Kar), held that the payment has been received for providing data collected by the assessee and there was no making available of any technical knowledge/skill/knowhow or process. As discussed above, the facts in the present case are totally different.*

*3.12 In light of the above discussion, the DRP holds that all the services rendered by Atos US fall within the ambit of Article 12 of th India US DTAA as royalty/fee for technical services and are liable to tax in India. The objection raised by the assessee is not found acceptable and is dismissed."*

**10.** Aggrieved assessee is in appeal before us raising following grounds in its appeal: -

*"1. That on the facts and in the circumstances of the case and in law, the Learned Deputy Commissioner of Income-tax (International Taxation) 1(1)(2), Mumbai (the Learned AO') and the Dispute Resolution Panel (the DRP) erred in holding the sum of Rs.7.55.89.550 as 'Royalty under Section 9(1)(vi) of the Income-tax Act, 1961 (the Act) and Article 12 of the Double Taxation Avoidance Agreement (the DTAA') entered into between India and France.*

*2. That on the facts and in the circumstances of the case and in law, the Learned AO and the DRP erred in holding the sum of Rs. 7.55.89.550 as 'Fees for Technical Services' under Section 9(1)(vii) of the Act and Article 12 of the DTAA.*

*3. That on the facts and in the circumstances of the case and in law, the Learned AO and the DRP erred in not considering that*

*the sum of Rs. 7.55,89.550 is in the nature of "Business Profits" under Article 7 of the DTAA, not taxable in India as the Appellant did not have a Permanent Establishment in India under Article 5 of the DTAA.*

*4. That on the facts and in the circumstances of the case and in law, while calculating the tax liability of the Appellant, the Learned AO has erred in levying surcharge and education cess on the rate prescribed under the Article 12 of the DTAA.*

*5 That on the facts and in the circumstances of the case and in law, the learned AO has erred in proposing to initiate penalty proceedings under section 271(1)(c) of the Act without appreciating that none of the provisions of section 271(1)(c) of the Act gets attracted in the facts of the Appellant's case."*

**11.** At the time of hearing Ld. AR submitted as under: -

*"2.1 Atos USA had entered into a central agreement with Microsoft USA to obtain licenses for the use of Microsoft products by various entities in the Atos Group. The Microsoft software products are provided to various Atos Group entities through a server/standard facility which can be accessed by the group entities. Accordingly, the Appellant recharged the group entities for its services of purchasing/delivery of Microsoft products basis the use of the said Microsoft products by them.*

*2.2 Under the aforesaid arrangement, the Appellant had accrued income of Rs. 7,10,56,609 from Atos India towards the following Microsoft products (standard off-the-shelf software products) used by Atos India during the relevant previous year:*

| **S. No.** | **Particulars** |
|---|---|
| **1.** | ***Enterprise product components*** |
| 1.1 | *Office Professional Plus 2010*<br>*(Office suite that includes Word, Excel, PowerPoint, Outlook etc.)* |

| S. No. | Particulars |
|---|---|
| 1.2 | *Enterprise CAL*<br>*[Enterprise CAL (Client Access License) provides access rights to multiple Microsoft software and services. This simplifies licensing and tracking by reducing the number of licenses necessary to access Microsoft software and services and also provides pricing that's more attractive than licensing the equivalent components individually.]* |
| **2.** | ***Enterprise products profiles*** |
| 2.1 | *Profile 1 (enterprise desktop)*<br>*(Users can be assigned in product profiles and they are granted access to the apps and services of the product on which the product profile is based)* |
| **3.** | ***Visual Studio*** |
| 3.1 | *Visual Studio 2010 professional*<br>*(An integrated development environment which is used to develop computer programs, as well as websites, web apps, web services and mobile apps)* |
| 4. | ***Project and Visio*** |
| 4.1 | *Project 2010 Pro (A project management software product designed to assist a project manager in developing a schedule, assigning resources to tasks, tracking progress, managing the budget, and analyzing workloads)* |
| 4.2 | *Project 2010 Standard* |
| 4.3 | *Visio 2010 Pro (A software product which helps in creating professional diagrams, flow charts etc.)* |
| 4.4 | *Visio 2010 Standard* |
| 5. | ***Windows Server*** |
| 5.1 | *Windows Server 2008 Enterprise (Windows Server is the platform for building an infrastructure of connected applications, networks and web services)* |
| 5.2 | *Windows Server 2008 Standard* |
| **6.** | ***Forefront*** |

| S. No. | Particulars |
|---|---|
| 6.1 | *Forefront Threat Management Gateway 2010 Standard (An integrated security gateway comprising of firewall, antivirus program, etc.)* |
| 6.2 | *Forefront Threat Management Gateway Web Protection Service* |
| 7 | ***Exchange, Sharepoint and Bizztalk*** |
| 7.1 | *Exchange Server 2010 Standard*<br>*(Microsoft Exchange Server is a mail server and calendaring server developed by Microsoft which primarily focuses on sending, receiving and storing email messages. In addition to managing messaging traffic, Exchange Server provides several other collaboration features, like calendaring, and tight integration with other Microsoft Office applications.)* |
| 7.2 | *Sharepoint Server 2010*<br>*(Sharepoint Server by Microsoft helps in creating public websites, collaboration platforms, etc.)* |
| 8 | ***SQLServer*** |
| 8.1 | *SQL Server 2008 standard,*<br>*(A software product with the primary function of storing and retrieving data as requested by other software applications)* |

*Appellant's submissions*:

> *2.3 It is humbly submitted that the provisions regarding taxability of royalty and fees for technical/included services under section 9 the Income-tax Act, 1961 (the Act) are wider in scope as compared to the respective provisions under Article 12 of the India-USA Double Taxation Avoidance Agreement (India-USA DTAA').*
>
> *2.4 Therefore, since the provisions of the India-USA DTAA are more beneficial to the Appellant as compared to the provisions of the Act, the taxability or otherwise of the income of the Appellant from Atos India shall be governed by the provisions of the India-USA DTAA, in view of section 90(2) of the Act. Accordingly, the Appellant has restricted its submissions in respect of taxability under the India-USA DTAA.*
>
> *2.5 Article 12(3) of the India-USA DTAA defines the term 'Royaltes' as under:*

*"The term "royalties" as used in this Article means payments of any kind received consideration for the use of, or the right to use:*

*(a) 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) 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.*

*2.6 Article 12(3)(a) brings within the ambit of the definition of royalty, a payment made for the use of or the right to use a 'copyright of a literary, artistic or scientific work. Thus, only those payments that allow a payer to use/acquire a right to use a copyright in a literary, artistic or scientific work are covered within the definition of royalty.*

*2.7 Basis the above definition of royalty, it is important to understand the meaning of the term 'copyright'. Since the term copyright is not defined under the provisions of the Act, one would have to take recourse to the provisions of the Copyright Act, 1957 (Copyright Act').*

*2.8 As per section 14 of the Copyright Act, 'copyright' means the exclusive right to do any of the acts specified therein, viz., to reproduce the work, to issue copies of the work to public, to make any translation or adaptation of the work, etc. Unless any of the exclusive rights or a combination thereof as stated under section 14 of the Copyright Act are transferred by the copyright holder, it cannot be said that the use or right to use the copyright has been granted.*

*2.9 Thus, payment made for acquiring the right to use any copyrighted product, wherein the payer does not get any of the*

*'exclusive right' as stated in section 14 of the Copyright Act, does not amount to payment made for the use or right to use the 'copyright' in the product and therefore, shall not be covered within the scope of "royalty".*

*2.10 In the present case, the payment made by Atos India to the Appellant is towards licenses for Microsoft's software products which are standard off-the shelf products. The only right that Atos India (the end-user of Microsoft products) gets is a right to use the Microsoft products, which are akin to "copyrighted articles' and not a right to use the copyright in those Microsoft products Therefore, the payment received by the Appellant does not amount to payment for the use of or right to use any copyright' but rather payment for access to copyright products*

*2.11 In this regard, attention is invited to the decision of Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence (P.) Ltd. v. CIT: (2021] 125 taxmann.com 42 (SC). In this landmark judgement, the Hon'ble Supreme Court has held that the amount paid by resident Indian end-user/distributors to non-resident computer software manufacturers/suppliers is not payment of royalty for use of copyright since the end-user/distributor does not get any of the rights under section 14 of the Copyright Act and does not get the right to reproduce a computer programme and exploit the reproduction by way of sale, transfer, license etc., which is at the heart of the definition of 'copyright' under the Copyright Act.*

*In this bunch of cases, the Hon'ble Supreme Court has taken into consideration the agreement between Microsoft Corporation and an end user for use of Microsoft products and noted as under:*

> *"44. (iii) Category 3:*
>
> *The standard-form EULA accompanying Microsoft software products sold to resident Indian end-users by Microsoft Corporation, a non-resident, foreign vendor includes the following terms:*
>
> *46. When it comes to an end-user who is directly sold the computer programme, such end user can only use it by installing it in the computer hardware owned by the end-user and cannot in any manner reproduce the same for sale or transfer, contrary to the terms imposed by the EULA.*

*47. In all these cases, the "licence" that is granted vide the EULA, is not a licence in termsof section 30 of the Copyright Act, which transfers an interest in all or any of the rights contained in sections 14(a) and 14(b) of the Copyright Act, but is a "licence" which imposes restrictions or conditions for the use of computer software. Thus, it cannot be said that any of the EULAS that we are concerned with are referable to section 30 of the Copyright Act, inasmuch as section go of the Copyright Act speaks of granting an interest in any of the rights mentioned in sections 14(a) and 14(b) of the Copyright Act. The EULAS in all the appeals before us do not grant any such right or interest, least of all, a right or interest to reproduce the computer software. In point of fact, such reproduction is expressly interdicted, and it is also expressly stated that no vestige of copyright is at all transferred, either to the distributor or to the end-user. A simple illustration to explain the aforesaid position will suffice. If an English publisher sells 2000 copies of a particular book to an Indian distributor, who then resells the same at a profit, no copyright in the aforesaid book is transferred to the Indian distributor, either by way of licence or otherwise, inasmuch as the Indian distributor only makes a profit on the sale of each book. Importantly, there is no right in the Indian distributor to reproduce the aforesaid book and then sell copies of the same. On the other hand, if an English publisher were to sell the same book to an Indian publisher, this time with the right to reproduce and make copies of the aforesaid book with the permission of the author, it can be said that copyright in the book has been transferred by way of licence or otherwise, and what the Indian publisher will pay for, is the right to reproduce the book, which can then be characterised as royalty for the exclusive right to reproduce the book in the territory mentioned by the licence*

*Finally, the Hon'ble Apex Court held as under:*

*"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."*

*2.12 As can be seen from the above, the end user license agreement accompanying Microsoft products was subject matter of appeal before the Hon'ble Supreme Court. Further, the appeals before the Supreme Court were also concerned with the India-USA DTAA (kindly refer para 40 of the decision). Therefore, the aforesaid decision is squarely applicable to the facts of the present case.*

*2.13 Further, attention is also invited to the decision of the Hon'ble Delhi High Court in the case of EY Global Services Ltd. v. ACIT: W.P.(C) Nos. 11957 & 12003 of 2016, wherein, the fact pattern is similar as that of the Appellant. In this case, a group entity incorporated in the United Kingdom (UK) purchased software from third-party vendors by way of a licence for the use of the same by the member firms of the group. The payment received by the UK company from its members was for the use of computer software loaded on its server by the creation of a standard facility for which access was granted to all the member firms of the group. The UK company had also entered into a contract with the member firms to provide support services including procurement services in respect of external software licenses for member firms' internal business use.*

*The Hon'ble Delhi High Court relied upon the decision of Hon'ble Supreme Court in the case of Engineering Analysis (supra) and held that the payment received by the UK entity for providing access to computer software to its member firm in India does not amount to 'royalty under the provisions of the Act and the India-UK DTAA. Relevant extract from the decision is reproduced hereunder for ready reference:*

*"13. A reading of the above judgment would clearly show that for the payment received by EYGSL (UK) from EYGBS (India) to be taxed as "royalty", it is essential to show a transfer of copyright in the software to do any of the acts mentioned in section 14 of the Copyright Act, 1957. A licence conferring no proprietary interest on the licencee, does not entail parting with the copyright. Where the core of a transaction is to authorise the end-user to have access to and make use of the licenced software over which the licencee has no exclusive rights, no copyright is parted with and therefore, the payment received cannot be termed as "royalty".*

*14. In the present case, the EYGBS (India), in terms of the Service Agreement and the MOU, merely receives the right to use the software procured by the EYGSL (UK) from third-party vendors. The consideration paid for the use of the same therefore, cannot be termed as royalty as held by the Supreme Court in Engineering Analysis Centre (supra). In determining the same, the rights acquired by the EYGSI (UK) from the third-party software vendors are not relevant. What is relevant is the Agreement between the EYGSL (UK) and the EYGBS (India). As the same does not create any right to transfer the copyright in the software, the same would not fall within the ambit of the term 'royalty' as held by the Supreme Court in Engineering Analysis Centre (supra).*

*….*

*16. The submission of the learned counsel for the Revenue that the judgment of the Supreme Court in Engineering Analysis Centre (supra) cannot be applied because it confines itself only to the four categories mentioned in paragraph 4, also cannot be accepted. Though the Supreme Court was on facts considering the four categories of cases that arose in the appeals before it, it has laid down the law for general application. The law, as laid down by the Supreme Court, when applied to facts of the present case, squarely covers the same in favour of the petitioners.*

*….*

> *18. In view of the above, the Impugned Rulings dated 10-8-2016 passed by the learned AAR are set aside and it is held that the payment received by EYGSL (UK) for providing access to computer software to its member firms of EY Network located in India, that is, EYGBS(India), does not amount to 'royalty' liable to be taxed in India under the provisions of the Income-tax Act, 1961 and the India-UK DTAA."*

*2.14 In view of the above, it is humbly submitted that the amount received towards recharge of costs pertaining to Microsoft License Fee from Atos India should not be treated as royalty/FIS under the India-USA DTAA and the addition made by the Ld. AO in relation thereto deserves to be deleted.*

***3. Services relating to Tower Watson Project:***

*Facts:*

*3.1 The Appellant (formerly known as Siemens IT Solutions and Services, Inc.) had entered into a Master Services Agreement as of 01.02.2011 with Towers Watson Pennsylvania Inc. (Tower Watson) for provision of information technology and related services (including a Service Desk) to Tower Watson Entities (kindly refer pages 165-352 of the paperbook). In view of the said agreement, Atos India had agreed to provide information technology services (IT services) to Tower Watson India.*

*3.2 As part of the IT Services to be provided by Atos Group to Tower Watson Group (inter-alia including IT services from Atos India to Tower Watson India), a Service Desk facility was to be provided to Tower Watson employees for dealing with IT incidents faced by them. The said Service Desk is maintained by the Appellant in the USA for the entire Tower Watson Group and serves as a Single Point of Contact (SPOC) to deal with all incidents, problems and service requests relating to IT Services. A detailed description of the Service Desk is provided at page 347 of the paperbook. In view of the above, Atos India made payments to the Appellant for use of the Appellant's Service Desk by authorized personnel of Tower Watson India.*

*3.3 The primary purpose of the Service Desk is to restore normal service for Tower Watson India personnel as quickly as possible. The IT related service requests/incidents are raised by Tower Watson India personnel on the Service Desk facility which is maintained by Atos USA ie. the Appellant. Once a service request is raised, the Appellant deals with all the IT incidents raised by Tower Watson India so as to resume IT services for them. However, in case a physical visit to the customer's site is required to resolve an issue, Atos India provides such onsite services to Tower Watson India. It may be noted that the services are rendered by the Appellant directly to personnel of Tower Watson India on behalf of Atos India. For the services rendered by the service desk/Appellant directly to authorized personal Tower Watson India on behalf of Atos India, Atos India had made a payment of Rs. 45.32,940 to the Appellant.*

***Appellant's submissions:***

*3.4 Article 12(4) of the India-USA DTAA defines the term "fees for included services" (FIS) as under*

> *"fees for included services" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) f such services*
>
> *(a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received; or*
>
> *(b) make available technical knowledge, experience, skill, know-how, or processes, orconsist of the development and transfer of a technical plan or technical design."*

*3.5 As can be seen from the above, in order to attract the taxability of an income under Article 12(4)(b), not only the payment should be in consideration for rendering of technical or consultancy services, but additionally, the services so rendered should also be such that 'make available' technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design.*

*3.6 In this regard, attention is invited to the Memorandum of Understanding ("MOU") entered into by the Indian Government with the Government of the USA in relation to the India-USA DTAA to explain Article 12 and its applicability in detail. Relevant paragraphs of this MoU are reproduced below:*

> *"Paragraph 4 (in general)*
>
> *……..*
>
> *Under paragraph 4, technical and consultancy services are considered included services only to the following extent. …… (2) as described in paragraph 4(b), if they make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design.* ***Thus, under paragraph 4(b), consultancy services which are not of a technical nature cannot be included services.***
>
> *….*
>
> *"Paragraph 4(b)*
>
> *Generally speaking,* ***technology will be considered "made available" when the person acquiring the service is enabled to apply the technology. The fact that the provision of the service may require technical input by the person providing the service does not per se mean that technical knowledge, skills, etc., are made available to the person purchasing the service, within the meaning of paragraph 4(b). Similarly, the use of a product which embodies technology shall not per se be considered to make the technology available****.*
>
> *……" (Emphasis supplied)*

*3.7 As per the meaning of the term 'make available' explained in the MoU, technology will be considered as made available' when the person acquiring the service is enabled to apply the technology. In other words, when the recipient of services is able to make use of technical knowhow, experience, etc. without recourse to the service provider in future, in such a case, such technical knowhow,*

*experience, etc. could be considered to be made available to the service recipient. In this regard, attention is also invited to the landmark decision of the Hon'ble Karnataka High Court in the case of CIT & Ors vs De Beers India Minerals (P) Ltd.: [2012] 346 ITR 467 (Kar), wherein, while discussing the concept of "make available", the Court held as under:*

> *"…… if the assessee is able to carry on his business in future without the technical service of the service provider in respect of services rendered then, it would be said that technical knowledge is made available - Furgo has not made available the technical knowledge with which they rendered technical service Though Furgo rendered technical services as defined under section 9(1)(vii) Explanation 2, it does not satisfy the requirement of technical services as contained in DTAA Liability of tax is not attracted - The case on hand does not fall in the second part of the Fee for technical services' clause in DTAA dealing with development and transfer of plans and designs...".*

*3.8 Thus, the concept of make available envisages enduring benefit to the recipient of services and continued dependence by the recipient on services of the service provider may indicate an absence of 'make available.*

*3.9 In the instant case, the Service Desk provided by the Appellant does not make available any skill, know how, technical knowledge, etc. which enables Atos India or Tower Watson India to apply the technology contained therein on its own and there is continued dependence on the "service desk" for resolving the incidents/problems. Therefore, the payment received for such services do not qualify as FIS under Article 12(4) of India-USA DTAA.*

*3.10 In support of the above contentions, the Appellant wishes to place reliance on the decision of Hon'ble Pune Bench of the Tribunal in the case of Sandvik Australia Pty. Ltd. v. DDIT: ITA No. 93/PN/2011, wherein the Hon'ble Tribunal held that Information Technology (IT) support services such as help desk, etc. for solving IT related problems provided by an Australian company to its Indian subsidiary had not "made available" any technical knowledge or expertise to the Indian company and therefore, were not covered by para 12(3)g) of India-Australia DTAA. Relevant*

*extract from the decision is reproduced hereunder for ready reference:*

> *"9.... The assessee is providing help desk and user administration services, ie., IT support and advisory services for solving any IT related problems faced by the users as well as user administration services such as addition of new user/deletion of any existing users in the system.*
>
> *.....*
>
> *13. We find that the expression "making available" is very much important to decide in which contracting state the amount received for rendering the services relating to the technical know-how is to be taxed. The expression "make available" is used in the context of supplying or transferring technical knowledge or technology to another. It is different than the mere obligation of the person rendering the services of that persons own technical knowledge or technology in performance of the services. The technology will be considered as made available when the person receiving the services is able to apply the technology by himself.*
>
> *.....*
>
> *16. In the present case, as per the terms of the agreement between the assessee company and Sandvik Asia Ltd., does not support the case of the Revenue that the assessee's case is covered in clause (g) of para 3 to Article 12 of the India Australia Treaty as the assessee has not made available any technical knowledge or expertise to the recipient Indian company. In our opinion, the assessee has only provided the back-up services and IT support services for solving IT related problems to its Indian subsidiary. Hence, unless and until the services are not made available, same cannot be taxable in India. We, therefore hold that the services rendered by assessee company to its Indian group companies, though are in the nature of technical services, but is not covered in para (3Xg) to Article 12 of the India*

> *Australia Treaty and hence, the same is not taxable in India. We also hold that the amount received by the assessee cannot be treated as a Royalty even under the normal provisions of I.T. Act. But under the normal provision of the I.T. Act the same constitute consideration for rendering the technical services covered u/s.9(1)(vii) of the I.T. Act. Accordingly, Ground No.1 is allowed and issue is decided in favour of the assessee.*
>
> *In view of the above, the Appellant humbly submits that the amount received towards services relating to Tower Watson Project should not be held to be FIS/royalty under the India-USA DTAA and the addition made in relation thereto deserves to be deleted."*

**12.** On the other hand, Ld.DR opposed the submissions of the Ld. AR of the assessee and he brought to our notice Page No. 160 and 162 of the Paper Book which is copy of the agreements for services rendered by the assessee and he specifically brought to our notice Clause 5.2 of the service agreement. He submitted that it is a service and at the same time he submitted that assessee has not reported these services in 3CB. Further, he brought to our notice agreement relating to service desk services and specifically the Clause 8.4 of the above services and submitted that these are all support services rendered by the assessee to Atos India and prayed that these services are rendered by the assessee which will fall under royalty as well as FTS. Therefore, he relied on the orders passed by the DRP/AO.

**13.** Considered the rival submissions and material placed on record, we observe that the assessee has provided two services to its subsidiary in India for the execution of sub-contract with Tower Watson India. It is important to note that the services provided by Atos India to Tower Watson India are independently charged to tax as business receipt. For execution of services to Tower Watson by Atos India is based on the Global contract executed by the Assessee and Tower Watson Pennsylvania Inc. In order to execute the above sub-contract the assessee has provided certain additional services like allowing them to subscribe the Microsoft products and common services in the nature of Help desk facility to be provided to the employees of Tower Watson employees for dealing with the IT incidents faced by them. Let us deal with the above issues separately.

**14.** The assessee has entered into global contract with Microsoft License fees and kept the ownership with them. Based on the above contract, the assessee has entered into separate agreement with the Atos India for recharge of costs pertaining to usage of the above licenses by Atos India. Accordingly, based on the usage of the Licenses the assessee has charged the same to Atos India as per the above said

agreement. The assessee has filed copies of above said agreement entered with Atos India and relevant invoices raised to Atos India. Ld AR took us through the above said agreement and invoices to highlight that the assessee has charged only to the extent the Atos India has made request for usage of the approved Microsoft Licences as per their requirements. The invoices are raised based on the actual utilization of the Licences. The revenue authorities treated the above said services as Royalty or FTS. On careful consideration, we observe that the License for usage of the copy righted products are with Microsoft only and the assessee has acquired global right and transferred the above said Licenses to its group entities based on the requirements. Whether this transaction falls under the category of Royalty or FTS is the issue. We observe that the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence (P) Ltd (supra) held that Microsoft Software products are sold to end users by Microsoft Corporation and whatever the license which are routed thru the middle man, the Microsoft does not grant any right or interest, least of all, a right or interest to reproduce the computer software. Further such reproduction is expressly interdicted and expressly stated that no vestige of copyright

is at all transferred either to the distributor or to the end user. Therefore, it does not fall in the category of Royalty or copy right.

**15.** Further we observe that in the case of EY Global Services Ltd, which is similar to the facts in the case of the Assessee, in which Hon'ble High Court has relied upon the decision of the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence (P.) Ltd., *v.* CIT [125 taxmann.com 42 (SC)]. The decision of the above is reproduced below:

> *"13. A reading of the above judgment would clearly show that for the payment received by EYGSL (UK) from EYGBS (India) to be taxed as "royalty", it is essential to show a transfer of copyright in the software to do any of the acts mentioned in section 14 of the Copyright Act, 1957. A licence conferring no proprietary interest on the licencee, does not entail parting with the copyright. Where the core of a transaction is to authorise the end-user to have access to and make use of the licenced software over which the licencee has no exclusive rights, no copyright is parted with and therefore, the payment received cannot be termed as "royalty".*
>
> *14. In the present case, the EYGBS (India), in terms of the Service Agreement and the MOU, merely receives the right to use the software procured by the EYGSL (UK) from third-party vendors. The consideration paid for the use of the same therefore, cannot be termed as royalty' as held by the Supreme Court in Engineering Analysis Centre (supra). In determining the same, the rights acquired by the EYGSL (UK) from the third-party software vendors are not relevant. What is relevant is the Agreement between the EYGSL (UK) and the EYGBS (India). As the same does not create any right to transfer the copyright in the software, the same would*

*not fall within the ambit of the term 'royalty' as held by the Supreme Court in Engineering Analysis Centre (supra).*

*…*

*16. The submission of the learned counsel for the Revenue that the judgment of the Supreme Court in Engineering Analysis Centre (supra) cannot be applied because it confines itself only to the four categories mentioned in paragraph 4, also cannot be accepted. Though the Supreme Court was on facts considering the four categories of cases that arose in the appeals before it, it has laid down the law for general application. The law, as laid down, by the Supreme Court, when applied to facts of the present case, squarely covers the same in favour of the petitioners.*

*…*

*18. In view of the above, the Impugned Rulings dated 10-8-2016 passed by the learned AAR are set aside and it is held that the payment received by EYGSL (UK) for providing access to computer software to its member firms of EY Network located in India, that is, EYGBS (India), does not amount to 'royalty' liable to be taxed in India under the provisions of the Income-tax Act, 1961 and the India-UK DTAA."*

**16.** From the above, it is clear that the assessee has acquired the global license and allowed the group entities to use the above Licenses on the basis of requirements, the assessee has billed them according to their usage by properly documenting the usage and charged to them. As held in the decision of Hon'ble Supreme Court and Hon'ble Delhi High Court, the Microsoft Licenses are not falling under the category of Royalty or Copy Rights under the definition of respective categories.

Hence the claim of the assessee is proper and we direct the Assessing Officer to delete the proposed addition in this regard.

**17.** Coming to the other issue relating to service desk provided by the assessee to the employees of Tower Watson to monitor the IT related glitch. We observe that as part of the IT services to be provided by the assessee to the Tower Watson Group, inter-alia it covers Atos India to Tower Watson India for dealing with the IT incidents faced by the employees of the Tower Watson. The above said Service Desk is maintained by the assessee in the USA for the entire Tower Watson Group and serves as a single point of Contact to deal with all the incidents, problems and service requests from various group concerns of Tower Watson relating to IT services. The details of services provided are submitted before us at Page No 347 of the paper book. It was submitted before us that the issues are addressed by the respective group concerns, in this case, Atos India and the assessee has not provided or resolved any IT related issues, which gives the impression to attract make available clause.

**18.** We observe that the assessee has given sub contract to Atos India of the services to be provided to Tower Watson India, the same is

placed in record at Page No.160 of the Paper Book. The revenue has heavily relying on this sub-contract agreement to bring to tax the payment made by Atos India to the assessee relating to the Service Desk facility provided to the Tower Watson group. According to us, this activity is completely different to the sub-contracting agreement. As per the terms of agreement, the engagement clause clearly indicate that the assessee engages the services of Atos India to perform the services in accordance with the scope, delivery schedule, services levels and other essential factors as detailed in the services schedule (schedule no 2) of the sub contract agreement. The services provided by the assessee to the group entity are separate and nothing to do with the separate sub contract awarded to the Atos India, which is independent contract. The service desk services are provided to all the group entities to enable the common services provided to the Watson Group employees and there is nothing on record to indicate any independent service provided to Atos India or IT enabled services which gives knowledge made available to Atos India. Therefore, in our considered view, the services provided by the assessee is separate and it only collected the related cost to maintain the service desk. Therefore, it is a receipt which will fall under the Article 7 of the treaty. Hence, the addition proposed and sustained

by the Ld.DRP are beyond the scope and accordingly Assessing Officer is directed to delete the same. Accordingly, the ground raised by the assessee is allowed.

**19.** In the result, appeal filed by the assessee is allowed.

Order pronounced in the open court on 01st March, 2023.

| | |
|---|---|
| **Sd/-** | **Sd/-** |
| **(AMIT SHUKLA)** | **(S. RIFAUR RAHMAN)** |
| **JUDICIAL MEMBER** | **ACCOUNTANT MEMBER** |

Mumbai / Dated 01.03.2023
Giridhar, 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

(Asstt. Registrar)
**ITAT, Mum**