IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 29.05.2025

\+ **ITA 150/2025 & CM APPL. 29405/2025**

THE COMMISSIONER OF INCOME
TAX - INTERNATIONAL TAXATION -1 ....Appellant

Versus

AMAZON WEB SERVICES, INC ....Respondent

AND

\+ **ITA 154/2025 & CM APPL. 29646/2025**

THE COMMISSIONER OF INCOME
TAX - INTERNATIONAL TAXATION -1 .....Appellant

Versus

AMAZON WEB SERVICES, INC .....Respondent

Advocates who appeared in this case:

For the Appellant : Mr. Ruchir Bhatia, SSC, Mr. Anant Mann, JSC Ms. Aditi Sabharwal and Mr. Abhishek Anand, Advocates for the Revenue.

For the Respondent: Mr. Porus Kaka, Sr. Advocate with Mr. Rohit Jain, Mr. Aniket D. Agrawal, Mr. Manish Kanth, Ms. Manisha Sharma, Advocates for the Assessee.

CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU
HON'BLE MR JUSTICE TEJAS KARIA

JUDGMENT

VIBHU BAKHRU, J.

1. The Revenue has filed the present appeals under Section 260A of the Income Tax Act, 1961 [**the Act**] impugning a common order dated 01.08.2023 passed by the learned Income Tax Appellate Tribunal [**the Tribunal**] allowing the appeals, being ITA No.522/Del/2023 and ITA No.523/Del/2023, in respect of assessment years [**AYs**] 2014-15 and 2016-17, respectively. The respondent [**Assessee**] had preferred the said appeals against orders dated 27.01.2023 and 24.01.2023 passed by the Assessing Officer [**AO**] under Section 147 read with Section 144C(13) of the Act in respect of AYs 2014-15 and 2016-17.

2. The Assessee is a company incorporated in the United States of America and is a tax resident of that country. The Assessee had received certain sums of money from Indian entities for rendering cloud computing services, which, according to the AO are chargeable to tax as royalty and fees for technical service [**FTS**] under the Act as well as "the Convention between the Government of the United States of America and the Government of the Republic of India for the Avoidance of Double Taxation and Prevention of Fiscal evasion with respect to taxes on income" [**India-US DTAA**].

3. The Assessee contends to the contrary and claims that its receipts are for providing standard cloud computing services, which are not chargeable to tax either as royalties or as FTS. Therefore, the Assessee had not filed its return of income. The Assessee's customers that had

remitted the charges to the Assessee for services had not withheld any tax under Section 195 of the Act for the same reason.

4. The Revenue had initiated proceedings under Section 201/201(1A) of the Act in case of one M/s Snapdeal Private Limited (erstwhile Jasper Infotech Private Limited), which had availed of the services of the Assessee. The information that the said company had remitted funds overseas as charges for the services rendered by the Assessee was furnished to the AO. The AO was of the view that the amounts received by the Assessee were chargeable to tax under the Act. Accordingly, the AO issued notices under Section 148 of the Act and commenced proceedings for re-assessment for AYs 2014-15 and 2016-17.

5. The draft assessment order was passed by the AO, assessing the total income of the Assessee. The Assessee had filed its objections before the Dispute Resolution Panel [**DRP]**, which were rejected by separate orders dated 06.12.2022. Pursuant to the said directions, the AO issued the final assessment orders dated 27.01.2023 and 24.01.2023 for AY 2014-15 and AY 2016-17, respectively, whereby the AO determined the Assessee's income chargeable to tax at ₹2,47,68,23,222/- in respect of AY 2014-15 and ₹10,07,81,05,172/- in respect of AY 2016-17.

6. The Assessee appealed the aforementioned final assessment orders before the Tribunal. The learned Tribunal allowed the said appeals and set aside the assessment orders in view of its finding that

the amounts received by the Assessee were neither in the nature of royalties nor fees for included services [**FIS**], which were chargeable to tax under the Act read with the India-US DTAA.

7. In the aforesaid context, the Revenue has projected the following common questions of law in the present appeals:

> "2.1 Whether on the facts and in the circumstances of the case, Ld. ITAT has erred in holding that the payments received by the Assessee accruing/arising from India from its customers are not royalty income within the meaning of Article 12(3) of the India-USA DTAA as well as section 9(l)(vi) of the Income Tax Act, 1961?
>
> 2.2 Whether on the facts and in the circumstances of the case, the Ld. ITAT has erred in holding that the payment received by the Assessee from customers is not royalty without appreciating the fact that the assessee provides use of hardware and complete infrastructure comprising of server, software, data storage space, networking equipment database, etc. and hence constitutes 'royalty' being towards usages of equipment by the customers?
>
> 2.3 Whether on the facts and in the circumstances of the case, the Ld. ITAT has erred in holding that the payments received by the assessee from customers is not royalty income without appreciating the fact that receipts from customers in India are on account of 'use of equipment' as specified under clause (iva) of Explanation 02 to section 9(l)(vi) of the Act read with Explanation 5 to section 9(l)(vi) of the Act as well as Article 12(3) of the India-USA DTAA?
>
> 2.4 Whether on the facts and in the circumstances of the case, the Ld. ITAT has erred in holding that the payments received by the assessee on account of cloud computing is not royalty income without considering

the fact that even if an argument is made that assessee receives service income, then also it would be treated as fees for included services (FIS) as per article 12(4)(a) of the India USA DTAA being ancillary and subsidiary to the application or enjoyment of the right property or information in the form of a online cloud computing for which it is entitled to royalty?

2.5 Whether the Ld. ITAT has erred in holding that the payments received by the assessee from its customers did not constitute 'fee for technical service' as defined under section 9(l)(vii) of the Income Tax Act, 1961 or 'fee for included service' as defined under Article 12(4) of the India-USA DTAA?

2.6 Whether Ld. ITAT has erred in holding that the payments received by the Assessee accruing/arising from India are not taxable in India without taking into account the fact that the agreement entered into by the Assessee with its customers result in importing of a technical knowledge, experience skill, know how or processes and therefore, there is fulfillment of a make available clause in terms of article 12(4) (h) of India-USA DTAA as well as Explanation -2 of section 9(l)(vii) of the I.T.Act, 1961 ?"

REASONS AND CONCLUSION

8. The principal issue that arises in the present appeals is whether the amounts received by the Assessee from Indian entities for providing its services are taxable under the Act. The AO had initiated the re-assessment proceedings pursuant to the information received that M/s Snapdeal Private Limited (erstwhile Jasper Infotech Private Limited) had made foreign remittances to the Assessee towards "Hosting and Bandwidth Charges" without deducting any withholding tax. It is the Assessee's case that it provides standardised and automated cloud

computing services to its customers. Any person desiring to avail of the services is required to enter into a standardized contract electronically, in respect of the said services. The AO had, in the aforesaid context, examined the said Standard Agreement [**the Agreement**] and on the basis of the same, concluded that some of the receipts were taxable as royalties and also taxable as FIS.

9. For the purposes of the present appeals, we may consider the conclusions drawn by the AO in the assessment order dated 27.01.2023 in respect of AY 2014-15, which is also similar to the conclusions drawn in the assessment order for AY 2016-17.

10. The AO examined certain clauses of the Agreement and concluded that Assessee is providing a host of services / intellectual property to its customers. The AO also noted that the Assessee provides the customers with Services Offerings and Application Program Interface [**API**] to enable the customers to develop further content and use existing content for its business. In terms of the Agreement, service offerings means Services (including associated APIs), the "AWS Content", the "AWS Marks", the "AWS Site". Further, the Agreement also includes provision for support services to be rendered by the Assessee.

11. The AO proceeded to hold that the Assessee was providing technical support to its customers and also making available technology and therefore, the fees received by it was taxable as FTS under the Act as well as FIS under Article 12 of the India-US DTAA. Additionally,

the AO held that the Service Offering also covered trademarks, service marks and concluded that the Assessee was providing copyright and trademark services to its customers for commercial exploitation. The AO reasoned that; therefore, the income of the Assessee would qualify as royalty.

12. The AO examined the cloud computing models and found that the amounts paid to the Assessee were also in the nature of right to use scientific equipment and therefore, were covered under the definition of ‘royalties’ under the India-US DTAA.

13. It is material to note that it is not the Revenue’s case that any part of the amounts received by the Assessee are taxable as business income attributable to the Assessee’s permanent establishment [**PE**] in India. There is no allegation that the Assessee has a PE in India. Thus, essentially, the controversy that arises in the present case is whether the amounts received by the Assessee for its services could be termed as ‘FTS’ or ‘royalties’, which are taxable under the Act and the India-US DTAA.

14. Admittedly, the Assessee provides standardised and automated cloud computing services / AWS services to its customers around the globe. Thus, the controversy is, essentially, confined to determining whether the AO’s conclusions are sustainable in reference to the Agreement entered into between the Assessee and its customers.

15. The learned Tribunal also examined various clauses of the Agreement to determine whether any of the services rendered could be construed as 'FTS' or 'royalty' chargeable to tax under the Act and the India-US DTAA and had concluded that that the Agreement did not entail transfer of any technology, skill, technical know-how or process with the meaning of Article 12(4)(b) of the India-US DTAA. The same also did not entail transfer of any right to commercially exploit the Assessee's Intellectual Property Rights [**IPR**]. Thus, the consideration for cloud computing services offered by the Assessee neither constitutes as royalty nor any identical payments which could be considered as ancillary or subsidiary to the enjoyment of any right for which royalties are payable within the scope of Article 12(3) or 12(4)(a) of the India-US DTAA.

16. It is necessary to understand the nature of services being offered by the Assessee. There is no cavil that the services offered by the Assessee are standardised services that can be availed by any of its customers. The Assessee operate a cloud computing platform, which essentially comprises of hardware as well as software. The Assessee provides cloud services for its customers to build and develop their own content. Admittedly, the Agreement does not entail transferring of any skill, knowledge or know-how by the Assessee to its customers, but lends support to its customers for the purposes of enabling the customers to use its cloud computing platform.

17. It is the Assessee's case that the charges received by it are not covered as FIS as defined under Article 12 of the India-US DTAA. It is thus relevant to refer to the said Article. Article 12 of the India-US DTAA is set out below:-

"ARTICLE 12

Royalties and Fees for Included Services

1. Royalties and fees for included services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, such royalties and fees for included services may also be taxed in the Contracting State in which they arise and according to the laws of that State; but if the beneficial owner of the royalties or fees for included services is a resident of the other Contracting State, the tax so charged shall not exceed:

(a) in the case of royalties referred to in subparagraph (a) of paragraph 3 and fees for included services as defined in this Article (other than services described in subparagraph (b) of this paragraph):

(i) during the first five taxable years for which this Convention has effect,

(A) 15 percent of the gross amount of the royalties or fees for included services as defined in this Article, where the payer of the royalties or fees is the Government of that Contracting State, a political subdivision or a public sector company; and

(B) 20 percent of the gross amount of the royalties or fees for included services in all other cases, and

(ii) during the subsequent years, 15 percent of the gross amount of royalties or fees for included services; and

(b) in the case of royalties referred to in subparagraph (b) of paragraph 3 and fees for included services as defined in this Article that are ancillary and subsidiary to the enjoyment of the property for which payment is received under paragraph 3(b) of this Article, 10 percent of the gross amount of the royalties or fees for included services.

3. The term “royalties” as used in this Article means:

(a) payments of any kind received as a consideration for the use of, or the right to use, any copyright of a literary, artistic, or scientific work, including cinematograph films or work on film, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trademark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience, including gains derived from the alienation of any such right or property which are contingent on the productivity, use, or disposition thereof, and

(b) payments of any kind received as consideration for the use of, or the right to use, any industrial, commercial, or scientific equipment, other than payments derived by an enterprise described in paragraph 1 of Article 8 (Shipping and Air Transport) from activities described in paragraph 2(c) or 3 of Article 8.

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.

5. Notwithstanding paragraph 4, "fees for included services" does not include amounts paid:

(a) for services that are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of property other than a sale described in paragraph 3(a);

(b) for services that are ancillary and subsidiary to the rental of ships, aircraft, containers or other equipment used in connection with the operation of ships or aircraft in international traffic;

(c) for teaching in or by educational institutions;

(d) for services for the personal use of the individual or individuals making the payment; or

(e) to an employee of the person making the payments or to any individual or firm of individuals (other than a company) for professional services as defined in Article 15 (Independent Personal Services).

6. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the royalties or fees for included services, being a resident of a Contracting State, carries on business in the other Contracting States, in which the royalties or fees for included services arise, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the royalties or fees for included

services are attributable to such permanent establishment or fixed base. In such case the provisions of Article 7 (Business Profits) or Article 15 (Independent Personal Services), as the case may be, shall apply.

7. (a) Royalties and fees for included services shall be deemed to arise in a Contracting State when the payer is that State itself, a political subdivision, a local authority, or a resident of that State. Where, however, the person paying the royalties or fees for included services, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the liability to pay the royalties or fees for included services was incurred, and such royalties or fees for included services are borne by such permanent establishment or fixed base, then such royalties or fees or included services shall be deemed to arise in the Contracting State in which the permanent establishment or fixed base is situated.

(b) Where under subparagraph (a) royalties or fees for included services do not arise in one of the Contracting States, and the royalties relate to the use of, or the right to use, the right or property, or the fees for included services relate to services performed, in one of the Contracting States, the royalties or fees for included services shall be deemed to arise in that Contracting State.

8. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them. and some other person, the amount of the royalties or fees for included services paid exceeds the amount which would have been paid in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of the Convention."

18. While 'Service Offerings' are defined under the Agreement reads as under:

> "**Service Offerings**" means the Services (including associated APIs), the AWS Content, the AWS Marks, the AWS Site, and any other product or service provided by us under this Agreement. Service Offerings do not include Third Party Content."

19. And, API under the Agreement means an application program interface.

20. The relevant extract of the Agreement, which indicates the scope of the Service Offering License as noted by the learned Tribunal is set out below:

> "8.4 Service Offerings License. As between you and us, we or our affiliates or licensors own and reserve all right, title, and interest in and to the Service Offerings. We grant you a limited, revocable, non-exclusive, non-sublicensable, non-transferrable license to do the following during the Term: (i) access and use the Services solely in accordance with this Agreement; and (ii) cow and use the AWS Content solely in connection with your permitted use of the Services. Except as provided in this Section 8.4, you obtain no rights under this Agreement from us or our licensors to the Service Offerings, including any related intellectual property rights. Some AWS Content may be provided to you under a separate license, such as the Apache Software License or other open source license. In the event of a conflict between this Agreement and any separate license, the separate license will prevail with respect to that AWS Content.
>
> 8.5 License Restrictions. Neither you nor any End User may use the Service Offerings in any manner or for any purpose other than as expressly permitted by this Agreement. Neither you nor any End User may, or may attempt to, (a) modify, alter, tamper with, repair, or otherwise create derivative works of any software included in the Service Offerings (except to the extent software included in the Service Offerings are provided to you under a separate license that expressly permits the creation of derivative works), (b) reverse engineer, disassemble, or decompile the Service Offerings or apply any other process or procedure to

> derive the source code of any software included in the Service Offerings, (c) access or use the Service Offerings in a way intended to avoid incurring fees or exceeding usage limits or quotas, or (d) resell or sublicense the Service Offerings. All licenses granted to you in this Agreement are conditional on your continued compliance this Agreement, and will immediately and automatically terminate if you do not comply with any term or condition of this Agreement. During and after the Term, you will not assert, nor will you authorize, assist, or encourage any third party to assert, against us or any of our affiliates, customers, vendors, business partners, or licensors, any patent infringement or other intellectual property infringement claim regarding any Service Offerings you have used. You may only use the AWS Marks in accordance with the Trademark Use Guidelines."

21. It is apparent from the above that whilst the Assessee's customers can access and use the cloud computing service, they do not acquire any right or title or any IPR that would entitle them to exploit or commercially monetize the said assets on its own.

22. Article 4 of the Agreement clearly spells out that the customers are solely responsible for the development, content, operation, maintenance and use of its Content. The relevant extract of Article 4 of the Agreement as noted by the AO as well as the learned Tribunal in their respective orders is reproduced below:

> **"4. Your Responsibilities**
>
> **4.1 Your Content**. You are solely responsible for the development, content, operation, maintenance, and use of Your Content. For example, you are solely responsible for:
>
> (a) the technical operation of Your Content, including ensuring that calls you make to any Service are compatible with then-current APIs for that Service;

(b) compliance of Your Content with the Acceptable Use Policy, the other Policies, and the law;

(c) any claims relating to Your Content; and

(d) properly handling and processing notices sent to you (or any of your affiliates) by any person claiming that Your Content violate such person's rights, including notices pursuant to the Digital Millennium Copyright Act.

4.2 Other Security and Backup. You are responsible for properly configuring and using the Service Offerings and taking your own steps to maintain appropriate security, protection and backup of Your Content, which may include use of encryption technology to protect Your Content from unauthorized access and routine archiving Your Content. AWS log-in credentials and private keys generated by the Services are for your internal use only and you may not sell, transfer or sub-license them to any other entity or person, except that you may disclose your private key to your agents and subcontractors performing work on your behalf."

23. As noted earlier, the AO had taken note that "Service Offerings" mean the AWS content, the AWS Marks, the AWS Site and other services provided under the Agreement.

24. In addition, the AO had also noted the definition of 'AWS Content' and 'AWS Mark', which is noted below:

"**AWS Content"** means Content we or any of its affiliates make available in connection with the Services or on the AWS Site to allow access to and use of the Services, including WSDLs; Documentation; sample code; software libraries; command line tools; and other related technology. AWS Content does not include the Services.
"**AWS Marks**" means any trademarks, service marks, service or trade names, logos, and other designations of

> AWS and its affiliates that we may make available to you in connection with this Agreement."

25. It is apparent from the above, the AWS Content, is made available by the Assessee only in connection with its services or on the AWS Site to allow access to the services. However, it is clear that the customers are not provided any right to commercially exploit the same. AWS Content is provided only for the purposes to allow access and use of its services. The same would include documentation, sample code, software libraries, command line tools and other related technology. Thus, the said content is confined to facilitate the access and avail the Assessee's services. It would be erroneous to assume that the Assessee derives any proprietary right in respect of the AWS Content.

26. Additionally, the AO had also noted the assistance offered by the Assessee to its customers under the support guidelines and the AO construed providing AWS Support to mean that the Assessee was making available technology to its customers. And, the consideration for the same would fall within the scope of FIS under Article 12 of the India-US DTAA.

27. The AO's aforesaid finding was founded on the definition of 'AWS content' and support guidelines. The AO had noted that on accessing the support links, the following information is available:

> "AWS Support provides a mix of tools and technology, people, and programs designed to proactively help you optimize performance, lower costs, and innovate faster. We save time for your team by helping you to move

faster in the cloud and focus on your core business. We are determined to make our customers successful on their cloud journey and address requests that range from answering best practices questions, guidance on configuration, all the way to break-fix and problem resolution.

On behalf of our customers, we are focused on solving some of the toughest challenges that hold you back in your cloud journey. Sometimes that means helping you troubleshoot an issue, but more often, it involves "looking around corners" to find ways for you to better utilize AWS services, answer best practices questions, and provide guidance on configuration. We focus on helping you achieve the outcomes you need to make your business successful. It is our approach to Support that sets AWS apart.

Benefits

Move faster with AWS

Use AWS experts to quickly build up knowledge and expertise. AWS Support helps you stay agile with architectural guidance as you build applications and solutions. Have a question or need help? Just ask - our cloud support engineers and subject matter experts are here with answers and guidance. They are looking around the corner to identify new ways AWS can help your business.

Highly-trained engineers, large network of subject-matter experts

At AWS, we hire smart Cloud Support Engineers that are well versed in DevOps technologies, automation, infrastructure orchestration, configuration management and continuous integration, and who are not constrained by how "things are usually done". Cloud Support Engineers held to same standard for technical aptitude as AWS software development organization. We also have a vast network of subject-matter experts

ranging from Solutions Architects to product managers that can come off the bench to help you as needed

Engineers empowered to help you achieve your goals

At AWS, Cloud Support Engineers do not simply follow a run-book. Rather, AWS engineers stay with Support cases from the start all the way through to resolution. This model avoids the need for escalation paths typically employed by support organizations and eliminates the need for customers to interface with multiple support engineers, which can slow down time-to-resolution and allow you to move faster in your cloud journey.

Support plans

Developer Support

We recommend AWS Developer Support if you are testing or doing early development on AWS and want the ability to get technical support during business hours as well as general architectural guidance as you build and test.

Business Support

We recommend AWS Business Support if you are running production workloads on AWS and want 24x7 access to technical support from engineers, access to Health API, and contextual architectural guidance for your use-cases.

Enterprise On-Ramp

We recommend Enterprise On-Ramp if you have production/business critical workloads in AWS and want 24x7 access to technical support from engineers, access to Health API, consultative architectural guidance, and a pool of Technical Account Managers (TAMs) to coordinate access to AWS subject matter experts.

Enterprise Support

We recommend Enterprise Support for 24x7 technical support from high-quality engineers, tools and

technology to automatically manage health of your environment, consultative architectural guidance, and a designated Technical Account Manager (TAM) to coordinate access to proactive / preventative programs and AWS subject matter experts.

Customer testimonials

FanDuel uses AWS Support for architectural guidance and expertise in order to focus on building value for its customers. AWS Support helps FanDuel scale up for critical events like the NFL season launch and even helped reduce infrastructure costs by 50%.

WirelessCar partners with AWS Support to improve its architecting of applications and improve its utilization of AWS services, all while reducing costs and ensuring optimal performance.

Pitney Bowes uses AWS Support for architectural guidance as it builds new applications, avoiding critical mistakes and designing for optimal performance. AWS Support helps Pitney Bowes create solutions that delight its customers.

Scope of AWS Support

Our AWS Technical Support tiers cover development and production issues for AWS products and services, along with other key stack components."

28. The AO reasoned that the support provided by the Assessee to its customers is highly technical. The AO also reasoned that the Assessee makes available various technologies to its customers on noting the definition of AWS Content, which include documentation and sample code and also the following extract from the support page:

> "We are determined to make our customers successful on their cloud journey and address requests that range from answering best practices questions, guidance on configuration, all the way to break-fix and problem resolution.

> AWS Support helps you stay agile with architectural guidance as you build applications and solutions."

29. The fact that the Assessee lends certain support and assistance to its customers for availing of the services does not in any manner support the view that the Assessee makes available technology or technical skills, know-how or the other process to its customers within the scope of Article 12(4)(b) of the India-US DTAA. The Assessee also addresses various requests of its customers including answering best practice questions, guidance of configuration amongst others only as a support for availing of its services.

30. The AO had observed that there are following three major models for delivering cloud computing services to business:

> "1. **Infrastructure as a Service (IaaS) Model** - Under this model, typically utilised by large multinational businesses, IT infrastructure in the form of data centers, virtual servers, network infrastructure, equipment, etc. are sourced as a service from third party service providers. **The customer does not manage or control the underlying cloud infrastructure, but has control over the operating system, storage, and deployed applications, and may be given limited control of select networking components**.
>
> 2. **Platform as a Service (PaaS) Model** - PaaS is a category of cloud computing services that provides a computing platform and programming tools as a service for software developers. The client does not control or manage the underlying cloud infrastructure, including the network, servers, operating systems, or storage, but has control over the deployed applications.
>
> 3. **Software as a Service (SaaS) Model** - Under this model the service provider hosts several software applications for consumers to use as and when required thereby eliminating

> the need to install and run the software application on the consumer's own infrastructure. It can be provided either to business customers (B2B) or to individual customers (B2C)."

31. The AO reasoned that the payments made to the Assessee are essentially towards usage of hardware/ infrastructure comprising of server, software, data storage space, networking equipments, data bases etc.

32. The AO had concluded that the charges received by the Assessee for cloud computing would be taxable as "equipment royalty".

33. Thus, the AO held that the payments made by Indian entities to the Assessee for cloud computing services would be chargeable as royalties on account of the payments made for 'use', or 'right to use' scientific equipment.

34. The Assessee had furnished its explanation regarding the services rendered by it. We consider it apposite to refer to relevant extract of the Assessee's submissions, as set out in the assessment order. The same is reproduced below:

> "The Company provides standard and automated cloud computing services to its customers. In this regard, we have provided below a general understanding of cloud computing services:
>
> - Historically, various organizations which needed to store and process large amounts of data, invested in computing resources i.e., hardware (servers) and software (operating systems). However, such hardware and software resources were costly, capital intensive, required large amount of space and were used in limited capacity by such companies. For

> e.g., a company may have a complex Enterprise Resource Planning (ERP) system, which would need large storage and processing capability to run, for which it may need to buy large and expensive servers to host the ERP only.
>
> - With development of public internet and capability of web-based access, companies began to innovate and found ways to provide computing resources as a service to customers remotely, flexibly and on an on-demand basis i.e., provision of computing resources without the need for customers to make capital-intensive investments in physical computer resources / hardware. Further, companies were able to develop technology which enabled the same computing resources to be used simultaneously for multiple users remotely, without any intermingling of data.
>
> - The Company was one of the first companies to develop web services for computing infrastructure requested by customers. The Company provides quick and easy ways for customers to access flexible, low-cost and on-demand cloud computing services according to their specific needs, when and where they need them."

35. The aforesaid explanation clearly indicates that the services offered by the Assessee does not entail transferring of any skill, knowledge, technology or process to its customers. The cloud computing models indicate that the Assessee has developed an infrastructure and permits the customers to access the hardware and software for developing their own content.

36. There is no cavil that the customers do not control the cloud computing hardware or software. They also have no right to commercially exploit the same.

37. The expression “use” or “right to use” as mentioned in Article 12(3) of the India-US DTAA is to be used in a narrow manner. The scope of royalties under Article 12(3) of the India-US DTAA does not extend to cover charges for services, which are delivered by an assessee by use of scientific equipment. In the present case, it is clear that the cloud computing hardware and software are used by the Assessee to render its services which are availed by its customers.

38. The AO’s conclusion that the provision of such service would amount to grant of the ‘right to use’ scientific equipment and therefore, the payments made were covered under the definition of ‘royalty’ under the Act as well as under Article 12(4)(a) of the India-US DTAA is erroneous.

39. There is no doubt that the Assessee grants access to standard and automated facilities, which provides computer power, storage, data and other services which may be required by customer for their computing needs. However, there is no material to establish that grant of such service entails transfer of any technical know-how, skill, knowledge or process. The customers of the Assessee do not acquire any right to commercially exploit any of the Assessee’s IPRs. The provision of cloud computing services does not entail placing any hardware at the exclusive disposal of the customer. The Assessee grants access to standard and automated services, which are available online. Customers can select from the services offered according to their needs. As explained by the Assessee, cloud computing provides an effective

alternative for customers to use cloud computing services instead of buying, owning and maintaining their own data centres and servers.

40. After examining the Agreement and appreciating the scope of services, the learned Tribunal found that the Assessee's customers are granted only a non-exclusive and non-transferable license to access the standard automated services offered by the Assessee. Further, the Assessee does not provide the source code of the licensed software to the customers. The Assessee's customers have no right to exploit the Assessee's IPR. The findings of the Tribunal to the aforesaid effect, as set out in the impugned order, are reproduced below:

> "13. On perusal of the terms of the above Customer Agreement, Trademark Guidelines and Support Services Guidelines, it is clearly evident that the prerequisites for the impugned receipts to be treated as royalty income in terms of Article 12(3) of the India-USA DTAA are not met as the customer do not receive any right to use the copyright or other IP involved in AWS Service; the customers are granted only a non-exclusive and non-transferable licence to access the standard automated services offered by the assessee without the source code of the licence being shared with the customer, the customers have no right to use or commercially exploit the IP; there is no equipment of any nature or at any time placed at the disposal of the customers by the assessee. Further, it is to be noted that under the Trademark Guidelines customer has been granted a limited, non-exclusive, revocable, non-transferable right to use AWS marks only to the limited extent for identification of the customer who is using AWS Services for their computing needs. Similarly, under the Support Service Guidelines, only incidental/ancillary support is provided to the customers which includes answering queries/troubleshooting for use of AWS Services subscribed by them. The Support Service Guidelines specifically provide

> that the technical support included in AWS services does not include code development, debugging, forming administrative task etc."

41. The question whether payments for cloud computing are taxable as royalty under the Act and the relevant Double Taxation Avoidance Agreement has been the subject matter of various decisions.

42. In ***CIT (International Taxation) v. Salesforce.com Singapore Pte. Ltd.: (2024) 465 ITR 257***, a coordinate bench of this Court had considered the question whether fees for CRM service provided by the assessee [**Salesforce**] to businesses and industries would be taxable as royalty under the Act and the India-Singapore Double Taxation Avoidance Agreement. In the said case, Salesforce maintained a CRM platform, access to which was granted to customers in India online. Salesforce maintained a data centre where certain data of their customers was stored and the customers would be granted access to the platform through online portal (salesforce.com). The customers desiring to avail of the services for maintaining their data at the data centre and accessing the same would subscribe to the services rendered by Salesforce. The customers, thereafter, could store and retrieve their proprietary data on the salesforce portal through a CRM application software by using the IDs and password as provided to them. The access also enabled the customers to generate reports etc. in the desired format. Whilst Salesforce reserved all rights, title and interest in and to the services, including all related intellectual property rights; its customers

owned the rights, title and interest in and to all their proprietary data exclusively. In the aforesaid context, this Court concluded as under:

> "11. Since the copyright in the application was never transferred or came to vest in a subscriber, we fail to appreciate the contentions, which are addressed on the anvil of Section 9 of the Act. This issue, in any case, stands conclusively settled bearing in mind the pertinent observations which were rendered by the Supreme Court in Engg. Analysis Centre of Excellence (P) Ltd. v. CIT [Engg. Analysis Centre of Excellence (P) Ltd. v. CIT, (2022) 3 SCC 321 : (2021) 432 ITR 471] and have been noticed in Relx Inc. case [CIT v. Relx Inc., (2024) 3 HCC (Del) 229 : (2024) 470 ITR 611] and have been reproduced hereinabove.
>
> 12. We deem it appropriate to additionally observe that the right of subscription to a cloud-based software cannot possibly be said to be equivalent to the "use" or "right to use" any industrial, commercial or scientific equipment. This more so since the respondents sought to place the consideration received under Article 12(4)(b) and which is specifically excluded from sub-article (3)(b).
>
> 13. The argument based upon Article 12(4)(a) also cannot sustain since the same pertains to payments received as consideration for managerial, technical or consultancy services and which are ancillary or subsidiary to enjoyment of the right, property or information referable to Para 3. This again would be founded upon the payment foundationally falling within the ambit of royalty as defined therein.
>
> 14. Similar would be the position which would obtain bearing in mind the unambiguous language in which Article 12(4)(b) of the Double Taxation Avoidance Agreement is couched. Article 12(4)(b) would have been applicable provided the appellants had been able to establish that the assessee had provided technical knowledge, experience, skill, know how or processes enabling the subscriber acquiring the services to apply the technology contained therein. The explanation of the assessee, and which has gone unrefuted even before us, was that the

customer is merely accorded access to the application and it is the subscriber which thereafter inputs the requisite data and takes advantage of the analytical attributes of the software. This would clearly not fall within the ambit of Article 12(4)(b) of the Double Taxation Avoidance Agreement.

15. In any event, clauses (a), (b) and (c) are factors which must be found to exist in addition to the consideration for service being relatable to the provision of managerial, technical or consultancy services. This is clearly evident from Article 12(4) using the expression "if such services…." However, once we have found that the principal conditions spelt out in Article 12(4) are themselves not satisfied, this issue would pale into insignificance.

16. Before parting, we deem it expedient to notice Explanation 4 to Section 9(1)(vi) of the Act which reads as follows:

> "Explanation 4.—For the removal of doubts, it is hereby clarified that the transfer of all or any rights in respect of any right, property or information includes and has always included transfer of all or any right for use or right to use a computer software (including granting of a licence) irrespective of the medium through which such right is transferred."

17. It becomes pertinent to observe that Explanation 4 in essence introduces a deeming fiction and includes transfer of all or any rights "for use" or "to use" a computer software including by way of a license irrespective of the medium through which such right is transferred. Significantly, the DTAA does not bring within its sweep a right for use or a right of use of a computer software.

18. We, accordingly, find that the view taken by the ITAT merits no interference. We find that the appeals raise no substantial question of law. The appeals shall consequently stand dismissed."

43. The issue involved in the present appeal is also covered in favour of the Assessee in the case of ***Engineering Analysis Centre of Excellence (P.) Ltd. v. CIT & Anr.: (2021) 432 ITR 471.***

44. In ***Commissioner of Income Tax (International Taxation) v. MOL Corporation: [2024] 162 taxmann.com 197 (Delhi),*** this Court found that no substantial question of law had arisen in respect of the taxability of subscription fees received for cloud services as royalty as the said issue was concededly covered by the decision of the Supreme Court in ***Engineering Analysis Centre of Excellence (P.) Ltd. v. CIT & Anr.*** (supra). In the said case, the assessee [**MOLC**] was a company incorporated in the United States of America. Its ultimate parent company was Microsoft Corporation USA [**MS Corp.**]. MS Corp's. wholly owned subsidiary named Gracemac Corporation, merged with MOLC with effect from 02.10.2006. MS Corp. was a sole owner of the intellectual property vested in Microsoft software. At the material time, MS Corp. had granted exclusive license for manufacture and distribution of Microsoft products to its wholly owned subsidiary Gracemac, which as stated earlier, had merged with MOLC. Gracemac had in turn had granted non-exclusive right to its wholly owned subsidiary Microsoft Operations Pte. Ltd. Singapore [**MOPS**] to manufacture Microsoft products in Singapore and distribute such products in Asia. MOPS had appointed M/s. Microsoft Regional Sales Corporation [**MRSC**] as a distributor of Microsoft products in Asia. MRSC had during the relevant period had received amounts for offerings cloud services. The AO had assessed the said amounts as

royalty, which is chargeable to tax. The assessee had contested the said conclusion. It was the assessee's contention that the AO had failed to appreciate the functional aspect of cloud based services and the subscription to cloud based service could not be construed as royalty under the India-US DTAA. The said contention was accepted by the learned Tribunal by following the decision of ***CIT (International Taxation) v. Salesforce.com Singapore Pte. Ltd.*** *(supra)*. The Revenue filed an appeal under Section 260A of the Act before this Court, *inter alia*, projecting the question to the effect that the learned Income Tax Appellate Tribunal had erred in holding that the subscription received from cloud services was not taxable as royalty. However, before this Court, the Revenue conceded the said issue was covered by the decision of ***Engineering Analysis Centre of Excellence Private Limited v. CIT*** *(supra)*. The relevant extract of the said decision is set out below:

> "13. The following questions of law are proposed by the appellant/revenue:
>
> > "A. Whether the Ld. ITAT erred in holding that licensing of the software products of Microsoft in the territory of India by Microsoft Regional Sales Pte. Ltd. is not taxable in India as Royalty under Section 9(1)(vi) of the Income Tax Act, 1961 read with Article 12 of the Indo-USA DTAA?
> >
> > B. Whether the Ld. ITAT erred in holding that licensing of computer is copyrighted article and not copyright and accordingly the sale of software is in nature of business income and not taxable as royalty under Section 9(1)(vi) of Income Tax Act, 1961 and absence of PE in India, it is not taxable under Article 7 of India-USA DTAA?

> C. Whether the Ld. ITAT erred in holding that the subscription received towards Cloud Services is not taxable as Royalty income under the provisions of Income Tax Act, 1961?"
>
> 14. As would be evident the first two questions of law [i.e., A and B] relate to income earned from licensing/sale of software while the third question [i.e., C] relates to subscription received against cloud services offered by the respondent/assessee.
>
> 15. The Tribunal has ruled that neither income earned from licensing/sale of software products nor subscription fee earned for providing cloud services, could be construed as royalty.
>
> 16. Mr Sanjay Kumar, senior standing counsel, who appears on behalf of the appellant/revenue, says that the proposed questions are covered by the judgment of the Supreme Court rendered in *Engineering Analysis Centre of Excellence (P.) Ltd. v. CIT 432 ITR 471 (SC).*
>
> 16.1. We are also informed by Mr Kumar that a review petition has been filed which is pending consideration."

45. The Special Leave Petition preferred by the Revenue against the said decision was also dismissed, albeit on account of delay.

46. We also consider it apposite to refer to the decision of the Karnataka High Court in ***Commissioner of Income-tax, International Taxation v. Urban Ladder Home Decor Solutions (P.) Ltd.: [2025] 171 taxmann.com 549 (Karnataka)***. The assessee in that case [**Urban Ladder**] had availed the cloud computing services from Amazon and had made payments for the same without withholding any tax. In the aforesaid context, the Revenue had initiated proceedings under Section 201(1)/201(1A) of the Act for holding Urban Ladder as an 'assessee in

default'. Urban Ladder had also used the services of M/s Facebook and Rocket Science Group for creating its advertisement content. The AO considered the payments made to M/s Facebook and Rocket Science Group, chargeable to tax as 'royalty'. Urban Ladder carried the matter in appeal before the learned Income Tax Appellate Tribunal and prevailed. Thereafter, the Revenue appealed the decision of the learned Income Tax Appellate Tribunal before the Karnataka High Court and the Court held as under:

> "20. …
>
> *** *** ***
>
> 21. In the instant case, the recipients, i.e, M/s Facebook and Rocket Science group only allow the assessee to use their facilities for the purpose of creating advertisement content. The payment made to Amazon Web Services (AWS) is only for using the information technology facilities provided by it, that too the billing would depend upon the extent of usage of those facilities. In fact, these non-resident companies do not give any specific license for use or right to of any of the facilities (which include software) and those facilities are not going to be used for the use in the business of the assessee. The right to use those facilities, as stated earlier, is intertwined with the main objective of placing advertisements in the case of Facebook and Mailchimp. In the case of AWS, the payment is made only for using of information technology infrastructure facilities on rental basis. Hence the question of transferring the copy right over those facilities does not arise at all. The agreements extracted above also make it clear that the copyright over those facilitating software is not shared with the assessee. In any case, the main purpose of making payment is to place advertisements only and

not to use the facilities provided by the non-resident companies. Thus the facilities provided by the nonresident companies are only enabling facilities, which help a person to place his advertisement contents on the platform of Facebook or to use MailChimp facility effectively. In case of AWS, the payment is in the nature of rent payments for use of infrastructure facilities.

22. Accordingly, we are of the view that the these non-resident recipients stand on a better footing than those assessees before the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Private Ltd (*supra*). Accordingly, following the ratio laid down by Hon'ble Supreme Court, we hold that the payments made to the above said three non-resident companies do not fall within the meaning of “royalty” as defined in DTAA. The AO has not made out an alternative case that these payments are taxable as business income in India. Hence, there is no necessity for us to deal with that aspect.

23. We have noticed earlier that the Ld CIT(A) has followed the decision rendered by Hon'ble Karnataka High Court in the case of Samsung Electronics Co Ltd (*supra*). In the case of Engineering Analysis Centre of Excellence Private Ltd (*supra*), the decision rendered by Hon’ble Karnataka High Court in the above said case has been overruled by Hon’ble Supreme Court. Hence on this reasoning also, the decision rendered by Ld CIT(A) would fail.

24. In view of the foregoing discussions, we are of the view that the payments made by the assessee to the three non-resident companies referred above cannot be considered ad “royalty payments” and hence they do not give rise any income chargeable in India under Indian Income tax Act in all the three years under consideration. In that view of the matter, there is no requirement to deduct tax at source from those payments u/s 195 of the Act. Hence the assessee herein

cannot be considered as an assessee in default u/s 201(1) of the Act.

25. Accordingly, we set aside the orders passed by Ld CIT(A) for the years under consideration and direct the AO to delete the demand raised u/s 201(1) of the Act and also the consequential interest charged u/s 201(1A) of the Act in all the three years under consideration.

26. In the result, all the appeals of the assessee are allowed."

21. The conclusion drawn by the ITAT is that, the recipients of the payments i.e., Facebook and Rocket Science Group only allowed the assessee to use their facilities for the purpose to use their advertisement contents. The payment to Amazon Web Services is only for using information technology facilities provided by it, that too the billing would depend upon the extent of usage of those facilities. The ITAT has come to a conclusion that the facilities provided by the non-resident Companies are only enabling facilities which help a person to place his advertisement contents on the platform of Facebook or to use MailChimp facility effectively. In case of Amazon, the payment is in the nature of rent payments for use of infrastructure facilities. The ITAT has, in paragraph No.22, has come to conclusion that the payments made to above three non-resident Companies do not fall within the meaning of 'royalty' as defined in DTAA. It may also be stated here that, in paragraph No.23, the ITAT has also referred to the judgment relied upon by the CIT(A) in the case of ***Samsung Electronics Co. Ltd.*** (supra) to hold that the decision as rendered by this Court in the above case has been over-ruled by the Supreme Court in the case of ***Engineering Analysis*** (supra). It is on that ground also, the decision rendered by the CIT(A) was set at naught. We agree with the aforesaid conclusion drawn by the ITAT. The terms of the agreement have been specified in the aforesaid paragraphs. A perusal of the agreements with the aforesaid three entities makes it clear that, copyright remained with the aforesaid three

entities. The limited grounds on which the appeal has been filed, have been noted above. The conclusion drawn by the CIT(A) in favour of the Revenue was primarily by relying upon the judgment in the case of ***Samsung Electronics Co. Ltd.*** (supra) and also by holding that the payments received by assessee from two affiliates by granting user right to software is royalty and has been brought to tax in India. The said judgment has been over-ruled. In this regard, we may also refer to the judgment of the Supreme Court in the case of ***Engineering Analysis*** (supra). Paragraphs No.111 to 119 are very clear in that respect. The Supreme Court has referred to the judgments of the Delhi High Court in the case of ***Director of Income Tax -Vs.- Ericsson A.B. [(2012) 343 ITR 470]***, ***Director of Income Tax -Vs.- Nokia Networks OY [(2013) 358 ITR 259]***. Similarly, a reference is also made to the judgments of the Delhi High Court in the case of ***Director of Income Tax -Vs.-Infrasoft Ltd. [(2014) 264 CTR 329]*** and ***CIT -Vs.-ZTE Corporation [(2017) 392 ITR 80]*** to hold in paragraphs No.119 and 120 as under:

> "119. Fourthly, the High Court is not correct in referring to Section 9(1)(vi) of the Income Tax Act after considering it in the manner that it has and then applying it to interpret the provisions under the Convention between the Government of the Republic of India and the Government of Ireland for the Avoidance of Double Taxation and for the Prevention of Fiscal Evasion with respect to Taxes on Income And Capital Gains, [Notification No. GSR 105(E) [45/2002 (F. No. 503/6/99-FTD)], dated 20-2- 2002.] ["India-Ireland DTAA"]. Article 12 of the aforesaid treaty defining "royalties" would alone be relevant to determine taxability under the DTAA, as it is more beneficial to the assessee as compared to Section 9(1)(vi) of the Income Tax Act, as construed by the High Court. Here again, Section 90(2) of the Income Tax Act, read with Explanation 4 thereof, has not been properly appreciated.
>
> 120. Fifthly, the finding that when a copyrighted article is sold, the end-user gets the right to use the

> intellectual property rights embodied in the copyright which would therefore amount to transfer of an exclusive right of the copyright owner in the work, is also wholly incorrect. For all these reasons, therefore, the judgment of the High Court of Karnataka in Synopsis Intl. [CIT v. Synopsis International Old Ltd., 2010 SCC OnLine Kar 5512] also does not state the law correctly."

> 22. So, in view of the aforesaid conclusion, Sri. Huilgol is justified to state that the issue in hand is covered by the judgment of the Supreme Court in the case of ***Engineering Analysis*** (supra). This is primarily because, the CIT(A) holds in its order that the arguments of the appellants i.e., respondent herein that consideration paid for purchase of software, cloud computing, cloud space hiring involving transfer of the right to use software is not royalty, is not acceptable, which has been negated by the ITAT, which order we have already reproduced above."

47. We find no merit in the contention that the amount received by the Assessee for providing services would be taxable as equipment royalty. As noted before, the Assessee's customers do not acquire any right of using the infrastructure and software of the Assessee for the purposes of commercially exploitation. The charges paid by the Assessee's customers are for availing services, which the Assessee provides by using its proprietary equipment and other assets. No part of its equipment or IPRs are alienated by the Assessee in favour of its customers for their use. Therefore, the payments received cannot be considered as royalties within the meaning of Article 12(3) of the India-US DTAA. This question is also stands covered by the decisions of this Court in ***Commissioner of Income-tax (International Taxation) v. Telstra Singapore Pte. Ltd.: (2024) 467 ITR 302***, ***Asia Satellite***

Telecommunications Co. Ltd. v. Director of Income-tax: (2011) 332 ITR 340, and ***Director of Income-tax v. New Skies Satellite BV & Anr.: (2016) 382 ITR 114.***

48. In our view, no substantial question of law arises for consideration of this Court. The appeals are, accordingly, dismissed. All pending applications are also disposed of.

VIBHU BAKHRU, J

TEJAS KARIA, J

MAY 29, 2025
RK