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

BEFORE
SHRI G.S. PANNU, HON'BLE VICE PRESIDENT
AND
MS. ASTHA CHANDRA, JUDICIAL MEMBER

ITA No. 1644/Del/2022
Asstt. Year: 2019-20

Openwave Mobility, Inc. 37, Ground Floor, Centrum Plaza, Sector-53, Golf Course Road, Gurgaon, Haryana – 122 -003 PAN AABC07261M	Vs.	DCIT Circle International Taxation 2(2)(2) New Delhi.
(Appellant)		**(Respondent)**

Assessee by:	Shri Gaurav Singhal, Adv.
Department by:	Shri Vizay B. Vasanta, CIT-DR
Date of Hearing:	07.03.2024
Date of pronouncement:	01.05.2024

<u>O R D E R</u>

<u>PER ASTHA CHANDRA, JM</u>

The appeal filed by the assessee is directed against the order dated 26.05.2022 passed under section 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 **(the "Act")** in pursuance to the directions of Ld. Dispute Resolution Panel **("DRP")** pertaining to the Assessment Year **("AY")** 2019-20.

2. The assessee has raised the following grounds of appeal:-

"1. That the Deputy Commissioner of income-tax, Circle Int. Tax 2(2)(2) (Ld. AO) has erred in law, in passing the assessment order without following the directions issued by the Dispute Resolution Panel -2 ('Hon'ble DRP) dated 17 May 2022 wherein the Hon'ble DRP has directed the Ld. AO to not make addition on account of the software license fees received by the Appellant.

Accordingly, the said order is bad in law being in violation of section 144C(10) of the income-tax Act, 1961 (Act) and deserves to be quashed.

2. That without prejudice to the above, the Ld. AO has erred in law, in disregarding and mis-interpreting the fact that the sum received by the Appellant towards software licensing fees was in the nature of consideration for a copyrighted article and not copyright.

3. That the Ld. AO has erred in law, in disregarding various judicial precedents (including the judgement of Hon'ble Apex Court) wherein it has been settled that consideration for supply of copyrighted article does not tantamount to Royalty under the provisions of the Double Taxation Avoidance Agreement (DTAA').

4. That the Ld. AO has erred on facts and in law, in alleging software licensing fee as 'Royalty though he could not factually demonstrate that the licensee namely M/s Reliance Jio Infocomm Limited (RJIL") had any rights to make copies of the software or to commercially exploit the rights in such software as envisaged in the Copyright Act, 1957.

5. That the Hon'ble DRP has erred in law and on facts, in not appreciating that the support and maintenance services being ancillary and subsidiary as well as inextricably and essentially linked to software license does not amount to Fees for included Services as per Article 12(5)(a) of the India- USA DTAA.

6. That the Ld. AO has erred on facts and in law, in making an addition of INR 4,94,29,858 by treating the transactions of both supply of software as well as support and maintenance services as Fees for o Technical Services/Fee for Included Services under Article 12 of the India - USA of the establishing satisfaction of 'make available' test present in the said Article.

7. That both the Ld. AO and Hon'ble DRP have erred on facts and in law, in treating the amount received by the Appellant towards support and maintenance services (being, INR 58,90,308) as Fees for Technical Services / Fee for Included Services without providing for any basis for satisfaction of make available test provided under Article 12 of the DTAA."

3. Briefly stated the assessee is a company incorporated under the laws of the United States of America **("USA")** and is a tax resident of USA. The assessee is engaged in providing services relating to Transmission Control Protocol and Video Optimization, Solution to Telecom Operators across the Globe. It has no business connection or Permanent Establishment **("PE")** in India. Being a tax-resident of USA and a non-resident for the purposes of Act in India it is entitled to the beneficial provisions of the Double Taxation

Avoidance Agreement between India and USA **("India-USA DTAA")**. On 20.02.2017 the assessee entered into a Software Licensing Agreement with Reliance Jio Infocomm Ltd. **("RJIL/Reliance/Jio")** and a Service Level Agreement by way of an Annexure (Annexure F) to the Software License Agreement for providing annual maintenance and support services pursuant to which the assessee received software licensing income and Annual Maintenance Contract **("AMC")** service income during the relevant AY under consideration. The assessee filed its return of income for AY 2019-20 on 11.11.2019 declaring total income at Rs. 4,94,29,858/- on account of rendering services pertaining to supply of software licence amounting to Rs. 4,35,39,550/- and support and maintenance services amounting to Rs. 58,90,308/- to RJIL. The assessee claimed these receipts as non-taxable in India and claimed credit of TDS/refund of Rs. 52,62,769/- on account of tax deducted at source by its customers in India. The case of the assessee was selected under CASS for scrutiny on the reason "High Ratio of Refund to TDS u/s 195". Statutory notices were issued and served upon the assessee electronically through the ITBA Portal which was duly complied with. In its reply, the assessee stated that the impugned receipts are not taxable in India as the underlying services do not fall within the purview of Royalty/ Fees for technical services/Fees for Included Services **("FTS/ FIS")** under Article 12 of India-USA DTAA and therefore shall qualify as business income of the assessee which is not chargeable to tax in the absence of PE of the assessee in India.

3.1 During the assessment proceedings, the Ld. Assessing Officer **("AO")** after analysing the Software License Agreement and disregarding the submissions/reply filed by the assessee arrived at a conclusion that the impugned receipts pertaining to supply of software (including AMC services) are taxable as FTS. Accordingly, he proposed an addition of Rs. 4,94,29,858/- as FTS income of the assessee for the following reasons recorded by him in the draft assessment order:

"(a) As per the relevant Software License Agreement, "software" means the proprietary Openwave Mobility software, including configurable components, to be provided by the Licensor to the Licensee.

b) Under sl.no. 6 of the Agreement, the nature of software license is seen to be non- exclusive, non-transferable (though right to transfer the license to licensee's affiliates through assignment/novation of the Agreement is allowed), unlimited, worldwide, perpetual, for unrestricted use for business purpose, irrevocable and with all future updates, upgrades, enhancements etc.

c) The Agreement allows for the integration of software with any of the Licensees' core partners in future at no additional cost.

d) The software provided by the assessee is not a product but an end-to-end solution using a proprietary process. Hence, it is not in the nature of sale of goods but in the nature of imparting right to use a proprietary process for client's business purposes. It was not shrink-wrapped software but a solution for network rollout.

e) The intention of the assessee is to create a hybrid model by integrating its own software with that of the client which can then only be used exclusively by the client. The License agreement from the Agreement is distinguishable from that illustrated in the order of Hon'ble Supreme Court in Engineering Analysis Centre of Excellence. The rights transferred are more than what is specific to the nature of computer programs. This was a case of imparting rights and the license to the licensee for use or right to use the IPR.

f) Support and maintenance services are inextricably linked to the License granted by the assessee to its Licensees and no separate contract has been entered by the assessee for the same. The services provided are offered in close coordination with the employees of the clients and include a training component as well. Consequently, the services fall under FTS clause as per India-US DTAA and make available clause also stand satisfied."

3.2 Aggrieved, the assessee filed objections before the Ld. DRP. During DRP proceedings, the assessee made the following submissions:-

"a) During the year, the assessee entered into a software licensing and service agreement with Reliance Jio InfoComm Limited and received software licensing and service income.

b) Pursuant to the software license agreement, the assessee granted a non-exclusive, non-transferable license to the said client to use and operate the software relating to transmission control protocol and video optimisation solution in India subject to the terms and conditions and restrictions specified in the Agreement.

c) The client has no right whatsoever to modify, alter, decompile, translate or disassemble any source code of the software. The source code and underlying algorithm of the software are the assessee's proprietary trade secrets.

d) In order to enable the client to effectively use and operate the software, the assessee will provide free annual maintenance contract services for a period of one year and thereafter such AMC services shall be optional.

e) The assessee shall implement optimisation solution into production network of the client with the technical specifications in the Software License Agreement. The services provided under this Agreement include installation/implementation of the software (including testing, production cut over and transition to operations) and on-site support services either directly or through sub-contracting for troubleshooting, resolving production/lap platform issues, implement and maintain proactive monitoring procedures, maintain a list of key risks etc.

f) The presence of staff for such on-site support services do not create any permanent establishment in India since they are not employees of the assessee, the assessee has no distributors in India; the local staff has no authority to obligate or contract on behalf of the assessee or act as an agent or secure any order or sign any contract or agreement etc., on behalf of the assessee.

g) The assessee does not have any fixed place of business in India at its disposal. The above mentioned services of installation/implementation and on-site support services are rendered with reference to software installation at every site of the client and are accordingly inextricably linked to the sale of software license. The client cannot independently apply the knowledge, if any, during the provision of services of the assessee pursuant to the Services Agreement

h) No rights are envisaged under provisions of section 14 of the Copyright Act on mere grant of rights to use a computer program. It is just transfer of right to use a copyrighted article.

i) The payment received by the assessee toward software licensing will tantamount to use of a copyrighted article and not Royalty under DTAA. It has been held by Hon'ble Supreme Court in the case of Engineering Analysis Centre Of Excellence Private Limited that amount paid by resident of a non-resident software supplier/manufacturer which does not amount to transfer of use of/right of use of any copyright under the DTAA is not taxable under the provisions of DTAA.

j) Income received against AMC services are ancillary and subsidiary to the sale of software. Hence their characterisation shall be the same as that of the predominant transaction of grant of rights to use the software. The consideration received by the agency from supplier of software does not qualify as Royalty under the DTAA. Hence receipts from AMC having the same character as that of such supply of software also cannot be held as Royalty under DTAA.

k) The AMC services also do not meet the test of 'make available' and cannot be taxed as FTS. The same qualifies as business profits under Article 7 of DTAA and is not taxable in India in absence of any permanent establishment of the assessee in India."

3.3 After considering the submissions of the assessee along with the material on record, the Ld. DRP vide its directions dated 17.05.2022 observed that the Software License Agreement dated 20.02.2017 captures two distinct transactions namely, a) supply and license of certain software and b) provision of AMC services to the licensee and hence rejected the assessee's contention that both the transactions are inextricably related and integrated with each other under Article 12 of the India-USA DTAA.

3.4 The Ld. DRP by placing reliance on the decision of the Hon'ble Supreme Court in the case of Centre of Excellence Pvt. Ltd. vs. CIT (2022) 3 SCC 321 and considering the terms of the Software Licence Agreement concluded in para 2.5 of its directions/ order that software licence fee will not constitute royalty income but business income under Article 7 of India-USA DTAA which is not taxable in India in the absence of PE of the assessee.

3.5 As regards the AMC charges, the Ld. DRP held the same to constitute FTS/FIS within the meaning and scope of Article 12(4)(b) of India-USA DTAA recording its observation and findings in para 2.6 to 2.10 of its directions/ order which are reproduced hereunder:

"2.6 As regards the annual maintenance charges, the AO held that as the rate of taxation of both software as well as FTS is the same, the categorisation as per FTS or Royalty does not have any material impact. The AO held that even otherwise the services provided are offered in close coordination with the employees of clients and included training component as well. Consequently the AO held that the services fall under FTS clause as per India-US DTAA. As stated earlier in Para 2.3 above, the annual maintenance charges constitute the second set of distinct services under the Agreement, the issue to be considered is whether the receipts on account of the same are Fee for Included Services' (FIS) under Article 12(4)(b) of the India-USA DTAA. Said Article 12 defines FIS as follows-

4. For purposes of this Article, "fees for included services" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services:

(a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received, or

(b) make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design.

2.7 Under the Agreement, AMC constitutes the annual maintenance support provided by the Licensor to Licensee for software or any other item. Further, after the initial one-year free AMC period, AMC services are optional under which the Licensee has the option to buy AMC on annual basis even after the expiry of the stipulated term. As held by Hon'ble Ahmedabad ITAT in Bombardier Transportation India Pvt. Ltd. vs. DCIT (ITA Nos. 192 to 196 & 235 to 239/Ahd/2015) in the context of claim of AMC services, it is not the medium of contract or payment, but the nature of services rendered by the payee which is the crucial factor to determine whether or not they amount to technical or professional services of the nature of FTS. The Agreement provides that the Licensor shall cooperate with the Licensee and its third parties in

*installation, implementation and commission as provided in the Roles and Responsibilities Matrix. It is seen that under such maintenance support services, the assessee as Licensor is seen to provide various services to the users for its products including providing of patches, updates, upgrades etc; 24*7 support on phone, email, Web based, remote access; option available to licensee to create unlimited support Portal login IDs etc. The Agreement mandates that the Licensor shall provide the highest level of support for various types of offerings. The customer / user thus obtains access to the assessee's live and online technical support resources for various support services and processes in relation to incident management, problem management, change management process/service requests, service operation, release management, configuration management, investigation, diagnosis, resolution and recovery, incident closure etc.*

2.8 The technical support services in relation to the assessee's products clearly require technical expertise which is rendered by the assessee. These services involving human intervention and skill entail application of the technology contained therein to enable the user to independently use the products. The training provided by the assessee (as stated at page-16 of the assessee's Form 35A objections filed in DRP proceedings) allows the user to acquire / develops the capability to independently use the products such that the AMC support is optional at the discretion of the user after the initial free AMC period. Considering the significant technical expertise involved in such services in respect of specialized products, these services duly make available the technical knowledge, experience and know-how available to the user. The support services are therefore neither standard nor routine, but are required to be specific and exclusive to the assessee's products so as to enable their usage. Under similar circumstances and in the context of specialised maintenance and repairs vis-à-vis routine service contracts such as cleaning, it has been held by Hon'ble Delhi High Court has in DIT vs. M/s Lufthansa Cargo India (ITA 95/2005) held as follows-

"Unlike normal machinery repair, aircraft maintenance and repairs inherently are such as af no given point of time can be compared with contracts such as cleaning etc. Component overhaul and maintenance by its very nature cannot be undertaken by all and sundry entities. The level of technical expertise and ability required in such cases is not only exacting but specific, in that, aircraft supplied by manufacturer has to be serviced and its components maintained, serviced or overhauled by designated centers. It is this specification which makes the aircraft safe and airworthy because international and national domestic regulatory authorities mandate that certification of such component safety is a condition precedent for their airworthiness. The exclusive nature of these services cannot but lead to the inference that they are technical services within the meaning of Section 9(1)(vii) of the Act.

2.9 On the same principle, the maintenance and support services provided by the assessee are specialized in nature requiring specialised personnel having the requisite technical knowledge, skill and experience. Through these services, such technical knowledge, skill and experience is made available to the user. Even in respect of services provided to Indian customers through system/servers located outside India, Hon'ble ITAT, Kolkata has held in ITA No. 2601/Kol/2018 that income from such services is taxable as Fees for Technical Services in India even if the technical services were performed outside the country since the payment for the same is not for the process but for the results of testing which is used in India. Further, in Metro & Metro, Agra vs. Assessee (I.T.A. No. 393/Agra/2012), Hon'ble Agra Bench of ITAT observed as under-

20. The principle of law, as clearly discernable from the observations made by Hon'ble Delhi High Court in Bharati Cellular's case (supra), is that the word technical services appearing in Explanation 2 to Section 9 (1) (vii) would also have to be construed as involving a human element. In other words, when services have no human element involved, such services cannot be treated as 'technical services' for the purposes of Section 9(1)(vii).

21. In Siemens case (supra), however, the coordinate bench went much beyond what was held by the Hon'ble Courts above. The coordinate bench has concluded that, "Thus if a standard facility is provided through a usage of machine or technology, it cannot be termed as rendering of technical services. Once in this case it has not been disputed that there is not much of the human involvement for carrying out the tests of circuit breakers in the Laboratory and it is mostly done by machines and is a standard facility, it cannot be held that (the assessee) is rendering any kind of technical services to assessee. These observations are not only based on erroneous analysis of the legal position but directly contrary to the law laid down by Hon'ble Supreme Court wherein it is held that <u>even in a case of completely automated process like interconnect and port access facility, which is facility to use the gateway and the network of other cellular operator, the Assessing Officer is still required to examine "whether at any stage, any human intervention is involved".</u> It is not a question of more of, or less of, human involvement. It is, in our humble understanding, the question of presence of or absence of human involvement..." (Emphasis supplied)

2.10 As seen above, even in a case of admittedly completely automated process like interconnect and port access facility, there is possibility of human involvement. In the present case, the complex solutions / systems developed by the assessee involves substantial human involvement. From the foregoing discussion, it is seen that 'make available' clause under Article 12 of the DTAA stands satisfied. The decisions relied upon by the assessee are distinguishable on above Agreement-specific facts. The said receipts are held to constitute Fees for Included Services within the meaning and scope of Article 12(4)(b) of India-USA DTAA which applies in this case. Grounds 1 to 3 are disposed of as above."

4. Pursuant to the above directions of the DRP, the Ld. AO completed the assessment under section 143(3) r.w. section 144C(13) on 26.05.2022 stating that the Ld. DRP has rejected the objections raised by the assessee and thereby making the addition of Rs. 4,94,29,858/- treating the entire receipts as FTS/FIS @ 10% as per Article 12 of the India-USA DTAA.

5. Aggrieved, the assessee is in appeal before the Tribunal and all the grounds of appeal relate thereto.

6. The Ld. AR submitted that the Ld. DRP has given a clear finding that the software licensing fee is not taxable on account of the decision of Hon'ble

Supreme Court in the case of Engineering Analysis Centre of Excellence Pvt. Ltd. (supra). However, the Ld. AO failed to follow the directions of the Hon'ble DRP and hence the assessment order passed by the Ld. AO in violation of the direction of the Hon'ble DRP is nullity in the eyes of law and deserves to be quashed. The Ld. AR further submitted that the Ld. DRP's directions have also been taken into consideration by Hon'ble Jurisdictional Delhi High Court in assessee's own case in Openwave Mobility Inc. vs. DCIT (W.P(C) 13659/2022) while addressing the writ application filed by the assessee against the lower tax withholding certificate issued by the Ld. AO for AY 2023-24. On the basis of this order of the Hon'ble Delhi High Court, a Nil withholding certificate was issued by the Ld. AO following the direction of the Hon'ble DRP and the decision rendered by the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Pvt. Ltd. (supra). The Ld. AR relied on the observations of the Ld. DRP contained in para 2.5 of its order.

5.1 As regards AMC charges, the Ld. AR submitted that the AMC services provided by the assessee are ancillary and subsidiary to the licensing of software. Since such services are simply an extension of the original transaction (being supply of the software) their characterisation shall be the same as that of the predominant transaction. In support thereof, he relied on the decision of the Delhi Bench of the Tribunal in the case of Aspect Software Inc. vs. ADIT (2015) 61 taxmann.com 36 (Delhi ITAT) and Infrasoft Ltd. vs. ADIT (2009) 28 SOT 179 (Delhi ITAT) which has been affirmed by the Hon'ble Delhi High Court in (2013) 39 taxmann.com 88 (Delhi HC). He drew our attention to para 8.5 of the assessment order and submitted that the Ld. AO has himself admitted that support and maintenance services are inextricably linked to the license granted by the assessee to its licensee and no separate contract is entered by the assessee for the same.

5.2 Without prejudice to the above contention, the Ld. AR further submitted that the AMC services do not qualify FTS/FIS since the make

available test under the India-USA DTAA is not satisfied. No technical knowledge is being made available to the employees of Jio while rendering AMC services. No human intervention is involved in rendering AMC services and hence cannot be treated as FTS as held by the Hon'ble Supreme Court in CIT vs. Bharti Cellular Ltd. (2010) 193 Taxman 97 (SC). The Ld. AO has treated the entire receipts by the assessee towards software licensing fee as FTS without any analysis as to how the impugned transactions satisfies the make available test under the India-USA DTAA. He placed reliance on the decision of the Karnataka High Court in CIT vs. De Beers India Minerals (Pvt.) Ltd. (2012) 21 taxmann.com 214 (Kar).

6. The Ld. DR relied on the order(s) of the Ld. AO/DRP. So far as the software license fees is concerned, the Ld. DR concurred with the view taken by the Ld. DRP as the same being not taxable as royalty income. As regards AMC charges, the Ld. DR supported the order(s) of the Ld. AO/DRP. He referred to clause 6.6 of the Service Level Agreement (Annexure F Annual Maintenance and Support Services) to the Software License Agreement between the parties wherein it is provided that *RELIANCE shall ensure that its Operations team have attended and passed the required training for the OPENWAVE Software product.*

6.1 In rebuttal, the Ld. AR submitted that no technical knowledge is provided to the employees of Reliance so as to make available any technical knowledge, experience, etc. to fall within the scope of Article 12 of India-USA DTAA. The training provided is incidental to the supply of software product and relied upon certain judicial precedents in support thereof.

7. We have heard the Ld. Representative of the parties and perused the material on records. It is an undisputed fact that during the relevant AY, the assessee is a tax resident of USA and has opted to be governed by the provisions of India-USA DTAA. Also, the assessee does not have a PE in India. The assessee had entered into a Software Licensing Agreement for

supply and license certain Software and Service Level Agreement (forming part of Software Licence Agreement) to provide AMC services to Reliance/Jio/ RJIL. During the relevant AY, the assessee received software licensing fee of Rs. 4,35,39,550/- and AMC charges of Rs. 58,90,308/- aggregating to Rs. 4,94,29,858/-. So far as the issue relating to the taxability of Software Licensing Fee of Rs. 4,35,39,550/- is concerned, we observe that the Ld. DRP has examined this issue in detail and recorded its observation finding in para 2.5 of its order reproduced below:-

"2.5 As regards the first set of transactions namely supply and license of software, the licensor grants the licenses to use and operate the software in india as follows - Non-exclusive, non-transferable and sub licensable to licensee's affiliates; unlimited; perpetual; unlimited use and irrevocable etc. As per clause 3 (License Restrictions) of the Agreement, though licensee will not (a) sell, rent, lease, distribute or sub-license the software or documentation; (b) host the software for third party services; (c) modify, alter, reverse engineer, decompile, translate or disassemble any source code of the software; (d) disclose, make available or allow any third party to use the software without licensor's prior written consent; or (e) develop any programs using licensor's source code. As per the said clause, the source code and underlying algorithm of the software are the assessee's proprietary trade secrets. On such terms and conditions of sale of the said software licenses, there is no finding in the draft assessment order that the user has a right to make copies or commercially exploit the right in the copyright of such software as laid down by Hon'ble Supreme Court in the context of Business Income/Royalty in Engineering Analysis Centre of Excellence Private Ltd. Vs. CIT (Civil Appeal Nos. 8733-8734 of 2018). In view of the same, the AO shall exclude receipts relating to sale of software licenses in accordance with and to the extent covered under the applicable categories contained in Hon'ble Supreme Court decision above. There is no dispute regarding the fact that the assessee does not have a permanent establishment in India. Accordingly, such receipts will constitute business income under Article 7 of the DTAA in line with the above-mentioned decision of Hon'ble Supreme Court and will not be taxable in India in the absence of PE."

8. The Ld. DRP directed the Ld. AO to exclude receipts relating to sale of software licenses in accordance with and to the extent covered under the applicable categories contained in Hon'ble Supreme Court's decision above. The Ld. DRP held the impugned receipts from supply of software as business income of the assessee not taxable in the absence of PE of the assessee in India under Article 7 r.w. Article 5 of India-USA DTAA. We also note that the Hon'ble Delhi High Court in Writ Petition filed by the assessee bearing No. W.P.(C) 13659/2022 against the rejection of application for Nil withholding

certificate by the Ld. AO considered the relevant findings of the Ld. DRP for AY 2019-20 and observed as under:-

"10. The petitioner's case is, that in terms of the aforementioned Software Licensing Agreement, it granted a non-exclusive and non-transferable license to RJIL, to use and operate the software concerning Transmission Control Protocol and Video Optimisation Solution in the territory of India.

10.1 As consideration, the petitioner receives licensing fees from RJIL.

11. Inter-alia, the petitioner's claim is, that RJIL has only been allowed to use the licence software and that the rights qua the same have not been transferred. It is, thus, the petitioner's submission, that it is not liable to tax the license fee received from RJIL.

12. In support of its submission, the petitioner relies upon the order dated 17.05.2022 passed by the Dispute Resolution Panel-2 ["DRP"] with regard to Financial Year (FY) 2018-2019 [AY 2019-2020].

13. In particular, our attention has been drawn to the following observations made by the DRP: -

> *"2.4 The submissions have been examined along with the materials on record. It is seen that the Software License Agreement dated 20.02.2017 captures two distinct transactions namely (a) supply and license of certain software and (b) providing of AMC services to the Licensee. Given the same, the assessee's contention that both the transactions are inextricably and integrated with each other under Article 12 of the DTAA is rejected.*
>
> *2.5 As regards the first set of transactions namely supply and license of software, the licensor grants the licenses to use and operate the software in India as follows Non-exclusive, non-transferable and sub licensable to licensee's affiliates; unlimited; perpetual; unlimited use and irrevocable etc. As per clause 3 (License Restrictions) of the Agreement, though licensee will not (a) sell, rent, lease, distribute or sub-license the software or documentation; (b) host the software for third party services; (c) modify, alter, reverse engineer, decompile, translate or disassemble any source code of the software; (d) disclose, make available or allow any third party to use the software without licensor's prior written consent; or (e) develop any programs using licensor's source code. As per the said clause, the source code and underlying algorithm of the software are the assessee's proprietary trade secrets. On such terms and conditions of sale of the said software licenses, there is no finding in the draft assessment order that the user has a right to make copies or commercially exploit the right in the copyright of such software as laid down by Hon'ble Supreme Court in the context of Business Income/Royalty in Engineering Analysis Centre of Excellence Private Ltd. Vs. CIT (Civil Appeal Nos, 8733-8734 of 2018). In view of the same, the AO shall exclude receipts relating to sale of software licenses in accordance with and to the extent covered under the applicable categories contained in Hon'ble Supreme Court decision above. There is no dispute regarding the fact that the assessee does not have a permanent establishment in India. Accordingly, such receipts will constitute business income under Article 7 of the DTAA in line with the above-mentioned decision of Hon'ble Supreme Court and will not be taxable in India in the absence of PE."*

14. Furthermore, Mr Gajendra Maheshwari, who appears on behalf of the petitioner, has also placed reliance on the judgment of the Hon'ble Supreme Court rendered in Engineering Analysis Centre of Excellence Private Limited v. CIT (2022) 3 SCC 321.

15. Mr Zoheb Hossain, who appears on behalf of the respondents/ revenue cannot but accept, that the concerned officer who passed the impugned order would have to take into account, the observations made by DRP in its order dated 17.05.2022, as also consider the impact of the judgment rendered by the Supreme Court in Engineering Analysis.

16. In our view, the aforementioned aspects will require consideration.

17. Accordingly, the impugned order dated 29.04.2022 is set aside, with the direction that the application filed by the petitioner will be decided afresh.

17.1 The concerned authority will hear the Authorized Representative (AR) of the petitioner.

17.2 For this purpose, the AR of the petitioner will appear before the concerned authority on 16.01.2023, at 11:00 AM.

17.3 The concerned authority will be at liberty to hear the AR of the petitioner via video-conferencing.

18. While disposing of the application, the concerned authority will bear in mind, the order dated 17.05.2022 passed by the DRP, and the ratio of the judgment rendered by the Supreme Court in Engineering Analysis."

9. In this view of the matter, we are inclined to agree with the findings of the Ld. DRP. What the assessee has supplied in the form of a Software to Reliance/ Jio is a copyrighted article not a copyright in the Software. Fact on record demonstrates that the Software is supplied by the assessee on a non-transferable, non-exclusive basis to various customers all over India. The assessee has only granted a right to use its Software to Jio in connection with its telecommunication business. The consideration received towards licensing of software is for use of a copyrighted article and therefore not taxable as royalty income under the provisions of Article 12 of the India-USA DTAA. In our considered view, the case of the assessee is squarely covered by the decision of the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence P. Ltd. (supra) which has already been upheld by the Ld. DRP and the Hon'ble Delhi High Court in light of the factual matrix of the present case. We, therefore have no reason to interfere with the findings of the Ld. DRP on the impugned issue. Consequently, consideration of Rs. 4,35,39,550/- received by the assessee from supply of software licence is not taxable in India in terms of Article 7 of the India-USA

DTAA. Accordingly, ground Nos. 1 to 4 is allowed with a direction to the Ld. AO to give effect to the Ld. DRP's findings in its directions/ order dated 17.05.2022.

10. Now coming to the remaining receipts of Rs. 58,90,308/- on account of support and maintenance services rendered by the assessee, the Ld. AO as well as the Ld. DRP has treated the impugned receipts taxable as FTS/FIS in India. Clause 15 (Parameter) of the Software Licence Agreement between the assessee and RJIL provides as under:

"15	*Annual Maintenance Contract ("AMC")*	*Annual Maintenance Contract ("AMC) is annual maintenance support provided by Licensor to Licensee for software or any other item. Following services shall be available during AMC and in addition to what is provided in Annexure F.* *1) Patches, updates, upgrades (major/minor versions), enhancements, new features, point releases.* *2) 24*7 support on phone, email, web based, remote access* *3) Licensor to provide highest level of support if Licensor has various type of support offerings* *4) Licensor to provide option to Licensee to create unlimited support portal login IDs. To facilitate control of License keys, all of these IDs should not have access to Software license keys.* *5) Any onsite support if required by Licensee will be provided by Licensor at no additional costs to Licensee.* *6) Licensor warrants that the Software shall always be up and running during AMC to meet Licensee's requirements.* *7) A product expert from Licensor shall visit Licensee once every quarter lo guide Licensee about the best possible use of the Software.* *8) All third parties software provided or included*

		in Software are also covered *9) Licensee has option to buy AMC on annual basis.* *10) The Licensor shall at least 10 days prior to the end of each annual AMC period, provide Licensee with written notice that the annual AMC period is ending, and Licensee shall have two (2) weeks after receipt of the written notice to notify Licensor of its intent to renew AMC for an additional annual period. If Licensee notifies its intent to renew AMC for an additional annual period then Licensee will issue a PO/WO for such renewal of additional annual AMC period within ninety (90) days from such notification. In the event that Licensee fails to issue the PO/WO, then Licensee will be deemed to have discontinued the AMC, and if Licensee thereafter request to resume AMC, then Licensee shall pay reinstatement charges equal to what Licensee would have paid if the AMC has not been discontinued.* *11) Licensor warrants that even after the expiry of the Term, Licensee shall have option to avail Licensor's support for the Software as long as Licensee continues to pay AMC charges."*

10.1 It is evident from the above that the Service Level Agreement which envisages rendition of support and maintenance services (AMC) forms part of the Software License Agreement by way of Annexure F to the said agreement (Page 85 to 87 of the Paper Book refers). Services provided by the assessee to Reliance are thus ancillary and subsidiary to the licensing of software and would therefore be characterised in the same manner as that of the predominant/ original transaction which is the supply of Software in the present case. The Ld. AO has himself acknowledged the fact that support and maintenance services are inextricably linked to the licence granted by the assessee to its licensees and no separate contract is entered by the assessee for the same.

10.2 We have perused the decision of the Delhi Tribunal in the case of Aspect Software Inc. vs. ADIT [2015] 61 taxmann.com 36 (Del) wherein it has been held as under:

> *"In the present case, the undisputed fact is that the implementation service is inextricably and essentially linked to the supply of software. In view of our decision in Ground No 2 that the supply of software is not taxable as "royalty" under the Tax Treaty, the provision contained in clause (a) to Article 12(4) would not apply to both Implementation and maintenance services. Further there is nothing to show that these services provided by the assessee actually made available to the End User/ Channel Partners any technical knowledge, experience, skill, know-how or processes so as to enable them to apply the said technology. Under these circumstances, we uphold the arguments of the learned Counsel of the assessee and allow the ground."*

10.3 Also, the Delhi Tribunal in the case of Infrasoft Ltd. vs. ADIT [2009] 28 SOT 179 (Del), affirmed by the Hon'ble Delhi High Court in [2013] 39 taxmann.com 88 (Delhi HC) held as under:

> *"...we hold that the amount received by the assessee under the license agreement for allowing use of the software was not 'royalty' either under the Income-tax Act or under DTAA. We also hold that the other receipts on account of maintenance charges and training fees being incidental to the software receipts assume the same character as that of software receipts and the same are liable to be taxed accordingly."*

10.4 Having said so, we will now also consider the alternative plea taken by the assessee. In our view, even the test of 'make available' under Article 12(4)(b) of the India-USA DTAA is not satisfied given the facts of the present case. Maintenance services comprise of troubleshooting, software updates, patches etc. and technical support by e-mail, fax etc. and the training services are for acquainting with the operation / use of software. These activities, in our view, do not qualify as 'make available' within the meaning of the expression contained in Article 12(4)(b) of the India-USA DTAA. The meaning of the expression 'make available' has been derived from umpteen numbers of judicial precedents as well as Protocol to the India-USA DTAA. If we consider the terms of the AMC under the Software Licence Agreement (read with Service Level Agreement) set out above, we find that none of the conditions to qualify the test of 'make available' has been satisfied in the

present case as - (i) the service recipient is not able to apply any expertise/ technology contained therein or use knowledge on its own without recourse to the service provider; (ii) the service recipient is not at the liberty to use the technical knowledge, skill, know-how and process of the assessee in its own right; and (iii) the service recipient is unable to perform the services on its own and have to necessarily seek services of the assessee time and again. Support may be drawn from the decision of the Hon'ble Karnataka High Court in CIT vs. De Beers India Minerals (Private) Ltd. (2012) 21 taxmann.com 214 (Kar.) wherein it has been held that-

> *"…to fit into the terminology 'making available' the technical knowledge, skill, etc. must remain with the person receiving the services even after the particular contract comes to an end. It not enough that the services offered are the product of intense technological effort and a lot of technical knowledge and experience of the service provider have gone into it."*

10.5 Clause 6.6 of the Service Level Agreement provides that *"Reliance shall ensure that its Operations team have attended and passed the required training for the Openwave Software Product"*. It is the contention of the Revenue that imparting of training amounts to provision of technical services by the assessee and therefore impugned receipts are subject to tax as FTS. Nothing has been brought on record by the Revenue to establish that any technical knowledge has been provided to the employees of Reliance / JIO and / or human intervention is required in provision of AMC services. The observations and findings of the Ld. AO/ DRP on these aspects are based on surmises and conjectures. Further, imparting training or educating a person with respect to functionality and attributes of a software or application would clearly not amount to the rendering of technical service under the DTAA which view has been upheld by the Hon'ble Delhi High Court's decision in the case SFDC Ireland vs. CIT [TS-175-HC-2024(DEL)].

11. In view of the factual matrix and legal position set out above, we hold that the receipts of Rs. 58,90,308/- are not taxable in India as FTS/ FIS under Article 12(4) of the India-USA DTAA. It is business profits of the assessee not taxable in India in the absence of a PE of the assessee in India

in terms of Article 7 of the India-USA DTAA. Accordingly, ground no. 5, 6 and 7 are decided in favour of the assessee. In the nutshell, the entire receipts of Rs. 4,94,29,858/- from the supply of software licence and maintenance and support services (AMC services) rendered by the assessee are held to be non-taxable in India.

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

Order pronounced in the open court on Ist May, 2024.

Sd/- **(G.S. PANNU)** **VICE PRESIDENT**	**Sd/-** **(ASTHA CHANDRA)** **JUDICIAL MEMBER**

Dated: 01/05/2024
Veena

Copy forwarded to -
1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi