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

BEFORE SHRI ANUBHAV SHARMA, JUDICIAL MEMBER, AND SHRI NAVEEN CHANDRA, ACCOUNTANT MEMBER

ITA No. 976/DEL/2023 [A.Y. 2020-21]

Forcepoint International Technology Limited B-5, Sector – 6, Noida PAN: AABCW 0411 B	Vs.	The ACIT Circle – 1(3)(1) International Taxation New Delhi
(Applicant)		(Respondent)

Assessee By : Shri Anil Bhalla, CA.

Department By : Shri Vijay B. Basanta CIT- DR

Date of Hearing : 27.06.2025
Date of Pronouncement : 22.09.2025

ORDER

PER NAVEEN CHANDRA, ACCOUNTANT MEMBER:-

This appeal by the assessee is preferred against the order of the ld. CIT(A) - 42, dated 08.02.2023 for A.Y 2020-21.

2. The grounds raised by the assessee read as under:

"1. Learned CIT(A) has erred both on facts and in law by holding that assessee company is providing technical services and its income of Rs.93,14,40,396/- is taxable as FTS under Article 12 of India-Ireland DTAA and under Section 9(1)(vii) of the Act.

1.1 Learned CIT(A) has erred both on facts and in law by contending that direct human involvement is not necessary for rendering technical services, thereby disregarding judgement Bharti Cellular Ltd [2011] 330 ITR 239.

1.2 Learned CIT(A) has erred both on facts and in law by stating in its order that appellant has in past always considered payment received as Fees for Technical Services under Article 12 of the India- Ireland DTAA and u/s 9(1)(vii) of the Act.

1.3 Learned CIT(A) has erred both on facts and in law by ignoring the fact that nature of product assessee company is selling is an email security program and apart from a right to use the computer software programme by the end-user himself, there is no further right to sub-licence or transfer, nor is there any right to reverse-engineer, modify, reproduce in any manner otherwise than permitted by the licence to the end-user.

1.4 Learned CIT(A) has erred both on facts and in law by ignoring the fact that what is granted to the distributor is only a non-exclusive, non- transferable licence to resell computer software, and no copyright in the computer programme is transferred either to the distributor or to the ultimate end user.

1.5 Ld CIT(A) has erred both on facts and in law by ignoring the fact that what is paid by way of consideration by the distributor in India to the foreign, non-resident manufacturer or supplier, is the price of the computer programm as goods, either in a medium which stores the software or in a medium by which software is embedded in hardware or by way of SaaS on the cloud, which may be then further resold by the distributor to the end-user in India, the distributor making a profit on such resale. Importantly, the distributor or reseller does not get the right to use the product at all.

1.6 Ld CIT(A) has erred both on facts and in law in not considering the fact that the income of the assessee company is not taxable in India by virtue of Hon'ble Supreme Court ruling in the matter of Engineering Analysis Centre of Excellence Pvt Ltd 125 taxmann.com 22 and thereby ignoring the Nil return of income filed by the assessee company and assessing at Rs.93,14,40,396/-

2. The appellant company craves leave to add, alter or amend the ground of appeal at a later stage."

3. The sum and substance of the grievance of the assessee is as to whether sale of software constitutes fess for technical services or not.

4. Brief facts of the case are that the assessee company Forcepoint International Technology Limited, Ireland (herein referred as FITL) [erstwhile Websense International Technology Limited (WITL)] is an overseas Company. It does not have permanent establishment in India.

5. The Assessee has filed its return on income u/s 139(1) declaring nil income and claiming a refund of Rs. 9,31,43,040/-. FITL is the leading provider of data protection Cybersecurity software (Triton), products entrusted to safeguard IT Infrastructure of organizations. FITL sells Websense software products to an independent third party distributors (resellers). They hold non-exclusive non-transferable rights to market and distribute Websense products namely proprietary software in India together with subscription to access Websense proprietary data bases of URL addresses (A SaaS model). These software products are delivered by the Distributor (reseller) to end user on payment in the following manner:-

- For SW Cloud offerings a login and password to the relevant cloud portal is shared as part of the fulfilment subscription basis. [This is in the nature of process on SaaS (Software as a service)].
- Software Keys are issued for on premise software subscriptions and then software is downloaded onto the hardware of the purchaser.

6. The assessee had a receipt of Rs. 52,71,32,336/- from Inflow Technologies Pvt Ltd, India('distributor') and Rs. 40,43,08,060/- from Ivalue Infosolutions Pvt Ltd, India (distributor) on account of the sale of software products. There is a tripartite sub-distributor agreement between Websense BV and Websense International Limited ('assessee, now Forcepoint Technologies International Ltd.) with respective distributors. These receipts are claimed as business income neither accruing nor arising in India, as there is no PE in India.

7. The Assessing Officer held vide his order dated 27.05.2022 that the receipts arising from the sale of software product to the Distributor, who, in turn resold to different end users, be taxable in India as Fee for Technical Services (FTS) under Article 12(3)(b) of the India-Ireland DTAA, and additionally taxable u/s 9(1)(vii) of the Income-tax Act, 1961. Accordingly, the amount of Rs. 93,14,40,396/- was taxed 10% as per Article-12 of the India-Ireland DTAA and u/s 9(1)(vii) of the Income-tax Act, 1961.

8. The appeal before the CIT(A) failed and hence the aggrieved assessee is before us.

9. The ld. counsel for the assessee vehemently contended that the assessee has no PE in India and makes various kinds of software which are sold worldwide as also in India through different distributors which whom the assessee has agreements and has referred to page 77 onwards of the Paper Book where the distribution agreement is furnished. Details of the products sold are at pages 89 onwards of the Paper Book.

10. The ld. counsel for the assessee argued that the relationship between the assessee and the distributor is that of principal to principal. The assessee raises invoices for their software sold and distributor has non-exclusive/non-transferable rights. There is no copyright given to the distributor and there is non-human interface which put the software sold at the level other than FTS. The ld. counsel for the assessee submitted that the assessee sells software and non-technical services.

11. The ld. counsel for the assessee relied upon the decisions of the Hon'ble High Court of Delhi in the case of ***Bharti Cellular Ltd*** 319 ITR 139 and the Hon'ble Supreme Court in 330 ITR 239 (SC) for the proposition that to be a technical service, the same has to have some human interface as referred to in Para 15 of the decision.

12. The ld. counsel for the assessee submitted that the nature of product assessee company is selling is an email security program and apart from a right to use the computer software programme by the end-user himself, there is no further right to sub-licence or transfer, nor is there any right to reverse- engineer, modify, reproduce in any manner otherwise than permitted by the licence to the end-user.

13. The ld. counsel for the assessee further argued that FTS necessarily has to involve human interface whereas in the instant case of the assessee, software is stand-alone product which requires no human interface. The nature of software sold are meant for preventing cyber attack and software sold are not specific to the customer needs.

14. With reference to the decision of the Hon'ble Supreme Court in the case of ***Kotak Securities Limited*** 383 ITR 1, the ld. counsel for the assessee emphasized that law with regard to human interface remains the same. The ld. counsel for the assessee also relied on the decision of the Hon'ble Jurisdictional High Court in the case of ***SFDC Ireland Ltd*** and referred to page 483 Para 27 and the decision of the co-ordinate bench in ***Finastra International Financial Systems PTE Ltd*** 158 Taxmann.com 632 and ***Tagit [P] Ltd*** 159 taxmann.com 93 Para 13.

15. The ld. counsel for the assessee further argued that in the preceding years, sale of software has been considered as sale per se only and has been accepted by the department. For the instant year, software as FTS has been considered only on the basis of the decision of the Hon'ble Supreme Court in the case of ***Engineering Analysis Centre of Excellence*** 125 taxmann.com 42. The ld. counsel for the assessee emphasized that there is no estoppel in law and relied upon the decision of the ITAT Delhi in the case of ***Honda Motorcycle and Scooter India Pvt Ltd*** at page 440 of the Paper Book. The ld. counsel for the assessee further informed that in the subsequent years, equalization method has been adopted.

16. On the other hand, the ld. DR argued that the assessee is only providing software solutions and not off the shelf software. It is the say of the ld. DR that the assessee is providing professional services to its clients. The ld. DR further submitted that in the case of ***Bharti Cellular*** [supra], human intervention exists. He also relied on the decision of the ITAT, Delhi in the case of ***Volvo Information Technology AB*** ITA No. 2169/DEL/2023.

17. In rejoinder, the ld. counsel for the assessee distinguished the case of ***SFDC Ireland*** [supra] by stating that in that case, there was no 'make available' clause in the DTAA and hence sale was not considered as FTS.

18. We have heard the rival submissions and have perused the relevant material on record. We find that the assessee is a leading provider of data protection Cybersecurity software. We find that in the Instant case, FITL is engaged in selling its software products to an independent third party distributor and hold non-exclusive non-transferable rights to market and distribute the products in India together with subscription to access data bases of URL addresses. A reading of the distribution agreement between software seller and distributor shows that the distributor is granted only a non-exclusive, non-transferable license to resell computer software to the end user (PB 77-88). There is no further right to sub-licence or transfer, nor is there any right to reverse-engineer, modify, reproduce in any manner otherwise than permitted by the licence to the end-user.

19. The assessee has also entered into an EULA (End User License Agreement) in the form of Forcepoint subscription agreement with end users. PB 100-114 which confirms this restriction. (Copy of invoices PB

126-132 & PB 154-158).We thus find that the distributor in India pays by way of consideration to the foreign, non-resident manufacturer or supplier, the price of the computer software programme as supply of goods via internet as SaaS on the cloud, which is then further resold by the distributor to the end-user in India. The distributor makes a profit margin on such resale.

20. In such a factual matrix, we are not convinced that the assessee renders any technical service to the distributor and to the end user. The instant case is that of sale of software simplicitor as a product by way of SaaS on the internet cloud services. The end user by using the code and password can use the software created by the assessee company to impregnate its technology systems with software protocol for security protection in its email services and its technology infrastructure. The end user receives only ancillary technical support in installation/maintenance of the software.

21. We are of the considered view that conclusion of the AO that SaaS means rendering of technical service is not justified. We would rather agree with the assessee that the AO, conscious of the fact that receipts from sale of software could not be taxed as 'Royalty' in India, after the

land mark judgment in ***Engineering Analysis Centre of Excellence*** 432 ITR 471 (SC), the AO tried to recharacterized the receipts as FTS under the Act. We would also agree with the assessee that there is no human intervention involved in the software sold in India, taking the receipts of the assessee outside the ambit of technical services, in line with the decisions of the Delhi High Court in ***Bharti Cellular*** 319 ITR 139 (Del) PB 378 PB 386 & 388 as confirmed by Hon'ble Supreme Court 330 ITR 239 (SC), wherein it was held that the technical services described in Section 9(1)(vii) read with explanation 2 would have to mean services rendered by human and that at the time of delivery of service there had to be a human interface.

22. We also find on page 20 of the assessment order that the AO has held that the customers of the assessee *"are paying for the unique IP that is provided by the algorithms developed by the assessee that delivers actionable, personalized, and unique insight to customers."* By the AO's own understanding, the sale of IP (Intellectual Property) would fall in the realm of Royalty and not FTS.

23. Coming to the case laws cited, we find that the ITAT Delhi in the case of ***Finastra International Financial Systems*** [supra] has held that Deemed software sale is not FTS as under:

> **"13. We find that the AO has read and interpreted the clauses of the agreement wrongly and selectively. While the AO has concluded that the agreements between the assessee and the end user/ distributor give credence to the fact that the terms of software sales by the assessee to its distributor/ end users in India are clearly distinguishable from the case of Engineering Analysis Centre of Exellence Pvt. Ltd., the assessee has contended that the AO has not read/ interpreted the agreements between the assessee and the distributor/ end user in the proper context. Having gone through the various clauses of the distributor agreement, we hereby hold that the subject matter is squarely covered by the judgment of Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Private Limited vs. CIT 125 taxmann.com 42 (SC)."**

24. Similarly, in the decision of the Hon'ble ITAT Delhi Bench in the matter of ***Tagit (P.) Ltd***. [2024] 159 taxmann.com 93 (Delhi-Trib) it was held that software sale is not FTS as under:

> ***"Where Assessee, a Singapore based company had received a certain sum from Indian bank towards sales of Mobeix Platform V6.10, mobile banking application for purpose of accessing server software and Assessing Officer concluded that receipts from sale of software were to be treated as FTS as assessee had provided***

platform to bank which involved complex use of technology, since it was explicit from licence agreement that assessee had sold software licences and not any services to its customers in India, impugned amount could not be taxed as FTS. (PB 414).

25. The Hon'ble Madras High Court in the case of ***Skycell Communication Limited*** 251 ITR 53 has held that just because there is a technical input behind a sale of product it cannot be held that technical services have been rendered, as under:

"10. Having regard to the fact that the term is required to be understood in the context in which it is used, "fee for technical services" could only be meant to cover such things technical as are capable of being provided by way of service for a fee. The popular meaning associated with "technical" is "involving or concerning applied and industrial science".

11. In the modern day world, almost every facet of one's life is linked to science and technology inasmuch as numerous things used or relied upon in every day life is the result of scientific and technological development. Every instrument or gadget that is used to make life easier is the result of scientific invention or development and involves the use of technology. On that score, every provider of every instrument or facility used by a person cannot be regarded as providing technical service.

12. When a person hires a taxi to move from one place to another, he uses a product of science and technology, viz., an automobile. It cannot on that ground be said that the taxi driver who controls the vehicle, and monitors its movement is rendering a technical service to the person who uses the automobile. Similarly, when a person travels by train or in an aeroplane, it cannot be said that the railways or airlines is rendering a technical service to the passenger and, therefore, the passenger is under an obligation to deduct tax at source on the payments made to the railway or the airline for having used it for travelling from one destination to another. When a person travels by bus, it cannot be said that the undertaking which owns the bus service is rendering technical service to the passenger and, therefore, the passenger must deduct tax at source on the payment made to the bus service provider, for having used the bus. The electricity supplied to a consumer cannot, on the ground that generators are used to generate electricity, transmission lines to carry the power, transformers to regulate the flow of current, meters to measure the consumption, be regarded as amounting to provision of technical services to the consumer resulting in the consumer having to deduct tax at source on the payment made for the power consumed and remit the same to the Revenue.

13. Satellite television has become ubiquitous, and is spreading its area and coverage, and covers millions of homes. When a person receives such transmission of television signals through the cable provided by the cable operator, it cannot be said that the home

owner who has such a cable connection is receiving a technical service for which he is required to deduct tax at source on the payments made to the cable operator.

14. Installation and operation of sophisticated equipments with a view to earn income by allowing customers to avail of the benefit of the user of such equipment does not result in the provision of technical service to the customer for a fee.

26. The requirement of involvement of manual and human interface is necessary for considering a service as "technical service' was elaborated by the Hon'ble Delhi High Court in the case of ***Bharti Cellular Limited*** [supra] and confirmed by the hon'ble Supreme Court. The Delhi High Court held as under:

" facility in question provided to the assessee is a "service" and in a broader sense a "communication service". The facility of interconnection is held as providing service which is "technical" in the sense that involved sophisticated technology. Thus the factual finding of the Jurisdictional High Court in this very facts and circumstances is that "technical services" is being provided by the FTO's to the assessee but that such "Technical Service" is not FTS as defined u/s. 9(1)(vii) of the Act as there is no human intervention. This finding that it is a "service" has not been upheld by the Hon'ble Supreme Court of India only the factual issue as to whether there was human intervention was set aside to AO. Under such circumstances, the question of taking a contrary view that it

is not a "technical services", but a case where the FTO had granted the assesse a right to use a process and the payment is for 'royalty' cannot be countenanced. Applying the binding decision of the Hon'ble Jurisdictional High Court we have to hold that the payment cannot be termed as covered by Explanation 2 read with Section 9(1)(vi) of the Act. On this ground alone the order of the First Appellate Authority has to be upheld. The charge that the payment in question is FTS u/s 9(1)(vii) excludes the possibility of the payment being royalty under section 9(1)(vi) of the Act. Both these sections deal with different set of facts situation which cannot co-exist.

27. The Revenue reliance on the decision of ***Kotak Securities Limited*** 383 ITR 1 (SC) does not come to the rescue of the AO as the hon'ble Supreme Court has hinted at modern day scientific and technological developments which may render human intervention obsolete, it has nevertheless not over ruled the principles laid down in regard to the ingredient of technical services as described in Section 9(1)(vii) of the Act by Delhi High Court in ***Bharti Cellular Limited*** 319 ITR 139 (Del.) as affirmed by the Hon'ble Supreme Court in 193 taxman 97 (SC).

28. In view of the judicial precedents, we are of the considered opinion that to fall within the scope of FTS, it is incumbent upon the Revenue to

establish an indelible link between the payment received by the assessee and the same constituting consideration for providing technical services which the Revenue has not done. We are of the considered view that the Revenue has not shown that based on the agreement or the invoices, read with details of product portfolio, that software has not been sold and that technical services were rendered in the nature of FTS. We further find that the Revenue's proposition arose from the fact that the offering by way cyber security protection, the software provided a comprehensive service experience or solution with the help of technology embedded in the security software and therefore there is a rendering of technical service and hence FTS. Such a proposition, we hold are not valid. We are of the view that the assessee supplied a software product which facilitated digital security in a user's technology infrastructure and which was delivered on the cloud. The payment received by assessee from Distributor was for acquiring security software simpliciter for onward selling to end customer. We, therefore, hold that the assessee company is not liable to be taxed on its income earned from sale of software to the Indian Distributor as FTS. Accordingly, we allow the grounds raised by the assessee.

29. In the result, appeal of assessee in ITA No.976/DEL/2023 is allowed.

The order is pronounced in the open court on 22.09.2025.

Sd/-	**Sd/-**
[ANUBHAV SHARMA] **JUDICIAL MEMBER**	**[NAVEEN CHANDRA]** **ACCOUNTANT MEMBER**

Dated: 22nd SEPTEMBER, 2025.

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1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Sl No.	PARTICULARS	DATES
1.	*Date of dictation of Tribunal Order*	
2.	*Date on which the typed draft order is placed before the Dictating Member*	
3.	*Date on which the typed draft order is placed before the other Member [in case of DB]*	
4.	*Date on which the approved draft order comes to the Sr. P.S./P.S.*	
5.	*Date on which the fair Order is placed before the Dictating Member for sign*	
6.	*Date on which the fair order is placed before the other Member for sign [in case of DB]*	
7.	*Date on which the Order comes back to the Sr. P.S./P.S for uploading on ITAT website*	
8.	*Date of uploading, inf not, reason for not uploading*	
9.	*Date on which the file goes to the Bench Clerk*	
10.	*Date on which the file goes for Xerox*	
11.	*Date on which the file goes for endorsement*	
12.	*The date on which the file goes to the Superintendent for checking*	
13.	*Date on which the file goes to the Assistant Registrar for signature on the order*	
14.	*Date on which the file goes to the dispatch section for dispatch the Tribunal order*	
15.	*Date of Dispatch of the Order*	
16.	*Date on which the file goes to the Record Room after dispatch the order*	