IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D" NEW DELHI

BEFORE SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER
AND
SHRI M BALAGANESH, ACCOUNTANT MEMBER

आ.अ.सं/.I.T.A Nos.1383 to 1392/Del/2023
निर्धारणवर्ष/Assessment Yeasrs:2004-05 to 2006-07, 2008-09 to 2011-12 & 2014-15 to 2016-17

DCIT, Circle 3(1)(1), Int. Taxation, Room No. 416, 4th Floor, E-2 Block, Dr. S.P. Mukherjee Civic Centre, J.L. Nehru Marg, New Delhi.	बनाम **Vs.**	Raytheon Company 870, Winter Steet, Waltham-MA 02451, Foreign USA, USA.
		PAN No. AADCR3511P
अपीलार्थी **Appellant**		प्रत्यर्थी/**Respondent**

&

आ.अ.सं/.I.T.A No.441/Del/2023
निर्धारणवर्ष/Assessment Year:2007-08

ACIT, Circle 3(1)(1), Int. Taxation, Room No. 416, 4th Floor, E-2 Block, Dr. S.P. Mukherjee Civic Centre, J.L. Nehru Marg, New Delhi.	बनाम **Vs.**	Raytheon Company C/o SRBC & Associates LLP, Golf View Corporate Tower-B, Sector-42, Sector Road, Gurgaon, Haryana.
		PAN No. AADCR3511P
अपीलार्थी **Appellant**		प्रत्यर्थी/**Respondent**

Revenue by	**Shri Vizay B. Vasanta, CIT –DR**
Assessee by	**Shri Nageshwar Rao & Akshay Uppal, Advs.**

सुनवाईकीतारीख/ Date of hearing:	30.08.2023
उद्घोषणाकीतारीख/Pronouncement on	31.08.2023

आदेश /O R D E R

PER C.N. PRASAD, J.M.

All these appeals are filed by the Revenue against different orders of the Ld. Commissioner of Income Tax (Appeals) for the assessment years 2004-05 to 2011-12 and 2014-15 to 2016-17 in deleting the penalty levied u/s 271(1)(c) of the Act. The Revenue has raised the following common grounds in all these appeals: -

(i) Whether on the facts and circumstances of the case the Ld.CIT(A) has erred in holding that the assessee has not concealed any particulars of income and quashing the impugned penalty order u/s 271(1)(c) of the Act when there has been a difference in returned income and assessed income and apparently, the difference is in view of royalty income not offered to tax in Return of Income which was accepted later in MAP resolution.

(ii) Whether on the facts and circumstances of the case the Ld.CIT(A) has erred by relying on the decision of the Hon'ble Supreme Court of India in case of Engineering Analysis whereas in the instant case there is no dispute by the assessee that the Royalty income is taxable in India and keeping in view that the said decision of the Apex Court was not available to it while filing its Return of Income for the concerned year.

(iii) Whether on the facts and circumstances of the case the Ld.CIT(A) has erred by relying on settled principle of law that where two views are possible, taking of one of the plausible views does not amount to concealment of particulars of income whereas in this case both assessee and the Department are having the

same view that the assessee had taxable presence in India.

(iv) Whether on the facts and circumstances of the case the Ld.CIT(A) has erred in holding that the assessee has not concealed any particulars of income and quashed the impugned penalty order u/s 271(1)(c) by ignoring the fact that in the case of non-resident the primary onus of ascertaining the income tax liability is with the non-resident payee as is evident in the instant case wherein the assessee filed nil Return of Income considering that it had no PE which was subsequently negated by the department during the assessment proceedings and also admitted by the assessee in MAP proceedings that it was having a taxable presence in India, therefore, penalty provisions u/s 271(1)(c) would be applicable in its case for concealment of particulars of income.

(v) Whether on the facts and circumstances of the case the Ld.CIT(A) has erred in holding that the assessee ahs not concealed any particulars of income and quashing the impugned penalty order u/s 271(1)(c) without appreciating the fact that the Hon'ble High Court of Karnataka in the case of M/s Toyota Kirloskar Motor (P) Ltd. Vs. UOI [2019] 109 taxmann.com 137 (Karnataka HC) has also that the MAP order is an adjustment to assessment order and is not annulment of assessment order."

2. The Ld. DR submits that in all these assessment years the assessee filed returns of income declaring Nil income and the assessments were completed u/s 143(3) r.w.s. 144C of the Act bringing to tax the amounts received by the assessee towards supply of spares contract and rotary joints on the contracts entered into with Airports Authority of India, contract for hardware repair

support, contract for software maintenance support, supply of spares etc. Ld. DR submits that the Assessing Officer held that the assessee had executed these contracts through PE in India, therefore, the amounts received by the assessee from the contracts entered into with Airports Authority of India was treated as royalty and the same were brought to tax at 20% rate as applicable to royalty income. Ld. DR submits that assessee filed appeals against the assessment orders passed u/s 143(3) r.w.s. 144C of the Act and the Ld.CIT(A) deleted the additions holding that the assessee does not have a PE in India. Ld. DR submits that meanwhile the assessee approached the authorities for settling the issue under Mutual Agreement Procedures (MAP) before the competent authority as per the provisions of Article 27 of India USA DTAA. Ld. DR submits that the appeals were settled under the MAP proceedings, wherein the additions were reduced and pending appeals before ITAT were dismissed. Consequent to MAP proceedings final orders were passed and the penalties were levied u/s 271(1)(c) of the Act for concealment of income against which the assessee preferred appeals before the Ld.CIT(A) and the Ld.CIT(A) deleted the penalty on the ground that the quantum additions made in the assessment orders passed u/s 143(3) r.w.s. 144C have been deleted by the

Ld.CIT(A) on the ground that there is no PE existence for assessee in India. Ld. DR strongly placing reliance on the decision of the Karnataka High Court in the case of Toyota Kirloskar Motor Private Limited Vs. Union of India in WP No. 57865/2015 dated 11.06.2019 submits that even after MAP proceedings there is no bar in levying penalty u/s 271(1)(c) of the Act. The Ld. DR strongly supported the orders of the Assessing Officer in levying penalty u/s 271(1)(c) of the Act.

3. On the other hand, the Ld. Counsel for the assessee inviting our attention to the Ld.CIT(Appeals) order submits that in all these assessment years the quantum additions made while passing the assessment order u/s 143(3) r.w.s. 144C have been deleted by the Ld.CIT(Appeals). However, the assessee to by peace approached the authorities for settling the issues under MAP and also subsequently the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Private Limited Vs. CIT 432 ITR 471 held that supply of software and document is not royalty. The Ld. Counsel further referring to MAP proceedings submits that it is only on assumption and by deeming fiction it was held that the assessee has a PE in India and the Assessing Officer has not established that there exists PE in India for assessee. Therefore, the Ld. Counsel for

the assessee submits that there is no concealment of income or furnishing all inaccurate particulars by the assessee which warrant any penalty u/s 271(1)(c) of the Act.

4. Heard rival submissions, perused the orders of the authorities below.

5. We observe that the assessee in all these assessment years filed returns declaring NIL income. The assessments were completed by the AO treating the amounts received by the assessee for report maintenance support services, supply of spares, supply of hardware software and installation and training services, repair support, software maintenance support, etc. as royalty on the ground that the assessee has existence of PE in India. However, the Ld.CIT(A) deleted the additions made in all these assessment years holding that there is no existence of PE in India for the assessee. Assessee under MAP approached the authorities to settle the issues. Meanwhile the Hon'ble Supreme Court in the case of Engineering Analysis Center of Excellence (P) Ltd. Vs. CIT (supra) held that supply of software and documentation did not constitute.

6. We find that the authorities for the purpose of settling the cases under MAP proceeded on assumption that the assessee has PE

in India and the business profits earned from those contracts are deemed to be attributed to the assumed PE and taxed in India at 30% of the profits arrived. We observe that even in the MAP proceedings it is only by way of an assumption that the authorities have concluded that the assessee has PE and on such assumption of PE the business profits were attributed to the PE for the purpose of settling the issues. No corroborative evidence is brought on record by the Revenue Authorities to suggest that the assessee has PE in India. Further the Ld.CIT(A) in all these assessment years in fact deleted the additions holding that Assessee does not have a PE in India.

7. We also find that the Ld.CIT(A) while deleting the penalty levied u/s 271(1)(c) of the Act held that the assessee has not concealed any particulars of income and has disclosed all material facts during the assessment as well as MAP proceedings observing as under: -

> *"5.1.1 I have perused the Penalty Order, Grounds of Appeal, and considered the submission of the Appellant. The AO levied Penalty under section 271(1) (c) of the Income Tax Act, 1961. The said Penalty under section 271(1) (c) of the Act is leviable upon satisfaction of either of the following two primary conditions:*
>
> - *If the Appellant has furnished Inaccurate Particulars of such income, or*

- *If the Appellant has concealed particulars of his income.*

5.1.2 Further, as per the explanation contained in the Section 271(1)(c) of the Act, it can be noted that, the penalty is leviable only when:

i) A person fails to offer an explanation or offers an explanation which is found by the AO or the Commissioner (Appeals) or the Principal Commissioner or Commissioner to be false, or

ii) Such person offers an explanation which he is not able to substantiate and fails to prove that such explanation is bonafide and that all the facts relating to the same and material to the computation of his total income have been disclosed by him.

5.1.3 In the present case, the AO has levied penalty u/s 271(1) (c) of the Act on account of 'Concealment of Particulars of Income' which is being contested by the Appellant in this appeal. Accordingly, my findings with reference to the above has been laid down in the subsequent paragraphs.

5.2 The Appellant's case consists of the following issues on merits:

1. *Existence of PE in India and consequent taxability of the Offshore Supply of Hardware / Equipments,*
2. *Taxability of Hardware Maintenance Services,*
3. *Taxability of the Supply of Software and Documentation,*
4. *Taxability of Software Maintenance Services.*

5.2.1 With regard to the point 1 and 2 above, the Appellant has submitted that it does not constitutes a PE in India and accordingly, the Appellant has not offered its receipts on account of Offshore

Supply of Hardware and Equipments. The said fact was also supported by the Advance ruling obtained by the Appellant's client Airport Authority of India in 292 ITR 102 by the Hon'ble Authority of Advance Ruling wherein it was held as under:

> *"there is nothing in assessment orders relating to 'R' which substantiates the revenue's version that there was a permanent establishment of 'R' in India in connection with the hardware repairs support contract or for that matter the software maintenance contract both of which originated in 2003 and were renewed in 2006. In fact there is no definite finding supported by reasons which throws light on the existence of P.E. in connection with the execution of these contracts. [Para 9.1]*
>
> *On the other hand, the probability is that as the entire activity of repair of equipment and rectification of anomalies took place outside India and the applicant or its agent took delivery of the repaired equipments, there was very little part which the liaison office could have played in the implementation of contracts in question. [Para 9.2]*
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> *The learned counsel for the Revenue has also drawn our attention to the fact that Raytheon had entered into an agreement described as "international representative agreement" on 28-1-2002 with Grintex [India] Ltd. (for short"Grintex"). As per the said agreement, which was extended/modified from time to time, the representative, namely, Grintex will promote and market the products and services and solicit orders from the customers and use its best efforts to secure sales contracts and to render other marketing assistance to Raytheon Company. We find no relevance of this contract in considering the question whether in relation to the contracts with which we are concerned, Raytheon has a PE through a dependent agent. Apart from the fact that the modified agreement describes the*

representative (Grintex) as an independent contractor having no authority to enter into contracts, there is nothing in the agreement which indicates that Grintex has been assigned any role or responsibility in the matter of implementation of hardware repair contract. True, there is a separate agreement between AAI (applicant) and Grintex India Ltd. for "in-country maintenance supports services for MATS - BD related hardware and software" - where under Grintex is required to provide support services in India in respect of the contracts with Raytheon. For instance, Grintex may have to provide services such as identifying and dismantling the defective part, arranging for packing and shipping the item for repairs outside India at Raytheon's workshop, getting necessary clearances for export and import, etc. It is made clear in that Agreement that Raytheon's activities under the contracts (for hardware & software repairs) shall remain confined to their work outside India. The agreement between the applicant and Grintex negates the inference that Grintex discharges any responsibility in connection with hardware repair support contract or the software maintenance contract as an agent of Raytheon. [Para 9.4]"

5.2.2 Accordingly, the Appellant had submitted that the Offshore Sale of Hardware / Equipments is not taxable in India. The AO, however, held that these exist a PE in India and hence, attributed the Receipts from Offshore Supply as Business Receipts taxable in India and also taxed the revenues received under the Hardware Maintenance Services.

5.2.3 It is pertinent to note that against the Assessment Orders passed by the AO, the Appellant was provided relief from this office for years AY 2000-01 to AY 2017- 18 and it has been consistently held by this office and my predecessor(s) that the Appellant does not constitute a PE in India accordingly, the Offshore Supply of Hardware/ Equipment was held as not taxable in

India. In addition, the Hon'ble AAR in its order also held as under:

> *"15. The above discussion leads us to the conclusion that insofar as software and documentation are concerned, the applicant acquired a right to use the same subject to certain conditions but the subject matter of outright sale in favour of the applicant. It follows that in regard to repair of hardware the payment received by RC does not fall within the meaning of income from the furnishing of services as defined in article 12. The payment, would, therefore, be business profits within the meaning of para 7 of article 7. In as much as admittedly RC has no permanent establishment in India the payment will not be taxable in India in view of the provisions of article 7 of the Treaty."*
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> *Both the Hardware maintenance and Software maintenance contracts were again renewed in 2006 on the same terms and conditions. The AAI again approached the AAR for the determination of the same question in response to which the AAR held as under-*
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> > *"7.3 This Authority referred to the provisions of the said Convention in extensor and accepted the contention of the applicant that the payments received by Raytheon from the applicant in connection with hardware repair contract were not liable to be taxed in India under the Income tax Act, 1961. This Authority held that the hardware and other equipment were the subject matter of outright sale in favour of the applicant and that the repair of hardware undertaken by Raytheon outside India did not amount to furnishing services as defined in Article 12 of the Convention. The payment was held to be in the nature of business profits when the meaning of Article 7 and in view of the admitted case that Raytheon had no PE in India, it was ruled that*

the payments under the hardware repair contract were not taxable in India by virtue of Article 7 of the Treaty".”

5.2.4 This office has provided a relief to the Appellant and has consistently concluded in multiple years from AY 2000-01 to AY 2017-18 that the Appellant does not constitute PE in India. The Hon'ble AAR in its rulings has also held that Appellant does not constitute a PE in India, accordingly payments under the hardware maintenance services contracts were not subject to tax in India in absence of PE of India. Accordingly, the Appellant was provided relief on the merits of Taxability of the Hardware Maintenance Services from this office for various years.

5.2.5 With regard to the Taxability of the Supply of Software, the Appellant also placed on record the explanation that it followed a view that the said supply do not amount to the sale of copyright and accordingly, the receipts on account of the said supply cannot be regarded as Royalty. The said view was based on the various judicial pronouncements which included the judgments of Jurisdiction High Courts which is now supported by the recent judgment of Hon'ble Supreme Court of India in the case of Engineering Analysis Centre of Excellence Private Limited vs. CIT [2021] 432 ITR 471 wherein it was held that since, the income earned by the Appellant from transfer of licensed product, being in the nature of transfer of copyrighted article would not constitute Royalty under the India-US DTAA, the same would fall under Article 7 (Business Profits) of India-US DTAA, and in the absence of a PE of the Appellant in India, the same shall not be taxed in India.

5.2.6 The Appellant further submitted that it had filed an application under Mutual Agreement Procedure (‘MAP’) with the Competent Authorities and the issue of taxability of supply of software was settled in order to buy peace of mind and avoid prolonged litigation despite the Appellant’s position. Further, Appellant’s position on taxability of Supply of Software was subsequently

upheld by the Hon'ble Supreme Court in the case of Engineering Analysis (supra).

5.2.7 Pursuant to the said Effect Order to the MAP Resolution reached, the AO levied Penalty under section 271(1)(c) of the Act contending that the Appellant has Concealed the Particular of the Income.

Further, the Appellant also submitted that the above issue on merits has been decided in Appellant's favour by the office in the AY 2017-18 following the reliance of the Hon'ble Supreme Court in the case of Engineering Analysis (supra), accordingly, the said issue lies in Appellant's favour on merits. Relevant extracts of the order passed by this office has been provided as under:

> *"5.3.4 Further, following the Hon'ble Supreme Court ruling in the case of Engineering Analysis Centre of Excellence Private Limited vs. CIT [202 J] 432 ITR 471, it can be rightly said that the Appellant's supply of Software and document is not Royalty. The relevant extracts of the said ruling reported in 432 ITR 471 has been reproduced as under:*
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> > *"117. The conclusions that can be derived on a reading of the aforesaid judgments are as follows:*
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> > *(i) Copyright is an exclusive right, which is negative in nature, being a right to restrict others from doing certain acts.*
> >
> > *(ii) Copyright is an intangible, incorporeal right, in the nature of a privilege, which is quite independent of any material substance. Ownership of copyright in a work is different from the ownership of the physical material in which the copyrighted work may happen to be embodied. An obvious example is the purchaser of a book or a CD/DVD, who becomes the owner of the physical article, but does not become the owner of the copyright inherent in the*

work, such copyright remaining exclusively with the owner.

(iii) Parting with copyright entails parting with the right to do any of the acts mentioned in section 14 of the Copyright Act. The transfer of the material substance does not, of itself, serve to transfer the copyright therein. The transfer of the ownership of the physical substance, in which copyright subsists, gives the purchaser the right to do with it whatever he places, except the right to reproduce the same and issue it to the public, unless such copies are already in circulation, and the other acts mentioned in section 14 of the Copyright Act.

(iv) A licence from a copyright owner, conferring no proprietary interest on the licensee, does not entail parting with any copyright and is different from a licence issued under section 30 of the Copyright Act, which is a licence which grants the licensee an interest in the rights mentioned in section 14(a) and 14(b) of the Copyright Act. Where the core of a transaction is to authorize the end-user to have access to and make use of the "licensed" computer software product over which the licensee has no exclusive rights, no copyright is parted with and consequently, no infringement takes place, as is recognized by section 52(1)(aa) of the Copyright Act. It makes no difference whether the end-user is enabled to use computer software that is customized to its specifications or otherwise.

(v) A non-exclusive, non-transferable licence, merely enabling the use of a copyrighted product, is in the nature of restrictive conditions which are ancillary to

such use, and cannot be construed as a licence to enjoy all or any of the enumerated rights mentioned in section 14 of the Copyright Act, or create any interest in any such rights so as to attract section 30 of the Copyright Act.

(vi) The right to reproduce and the right to use computer software are distinct and separate rights, as has been recognized in SBI v. Collector of Customs, 2000 (1) SCC 727 (see paragraph 21), the former amounting to parting with copyright and the latter, in the context of non-exclusive EULAs, not being so.

118. Consequently, the view contained in the determinations of the AAR in:

Dassault (AAR) (supra) and Geoquest (AAR) (supra) and the judgments of the High Court of Delhi in Ericsson A.B. (supra), Nokia Networks OY (supra), Infrasoft (supra), ZTE (supra), state the law correctly and have our express approval. We may add that the view expressed in the aforesaid judgments and determinations also accords with the OECD Commentary on which most of India's DTAAs are based.

……..

Conclusion of the SC:

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 fax 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(l)(vi), along with explanations 2 and 4 thereofj, which deal with royalty, not being more beneficial to the Appellants, 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."

Thus, based the above, the income earned by the Appellant from transfer of licensed product, being in the nature of transfer of copyrighted article would not constitute Royalty under the India-US DTAA. The same would fall under Article 7 (Business ProfitsI of India-US DTAA, and in the absence of a PE of the Appellant in India (as discussed abovel, the same shall not be taxed in India. Thus, the around is answered in favour of the Appellant."

Considering the above facts that the issue on merits have already been decided in favour of Appellantin its own case and is squarely covered by the decision of Hon'ble Supreme Court, the penalty levied by AO cannot sustain."

5.2.8 Further, with regard to the taxability of the Software Maintenance Services, the AO has held that the services are in the nature of Fees for Included Services and accordingly, made an addition to the total income and consequently levied Penalty under section 271(1)(c) of the Act upon settlement under MAP.

However, the AO's view was rebutted by the Appellant by contending that the said services are ancillary and subsidiary to the supply of software embedded in the hardware (as also decided by AAR in its ruling) and since supply of software is no longer considered as Royalty following the Hon'ble SC ruling in the case of Engineering Analysis (supra), the said ancillary services cannot be held as Fees for Included Services.

5.2.9 The said view of the Appellant was then upheld in the Appellant's own case for the AY 2017-18 on merits through this office and if was held as under:

> *"5.4.1. The issue of taxability of revenues under the maintenance support contract has already been considered by AAR in its ruling i.e. (299 ITR 102). The receipts against repair of software have been held to be in the nature of Fee for included services ('FIS') under Article 12(4)(a) of the India-US DTAA as well the provisions of the Act. However, from the facts of the case and the written submission of the Appellant, it is clear that the Appellant has provided software maintenance services to remove the anomalies in the software embedded in the Hardware earlier supplied. Accordingly, the same would amount to ancillary and subsidiary to the Software supplied.*
>
> *……..*
>
> *5.4.3 Further, it can be rightly said that the Software Maintenance services being ancillary to the Software supplied earlier cannot be regarded as FIS as the software against which the services were provided is itself not taxable as Royalty in purview of the Hon'ble Supreme Court judgment in the case Engineering Analysis Centre (Supra).*

5.4.4 Further, the consideration received by Appellant under the subject contracts cannot be classified as 'FIS' under lndia~US DTAA and thus, not taxable in India. Also, the revenues under subject contracts would fall under Article 7 (Business Profits) of India-US DTAA, and in the absence of a PE of the Appellant in India (as discussed above}, the same shall not be taxed in India.''

5.2.10 Thus, based the above, it can be said that there is force in Appellant's contentions as the Appellant's view regarding non-existence of PE in India and Taxability of Offshore Supply of Hardware/Equipment, Hardware Maintenance Services, Sale of Software and the Software Maintenance Services was supported favorable orders in preceding years from this office in Appellant's case and the Supreme Court ruling passed in this regard (discussed supra). Also, the AO has nowhere mentioned in the Effect Order under section 90/143(3) of the Act read with rule 44G of the Income Tax Rules, 1962 and the Penalty Order under section 271 (1)(c) of the Act that which information / fact was concealed. Therefore, it can be said that at the most there exists a difference of view between the AO and the Appellant.

5.2.11 The Appellant also submitted that it had not concealed the particulars of its income as all the relevant facts and information were submitted during the course of the assessment proceedings as and when called for and the positions taken by it was basis the various judicial pronouncements available. Thus, it can be said that the above issues of existence of PE in India, Royalty, Fees for Included Services, and the related Treaty issues are interpretation issues wherein the Appellant has taken a view and the AO has taken another view thus, it cannot be regarded as Concealment of Income.

5.2.12 Further, this office has also passed an Order dated 13 December 2022 disposing the Penalty levied by the AO for the AY 2007-08 i.e., MAP year bearing similar

facts to the subject year wherein the penalty was deleted holding as under:

"5.1.15. Further, I find merits in the Appellants submission placed on record and it is also pertinent to note that the addition in the total income of the Appellant in the MAP Effect order passed by the AO under section 90/143(3) of the Act read with rule 44G of the Rules was merely, an adjustment on account of settlement resolution reached between the Competent Authorities of the two nations. It is also to be noted that a resolution under MAP is an outcome of a negotiated process based on the detailed understanding of the facts of the case and is based on mutual discussions between the competent authorities. It also involves submission of information and relevant facts/information basis which the competent authorities arrives to a settlement. Accordingly, it can be said that the Appellant has disclosed all material facts during the assessment as well as MAP proceedings and has not concealed any particulars of income.

5.1.18. Thus, in view of discussion above, I hold that none of the pre-conditions for levying penalty as mentioned in section 271(l)(c) and explanation 1 to section 271 (l)(c) are satisfied in the present case. Accordingly, the impugned penalty order u/s 271(l)(c) is quashed. The AO is directed to grant relief accordingly."

5.2.13 Thus, as also held by this office in AY 2007-08, the Appellant has duly disclosed all material facts and information during the assessment proceedings as well as MAP proceedings basis which the MAP settlement has been arrived with. The Appellant submitted that if it would not have submitted all relevant information and facts, the MAP settlement would not have been arrived as by the two Competent Authorities of India and USA. Thus, not by any stretch of imagination it can be said that the Appellant has concealed any particulars of income.

5.2.14 Further, as rightly said by the judgement passed by the Hon'ble Delhi High Court in the case of Bacardi Martini India Limited [2007] (288 ITR 585) relied by the Appellant in its submission, concealment must be accompanied with the intention of the Taxpayer to evade his tax liability. Merely because there was difference of opinion between the Taxpayer and the Assessing Officer, it cannot be said that the Taxpayer had the intention to conceal his income. Also, the judgement passed by the Delhi bench of the Hon'ble Tribunal in the case of Nuchem Ltd vs DCIT [1993] (47 ITD 487) followed the same principal that it is not proper and fair to hold that the Taxpayer was guilty of Concealment of Income all because the explanation offered by the Taxpayer was not found to be acceptable. Thus, the issued discussed above are merely interpretational issues between the Assessing Officer and the Appellant and cannot be held as Concealment or Furnishing of Inaccurate particulars of Income upon which Penalty u/s 271(1)(c) of the Act can be levied.

5.2.15 Similar to AY 2007-08, I find merits in the Appellants submission placed on record and it is also pertinent to note that the addition in the total income of the Appellant in the MAP Effect order passed by the AO under section 90/143(3) of theAct read with rule 44G of the Rules was merely an adjustment on account of settlement resolution reached between the Competent Authorities of the two nations. It is also to be noted that a resolution under MAP is an outcome of a negotiated process based on the detailed understanding of the facts of the case and is based on mutual discussions between the competent authorities.lt also involves submission of information and relevant facts/information basis which the competent authorities arrives to a settlement. Accordingly, it can be said that the Appellant has disclosed all material facts during the assessment as well as MAP proceedings and has not concealed any particulars of income.

5.2.16 Further, as discussed in above paras the issues on which penalty has been levied by the AO has already been decided by this office on merits in various

years and also the issue of supply of Software and software maintenance is covered by the decision of Hon'ble Supreme Court of India in the case of Engineering Analysis (supra). Thus, levy of any penalty on the same is bad in law and ought to be deleted.

5.3 It is established principle of law that assessment and penalty proceedings are entirely different & independent and standard of evidence which may be good for assessment purpose may not be good for levying penalty u/s 271(1)(c). It is also settled principle of law that where two views are possible, taking of one of the plausible views does not amount to concealment of particulars of income.

5.4 Thus, in view of discussion above, I hold that none of the pre-conditions for levying penalty as mentioned in section 271(1)(c) and explanation 1 to section 271(1) (c) are satisfied in the present case. Accordingly the impugned penalty order u/s 271(1)(c) is quashed. The AO is directed to grant relief accordingly."

8. The Ld.CIT(A) has considered all the aspects of the material and concluded that the assessee has disclosed all material facts during the assessment as well as MAP proceedings and has not concealed any particulars of income. We see no infirmity in the order passed. We further observe that at best it is only a difference of opinion as to whether there exists PE in India for Assessee or not. There is no conclusive proof that the assessee has PE in India. In the penalty proceedings the AO simply relied on the MAP proceedings in holding that the assessee has PE in India which in fact is not correct. As we said earlier it is only on assumption that the assessee has PE in India and by way of deeming fiction the

profits were attributed for such assumed PE by the authorities in the MAP proceedings.

9. The case law relied on by the Ld. DR in the case of Toyota Kirloskar Motor Private Limited Vs. Union of India (supra), we observe that in that case the assessee has challenged the constitution validity of section 271(1)(c) in so far as it relates to imposition of penalty on amounts determined pursuant to convention for Avoidance of Double Taxation between India and Japan. The Hon'ble High Court held that section 271(1)(c) of the I.T. Act is intra vires the constitution in so far as the imposition of penalty on amounts determined pursuant to convention for Avoidance of Double Taxation between Union of India and other sovereign countries. We further observe that the Hon'ble High Court held that the Explanation 7 would not empower the authorities to levy penalty automatically for the transactions where MAP proceedings are applied. It was also held that the onus lies on the assessee to establish that the addition finally decide by the MAP is not due to concealment of income or furnishing all inaccurate particulars. Therefore, this decision of the Hon'ble Karnataka High Court will not come to the rescue of the Revenue as canvassed by the Ld. DR.

10. In the circumstances, we hold that there is no concealment of income or furnishing inaccurate particulars of such income by the assessee in any of these assessment years and thus, we sustain the order of the Ld.CIT(A) for the assessment years 2004-05 to 2011-12 and 2014-15 to 2016-17.

11. In the result, all the appeals of the Revenue for the assessment years 2004-05 to 2011-12 and 2014-15 to 2016-17 are dismissed.

Order pronounced in the open court on 31.08.2023

Sd/-	**Sd/-**
(M BALAGANESH)	**(C.N. PRASAD)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 31.08.2023

**Kavita Arora, Sr. P.S.*

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By order

Assistant Registrar, ITAT: Delhi Benches-Delhi