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

BEFORE SHRI SAKTIJIT DEY, VICE-PRESIDENT
AND
SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER

ITA No.2068/Del/2023
Assessment Year: 2020-21

Home Credit International a.s. Czech Republic, Evropska 2690/17, Dejvice, 160 00 Praha 6, Czech Republic, Abohar, Not Listed, 16000	**Vs.**	Assistant Deputy Commissioner of Income Tax, International Taxation, Gurgaon
PAN :AACCH8679P		
(Appellant)		**(Respondent)**

Assessee by	Sh. Sachit Jolly, Advocate Sh. Rishabh Malhotra, Advocate
Department by	Sh. Vizay B. Vasanta, CIT(DR)

Date of hearing	25.04.2024
Date of pronouncement	10.05.2024

ORDER

PER SAKTIJIT DEY, VICE-PRESIDENT

Captioned appeal by the assessee arises out of the final assessment order dated 30.05.2023 passed under section 143(3) read with section 144C(13) of the Income-tax Act, 1961 (in short 'the Act') pertaining to assessment year 2020-21, in pursuance to the directions of learned Dispute Resolution Panel (DRP).

2. Though, the assessee has raised multiple grounds, however, at the outset, the assessee has raised a pertinent issue questioning the validity of the final assessment order due to non-implementation of the directions of learned DRP.

3. Briefly the facts relating to this issue are, the assessee is a non-resident corporate entity incorporated in Czech Republic and a tax resident of that country. As stated by the Assessing Officer, the assessee is engaged in the business of data processing, databank services, administration of networks, provision of software and consulting in the area of hardware and software. He has further stated, the assessee provides business support services for Information System (IS)/Information Technology (IT) system infrastructure and as a part of its IT related support services. It also acts as a central procurer of certain off-the-shelf software licenses and related maintenance services on behalf of its group companies. In the previous year relevant to the assessment year under dispute, the assessee received revenue from various activities/services performed in India. In the return of income filed for the assessment year under dispute, the

assessee offered income of Rs.101,75,08,330/-, the details of revenue offered to tax are as under:

1.	Operational & Support Services Fee	Rs.63,34,80,990
2.	Management Charges	Rs.24,90,89,670
3.	Trademark Royalty	Rs.13,49,37,668
	Total	**Rs.101,75,08,328**

4. However, certain other income received from India were not offered to tax, either claiming benefit under India - Czech Double Taxation Avoidance Agreement (DTAA) or claiming that they are in the nature of reimbursement without any markup. The details of such income are, as under:

1.	Software Licence Fee	Rs.13,15,313
2.	Reimbursement of Software License Fee	Rs.8,59,39,213
3.	Reimbursement of Maintenance fee	Rs.20,07,22,157
4.	Travel Reimbursements	Rs.2,09,08,022

5. While verifying assessee's return of income and financial statements, the Assessing Officer called upon the assessee to explain the reason for not offering these incomes to tax. In response, the assessee reiterated its stand that such incomes are not taxable in India. It was further stated that in view of the decision of the Hon'ble Supreme Court in case of Engineering

Analysis Centre of Excellence Pvt. Ltd. Vs. CIT, [2021] 432 ITR 471 (SC), the receipts cannot be taxed as royalty. The Assessing Officer, however, was not convinced with the submissions of the assessee. While framing the draft assessment order, he was of the view that in terms with the agreement, assessee's group entity in India has not merely acquired software licences, but has acquired right to use the IT infrastructure maintained by the assessee, on which, the software is hosted. Thus, he held that the assessee has provided services to the Indian entity to use or right to use of its IT infrastructure, which is nothing less than equipment. Thus, referring to clause (iva) of Explanation 2 to section 9(1)(vi) and Article 12 of India - Czech DTAA, the Assessing Officer held that the receipts are to be treated as royalty. Accordingly, he brought to tax the amount of Rs. 28,79,76,683/-. Against the draft assessment order, the assessee raised objections before learned DRP. While disposing of the objections, learned DRP observed that the Assessing Officer has not illustrated, how the IT infrastructure is maintained and is beneficial to the Indian group entities in terms of acquiring the right to use the same. Thus, ultimately, learned DRP directed the Assessing Officer to consider

assessee's argument and complete the assessment through a speaking and reasoned order. While issuing such direction, learned DRP also made it clear that the Assessing Officer shall not conduct any fresh inquiry, but shall decide the issue based on documents/submissions available in the assessment record. After receiving the directions of learned DRP, the Assessing Officer, however, passed the final assessment order, more or less, in tune with the draft assessment order holding that the receipts are towards equipment royalty.

6. Before us, learned counsel appearing for the assessee submitted that before the Assessing Officer as well as before learned DRP, the specific case of the assessee was that the receipts are on account of sale of off-the-shelf software and reimbursement of cost without any markup. He further submitted that the assessee has asserted before the departmental authorities that the receipts are not for use or right to use of any equipment either in the nature of IT infrastructure or anything else, so as to treat them as equipment royalty under section 9(1)(vi) read with Explanation 2 clause (iva) and Article 12 of India – Czech DTAA. He submitted, though, learned DRP issued a

specific direction to the Assessing Officer to specify through a speaking and reasoned order, how the receipts constitute equipment royalty and what are the hardware devices and software applications provided to the Indian entities for use or right to use, however, the Assessing Officer has failed to carry out such directions.

7. Drawing our attention to the final assessment order, learned counsel submitted, nowhere in the assessment order, the Assessing Officer has specified the details of IT infrastructure comprising of hardware devices and software applications given to the Indian entity for use or right to use. Thus, he submitted, due to non-implementation of the directions of learned DRP, assessment order deserves to be declared invalid. For such proposition, he relied upon a decision of the Coordinate Bench in case of Bechtel Limited Vs. ACIT & Ors, ITA No. 8904/Del/2019 and Ors., dated 31.01.2024.

8. Relying upon the observations of the Assessing Officer, learned Departmental Representative submitted that though, it may be a fact that the assessee had provided software licenses to the Indian entity, however, such software is hosted in the IT

infrastructure maintained by the assessee, which included server and other systems. He submitted, the Indian entity can access the software by accessing server and other hardware devices connected therewith. Therefore, the receipts are to be treated as equipment royalty.

8. We have considered rival submissions and perused the materials on record. We have also applied our mind to the judicial precedents cited before us. The short issue arising for consideration is, whether the Assessing Officer, while passing the final assessment order, was justified in holding the receipts in dispute as equipment royalty under section 9(1)(vi) of the Act read with Article 12 of India – Czech DTAA. Materials on record reveal that in course of assessment proceedings, the Assessing Officer issued a show-cause notice to the assessee to explain, as to why the receipts in dispute should not be treated as royalty/FTS, as, such receipts are ancillary to enjoyment of such services, for which, royalty income has been received. In response to the show-cause notice, assessee had furnished a detailed reply submitting that the amount received towards licence fee cannot be treated as

royalty, as, it was for a non-exclusive right given to the Indian entity to use copyrighted software.

9. As regards reimbursement of software licence fee and maintenance fee, the assessee had submitted that it had procured certain licences centrally for its group companies and has cross-charged the Indian affiliates the licence and maintenance fees in respect of the same on a cost-to-cost basis. While framing the draft assessment order, the Assessing Officer observed that the assessee maintains a global IT infrastructure, which consists of owned, leased, supported and hosted IT systems etc. According to him, IT infrastructure made of various hardware devices and software/applications is a scientific equipment and also in the nature of commercial equipment. He has further observed that the agreement between the assessee and Indian group entities provide for use or right to use of equipment. Thus, in these premises, he treated the receipts as royalty.

9. However, before learned DRP, to counter the aforesaid finding of the Assessing Officer, the assessee made detailed submissions categorically denying the allegation that it had provided use or right to use of any IT infrastructure etc. to the

Indian group entities. The specific submissions/averments of the assessee before learned DRP denying the allegation of the Assessing Officer are enumerated below:

> *"2.The Assessee respectfully submits that the allegations of the Ld. AO that the Assessee has a huge IT infrastructure for the group companies, which consists of owned, leased, supported, and hosted IT systems, hardware devices, internet, and intranet systems and also that the Assessee has not facilitated purchase of software for Home Credit India Finance Private Limited CHCIFPL'), rather has made available complete infrastructure to all its group companies including HCIFPL, are erroneous. This is directly contrary to the submissions made by the Assessee which were discussed in detail during the course of assessment proceedings.*
>
> *3. As mentioned above, during the year, the Assessee received license fees amounting to INR 13,15,313 from HCIFPL in respect of a software, Blaze. The agreement for the said license was furnished to the Ld. AO vide response dated 22 March, 2022 wherein it has been clearly mentioned that the Assessee has granted a non-exclusive sub-license to use Blaze software only for its own internal business operations. Relevant extracts from the said agreement are reproduced below for ready reference:*
>
> > *"**Licence fee**" means the fee specified in the Schedule hereof payable by the Customer in consideration for the granting of the rights to use the Licensed Software in accordance with the terms of this Agreement*
> >
> > *…*
> >
> > *2. Sublicence*
> >
> > *2.1 In accordance with the provisions of the Master License Agreement entitling it to sublicense the Licensed Software, HCI us a holder of non-excluswe license on, inter cilia, Licensed Software hereby grants to the Customer and the Customer accepts a non-exclusive sublicense to use the Licensed Software specified in Schedule within the territory of India for the period specified in Schedule.*
> >
> > *2.2 The Customer may use the Licensed Software only for the Customers' own internal business operations to the extent specified in Schedule...*
> >
> > *2.3 Except us specifically permitted by this Agreement, the Customer shall not (and shall not permit others to) directly or indirectly:... (b) revere engineer, copy, translate, disassemble*

or decompile or otherwise attempt to derive source code from any Licensed Software...

4. From above, it is dear that the above agreement is for the sub-license of a software by the Assessee to HCIFPL for HCIFPL's internal use, without granting any underlying rights in the copyright to EICIFP ere is no consideration for the use of any IT infrastructure under this agreement.

5.Furthermore, the Assessee also centrally procured certain off-the shelf softwares (inter-alia Genesys, IBM Qradar, Vmware, Splunk etc.) and their related maintenance services on behalf of the Home Credit Group companies. Such modus operandi enabled the group to optimize third-party costs and brought efficiency into the procurement process. Thereafter, the costs incurred by the Assessee for procuring the third-party software and services were cross charged to the group companies on a cost-to-cost basis.

6. In this background, the Assessee received reimbursement of license fee and maintenance charges of INR 8,59,39,213 and 1NR 20,07,22,157, respectively from HCIFPL. Sample agreement in respect of such reimbursements was furnished to the Ld. AO vide submission dated 2 March 2022. Relevant extracts from the said agreement are reproduced below for ready reference:

(B) Initial User shall, as a service company of the Home Credit Group and Genesys' partner procure central purchases of the Licensed Software under the MSLA for the purposes and use of the Affiliates including the New User in order to achieve the best commercial conditions of such purchases.

(C) Parties wish to establish a process of transfer (i.e. assignment, sublicense etc.) of the Licensed Software by the Initial User to the New User throughout the validity of this Agreement in order to facilitate process of distribution of the Licensed Software within the Home Credit Group.

……..

1.1……..

***Licensed Software**: means Genesys' software products*

***Maintenance**: means Genesys Care of the respective Licensed Software in the scope specified in MSLA and at ...*

…….

2.1.2 The Initial User shall procure purchase of the Licensed Software for the purposes and use of the New User and place order with Genesys (Ind/ or its authorised partner for the quantity of Licenses required by the New User

……

3.3. The Parties acknowledge that the Initial User shall procure with Genesys renewals of the Maintenance in relation to the already assigned Licensed Software on behalf of the New User. Renewal of the Maintenance to the already assigned Licensed Software may be ordered by the Initial User on behalf of the New

> *User automatically unless the New User informs the Initial User that it does not intend to use the Licensed Software any longer and does not require the respective Maintenance renewal.*
>
> *3.4. Renewal of the Maintenance in relation to the already assigned Licensed Software shall be considered as procurement of Maintenance by the Initial User on behalf of the New User, which shall be paid to Genesys by the Initial User on behalf of the New User, whereas the Initial User shall be entitled to re-invoice costs for the renewed Maintenance to the New User.*

7. From above, it can be seen that under this agreement the Assessee is facilitating the procurement of a software and its related maintenance to IICIFPL. This is not a case of IT infrastructure belonging to the Assessee being used by HCIFPL under this agreement.

8. The above extracts establish that the claim of the Ld. AO that the Assessee had a large IT infrastructure which was in the nature of a scientific equipment, and which was used by HCIFPL is baseless and entirely based on surmises. The understanding captured by the Ld. AO in the draft assessment order is entirely incorrect and misplaced.

9. At this stage, without prejudice to the above, the Assessee also wishes to highlight that HCIFPL maintains, supports and develops its own elaborate IT infrastructure in India, as required for its business operations and there is a large team of local IT experts who are responsible for maintaining and running such IT infrastructure. HCIFPL doesn't use IT infrastructure located outside India for running its core business activities with respect to India regulations. It is evident from the above, that due to commercial and legal requirements, HCIFPL doesn't use Assessee's infrastructure for its core business operations and IA. AO, without appreciating the facts of case and nature of business, has erroneously assumed that the Assessee has provided some IT infrastructure to FICIFPL for running its core business.

10. At this stage, it would be relevant to examine the provisions of the law as well as various principles held by multiple judicial precedents with respect to equipment royalty (i.e., consideration for the use or right to use industrial, commercial or scientific equipment).

11. Explanation 2 to section 9(i)(vi) of the Act defines 'royalty' as follows:

> *Explanation 2. — For the purposes of this clause, "royalty" means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head "Capital gains") for-*
>
> *(i) the transfer of all or any rights (including the granting of a licence) in respect of a patent, invention, model, design, secret formula or process or trade mark or similar property;*
> *…….*
>
> *(iva) the use or right to use any industrial, commercial or scientific equipment but not including the amounts referred to in section 4413B;*
> *……..*
> *(vi) the rendering of any services in connection with the activities referred to in sub-clauses (i) to (iv), (iva) and (v).*

12. Article 12 of the India-Czech DTAA defines 'royalty' as, "payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, and films or tapes for television or radio broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or any industrial, commercial or scientific".

13. It is submitted that the term 'equipment' is to be understood in the context of a tangible equipment only. And in case of a tangible product, the clause 'use or right to use' such equipment is to be understood as actual use whereby the tangible equipment is placed under the control and possession of the user.

14. Owing to the lack of sufficient explanations, examples and definitions of the terms in Article 12 of the India-Czech DTAA, reliance may be placed on various principles arising from the judicial precedents and the commentaries wherein royalties in respect of scientific and commercial equipment has been discussed:

- ***OECD Report (2002) on "Treaty Characterisation Issues arising from e-cornmeree"***

Expression 'equipment' in Article 12 applies only to a tangible product. Relevant extracts are reproduced below (emphasis supplied):

> *26. The members of the Group all agreed that payments for such use of digital products cannot be considered as payments for the use of, or the right to use, industrial, commercial or scientific equipment" on the basis of one or more of the following reasons:*
>
> *- because digital products cannot be considered as "equipment", either because the word "equipment" can only apply to a tangible product (and the fact that the digital product is provided on a tangible medium would not change thefact that the object of the transaction is the acquisition of rights to use the digital content rather than rights to use the tangible medium) or because the word "equipment", in the context of the definition of royalties, applies to property that is intended to be an accessory in an industrial, commercial or scientific process and could not therefore apply to property, such as a music or video CD, that is used in and for itself*

- ***Dassault Systems K.K. [2010] 188 TAXMAN 223 (AAR - New Delhi, affirmed by the Hon'ble SC)***

  Licensed software products being intangible in nature cannot be brought into the purview of equipment royalty. Relevant extract has been reproduced below:

> *23. We may mention that the learned DR at one stage made a feeble attempt to bring the transaction under equipment royalty. However, it was not pursued further and moreover we find no legal basis for holding that there is any usage of equipment here.*

- ***DIT v. New Skies Satellite 1317 [201068 taxmann.com 8 (Delhi HC)***

Relying on its ruling in the case of Asia Satellite Telecommunications Co. Ltd [2011] 197 Taxman 263 (Delhi HC), the Honble Delhi HC has upheld the principle that the use or right to use any industrial, commercial or scientific equipment as envisaged in clause (iva) of Explanation 2 to sec.9(1)(0) contemplates full control and possession of the user over the equipment. Extracts of the ruling are reproduced below:

58…….The following extract from Asia Satellite Telecommunications Co. Ltd's case (supra) takes note of the OECD Commentary and Klaus Vogel on Double Tax Conventions, to show that the process must in fact be secret and that specifically, income from data transmission services do not partake of the nature of royalty……

……..As regards treaties that include the leasing of industrial, commercial or scientific (ICS) equipment in the definition of royalties, the characterization of the payment will depend to a large extent on the relevant contractual arrangements. Whilst the relevant contracts often refer to the lease of a transponder, in most cases the customer does not acquire the physical possession of the transponder but simply its transmission capacity: the satellite is operated by the lessor and the lessee has no access to the transponder that has been assigned to it. In such cases, the payments made by the customers would therefore be in the nature of payments for services, to which Article 7 applies, rather than payments for the use, or right to use, ICS equipment
……..

60. Consequently, since we have held that the Finance Act, 2012 will not affect Article 12 of the. MAAs, it would follow that the first determinative interpretation given to the word "royalty" in Asia Satellite, wizen the definitions were in fact pari materia (in the absence of any contouring explanations), will continue to hold the field for the purpose of assessment years preceding the Finance Act, 2012 and in all cases which involve a Double Tax Avoidance Agreement, unless the said DTAAs are amended jointly by both parties to incorporate income from data transmission services as partaking of the nature of royalty, or amend the definition in u manner so that such income automatically becomes royalty.

- ***DDIT v. Savvis Communication Corporation 120161158 ITD 750 (Mumbai nArr) Relevant extract has been reproduced below (emphasis supplied):***

  ….A payment cannot be said to be consideration for use of scientific equipment when person making the payment does not have an independent right to use such an equipment and physical access to it…

- ***Channel Guide India Ltd. v. ACTT (2 012125 taxmann.00131 25 (Minn ITAT)***

  In absence of control and possession *of user over equipment, amount paid to non-resident company cannot be held to be royalty for use or right to use any industrial, commercial or scientific equipment. Relevant extract has been reproduced below (emphasis supplied)*

> *21. As already held in the various judicial pronouncements, the use or right to use any industrial, commercial or scientific equipment as envisaged in clause (Iva) of Explanation 2 to sec.9(Y)(vi) contemplates full control and possession of the user over the equipment. In this regard, it is relevant to refer to the following observations/findings recorded by the Hon'ble Delhi High Court in Para no. 65 to 68 of the order passed in the case of Asia Satellite Telecommunications Co. Ltd. (supra):*
>
> *22. Keeping in view the above observations /findings recorded by the Hon`ble Delhi High Court in the case of Asia Satellite Telecommunications Co. Ltd. (supra) involving similar facts and circumstances, it cannot be said that the amount paid by the assessee to SSA is for the use or right to use any industrial, commercial or scientific equipment as envisaged in clause (iva) of Explanation 2 to sec.9(1((vi) inserted w.e.f. 1.4.2002 in the absence of control & possession of the user over the equipment.*

15. From the above, the following important principles emerge in connection with equipment royalty

> *(a) Equipment royalty would only apply in case of some tangible equipment being given for use*
> *(b) The clause 'use or right to use' an equipment would get satisfied only when the user has control and possession over such tangible equipment*

16. In the instant case, the payments proposed to be classified as royalty by the IA. AO are not consideration for the use or right to use any equipment. In fact, there is no equipment, let alone scientific or otherwise, whose usage is being allowed in the instant case. It is also evident that the IT network being assumed by the Ld. AO is located outside India while HCIFPL's business is entirely based in India, all its employees are based in India and therefore, the test of control and possession over the alleged IT infrastructure can never be met in this case.

17. The entire assessment proposed to be made by the Ld. AU is based on surmises and erroneous suppositions. Other than the bald allegation that the Assessee maintains huge IT infrastructure, which is given for use to HCIFPL, no evidence has been presented by the Ld. AO in support if their false accusations. As evidenced from above, the payments received by the Assessee were for license of software and reimbursement of license fee and maintenance fee for centrally procured software by the Assesses for its AEs.

18. Thus, the variation to the returned income proposed by the Ld. AO ought to be deleted. The sums received by the Assessee are not taxable in India in view of the arguments given in Annexure 5 above.

19. In view of the above, the reimbursements towards license fee and maintenance fee of INR 8,59,39,213 and INR 20,07,22,157 cannot be considered as taxable in the hands of the Assessee and therefore the variation proposed to the returned income by the I.d. AO ought to be deleted. "

10. Pertinently, after considering the aforesaid submissions of the assessee, learned DRP issued the following directions to the Assessing Officer:

"4.1.3 The Panel has carefully considered the rival averments as mentioned above. At the outset, the Panel takes note that the value/figure on account of payment received under the head reimbursement of maintenance fee is taken by AO differently at para no. 2.2/page 2 @ INR 20,37,56,293/- and at para no. 5/page 8 @ INR 20,07,22,157/-. The assessee has taken this figure @ INR 20,07,22,157/- in its submission including the Synopsis. In this regard, the AO is directly to rectify it and taken the correct figure.

4.1.3.1 The Panel takes note from the AO's draft order that the assessee filed two submissions dated 07.02.2022 and 22.03.2022 and the order was passed on 29.09.2022. Meanwhile, as the AO has mentioned that an opportunity of personal hearing was also granted to the assessee, but date is not mentioned.

4.1.3.2 The AO has discussed the provisions related to royalty as per explanation 2(iva) to section 9(1)(vi) of the Act in the draft order.

4.1.3.3 The AO has repetitively stated that the assessee maintains a global IT infrastructure which consists of owned, leased, supported, and hosted IT systems, hardware devices, internet and intranet systems etc. but the AO has not illustrated as to how the said infrastructure is maintained and is beneficial to the AEs in terms of acquiring the right to use the same. The AO should have clarified about the various hardware devices and software applications having matched with the detail of such scientific equipment under the relevant tax treaty.

4.1.3.4 The Panel also takes note of assessee's submissions that the assessee does not maintain and make available any infrastructure to the domestic AE in India.
4.1.3.5 The Panel further has learnt that the Revenue has filed a review petition before the Apex Court in case of M/s. Engineering Analysis Centre of Excellence Private Limited Vs. CIT [2021] which has been admitted and is pending for final adjudication.

4.1.3.6 The assessee has filed the factual and legal arguments in detail from page no. 14 to 19 of the paper-book attached with form no. 35A. Before the Panel, this issue is no more re-integra and has been issuing directions in favour of the Revenue. However, in the case under consideration, the AO's order is not self-speaking of the facts of the case and examination thereof and hence is ambiguous. Nevertheless, the AO is directed to consider the assessee's arguments as referred to above and complete the assessment as per ambit of law and judicial precedents by passing a speaking and reasoned order. The Panel hastens to clarify that the AO shall not conduct any fresh inquiry in this regard; the verification shall be made based on documents/submissions available on the assessment records. The objections in this regard are disposed of accordingly."

11. The findings of learned DRP can be summarized as under:

i. The Assessing Officer has not illustrated as to how the alleged infrastructure is maintained and how it is beneficial to the AEs in terms of acquiring the right to use the same.

ii. Assessing Officer has not clarified about the various hardware devices and software applications having matched with the details of such scientific equipment under the tax treaty.

iii. The assessee has specifically submitted that it does not maintain and make available any IT infrastructure to Indian group entity.

iv. The draft assessment order is not self speaking of the facts of the case, hence, is ambiguous.

12. Thus, from the aforesaid observations of learned DRP, it is very much clear that learned Panel had concluded that the Assessing Officer has failed to establish his case of equipment royalty by bringing material facts on record. Since, learned DRP was not convinced with the theory of equipment royalty put up by the Assessing Officer, a specific direction was issued to the Assessing Officer to consider assessee's argument and complete the assessment by a speaking and reasoned order. However, a careful reading of final assessment order would make it clear that the Assessing Officer has done precious little to implement the directions of learned DRP in letter and spirit, other than repeating his observations made in the draft assessment order. Though, learned DRP had specifically directed the Assessing Officer to demonstrate, how the IT infrastructure is maintained; how it is beneficial to AEs in terms of acquiring the right to use; what are

the various hardware devices and matching software applications, which can constitute scientific or commercial equipment etc., the Assessing Officer has failed to demonstrate such fact in the assessment order. On a specific query from the Bench, as to what constitutes IT infrastructure and what are the hardware devices etc., which can be construed as scientific or commercial equipment, learned Departmental Representative fairly submitted that such facts are not forthcoming from the assessment order. The contention of the learned Departmental Representative that the Indian entity has been given right to use the server while accessing the software, is too specious an argument to be accepted. It would be preposterous to even assume that right of ownership over the server has been transferred by the assessee while selling software licences. More so, when the Revenue has failed to bring any material on record to even remotely establish such fact. Thus, in our view, it is a clear case of non-implementation of directions of learned DRP by the Assessing Officer.

13. Section 144C, which provides the mechanism for making assessment in case of an eligible assessee is a self contained code

by itself. As per the provisions contained under section 144C of the Act, after framing of a draft assessment order, if eligible assessee chooses to avail the DRP route, then such assessee has to raise objections before the DRP within the period of 30 days of the receipt of draft assessment order. Sub-section (5) of section 144C provides that after receiving the objections, the DRP shall issue such directions as it thinks fit for the guidance of the Assessing Officer to enable him to complete the assessment. Sub-section (10) of section 144C makes it clear that every direction issued by the DRP shall be binding on the Assessing Officer. Whereas, sub-section (13) of section 144C postulates that the Assessing Officer shall pass the final assessment order in conformity with the directions issued by learned DRP without providing any further opportunity of being heard to the assessee. The purpose for not providing any opportunity of being heard to the assessee at the final assessment stage is only because as per the mandate of section 144C(13), the Assessing Officer has to only implement the directions given by learned DRP and nothing else. Thus, non-implementation of directions of learned DRP, in terms of section 144C(13), is a gross violation of the statutory

provisions, which a statutory authority properly instructed in law, cannot do. When the statue mandates a particular thing to be done in a particular manner, it has to be done in that manner only or not at all.

14. In the facts of the present appeal, undisputedly, the Assessing Officer has failed to implement the directions of learned DRP, hence, has not acted as per the mandate of section 144C(13). While considering the effect of non-implementation of directions of learned DRP, the Coordinate Bench in case of Bechtel Ltd. Vs. ACIT (supra) has held as under:

> *"11. At this stage, we may refer to certain provisions contained under section 144C of the Act. As per sub-section (5) of section 144C of the Act, the DRP after receiving objection shall issue such direction as it thinks fit for the guidance of the Assessing Officer to enable him to complete the assessment. Sub-section (8) of section 144C empowers the DRP to confirm, reduce or enhance the variation proposed in the draft assessment order. Sub-section (10) of section 144C makes it clear that every direction issued by the DRP shall be binding on the Assessing Officer. Whereas, subsection (13) of section 144C mandates that after receiving the directions issued by the DRP under sub-section (5), the Assessing Officer shall complete the final assessment in conformity with the directions issued by learned DRP. Thus, a conjoint reading of the aforesaid provisions make it clear that once the DRP issues certain directions while disposing of objections filed by an eligible assessee, the Assessing Officer is duty-bound to implement such directions in letter and spirit.*
>
> *12. In the facts of the present appeal, undisputedly, the Assessing Officer has not implemented the directions of learned DRP as mandated under section 144C(10) read with section 144C(13) of the Act. Surprisingly, even though, the Assessing Officer has reproduced the directions of learned DRP in the body of the assessment orders, however, he failed to implement the specific direction of learned DRP*

and has merely done a cut paste job of the draft assessment order by repeating the additions made therein treating the receipts as FTS/FIS. In our view, this can be due to a conscious disregard to the directions of learned DRP or final assessment orders have been passed mechanically without application of mind.

13. In case of M/s. ESPN Star Sports Mauritius S.N.C. ET Compagnie Vs. Union of India (supra), the Hon'ble Jurisdictional High Court, in judgment dated 23.03.2016, while considering identical nature of dispute relating to non-implementation of directions of DRP in the final assessment order has gone through the entire provision of section 144C, which is a code by itself, and held as under:

> *"29. The above submissions have been considered. In the first place the Court would like to observe that this is an instance of blatant disregard by the AO of the order of the DRP notwithstanding that the DRP had categorically held that the two Petitioners do not satisfy the conditions of an 'eligible assessee' in terms of Section 144 (15) (b) (ii) of the Act. As already noticed under Section 144C (10) of the Act the AO had no option but to comply with the order of the DRP. Even if no direction was issued by the DRP under Section 144C (5) of the Act, the fact that the DRP held that both the Petitioners were not 'eligible Assessees' could not have been ignored by the AO.*
>
> *30. It appears to the Court that it is plain that under Section 144C, the AO should have proceeded to pass an order under Section 143 (3) of the Act. Instead the AO confirmed the draft assessment order passed under Section 144C (1) of the Act. This, therefore, vitiated the entire exercise. The Court has no hesitation in holding that the final assessment order dated 28th January 2015 is without jurisdiction and null and void. The draft assessment order dated 28th March 2014, having been passed in respect of entities which were not 'eligible assessees', is also held to be invalid.*
>
> *31. It is a matter of concern that the AO has in the present case has chosen to label the order of the DRP to be invalid and that is the justification for not complying with the said order. As already noticed, the DRP, in terms of Section 144C (15) (a) is a collegium of three Principal Commissioners or the Commissioner of Income Tax. The DRP admittedly is the superior authority in relation to an AO who in this case appears to be Additional CIT. Section 144C (10) read with Section 144C (13) makes it abundantly clear that there is no option with an AO but to be bound by orders and subject to*

review by the DRP. It is bound by the DRP. A reference may also be made to the decision in Zuari Cement Limited (supra) where it was held that an order of assessment which is contrary to the mandatory provisions of Section 144C of the Act was declared as "one without jurisdiction, null and void and enforceable." It is therefore, for this reason, in the said case, the High Court of Andhra Pradesh set aside the impugned order while allowing the writ petition notwithstanding that the Petitioner had a statutory remedy available to it.

32. The situation as far as the present case is concerned is no different. The said order of the Andhra Pradesh High Court was upheld by the order of the Supreme Court when it dismissed Special Leave Appeal (Civil) 16694 of 2013 by its order dated 27th September 2013.

33. Recently the High Court of Bombay has in International Air Transport Association (supra) held that an assessment order passed by the AO which is contrary to the mandatory requirement of Section 144C of the Act, is entirely without jurisdiction. There, despite the Petitioner being a foreign company, the AO did not record the procedure under Section 144C (1) of the Act and proceeded to pass the final assessment order under Section 143(3) of the Act.

34. In Vijay Television (P) Ltd v. Dispute Resolution Panel, Chennai (2014) 369 ITR 113 (Mad) where again the AO passed the final assessment order under Section 143 (3) of the Act instead of passing a draft assessment order under Section 144C (1) of the Act and then sought to issue a Corrigendum modifying the final order of the assessment to be read as a draft assessment order but beyond the period prescribed for limitation for passing such order. The High Court held the entire exercise to be without jurisdiction.

35. In Pankaj Extrusion Limited v. Assistant Commissioner of Income Tax (2011) 241 CTR (Guj) 390 the Division Bench of Gujarat High Court, in interpreting Section 144C of the Act held that where an Assessee was not an 'eligible assessee', the question of passing the draft assessment order under Section 144C of the Act did not arise.

36. As far as the decision of this Court in Honda Cars India Limited v. Deputy Commissioner of Income Tax (supra) is concerned, the question that arose is whether the AO could have passed the draft assessment order when the Assessee

did not satisfy the condition 'eligible assessee' under Section 144C (15) (b) of the Act. Answering the question is in the negative, the Court held that the draft assessment order of the AO is null and void and quashed on that basis. In para 15 of the said decision, it was observed as under:

> *"15. Since we have quashed the draft assessment order, the question that the assessment has now become time barred as left open and it is open to the parties to take recourse of such remedy, as may be available to them in law."*

37. As regards the conduct of the AO in the present case, the Court would only like to highlight the lead portion of the decision of the Supreme Court in Union of India v. Kamlakshi Finance Corporation Limited (supra). The facts in that case were that the according to the Assistant Collector ('AC'), the electrical insulation tapes manufactured by the Assessee, Kamlakshi Finance Corporation Limited ('KFCL') fell under the Tariff heading 39.19 of the Schedule to the Central Excise Tariff Act, 1985 whereas the Assessee was claiming they fell under Entry 85.47. The impugned order of the AO was set aside by the Collector (Appeals) who issued a direction to the AC to pass a fresh reasoned and speaking order.

However, the AC declined to follow the order of the Collector (Appeals) and reiterated his earlier decision that was set aside by the Collector (Appeals). The writ petition filed by the Assessee was allowed by the Bombay High Court against which the Union of India went before the Supreme Court.

38. The Supreme Court in Union of India v. Kamlakshi Finance Corporation Limited (supra) took exception to the conduct of the AO in overlooking the binding order of the Collector (Appeals) and reiterating the order passed by him earlier. In response to the plea of the Appellant that the Officer who passed the order was not actuated by any malafide, the Supreme Court observed, in this regard, as under:

> *"6..... we are not concerned here with the correctness or otherwise of their conclusion or of any factual mala fides but with the fact that the officers, in reaching their conclusion, by- passed two appellate orders in regard to the same issue which were placed before them, one of the Collector (Appeals) and the other of the Tribunal. The High Court has, in our view, rightly criticised this conduct of the Assistant Collectors and the harassment*

> *to the Assessee caused by the failure of these officers to give effect to the orders of authorities higher to them in the appellant hierarchy. It cannot be too vehemently emphasised that it is of utmost importance that, in disposing of the quasi-judicial issues before them, revenue officers are bound by the decisions of the appellate authorities. The order of the Appellate Collector is binding on the Assistant Collectors working within his jurisdiction and the order of the Tribunal is binding upon the Assistant Collectors and the Appellate Collectors who function under the jurisdiction of the Tribunal. The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the appellate authority is not 'acceptable' to the department - in itself an objectionable phrase - and is the subject matter of an appeal can furnish no ground for not following it unless its operation has been suspended by a competent court. If this healthy rule is not followed, the result would only be undue harassment to Assessees and chaos in administration of tax laws."*

39. In Nav Bharat Impex v . Union of India (supra) the Division Bench of this Court dealt with the case where despite the clear directions given by the CIT (Appeals), the delayed refunds were paid to the Petitioner without any element of interest. It was noted that the Assistant Commissioner was merely required to comply with the directions given by the CIT (A) in the appellate order. However, the Assistant Commissioner look it upon himself to examine the case, as per his own understanding and therefore, had "gone to the extent of overreaching the orders of his superior authority, that is, the Commissioner (Appeals)."

40. Relying on the decision in Union of India v. Kamlakshi Finance Corporation Limited (supra) the Court set aside the rejection of claim of interest by the Petitioner in that case and directed the Assistant Commissioner to comply with the orders passed by the Commissioner Appeals).

41. The language used in the present case by the AO while disagreeing with the binding order of the DRP is wholly unacceptable. In the final assessment order dated 28th January 2015, the AO while discussing the order of the DRP observed inter alia in para 4.2 that "The DRP has not acted in accordance with the provisions of the Act while passing this

order which is grossly illegal, against the intent of legislature, without following the basic principles of natural justice and adopting very narrow interpretation of the provisions of the Act."

42. In the circumstances, the Court, while setting aside the final assessment order dated 28th January 2015, directs that the draft assessment order, the order of the DRP, the final assessment order as well as this order shall be placed before the concerned Commissioner who is administratively supervising the work of Additional CIT who passed the draft and final assessment order. The Commissioner will thereafter proceed in accordance with law after issuing notice to the concerned AO and affording him an opportunity of being heard.

43. Mr. Manchanda then submitted that this Court should clarify that in terms of Section 153 (3) B of the Act, the Revenue can within a period of 30 days pass the final assessment order under Section 143 (3) of the Act. The Court notes that the Revenue has not been able to contest the submission of the Petitioners that in the present case the Revenue has issued a notice to the Petitioner under Section 147 of the Act seeking to reopen the assessment for the AY 2010-11. The question of the Court issuing any clarification as sought by the Revenue therefore does not arise. In any event in the present case, the AO did pass the final assessment order in continuation of draft assessment order under Section 144C (1) of the Act and the said final assessment order has been held by this Court, for the reasons recorded hereinabove, to be invalid.

44. The other plea of the Revenue that the Petitioners ought to have challenged the final assessment order before the CIT (A) is untenable for the reason that it was contrary to the order of the DRP which held in favour of the Petitioners. The order of the DRP was not challenged by the Revenue. In the circumstances, the final assessment order was without jurisdiction and this constitutes sufficient ground for the Court exercise its powers under Article 226 of the Constitution.

45. For the above reasons, the draft assessment order dated 28th March 2014 and the final assessment order dated 28th January 2015 passed by the AO are held to be void ab initio and quashed on that basis. The orders consequential thereto also do not survive. However, it is clarified that the Court has not expressed any opinion regarding the validity of the

> *proceedings against the Petitioners under Section 147/148 of the Act. The rights and contentions of the parties in those proceedings are left open to be urged and decided by the appropriate authority in accordance with law."*
>
> *14. As could be seen from the aforesaid observations of the Hon'ble Jurisdictional High Court, non-implementation of directions of DRP in terms of section 144C renders the final assessment order wholly without jurisdiction and void-ab-initio. The plethora of decisions cited by learned counsel appearing for the assessee express similar view. Therefore, we do not intend to deal in detail with them. Thus, keeping in view the ratio laid down by Hon'ble Jurisdiction High Court, as discussed above, we hold that the impugned assessment orders are wholly without jurisdiction or in excess of jurisdiction, hence, void-ab-initio. Therefore, assessment orders under challenge in these appeals deserve to be quashed. Accordingly, we do so."*

13. No contrary decision has been brought to our notice by learned DRP. Thus, respectfully following the ratio laid down by the Coordinate Bench in the above cited decision, we hold that the impugned assessment order is wholly without jurisdiction, hence, invalid. Accordingly, we quash it. Since, we have decided the appeal on legal issue, the issues on merits are kept open.

14. In the result, appeal is partly allowed, as indicated above.

Order pronounced in the open court on 10th May, 2024

Sd/-	***Sd/-***
(PRADIP KUMAR KEDIA)	**(SAKTIJIT DEY)**
ACCOUNTANT MEMBER	**VICE-PRESIDENT**

Dated: 10th May, 2024.
RK/-
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi