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

BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER
AND
DR. B.R.R. KUMAR, ACCOUNTANT MEMBER

ITA No. 393/DEL/2018 : (A.Y. 2014-15)
&
ITA No. 2780/DEL/2022; (A.Y. 2015-16)

Volvo Information Technology AB, Sweden 65/2, 6th Floor, Bagmane Parin, Bagmane Tech Park, CV Raman Nagar, Bengaluru-560093. PAN- AADCV2382G	Vs	DCIT, International Taxation, Circle-3(1)(1), New Delhi.
APPELLANT		**RESPONDENT**
Assessee represented by	Sh. Ajay Vohra, Sr. Adv.; Ms. Somya Jain, Ms. Shaily Gupta; & Sh. Archit Kabra.	
Department represented by	Sh. Vizay B. Vasanta, CIT(DR)	
Date of hearing	06.12.2023	
Date of pronouncement	20.12.2023	

O R D E R

PER KUL BHARAT, JM:

These two appeals preferred by the assessee pertain to A.Y. 2014-15 and 2015-16. Since facts and grounds for adjudication are similar, both the appeals

were taken up for hearing together and are being disposed of by a consolidated order for the sake of brevity.

2. First we take up ITA no. 393/Del/2018 pertaining to the A.Y. 2014-15. The assessee has raised following grounds of appeal:

> "*1. That the assessing officer erred on facts and in law in completing the assessment at an income of Rs.77,72,01,480 as against NIL income, returned by the appellant.*
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> *2. That the assessing officer/ DRP erred on facts and in law in characterizing the total income of Rs.77.72,01,480 received during the relevant previous year from Volvo Group entities in India towards providing standard facilities or services, access to business application software, e.g. SAP, ERP and other ERP solutions, Probuilder, CATIA V5 (VCE), RF-SMART, KABA for SAP HR, etc., (ii) Volvo Corporate Network and (iii) facility for end user services, such as, emails, personal computer environment, etc. holding the same as royalty and therefore, liable to tax @ 10% in India in terms of section 9(1)(vi) of the Income-tax Act. 1961 as well as under the Double Taxation Avoidance Agreement (DTAA).*
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> *3. That the assessing officer / DRP erred on facts and in law in holding that consideration received from the Volvo Group entity was (i) towards right to use of the copyright and (ii) for use of processes and therefore, the same is to be characterized as a royalty.*
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> *4. That DRP erred on facts and in law in arbitrarily proceeding on the basis as if the aforesaid amount was a payment of royalty and the appellant failed to establish / justify the ALP of the same.*"

3. Facts, in brief, are that the assessee company filed its return of income on 29.11.2014 declaring total income of Rs. 77,72,01,480/- under the head "income

from other sources". The tax @ 10% was offered as per the provisions of DTAA. Thereafter, the return was revised on 30.03.2016 declaring income at Nil. The case was selected for limited scrutiny to examine the issue relating to receipts u/s 194C and 194J (as per 26AS), were found to be more than the receipts disclosed in ITR-4/5/6. In response to the statutory notices, Shri Nirmal Malpani, the learned Authorized Representative, attended the proceedings before the AO. After considering the submissions of the assessee, the AO passed draft assessment order. Thereby he proposed to assess the total income at Rs. 77,72,01,480/- treating the same royalty in terms of section 9(1)(vi) of the Act as well as DTAA taxable @ 10% on gross basis. Against this the assessee filed its objections before the learned DRP. The learned DRP vide order dated 01.09.2017 did not interfere in the finding of the AO and sustained the proposed additions. Thereafter, the AO passed the impugned order. Thereby he assessed income at INR 77,72,01,480/-, treating the amount received from Indian entity as royalty as per the provisions of Section 9(1)(vi) of the Act as well as DTAA. Aggrieved against this, the assessee is in appeal before this Tribunal.

4. The only effective ground in this appeal is regarding characterizing payment of INR 77,72,01,480/- received by the assessee during the relevant previous year as royalty and taxing at 10% of gross receipts.

5. Learned Sr. Counsel Shri Ajay Vohra vehemently argued that the authorities below grossly erred in characterizing and taxing the payment received by the assessee as royalty. He contended that the issue is otherwise squarely covered in favour of the assessee by the judgment of the Hon'ble Supreme Court rendered in the case of Engineering Analysis Centre for Excellence (P) Ltd. Vs. CIT 432 ITR 471 (SC) as well as the judgment of the Hon'ble Delhi High Court in the case of DIT Vs. Infrasoft Ltd. [ITA 1034/2009] 39 taxmann.com 88. Learned Sr. Counsel submitted that the authorities below failed to appreciate the facts in right perspective and did not consider the submissions made on behalf of the assessee during the proceedings before the lower authorities. He reiterated the submissions as made by the assessee before learned DRP. He submitted that the short issue involved in this appeal is whether the payment received by the assessee can be characterized as royalty. He took us through the Master Service Agreement executed by the assessee and the relevant provisions of India-Sweden DTAA to buttress the contention that the authorities below have erred in characterizing the payment as royalty.

6. On the other hand, learned CIT(DR) opposed the submissions of the learned counsel for the assessee and supported the orders of lower authorities. He submitted that the learned DRP has elaborately examined the findings of the

assessing authority and under the facts of the present case the learned DRP was justified in upholding the finding of the AO.

7.We have heard rival submissions and perused the material available on record. We find that the learned DRP upheld the finding of the AO by observing as under:

> "2.*1.6 Having considered the above arguments, the Pane is of the view that some of the general aspects, which are indicative and by no means exhaustive, for determining the arm's length nature of royalty payment needs to be considered to establish the benefit fest, a key test for royalty payment, such as,*
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> > *i. the nature and complete description of the techrology/intangible transferred or licensed to the taxpayer in respect of which royalty is paid;*
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> > *ii. as per the Act, each class of transactions has to be examined having regard to the arm's length principle. As payment made in the form of royalty is a class of its own, it requires separate analysis and must not be clubbed with any other segment;*
> >
> > *iii. the application of the arm's length principle would be to see whether the royalty paid by the taxpayer for the intangible is in accordance with charges for the intangible that would have been, or would have been, or would reasonably be expected to be. levied between independent parties dealing at arm's length for comparable intangible under comparable circumstances. Further, it needs to be seen how much a comparable independent technology recipient, under comparable circumstances, would be willing to pay for that intangible;*
> >
> > *iv. Royalty payments are to be treated at arm's length only when it is proved substantially by the taxpayer that such intangibles were actually received and further proving that such received intangibles have benefited it (the value addition would need quantification);*
> >
> > *v. the margin earned by the taxpayer when compared to the arithmetical mean margin of the comparable companies (who are not paying similar payments and also not owning significant intangibles)*

considered by the TPO, whether the margin of the taxpayer is lower after paying royalty amounts for the technology transferred by the AE:

vi. copies of agreements based on which the taxpayer paid the royalty and their scope and validity,

vii. the development or usage of the intangible property and the factors affecting the royalty rate. The rate at which the company has paid royalty to the AE vis-a-vis independent parties and the method of computation of such royalty that are paid/ payable by the taxpayer to the AE(s);

viii. whether any cost benefit analysis has been undertaken by assessee

2.1.6.1 The assessee has claimed in its submissions before us that the amount received by the assessee is towards certain standard facilities required for the running of operations of the Volvo Indian entities and that by providing such facilities to the Volvo Indian entities they do not use or obtain a right to use the copyright in any of the software/business application as it merely has access to the information/data processed by the software/application owned and executed by the assessee in its server in Sweden, and the Volvo Indian entities do not have the right of commercial exploitation of the intellectual property contained as well, and therefore there is no relevance of the 'right to use copyright' and such provision of standard facilities cannot be classified as royalty. However, it can be seen that the assessee is receiving separate payments as under:

Payment by Volvo India Pvt. Ltd:	*Rs. 6648,83 563/-*
Payment by Volvo Buses India Pvt. Ltd:	*Rs. 2,66,74. 70/-*
Payment by Volvo Eicher Commercial Vehicles Ltd:	*Rs. 8.41.67,458/-*

It is unlikely that any independent enterprise would have agreed to make such a payment of royalty. During the TP audit, the assessee has failed to furnish information as to how the rate of royalty was determined along with the basis thereof and what was the prevailing rate in the market. The assessee has failed to clarify whether the assessee has carried out any cost benefit analysis in respect to the payment of royalty. The assessee did not clarify regarding the cost that has been incurred by the AE on the development of these softwares. A perusal of the TPO's order shows that he has examined the issue of royalty from all angles and arrived at the

conclusion that the assessee has not been able to provide sufficient justification for payment of royalty. Even before the DRP it has not been established as to why royalty should be paid, especially in an industry where technology changes are very rapid.

2.1.6.2 The payment of royalty has to be tested on principles that govern the determination of arm's length price for international transactions. Based on the detailed analysis done by the TPO and the perusal of the record this panel is of the opinion that the assessee has not been able to give details of the cost that the AE has incurred in the development of this technology. Any independent enterprise would seek this detail as it would expect to share only a portion, of the cost relating to it especially in an industrial sector where technology is changing rapidly. In the circumstances linking the remuneration to AE to the sales of the assessee would pass an undue benefit to the AE. In the case of Gemplus India Pvt. Ltd. ACIT, Bangalore in ITA No. 352/ Bang/2009 (2010-TII-55ITAT-BANG-TP) it has been held as follows:

> *"Therefore it is very imperative on the part of the assessee to establish before the TPO that the payments were made commensurate to the volume and quality of services and such costs are comparable. The payment terms as pointed out by the TPO are independent of the nature or volume of services. The assessee has defeated in this primary examination itself The TPO is also justified in making a pertinent observation the expenses are apportioned by Singapore affiliate among different country centres on the basis of their own agreements and not on the basis of the actual services rendered to the individual units. It is in addition to the above fundamental flaw that the TPO has made a clear findings that there are no details available on record in respect of the nature of services rendered by Singapore affiliate to the assessee company. Therefore, we are of the considered view that the TPO is justified in holding that he assessee has no proved any commensurate benefits against the payments of service charges to the Singapore affiliate. Therefore, the TPO is justified in making the adjustment of ALLP under sec. 92CA of the Income-tax Act 1961."*

2.1.7 In the light of the above facts we do not feel inclined to interfere with the order of the AO. The objections of the assessee relating to the order of the AO whereby he has held the above payments as royalty are thus rejected.

The objections of the assessee are decided as above. The assessing officer is directed to incorporate the findings of the DRP in respect of various objections suitably in the final order. AO shall also place a copy of the DRP Directions as Annexure to the final order."

7.1 Learned DR during the course of hearing submitted that the point of objection is that the payments have been received from the Indian entities.

7.2. On the other hand, submissions of the assessee is that amount is received by the assessee towards providing facilities to Volvo Indian entities and by such arrangement they (Indian entities) do not use or obtain a right to use the copy right in any of the software/business software/ application owned and executed by the assessee.

7.3 Under this backdrop learned CIT(DR) was asked to point out any terms of agreement or any other material that empowered assessee or confer such right on the assessee. He submitted that there is no such term, however, from the surrounding facts it can be construed that the assessee has such right and learned authorities below have rightly held so.

7.4 Learned Sr. Counsel relied on the following case laws to rebut the contention of the learned CIT(DR) that the AO was justified in treating and

characterizing the payment of INR 77,72,01,480/- received by the assessee during the relevant previous year as royalty:

(i) EY Global Services Ltd. Vs. ACIT 441 ITR 54 (Del.);

(ii) CIT Vs. Dasault System Sumulia (P) Ltd. 127 taxmann.com 27 (Mad.);

(iii) Accer India Pvt. Ltd. Vs. ACIT – ITA 171 of 2021 (Kar.); and

(iv) GE Energy Management Services Inc. Vs. ADIT – 135 taxmann.com 173 (Del. Trib.)

7.5 The Hon'ble Delhi High Court in the case of EY Global Services Ltd. (supra), following the judgment of the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence (P) Ltd. (supra), has held as under:

"9. The learned counsel for the petitioner submits that the Impugned Ruling is liable to be set aside as it is contrary to the law declared by the Supreme Court in its recent judgment dated 02.03.2021, Engineering Analysis Centre of Excellence Private Limited v. Commissioner of Income Tax and Anr., 2021 SCC OnLine SC 159. He submits that vide the Service Agreement and the MOU, the EYGSL (UK) provides to EYGBS (India) a non-exclusive non-assignable sub-licence (with no right to grant further sub-licences) to use the deliverables and/or services. The EYGSL (UK) purchases the software from third-party vendors by way of a licence for the use of the same by member EY firms. The payment received by EYGSL (UK) from its members is for the use of computer software loaded on its server by the creation of a standard facility for which access is granted to all the EY member firms. He submits that in terms of the judgment of the Supreme Court in Engineering Analysis Centre (supra), there is no transfer of copyright in favour of the member firms, including EYGBS (India), and therefore, the payment received from EYGBS (India) by EYGSL (UK) does not amount to royalty Signature Not Verified Digitally Signed Signing Date:10.12.2021 18:30:13 under Article 13 of the Double Taxation Avoidance Agreement between

India and the United Kingdom (hereinafter referred to as the „India-UK DTAA").

10. On the other hand, the learned counsel for the Revenue submits that the judgment of the Supreme Court in Engineering Analysis Centre (supra) has no application to the facts of the present case. He submits that the said judgment is confined only to the four categories of cases as mentioned in the judgment itself in paragraph 4 thereof. The EYGSL (UK) and the EYGBS (India) do not fall in any of the said four categories. He submits that in the present case, the EYGSL (UK) procures the computer software from different vendors and provides the same to its member firms. The purpose is to obtain a licence from the third-party vendors for all its entities under common control and create a standard facility to be accessed and used by all entities and in lieu of that, it receives consideration based on certain parameters. This is nothing but commercial exploitation of standard facilities created. He submits that the licence fee paid by the EYGSL (UK) for the software is with respect to the number of users. The computer programme is a „literary work" under the terms of Article 13(3) of the India-UK DTAA and payments for the use or right to use such copyright of the literary work would constitute „royalty". Through the licence, the owner of the computer programme lawfully enables a person to use the confidential information contained therein and even in terms of the India-UK DTAA, the consideration paid for the use or right to use such confidential information would constitute Signature Not Verified Digitally Signed Signing Date:10.12.2021 18:30:13 „royalty" and attract tax. He submits that Income Tax Act, 1961 has been amended retrospectively to incorporate an inclusive definition of „royalty" vide Explanation (5) to Section 9(1)(vi) of the Act. It is only a clarificatory amendment and, therefore, would have retrospective application.

11. We have considered the submissions made by the learned counsels for the parties.

12. At the outset, we would quote the law declared by the Supreme Court in Engineering Analysis Centre (supra), hereinbelow:

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

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

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

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

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

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42. The subject matter of each of the DTAAs with which we are concerned is income tax payable in India and a foreign country. Importantly, as is now reflected by explanation 4 to section 90 of the Income Tax Act and under Article 3(2) of the DTAA, the definition of the term "royalties" shall have the meaning assigned to it by the DTAA, meaning thereby that the expression "royalty", when occurring in section 9 of the Income Tax Act, has to be construed with reference to Article 12 of the DTAA. This position is also clarified by CBDT Circular No. 333 dated 02.04.1982, which states as follows:

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43. Thus, by virtue of Article 12(3) of the DTAA, royalties are payments of any kind received as consideration for "the use of, or the right to use, any copyright" of a literary work, which includes a computer programme or software.

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45. A reading of the aforesaid distribution agreement would show that what is granted to the distributor is only a non- exclusive, non-transferable licence to resell computer software, it being expressly stipulated that no copyright in the computer programme is transferred either to the distributor or to the ultimate end-user. This is further amplified by stating that apart from a right to use the computer programme by the end-user himself, there is no further right to sub-license or transfer, nor is there any right to reverse-engineer, modify, reproduce in any manner otherwise than permitted by the licence to the end-user. What is paid by way of consideration, therefore, by the distributor in India to the foreign, non-resident manufacturer or supplier, is the price of the computer programme as goods, either in a medium which stores the software or in a medium by which software is embedded in hardware, which may be then further resold by the distributor to the end-user in India, the distributor making a profit on such resale. Importantly, the distributor does not get the right to use the product at all.

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 Signature Not Verified Digitally Signed Signing Date:10.12.2021 18:30:13 terms of 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 30 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.

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72. The transfer of "all or any rights (including the granting of a licence) in respect of any copyright", in the context of computer software, is referable to sections 14(a), 14(b) and 30 of the Copyright Act. As has been held hereinabove, the expression "in respect of" is equivalent to "in" or "attributable to". Thus, explanation 2(v) to section 9 (1)(vi) of the Income Tax Act, when it speaks of "all of any rights...in respect of copyright" is certainly more expansive than the DTAA provision, which speaks of the "use of, or the right to use" any copyright. This has been recognised by the High Court of Delhi in CIT v. DCM Limited, ITA Nos. 87-89/1992 in its judgment dated 10.03.2011, as follows:

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73. However, when it comes to the expression "use of, or the right to use", the same position would obtain under explanation 2(v) of section 9(1)(vi) of the Income Tax Act, inasmuch as, there must, under the licence granted or sale made, be a transfer of any of the rights contained in sections 14(a) or 14(b) of the Copyright Act, for explanation 2(v) to apply. To this extent, there will be no difference in the position between the definition of "royalties" in the DTAAs and the

definition of "royalty" in explanation 2(v) of section 9(1)(vi) of the Income Tax Act.

74. Even if we were to consider the ambit of "royalty" only under the Income Tax Act on the footing that none of the DTAAs apply to the facts of these cases, the definition of royalty that is contained in explanation 2 to section 9(1)(vi) of the Income Tax Act would make it clear that there has to be a transfer of "all or any rights" which includes the grant of a licence in respect of any copyright in a literary work. The expression "including the granting of a licence" in clause (v) of explanation 2 to section 9(1)(vi) of the Income Tax Act, would necessarily mean a licence in Signature Not Verified Digitally Signed Signing Date:10.12.2021 18:30:13 which transfer is made of an interest in rights "in respect of" copyright, namely, that there is a parting with an interest in any of the rights mentioned in section 14(b) read with section 14(a) of the Copyright Act. To this extent, there will be no difference between the position under the DTAA and explanation 2 to section 9(1)(vi) of the Income Tax Act.

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119. The conclusions that can be derived on a reading of the aforesaid judgments are as follows:

> *i) Copyright is an exclusive right, which is negative in nature, being a right to restrict others from doing certain acts.*
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> *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 pleases, except the right to reproduce the same and issue it to the public, unless such copies are already in Signature Not Verified Digitally Signed Signing Date:10.12.2021 18:30:13 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 customised 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.

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> *173. Our answer to the question posed before us, is that the amounts paid by resident Indian end-users/distributors to non-resident computer software manufacturers/suppliers, as consideration for the resale/use of the computer software through EULAs/distribution agreements, is not the payment of royalty for the use of copyright in the computer software, and that the same does not give rise to any income taxable in India, as a result of which the persons referred to in section 195 of the Income Tax Act were not liable to deduct any TDS under section 195 of the Income Tax Act. The answer to this question will apply to all four categories of cases enumerated by us in paragraph 4 of this judgment."*

13. 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 Signature Not Verified Digitally Signed Signing Date:10.12.2021 18:30:13 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).

15. We may also note that the learned AAR in its Impugned Order has relied upon its earlier view in Citrix Systems Asia Pacific Pty Ltd., In Re., (2012) 343 ITR 1 (AAR), which has been expressly stated to be bad law 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.

17. The submission made by the learned counsel for the revenue relying upon the amendment to Section 9(1)(vi) of the Income Tax Act, 1961 has also been specifically considered and rejected by the Supreme Court.

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18. In view of the above, the Impugned Rulings dated 10.08.2016 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."

7.6 In the light of the above binding precedence we are of the considered view that the authorities below committed an error in taxing the impugned receipts as "royalty". Grounds raised by the assessee are allowed.

8. Consequently, appeal of the assessee in ITA No. 393/Del/2018 for A.Y. 2014-15 is allowed.

Now we take up assessee's appeal for A-.Y. 2015-16 in ITA no. 2780/Del/2022. The assessee has raised following grounds of appeal:

*"**Re: Violation of principles of natural justice***

1. That on the facts and circumstances of the case and in law, the order dated 26.09.2022 passed by the Commissioner of Income Tax (Appeals) [CIT(A)] under section 250 of the Income Tax Act, 1961 ('the Act') is patently erroneous and bad-in-law.

1.1. That the CIT(A) erred in passing the impugned order without granting an opportunity of being heard through video conferencing/personal hearing inasmuch as the officer before whom the hearing through video conferencing was conducted is different from the officer passing the impugned order, which is in gross violation of principles of natural justice.

1.2. That the CIT(A) erred in passing the impugned order by not considering all the submission(s) filed by the appellant which is in gross violation of principles of natural justice.

1.3. That the CIT(A) erred in passing the impugned order on mere conjectures and surmises made on the basis of vague assumptions which are wholly contrary to the facts of of the the case.

Re: Merits

2. That on the facts and circumstances of the case and in law, the CTT(A) erred in treating the payments received by the appellant from Volvo India Pvt Ltd, Volvo Buses India Pvt Ltd and VE Commercial Vehicles Ltd ('Volvo Indian Entities") aggregating to a sum of Rs.119,88,54,215, as royalty both under section 9(1)(vi) of the Act and Article 12(3) of the India Sweden Double tax Avoidance Treaty (Tax Treaty).

2.1. That the CIT(A) erred in holding that the appellant could not justify its claim with documentary evidence without considering the voluminous documents including agreements, emails, invoices, details of request made, etc., submitted during the course of appellate proceedings.

2.2. That the CIT(A) erred in not appreciating that the payment was received from Volvo Group Indian entities for (1) allowing access to Business Application software, (ii) providing end user services and shared infrastructure, (iii) allowing access to Volvo Corporate Network, (iv) providing business consultancy services, and (v) providing support to IT division for local services, which do not constitute royalty in terms of Article 12(3) of the Tax Treaty with Sweden.

2.3. That the CIT(A) erred in not appreciating that the payment received towards sale of standardized software licenses, is in nature of transfer of

copyrighted article and not for use or right to use any copyright, and therefore, does not constitute royalty as per Article 12(3) of the Tax Treaty and is not subject to tax in India.

2.4. That the CIT(A) erred in not appreciating that Volvo Indian entities did not use or obtain right to use the copyright in any of the software business application of the appellant as the Indian entities merely have access to the information/ data processed by the software/ application owned and executed by the appellant on its server in Sweden.

2.5. That the CIT(A) erred in not following the binding decision of the Hon'ble Apex Court in the case of Engineering Analysis Centre of Excellence (P.) Ltd vs. CIT: 432 FTR 471 and making various allegations merely because transactions were being entered between related parties.

2.6. That the CIT(A) further erred in not appreciating that the other services, shared infrastructure, access to Volvo Corporate Network rendered by the appellant were routine services which do not qualify as royalty under the Act or the DTAA.

2.7. That the CIT(A) erred in levelling false and baseless allegations, on mere conjectures and surmises, without appreciating the facts of the case.

2.8. That the CIT(A) further erred in holding that a software program is a process as defined in terms of clause (iii) of Explanation 2 to section 9(1)(vi) of the Act without appreciating that the Volvo Group Indian entities only receive services to access the IT facilities and the appellant does not make available any secret formula or process to the Indian entities.

3. That on the facts and circumstances of case and in law, the CIT(A) erred in not adjudicating the ground relating to non-taxability of reimbursement of pension cost of Rs.40,11,217 paid by the appellant in respect of employees of Volvo India Pvt Ltd (VIPL).

3.1. That the CIT(A) erred in not appreciating that the said receipts were in the nature of reimbursement received for social security contribution made by the appellant for employees of VIPL in Sweden and hence the same was not taxable under the Act.

The appellant craves leave to add, alter, amend or vary from the aforesaid grounds of appeal before or at the time of hearing."

9. Facts, in brief, are that the assessee company filed its return of income on 28.11.2015 declaring NIL income. The case was selected for complete scrutiny under CASS. The AO completed the assessment u/s 143(3)/144C(3) of the Income-tax Act, 1961 (the "Act") vide order dated 14.12.2018 at Rs. 119,88,54,215/-. In doing so, following his order for earlier year i.e. A.Y. 2014-15, the AO treated the entire receipts of INR 119,88,54,215/- from different India Entities, as 'royalty' in terms of section 9(1)(vi) of the Act as well as DTAA taxable @ 10% on gross basis. In appeal, the learned CIT(A), partly allowed the appeal, inter alia, observing as under:

> "*5.33 Accordingly after a holistic and deep evaluation of all related matte and issues, as discussed above. I conclude and hold the payment by Volvo Indi entites to the non-resident appellant, as Royalty, for various reasons as discuss herein above, taxable on gross basis, as per the prevailing Indian Tax Laws. Howe the rate of tax applicable would be 10% only as per the Sweden Treaty re applicable to Royalties, which is lower, without taking any cess or surcharge I account, as in the domestic Indian Tax Law i.e. The Income Tax Act 1961. Thus SL Royalty Income will be taxable at such lower Treaty rate of 10% flat only, ignoring rate as per The Indian Tax Law, which includes surcharge & cess also."*

10. Admittedly the facts for the assessment year in question are identical to A.Y. 2014-15 in assessee's own case, wherein we have allowed the assessee's claim by holding that the receipts in question could not be taxed as "royalty". For the same reasons herein also we hold that the entire receipt of INR 119,88,54,215/- received from different India entities could not taxed as royalty. Accordingly, orders of

authorities below in taxing the receipts as "royalty" are set aside and the grounds of appeal taken by the assessee are allowed.

11. Consequently, assessee's appeal in ITA No. 2780/Del/2022 for A.Y. 2015-16 is allowed.

12. In the result, assessee's appeals in ITA No. 393/Del/2018 for A.Y. 2014-15 as well as ITA No. 2780/Del/2022 for A.Y. 2015-16 are allowed

Order pronounced in open court on 20th December, 2023.

Sd/-	**Sd/-**
(DR. B.R.R. KUMAR)	**(KUL BHARAT)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

MP
Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI