

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'D', NEW DELHI**

Before Sh. Saktijit Dey, Vice President

Dr. B. R. R. Kumar, Accountant Member

ITA No. 2623/Del/2023 : Asstt. Year: 2021-22

GE Precision Healthcare LLC, 3000 N, Grandview Blvd, Waukesha, Wisconsin, USA 53188	Vs	ACIT, Circle 1(3)(1), New Delhi
(APPELLANT)		(RESPONDENT)
PAN No. AAHCG6915E		

Assessee by : Sh. Ravi Sharma, Adv.

Revenue by : Sh. Vizay B. Vasanta, CIT-DR

Date of Hearing: 18.10.2023

Date of Pronouncement: 17.01.2024

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeal has been filed by the assessee against the order dated 22.08.2023 passed by the AO u/s 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961.

2. Following grounds have been raised by the assessee:

"1. On the facts and circumstances of the case and in law, the order dated August 22, 2023, passed by the Learned Assistant Commissioner of Income Tax, Circle 1(3)(1), International Tax, Delhi (Ld. AO') under section 144C(13) read with section 143(3) of the Income-tax Act, 1961 ('the Act) is invalid, erroneous and bad in law;

1.1 On the facts and circumstances of the case and in law, the Respondent/DRP grossly erred in assessing the total income of the Appellant at INR 21,51,11,064 as against the returned income of INR 9,18,94,072 declared by the Appellant;

2. *On the facts and circumstances of the case and in law, the Respondent/DRP grossly erred in taxing the receipt of software sub-license fees as income from other sources under section 56 of the Act and Article 23(3) of the India-USA Double Tax Avoidance Agreement (DAA').*
 3. *On the facts and circumstances of the case and in law, the Respondent/DRP grossly erred in not appreciating that the receipt from software sublicensing is in the nature of business income and cannot be taxed in the absence of Permanent Establishment of the Appellant in India.*
 4. *On the facts and circumstances of the case and in law, the Respondent/ DRP grossly erred in not appreciating the true nature of the commercial tools/ software supplied for the purpose of business and erred in drawing an analogy from the income statement of Indian Associated Enterprise of the Appellant.*
 5. *On the facts and circumstances of the case and in law, the Respondent/ DRP ought to have appreciated the business model adopted by the Appellant and erred in applying "other income" provision which is nothing but a residuary clause both under the Act as well as the DTAA.*
 6. *On the facts and circumstances of the case and in law, the Respondent has erred in making an addition of INR 1,56,61,460 under the head business and profession without ascribing a reason for such adjustment.*
 7. *On the facts and in the circumstances of the case and in law, the Respondent erred in levying interest under section 234A and section 234B of the Act.*
 8. *On the facts and in the circumstances of the case and in law, the Respondent erred in levying fees of INR 10,000 under section 234F of the Act.*
 9. *On the facts and circumstances of the case and in law, the Respondent has erred in proposing to initiate the penalty proceedings under section 270A of the Act."*
3. Heard the arguments of both the parties and perused the material available on record.

4. GE Precision Healthcare LLC, is a company incorporated in the state of Delaware, USA. It carries on healthcare business for the General Electric group, and is a global medical device provider that designs, develops, manufactures and distributes diagnostic imaging and clinical systems, products and services for drug discovery, biopharmaceutical manufacturing, and cellular technologies, imaging agents used during medical scanning procedures, and a range of healthcare information technology solutions.

5. The Assessee also provides services such as performance improvement and performance solutions services, computerized data management, and remote diagnostic and repair services of medical equipment manufactured by the Assessee and others. The Assessee conducts its operations across the world through subsidiaries and affiliates.

6. The assessee filed its return of income on 31 March 2022 declaring total income of Rs.9,18,94,072 /- and claimed refund for Rs. 1, 19,86,620/- The details of the Revenue of the assessee are as under:

S.No	Particulars	Taxable/Non-taxable	Amount
1	Income from sublicensing of standardized software tools to affiliates in India	Nil	10,75,55,532
2	Fee for technical	Offered to tax	9,17,39,690

	services received from affiliates in India (offered to tax under section 9(1)(vii) of the Act)		
3	Interest on income tax refund	Offered to tax	1,54,382
	Total		19,94,49,604/-

7. The assessee has received receipts of Rs. 19,94,49,604/- from rendering certain technical services to its affiliates in India. Also, the Assessee in the course of its business had sub-licensed certain standard software tools to its affiliates in India for their internal use. During the assessment proceedings before the Assessing Officer the assessee submitted that it does not have a business connection in India u/s 9(1)(i) of the Income-tax Act, 1961 and the software sold by it does not fall under the ambit of 9(1)(vi) of the Income-tax Act, 1961 and is covered by the decision of the Hon'ble Supreme Court in Engineering Analysis Centre of Excellence Pvt. Ltd vs CIT [2021] 125 taxmann.com 42 (SC).

8. The Assessing Officer did not agree with the contention of the assessee that the software sold by it does not fall under the ambit of 9(1)(vi) of the Income-tax Act, 1961 and held that payment for the use of the software was taxable u/s. 56 of the Act, r.w. Article 23 (3) of the India-USA DTAA.

9. Aggrieved the assessee sought directions of the Id. DRP.

10. The issue before us pertains to taxability of the "software" supplied to Indian affiliates. The Assessing Officer treated the amount as taxable u/s 56(1) of the Income Tax Act 1961 r.w. Article 23(3) of the India-USA DTAA.

11. The Id. DRP in the directions sent by two Members of the DRP-1, New Delhi namely Shri Anshuman Pattnaik and Shri Sanjay Kumar Bharathi affirmed the order of the Assessing Officer relying on the order of the Id. DRP for the assessment year 2020-21. The relevant part of the said order of the Id. DRP is as under:-

3.5 The annual report of the Indian AE for F.Y. 2019-20 - Wipro GE Healthcare Pvt. Ltd. - is available in the public domain. Information from this report was cross-checked with the assessee through a notice u/s 142(1) of the Income-tax Act, 1961 issued on 08.02.22, and no objection was raised by the assessee against the use of the AE's Annual Report. The assessee did not raise any issue to the aforesaid notice. As per the segmental information, 21% of the Indian entity's revenue comes from 'Sale of Services - Software Income'. This corresponds to a total turnover of Rs. 11,00,56,00,000.00 during the subject year.

3.6 The AO noted that as per the Related Party Schedule, 'Software Revenue - [from] fellow subsidiaries' lists a total revenue of Rs. 10,67,03,00,000.00 from GE Precision Healthcare LLC (page 40 of the Annual Report). He accordingly concluded that 97% of the income from the AE's software services is from sales back to the assessee and held as follows:

I. With respect to the activity of software licenses, the assessee is involved with solely its affiliates / GE group entities.

II. The assessee takes no risk nor entrepreneurial activity in sub-licensing these software applications from third parties and further sub-licensing them to its affiliates, including Wipro GE.

III. For all the software sub-licensed by the assessee to the Wipro-GE (Indian AE), the AE makes use of the software to earn service income which constitutes 21% of its overall revenue from operations. During the subject year, 97% of this

software income was earned by the AE through sale of software services to the assessee.

IV. Thus, through the software sub-licensed by the assessee to the AE on a per-user per-month basis, sales are made back to the assessee. In this regard, the assessee's contentions with respect to the show cause notice are now considered. Primarily, the assessee has contended that the income from sublicensing of software to Wipro-GE is business income u/s 9(1)(i) of the Income-tax Act, 1961, which in the absence of PE, is not taxable.

3.7 The AO further noted that Article 7 of the Indian DTAA deals with taxation of international business profits. As per which the source country may tax the business profits of a non-resident in India if the non-resident operates in India through a Permanent Establishment (PE). The PE threshold rule is based on physical presence of the non-resident. However, as the digitalized businesses do not require a physical presence in a source country and may operate remotely, the PE threshold rules are inadequate to establish taxable presence of such businesses in a source country. Relying on the OECD BEPS Action plan 1, which was undertaken to consider the tax challenges raised by digitization of businesses, and the lack of international consensus on framing new tax rules for digital economy, he held that under Tax Treaty framework, taxing right is allocated to the contracting states on the basis of categorization/characterization of income: Active or passive income. Generally, with regard to passive income such as dividend, interest, Ryalty and FTS or capital gains, both the contracting states have right to tax such income. However, in respect of active income (business income), the source country has a right to tax only when the non-resident has a PE in that state. The threshold of PE under DTAA and "business connection" under income-tax Act cover situations where the business activities of non-resident satisfy "business in" criteria for establishing a taxable presence in the source country. Relying on CIT Vs Visakhapatnam Port Trust (144 TR 146), the AO held whether the income to be characterized as active business income or passive income must be decided on the basis of degree of involvement in the activities by the non-resident taxpayer in a source country. In order to categorize certain income stream as business income in the hands of non-resident in a source country, the taxpayer need to exhibit that his/her involvement is substantial. In other words, the non-resident creates a taxable presence in a source country only when it establishes a significant/substantial economic connection. The PE threshold rules for taxation of business profits of non-resident in a source country is based on this criterion.

Physical presence with certain degree of permanence of a non-resident or doing activities through a dependent person or employees are considered to satisfy the substantial economic connection in a source country. He also relied on the decision of the Apex court in the case of R D Agrawal (56 ITR 20,24), which laid down the law that non-resident is said to have a business activity if there exists a real and intimate relation between trading activity carried on outside the taxable territories and trading activity within the territories. The landmark judgment of the Andhra Pradesh High Court in the case of GVK Industries Ltd (228 ITR 564) was also relied upon to argue that to constitute a business activity there must be continuity of activity or operation of the non-resident with the Indian party and a stray or isolated transaction is not enough to constitute business activity. He also placed reliance on the Authority of Advance Ruling in the case of Honeywell Technologies SARL, where the AAR, after referring to the decisions of the Hon'ble Supreme Court in R.D. Aggarwal & Co. (supra) and in Anglo French Textile Co. Ltd. v. CIT (1953) 23 LTR 101 (SC), summed up the essential features of the business connection thus:

(a) a real and intimate relation must exist between the trading activities carried on outside India by a non-resident and the activities within India:

(b) such relation, shall contribute, directly or indirectly, to the earning of income by the nonresident in his business; a course of dealing or continuity of relationship and not a mere isolated or stray nexus between the business of the non-resident outside India and the activity in India, would furnish a strong indication of 'business connection' in India.

(c) a course of dealing or continuity of relationship and not a mere isolated or stray nexus between the business of the non-resident outside India and the netivity in India, would furnish a strong indication of 'business connection' in India.

He accordingly held that there was unanimous view that regularity, continuity, frequency, volume are the basic attributes of a business activities, these attributes signify substantial involvement of a taxpayer. In the instant case, the transaction between the assessee and its Indian AE does not satisfy these criteria. Thus, he urged that the present case was that of "business with" in india as against "business in" In view of this, consideration to be received by the assessee from Wipro-GF was not business income. He accordingly concluded that the transaction was one-time affair. Moreover, income from this arrangement was received by the assessee at a fixed price which is predetermined (on a per-user per-month basis). These the attributes of passive income. As a general rule, the characterization of income as active business income or passive

income is decided on the basis of degree of involvement in the activities by the non-resident taxpayer in a source country. One of the bright line tests is the quantum of business expenses. In this case, admittedly, the assessee has not incurred any business expenses in India. Thus, all the significant functions performed, as well as significant risks undertaken were offset onto the Indian party and the receipts to the assessee did not satisfy the tests of business income discussed above, as laid down by various courts. The business risk was disproportionately borne by the Indian entity and the consideration receivable by the assessee was a return on investment in respect of sub-licensing of software from third parties and for which license expenses would also be booked by the assessee in its trading account year-on-year, if it maintained financial statements - which it did not. Thus, the receipts of the assessee arising from its agreement with the Indian AE were not business income and hence the contention of the applicant that its receipts from the sub-licensing of software were in the nature of business income was held to be not tenable.

3.8 The AO also distinguished the ratio decidendi of the Supreme Court's judgement in Engineering Analysis Center of Excellence v CIT on the basis of facts and circumstances. In particular, he argued the argument was not centered around the transfer of copyright to the resident end-user, or the reproducibility of the software concerned, but that of use of said copyrighted software towards on a rental basis, to use the software to provide services sold back to the assessee. He accordingly held that payment for such use was taxable u/s 56 of the Income-tax Act and Article 23(3) of the India-USA DTAA. Article 23 of the India-USADTAA. The Panel, therefore, finds no infirmity in the order of the AO. These objections is accordingly dismissed."

12. Further we have also gone through the comments of another member Shri Manvendra Goyal, which are reproduced below:

Comments of Member-3 of DRP-I

*Assessee had supplied software to IB Indian affiliates for which it had received 10,75,55,532/-, which the AO had added to the assessee income as income from other source. The assessee has relied upon the following legal agreements:-
Case-laws relied upon by the Assessee*

A. Software license fees is business income and not other income

- *JCIT (OSD) vs. Merrill Lynch Capital Market Espana SA SV (112 taxmann.com 119) (Mumbai /TAT)*
- *Bangkok Glass Industry Co. Ltd. VS. ACIT (34 taxmann.com 77) (Madras HC)*
- *CSC Technology Singapore Pte. Ltd. v. ADIT (19 taxmann.com 123) (Delhi ITAT)*
- *Husco International Inc. VS. ACIT (IT), (133 taxmann.com 196) (Pune /TAT)*
- *Channel Guide India Ltd. vs. AC/T (25 taxmann.com 25) (Mumbai ITAT)*
- *McKinsey & Company (Thailand) Co. Ltd. Vs. DDIT (36 taxmann.com 375) (Mumbai ITAT)*

B. Software license fees is not royalty

- *DIT vs. Infracsoft Ltd. (2014) 264 CIR 329*
- *Engineering Analysis Centre of Excellence Private Limited vs. CIT (Civil Appeal Nos. 8733-8734 OF 2018)*

Any additional new case laws which the Assessee may like to rely upon

- *ACIT V. Symantec Asia Pacific Pte. Ltd. (142 taxmann.com 455) (Delhi - Trib.) Tupperware India (P.) Ltd. v. ACIT (145 taxmann.com 187) (Delhi - Trib.) Co*
- *GE Intelligent Platforms Asia Pacific Pte. Ltd. V. ACIT(139 taxmann.com 199) (Delhi-Trib)*

The assessee hereby reserves the right to rely upon any additional case-laws that comes to its attention during the course of the proceedings before the Hon'ble Panel.

From the details furnished it would appear that assessee had indeed furnished licensed software to its affiliates, the details of which are as under:-

<i>S.No</i>	<i>Software Licences</i>	<i>Brief description</i>
<i>1</i>	<i>Apttus CPQ</i>	<i>Apttus Configure Price Quote is a sales tool that can help quote complex and configurable products with ease and consistency.</i>
<i>2</i>	<i>Apttus CLM</i>	<i>Contract Management solution ends the era of manual and disjointed contract processes, helping legal teams drive contract compliance while reducing cycle times, avoiding bottlenecks, improving negotiation outcomes & eliminating errors & risk</i>
<i>3</i>	<i>X-Arthur Designer</i>	<i>X-Author lets you use Microsoft Excel natively as a user interface (UI) for tasks that need Excel rather than a browser UI</i>
<i>4</i>	<i>Apptus Promotion Management</i>	<i>With the Promotions Management application, you can now manage, execute, and analyze promotions using the CPQ product line. With the Promotions Management application, marketing managers can create new promotions, get interal approvals for such promotions, and</i>

		<i>roll these promotions to their sales channels.</i>
5	<i>SFDC Einstein Analytics</i>	<i>Empower customer-facing teams with intelligent analytics and predictions in Salesforce workflows</i>
6	<i>SFDc ELTON</i>	<i>Used for information technology inventory, tool tracking, spare parts, evaluation, demonstration equipment and assets.</i>
7	<i>SFDC Chatter Plus</i>	<i>The Chatter Plus license is for users who don't have Salesforce licenses but must have access to Chatter and some additional Salesforce objects. Chatter Plus users can be Chatter moderators and have access to standard Chatter people, profiles, groups, and files pages.</i>
8	<i>Oracle Variable Compensation</i>	<i>Variable Compensation is a software related to human resource function that is used to create and manage multiple variable compensation plans. These plans can encompass everything from onetime ad hoc awards to stock options, bonus plans, non-cash incentives, and holiday gifts or bonuses.</i>

Assessee draws attention to the leading case of Engineering Analysis, the conclusions of which have been surmised by the assessee as follows:-

The Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence (p) Ltd v. Commissioner of Income Tax (2021) (supra). The Supreme Court in the case of Engineering Analysis (supra) drew the following conclusions:

1. Where the Indian importers do not acquire any copyright and/ or the right to sub-license, transfer, reproduce, etc., the software and instead acquired non-exclusive, non-transferable license to use the software, the transaction is essentially sale of a physical object which contains an embedded computer software, and is therefore, a sale of goods.

2. Right to reproduce a computer programme and exploit the reproduction by sale, transfer, licence, etc., is at the heart of an exclusive right copyright. A non-exclusive, non-transferable licence, merely enabling the use of a copyrighted product, is in the nature of restrictive conditions, which cannot be construed as a license to enjoy all of the rights mentioned in section 14 of the Copyright Act, or create an interest in any such rights to attract section 30 of the Copyright Act.

3. Making copies or adapting a computer programme to utilise this computer programme for the purpose for which it was supplied, or to make back-up copies as a temporary protection against loss, destruction or damage to utilise the computer programme for the purpose for which it was supplied, does not constitute an act of infringement of copyright, and thus the consideration for the same would not constitute royalty.

Now if the software sales (under license) were here to before treated as royalty- FTS they could be made taxable business income- if the assessee had a P/E in India, or could have been taxed as royalty/ FTS depending upon certain facts of the case.

Reference is made to the comments of Hon'ble Supreme Court in the above judgement, as under:-

154. From these positions taken, which use the language "reserves the right to" and is of the view that some of the payments referred to may constitute royalties", it is not at all clear as to what exactly the nature of these positions are. This may be contrasted with the categorical language used by India in its positions taken with respect to other aspects (India does not agree to"), as follows:

"18. India does not agree with the interpretation that information concerning industrial, commercial or scientific experience is confined to only previous experience."

"20. India does not agree with the interpretation in paragraph 9.1 of the Commentary on Article 12 according to which a payment for transponder leasing will not constitute royalty.

This notion is contrary to the Indian position that income from transponder leasing constitutes an equipment royalty taxable both under India's domestic law and its treaties with many countries. It is also contrary to India's position that a payment for the use of a transponder is a payment for the use of a process resulting in a royalty under Article 12.

India also does not agree with the conclusion included in the paragraph concerning undersea cables and pipelines as it considers that undersea cables and pipelines are industrial, commercial or scientific equipment and that payments made for their use constitute equipment royalties.

21. India does not agree with the interpretation in paragraph 9.2 of the Commentary on Article 12. It considers that a roaming call constitutes the use of a process. Accordingly, the payment made for the use of that process constitutes a royalty for the purposes of Article

12. *It is also the position of India that a payment for a reaming call constitutes a royalty since it is a payment for the use of industrial, commercial or scientific equipment.*

22. *India does not agree with the interpretation in paragraph 0.3 of the Commentary on Article 12, It considers that a payment for spectrum license constitutes a royalty taxable both under India's domestic law and its treaties with many countries." (Positions on Article 12, OECD Commentary 2014)*

155. *In DIT V. New skies Satellite BV [20161 68 taxmann.com 8/28 Taxman 577/382 ITR 114 3A, 'New Skies Satellite'), a Division Bench of the High Court of Delhi correctly observed that mere positions taken with respect to the OECD Commentary do not alter the DAA's provisions, unless it is actually amended by way of bilateral re-negotiation. This was put thus:*

*"68. On a final note, India's change in position to the OECD Commentary cannot be a fact that influences the interpretation of the words defining royalty as they stand today. The only manner in which such change in position can be relevant is if such change is incorporated into the agreement itself and not otherwise. A change in executive position cannot bring about a unilateral legislative amendment into a treaty concluded between two sovereign states, It is fallacious to assume that any change made to domestic law to rectify a situation of mistaken interpretation can spontaneously further their case in an international treaty, Therefore, mere amendment to Section 9(1)(vi) cannot result in a change. It is imperative * that such amendment is brought about in the agreement as well. Any attempt short of this, even if it is evidence of the State's discomfort at letting data broadcast revenues slip by, will be insufficient to persuade this Court to hold that such amendments are applicable to the DTAA's."*

156. *It is significant to note that after India took such positions qua the OECD Commentary, no bilateral amendment was made by India and the other Contracting*

States to change the definition of royalties contained in any of the DTAAAs that we are concerned with in these appeals, in accordance with its position. As a matter of fact, DTAAAs that were amended subsequently, such as the Convention between the Republic of India and the Kingdom of Morocco for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes On Income,⁴⁷ ["India-Morocco DTAA", which was amended on 22-10-2019,⁴⁸ incorporated a definition of royalties, not very different from the definition contained in the OECD Model Tax Convention, as follows:

"The term "royalties" as used in this Article means:
(a) payments of any kind received as a consideration for the use of or the right to use, any copyright of a literary, artistic or scientific work, including cinematograph films or recordings on any means of reproduction for use for radio or television broadcasting, any patent, trade mark, design or model, plan, computer software programme, secret formula or process, or for information concerning industrial, commercial or scientific experience; and
(b) payments of any kind received as consideration for the use of, or the right to use, any industrial, commercial or scientific equipment"

(Article 12.3)

157. Similarly, though the India-Singapore DTAA came into force on 8-8-1994, it has been amended several times, including on 01-9-2001,⁹ and 23-3-2017,⁹ However, the definition of "royalties" has been retained without any changes,. Likewise, the Convention between the Government of the Republic of India and the Government of Mauritius for the avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains and for the Encouragement of Mutual Trade and Investment, ["India-Mauritius DTAA" was entered into on 6-12-1983, and was amended subsequently on 10-8-2016,⁵² without making any change to the definition of "royalties"

158. It is thus clear that the OECD Commentary on Article 12 of the

OECD Model Tax Convention, incorporated in the DTAA's in the cases before us, will continue to have persuasive value as to the interpretation of the term "royalties" contained therein.

159. Viewed from another angle, persons who pay TDS and/or assessee in the nations governed by a DTAA have a right to know exactly where they stand in respect of the treaty provisions that govern them. Such persons and/or assessee can thus place reliance upon the OECD Commentary for provisions of the OECD Model Tax Convention, which are used without any substantial change by bilateral DTAA's, in the absence of judgments of municipal courts clarifying the same, or in the event of conflicting municipal decisions. From this point of view also, the OECD Commentary is significant, as the Contracting States to which the persons deducting tax/assessee belong, can conclude business transactions on the basis that they are to be taxed either on income by way of royalties for parting with copyright, or income derived from license agreements which is then taxed as business profits depending on the existence of a PE in the Contracting State.

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164. The learned Additional Solicitor General then referred to the judgment of this Court in Commissioner of Customs v. G.M. Exports [2015] 62 taxmann.com 184 (SC, and in particular on the four propositions that were culled out in the context of the law of an anti-dumping duty in consonance with the General Agreement on Tariffs and Trade (GATT), 1994, as follows:

"23. A conspectus of the aforesaid authorities would lead to the following conclusions:

(1) Article 51(c) of the Constitution of India is a directive principle of State policy which states that the State shall endeavour to foster respect for international law and treaty obligations. As a result, rules of international law which are not contrary to domestic law are followed by

the courts in this country. This is a situation in which there is an international treaty to which India is not a signatory or general rules of international law are made applicable. It is in this situation that if there happens to be a conflict between domestic law and international law, domestic law will prevail

(2) In a situation where India is a signatory nation to an international treaty, and a statute is passed pursuant to the said treaty, it is a legitimate aid to the construction of the provisions of such statute that are vague or ambiguous to have recourse to the terms of the treaty to resolve such ambiguity in favour of a meaning that is consistent with the provisions of the treaty.

(3) In a situation where India is a signatory nation to an international treaty, and a statute is made in furtherance of such treaty, a purposive rather than a narrow literal construction of such statute is preferred. The interpretation of such a statute should be construed on broad principles of general acceptance rather than earlier domestic precedents, being intended to carry out treaty obligations, and not to be inconsistent with them.

4) In a situation in which India is a signatory nation to an international treaty, and a statute is made to enforce a treaty obligation, and if there be any difference between the language of such statute and a corresponding provision of the treaty, the statutory language should be construed in the same sense as that of the treaty. This is for the reason that in such cases what is sought to be achieved by the international treaty is a uniform international code of law which is to be applied by the courts of all the signatory nations in a manner that leads to the same result in all the signatory nations."

167. The Revenue, therefore, when referring to "royalties" under the DAA, makes a distinction between such royalties, no doubt in the context of technical services, and remittances for supply of computer software, which is then treated as business profits, taxable under the

relevant DTAA depending upon whether there is a PE through which the assessee operates in India. This is one more circumstance to show that the Revenue has itself appreciated the difference between the payment of royalty and the supply/use of computer software in the form of goods, which is then treated as business income of the assessee taxable in India if it has a PE in India.

CONCLUSION

168. Given the definition of royalties contained in Article 12 of the DAAs mentioned in paragraph 41 of this judgment, it is clear that there is no obligation on the persons mentioned in section 195 of the Income-tax Act to deduct tax at source, as the distribution agreements/EULAs in the facts of these cases do not create any interest or right in such distributors/end-users, which would amount to the use of or right to use any copyright. The provisions contained in the Income-tax Act (section 9(1)(v), along with explanations 2 and 4 thereof), which deal with royalty, not being more beneficial to the assessee, 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 nonresident 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.

170. The appeals from the impugned judgments of the High Court of Karnataka are allowed, and the aforesaid

judgments are set aside. The ruling of the AAR in Citrix Systems (AAR) (supra) is set aside. The appeals from the impugned judgments of the High Court of Delhi are dismissed."

Decision

The prima facie view would be that the judgment of SC in the case of M/s Engineering Analysis Centre of Excellence (p) Ltd v. Commissioner of Income Tax (2021), would be applicable to the appellant and hence the amount paid for the user of software purchased under the license would not be taxable a per the judgement given above.

Attention of AO and the concerned CIT (Int. Tax.) is invited to section 150(1) of the I.T. Act 1961, as per which, the AO would be able to reassess the income of and to give effect to any direction of any court. Hence, In case the judicial views were to change in favour of revenue regarding the matters dealt with, the same may be given effect to by an appropriate action to protect the interests of the revenue.

In given facts the treatment of these as income from other sources does not seem proper. As there has been no findings of P/E there cannot be taxed as income of P/E. Following the ruling given Hon'ble Supreme Court in the case of Engineering Analysis & keeping in mind of article 141 of the Constitution of India, in my humble view it would appear that

a) That income required from provision of software services cannot be in absence of facts) income from other sources has to be taxed as business Income.

b) Following Supreme Court Judgement, the same would also not be taxable as royalty.

13. The other member of the Id. DRP Shri Goyal held that, the judgment of Hon'ble Apex Court in the case of M/s Engineering Analysis Centre of Excellence (p) Ltd v. Commissioner of Income Tax (2021), would be applicable to the facts of instant case and this direction of the Id. DRP is found to be correct. The endeavor of the Assessing Officer and the Id. DRP to distinguish

the *ratio decidendi* of the judgment of Hon'ble Apex Court is without any tangible basis.

14. Further we have also find that the similar issue has also been adjudicated in the case of the assessee by the coordinate bench of the Tribunal in ITA No. 404/Del/2023 dated 14.08.2023. For the sake of ready reference their relevant part of the said order is reproduced as below:

16. On going through the aforesaid reasonings of the Assessing Officer, it is very much clear that the Assessing Officer has accepted the position that the assessee buys software licenses from third party vendors and sublicenses them to its affiliates. He has also observed that by using the sublicensed software the affiliates carry on their business activity and generate income from services provided to the assessee. From the aforesaid observations of the Assessing Officer, two facts are very much clear. Firstly, the assessee is not the owner and manufacturer of the software, and secondly, the licenced softwares are used as business tools by the affiliates to generate service income from the assessee. If that is the case, we fail to understand how the receipts from sublicensing of softwares can be treated as other income under section 56(1) of the Act and Article 23(3) of the tax treaty. It is established on record that the assessee has not sublicensed standardized software licenses on standalone basis.

The details of software licenses sublicensed by the assessee to its affiliates and their functionality are described as under:

<i>S.No</i>	<i>Software Licences</i>	<i>Brief description</i>
<i>1</i>	<i>Apttus CPQ</i>	<i>Apttus Configure Price Quote is a sales tool that can help quote complex and</i>

		<i>configurable products with ease and consistency.</i>
2	<i>Apttus CLM</i>	<i>Contract Management solution ends the era of manual and disjointed contract processes, helping legal teams drive contract compliance while reducing cycle times, avoiding bottlenecks, improving negotiation outcomes & eliminating errors & risk</i>
3	<i>X-Arthur Designer</i>	<i>X-Author lets you use Microsoft Excel natively as a user interface (UI) for tasks that need Excel rather than a browser UI</i>
4	<i>Apttus Promotion Management</i>	<i>With the Promotions Management</i>

		<p><i>application, you can now manage, execute, and analyze promotions using the CPQ product line. With the Promotions Management application, marketing managers can create new promotions, get interal approvals for such promotions, and roll these promotions to their sales channels.</i></p>
5	<i>SFDC Einstein Analytics</i>	<p><i>Empower customer-facing teams with intelligent analytics and predictions in Salestorce workflows</i></p>
6	<i>SFDc ELTON</i>	<p><i>Used for information technology inventory, tool tracking, spare</i></p>

		<i>parts, evaluation, demonstration equipment and assets.</i>
7	<i>SFDC Chatter Plus</i>	<i>The Chatter Plus license is for users who don't have Salesforce licenses but must have access to Chatter and some additional Salesforce objects. Chatter Plus users can be Chatter moderators and have access to standard Chatter people, profiles, groups, and files pages.</i>
8	<i>Oracle Variable Compensation</i>	<i>Variable Compensation is a software related to human resource function that is used to create and manage multiple variable compensation</i>

		<p><i>plans. These plans can encompass everything from onetime ad hoc awards to stock options, bonus plans, non-cash incentives, and holiday gifts or bonuses.</i></p>
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17. From the description of the software licences sublicensed to the affiliates, it is very much clear that the sublicensed softwares were meant to be used by the affiliates in their day-to-day business activity of healthcare, which is the business of the entire group. Therefore, it cannot be said that the receipt from sublicensing of software is not in course of assessee's business activity, hence, cannot be characterized as business income. Further, from the details available on record, it is observed that sublicensing of software is not an one off activity but an activity carried on with regularity, continuity and frequency. Therefore, in our view, it cannot be treated as a passive activity.

18. Reverting back to the issue, whether the receipts can be recharacterized as other income as envisaged under section 56(1) of the Act and Article 23(3) of the Act, it is very much clear, as per the provisions of domestic law, an item of income, which does not fall under any specific heads of income, such as, salary, house property, business and profession and capital gain, will fall under the residuary head 'income from other sources' as per section 56(1) of the Act. Similarly, Article 23(3) of the tax treaty provides for taxation of residuary items of income which are not dealt with in the other Articles of the tax treaty. In the facts of the present appeal, admittedly, the item of income sought to be taxed is the receipts from sublicensing of software licences. Therefore, ordinarily, the income can be characterized as royalty under section 9(1)(vi) of the Act and Article 12 of the DTAA. In case, it is not taxable as royalty income, it can be treated as

business income under Article 7 of the tax treaty. Thus, to our understanding, the residuary provision under Article 23 can come into play when an item of income is not expressly dealt with in other articles preceding article 23 of the tax treaty.

19. Characterization of an item of income under a particular Article is different from taxability of that income under the said Article. A particular item of income can fall either under Article 7 or Article 12. However, their taxability under these articles is subject to fulfillment of conditions enumerated therein. If the particular item of income falling under these articles is not taxable due to non-fulfillment of the conditions mentioned therein, it cannot automatically be re-characterized as other income under Article 23 of the tax treaty. In other words, the residuary provisions of Article 23 will not apply to items of income, which can be classified under other provisions of the tax treaty, but their taxability is subject to fulfillment of conditions mentioned therein.

20. In the facts of the present appeal, to our understanding, the receipts in dispute could have been characterized either as royalty income falling under Article 12 or business income under Article 7 of the tax treaty. However, in view of the ratio laid down in judicial precedents, the income is not taxable as royalty. Alternatively, it could have been taxed as business income under Article 7 of the tax treaty. However, in absence of a PE, it cannot be taxed in India. Thus, in our view, the income in dispute, since can be classified under other Articles of the tax treaty, they cannot be brought under the residuary provision contained under Article 23 of the tax treaty. In this context, we are supported by the decisions cited before us by learned counsel for the assessee. Therefore, we conclude that the income cannot be treated as other income under Article 23(3) of the tax treaty. The only provision under which it could have been taxed is as business income under Article 7. However, in absence of a PE in India, it cannot be taxed under that provision as well. Therefore, we direct the Assessing Officer to delete the addition.

15. Having gone through the material on record, directions of the two members of the Id. DRP affirming the action of the Assessing Officer in the draft Assessment Order, the directions of the other member of the Id. DRP directing that no taxability

arises, keeping in view the order of the coordinate bench of the Tribunal in the assessee's own case and keeping in view the judgment of Hon'ble Apex Court, we hold that the amount received on account of sublicensing of standardized software is not liable to tax.

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

Order Pronounced in the Open Court on 17/01/2024

Sd/-
(Saktijit Dey)
Vice President

Sd/-
(Dr. B. R. R. Kumar)
Accountant Member

Dated: 17/01/2024

Subodh Kumr, Sr. PS

Copy forwarded to:

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

ASSISTANT REGISTRAR