

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

**BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER
AND
SMT. RENU JAUHRI, ACCOUNTANT MEMBER**

**ITA No.- 825/Del/2023
[Assessment Year: 2020-21]**

Fireeye Ireland Limited, 2 Park Place, City Gate, Mahon, Cork, Ireland-999999.	Vs	The Assistant Commissioner of Income Tax, Circle 1(3)(1), International Taxation, Civic Centre, Minto Road New Delhi-110002
PAN- AACCF3351Q		
Assessee		Revenue

**ITA No.- 3701/Del/2023
[Assessment Year: 2021-22]**

Fireeye Ireland Limited, 2 Park Place, City Gate, Mahon, Cork, Ireland-999999.	Vs	The Assistant Commissioner of Income Tax, Circle 1(3)(1), International Taxation, Civic Centre, Minto Road New Delhi-110002
PAN- AACCF3351Q		
Assessee		Revenue

Assessee by	Shri Ajay Vohra, Sr. Adv. Ms. Ishita Farsaiya, Adv. & Ms. Vanshika Taneja, Adv. (VC)
Revenue by	Shri Saroj Kumar Dubey, CIT(DR)

Date of Hearing	19.03.2026
Date of Pronouncement	05.06.2026

ORDER

Per Renu Jauhri, Accountant Member:

These two appeals by the assessee are directed against the two separate Final Assessment Order dated 30.01.2023 and 23.10.2023 passed by the ACIT, Circle Int. Tax- 1(3)(1), New Delhi, (hereinafter referred to as the 'Id. AO') under Section 143 read with Section 144C(13), of the Income-tax Act, 1961 ("the Act"), pursuant to the directions of the Hon'ble Dispute Resolution Panel-1, New Delhi (DRP) order dated 21.09.2023 for the Assessment Year 2020-21 and 2021-22 respectively. Since common issues are involved in these two appeals, the same are being disposed off by way of this common order for the sake of convenience and brevity.

2. Ground of appeal filed by the assessee (ITA No.- 825/Del/2023) are reproduced as under:

“Ground 1: Erroneous tax treatment of consideration received from software offerings (Ia, sale and right to use of software licenses/subscriptions etc, and related support), as Fee for Technical Services (FTS)

1.1 That the assessment order dated 30 January 2023 passed by the Assistant Commissioner of Income Tax, Circle International Tax-1(3)(1) under section 143(3) read with section 144C(13) of the Income-tax Act, 1961 (the Act), is bad in law and on facts and liable to be quashed

1.2 That on the facts and in the circumstances of the case and in law, the Ed. AO has erred in not applying the decision of the Supreme Court in the case of Engineering Analysis Centre of Excellence Pvt Ltd vs CIT [2021] 125 taxmann.com 42 (SC) and also erred in holding that the consideration received from software offerings (ie, sale and right to use of software licenses/subscriptions etc. and related support) is taxable in India as fees for technical services at per Article 12(3)(b) of the India-Ireland tax treaty and section 9(1)(vii) of the Act.

1.3 That on the facts and in the circumstances of the case and in law, the Ld. AO erred in holding that the Assessee renders services, as against its actual activity of supply of software license/subscription etc to customers in India.

1.4 That on the facts and in the circumstances of the case and in law, the Ld. AD erred in contending that the Assessee provides services which are customized, individualized and specific to the customers

1.5 The Ld AO has erred is not passing a reasoned/ speaking order as to why the Supreme Court judgment in the case of Engineering Analysis is not applicable to the Appellant as directed by the Honourable Dispute Resolution Panel (Hon'ble DRP)

1.6 That on the facts and in the circumstances of the case and in law, the Ld AO has grossly erred in placing reliance on the decision of Vodafone International Holdings B. V. v. Union of India [2012] 204 Taxman 408 (SC) by concluding that the Company has artificially entered into reseller agreement with intermediaries and the same does not make any economic sense when viewed in isolation with the actual substance of the contract. It has also been erroneously concluded that the transaction is split up in an unfair and unreasonable manner with a view to evade taxes

Ground No. 2: Levy of Interest under section 234A of the Act

On the facts and circumstances of the case and in law, the Ld. AO has erred in levying interest amounting to INR 468,865 under section 234A of the Act

Ground No. 3: Levy of Interest under section 234B of the Act

3.1 On the facts and circumstances of the case and amounting INR 3,188,282 under section 234B of the Act. law, the Ld. AO has erred in levying interest

Ground No. 4: Erroneous adjustment of refund issued

4.1 On the facts and circumstances of the case and in law, the Ld. AO has erred in adjusting an amount of INR 823,834 as refund already issued

Ground No. 5: Initiating penalty under section 270A of the Act

5.1 That on the facts and circumstances of the case and in law, the Ld. AO has erred in initiating penalty proceedings under section 270A of the Act.

5.2 That on the facts and circumstances of the case and in law, the Ld. AO in the notice issued u/s 270A of the Act initiating penalty proceedings has not specified the limb under which penalty is initiated i.e. whether under-reporting of income or misreporting of income.

Ground No. 6: Relief

6.1 The Appellant prays that the Ld AO be directed to grant all such relief arising from the preceding grounds as also all relief consequential thereto.

6.2 The above grounds (including sub-grounds) are independent of, and without prejudice to one another.

2.1 ITA No.-3701/Del/2023

“1. Non-quoting of valid computer-generated DIN on the body of DRP directions dated 21 September 2023 passed under section 144C(5) of the Act.

2. Erroneous tax treatment of consideration received from software offerings (i.e., sale and right to use of software licenses/subscription etc. and related support), as Fee for Technical Services (FTS)

3. Non-applicability of Equalisation levy provisions

4. Levy of interest under section 234A, 234B and 234C of the Act.”

3. At the outset, the Ld. AR has submitted that the additional grounds related to DIN are not being pressed.

ITA 825/Del/2023 for A.Y. 2020-21 is taken as the lead case.

4. Brief facts of the case are that: The assessee is a company incorporated in Ireland and is a tax resident of Ireland in term the India-Ireland Double Taxation Avoidance Agreement (DTAA). It is stated to be engaged in the selling a various standard software products in the field of cyber security by way of granting restricted user license / subscription and related support services. The assessee filed its return for A.Y. 2020-21 declaring income of Rs. 22,07,61,870/- on 31.03.2021. During the year, it has shown sale consideration of Rs. 53,39,55,995/- from sale of standard Fire Eye Software products which was not offered to tax. The case was selected for scrutiny and draft assessment

order was passed proposing to treat the sale consideration as Fees for Technical Services (FTS) which was claimed by the assessee to be exempt in the light of the decision of the Hon'ble Supreme Court in the case of *Engineering Analysis Centre of Excellence Pvt. Ltd. vs. CIT [2021] 125 taxmann.com 42 (SC)*.

3.1 Aggrieved, the assessee filed objections before the DRP. The DRP directed the ld. AO as under:

“ 4.2.....
The Panel further takes a note of the assessee's request made at para 6 of its submission dated 22.08.2022 that terms are similar to the conditions referred to in the Supreme Court judgment in the case of Engineering Analysis Centre of Excellence Pvt Ltd vs CIT [2021] 125 taxmann.com 42, basis which it was concluded by Honorable Supreme Court that sale of software licenses is not taxable as royalty under the Act read with the relevant DTAA (India-Ireland DTAA was also covered in the above-mentioned judgment)..... Hence, the AO is directed to record his observation on applicability of the decision in case of Engineering Analysis by passing a speaking and reasoned order for acceptance or otherwise.”

3.2 Thereafter, the AO passed the Final Assessment Order observing as under:

“As directed by Hon'ble DRP, claim of assessee that subject transaction is covered by judgement of SC in case of Engineering Analysis was reexamined. From the contract agreements provided by assessee, it is evident that The nature of SaaS, as provided to the end customer, involve the following services:

(a) Machine-Learning and behavioral analysis technologies.

(b) Contextual threat intelligence, advanced threat analytics.

(c) Machine-based threat detection, behavioral analysis, virtual machine-based threat Analysis.

(d) Machine-learning detection engines, behavior and rules-based detection modules.

(e) Multiple AI and machine-learning capabilities, including integrated reasoning, dynamic scoping and reprioritization, and probabilistic mathematics, to mimic security experts' judgement at machine-speed in the investigation, scoping and prioritizing of security alerts.

(f) Dynamic, contextual, and strategic threat intelligence.

From the above discussion on the nature of services provided by the assessee under the FireEye and Mandiant brands, it is clear that 'FireEye' is not a set of static, standardized services. It can be seen that under the umbrella of SaaS, a variety of services were offered to the customers. DEPA

Clearly, the set of services being provided are customized, individualized, and specific to the customers. They are a set of differentiated services. A further appreciation for these services can be gleaned from the definition of the constituent descriptions. In particular, consider FireEye Security Control Products, Helix Security Operations Platform, Cloudvisory, Advanced Threat Detection and Prevention Technologies, and the Automated Extended Detection and Response. All these services involve the use of neural training models, neural architectures, and neural networks to train models that evaluate and work on the input dataset.

Accordingly, subject transactions is not covered by SC judgement. Moreover, case laws cited by assessee are also not applicable as per the facts of the instant case is entirely different.”

3.3 The assessment was accordingly framed by treating the sale proceeds of Rs. 53,39,55,995/- as FTS in terms of Article 12(3)(b) of the DTAA and taxable @ 10% u/s 9(1)(vii) of the Act.

3.4 Aggrieved by the AO's order, the assessee is in appeal before the Tribunal.

4. Before us, the ld. AR has made elaborate arguments whereby it has been contended as under:

“2) The Appellant company is engaged in the business of selling a wide range of standard FireEye software products in various regions (including India), mainly in the field of cybersecurity by way of granting restricted user license or subscription and related support services which is mainly updates/upgradation to such software along with certain incidental support.

3) During AY 2020-21 and 2021-22, FIL, inter alia, sold FireEye software products in India mainly through distributors. FireEye software products include network, email, endpoint, cloud security control products, cloudvisory, cloud visibility solution, and Helix security operations platform apart from FireEye appliance products (i.e., hardware). The brief details of standard FireEye software products is given below:

a) Network - Evaluates traffic on network for security vulnerabilities and malware.

b) Network Forensics - Performs hunting and analytics for security events.

c) *Email - Evaluates email traffic for security vulnerabilities, phishing and malicious URLs.*

d) *Endpoint-Scans and analyses events on endpoint for security vulnerabilities.*

e) *Cloudvisory - Delivers continuous visibility, compliance, and governance to simplify securing cloud workloads*

f) *Helix An XDR (extended detection and response) platform that correlates events from multiple security solution.*

g) *Detection on Demand - Cloud based file scanner.*

4) *The majority of the sales of the standard FireEye software products in India is to distributors namely, Inflow Technologies Private Limited and iValue Info Solutions Private Limited, amongst others. The Appellant submits that the customer typically downloads the software or accesses the software on a cloud platform.*

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13) *The Ld. AO in the assessment order for AY 2020-21 has grossly erred in making factual inaccurate statement in holding that software sale consideration as FTS, which has been followed and copied in AY 2021-22 also by him.*

The Ld. AO has made the following incorrect statements in the assessment order:

"Needless to point out that, in the case of FireEye, the technologies cater the specific needs of the customer. The data is provided by the users seeking specific solution such as targeting valued customers, inventory management, accessing potential customers or market etc. Therefore, the contention of the assessee that the cloud services were rendered for standard facility has no basis) The services under consideration here are nothing but special, exclusive, and customized to the end-user. The implicit value for the service seeker lies in the customizability, uniqueness, and personalization of the end-result These services are not common to all users. Their value instead lies in their difference to different end-users. This value is embedded in the unique Intellectual Property Rights of the "FireEye" trademark."

.....

"Clearly, the set of services being provided are customized, individualized, and specific to the customers. They are a set of differentiated services

.....

14) *It is pertinent to note that the Appellant is selling standard FireEye software products. The software products are not related to inventory management, these are not customized or personalized as wrongly stated by the Ld. AO."*

4.1 The Ld. AR placed copies of sample 'Distributor Agreement' with iValueInfoSolutions Pvt. Ltd. and the 'End User License Agreement (EULA)' to demonstrate wherein it is stated that the assessee has granted the following rights: -

Distributor Agreement:

" Clause 2 Resale of Offerings

"2.1 Appointment. Subject to Distributor's compliance with the terms and conditions of this Agreement, FireEye hereby grants to Distributor a non-exclusive, non-sublicensable, nontransferable right to distribute Offerings purchased by Distributor under this Agreement, to End Users in the Territory. In addition to direct sales to End Users in the Territory, Distributor may also appoint resellers in the Territory ("Resellers") and distribute Offerings through such Resellers.. the

"2.2 End User Agreement. Distributor shall sell (and require its Reseller to sell) the Offerings and any renewals to End Users in the Territory and subject to FireEye's then current standard terms and conditions for such Offerings, currently found at www.fireeye.com/company/legal (the "End User Agreement"). The End User Agreement is subject to change from time to time, and the End User Agreement in effect as of the date FireEye receives a Purchase Order from Distributor will be the End User Agreement applicable to Offerings set out in that Purchase Order.

Distributor shall not grant (and shall not permit its Resellers to grant), to End Users any rights or make any warranties with respect to the Offerings other than pursuant to the End User Agreement."

Clause 3 Proprietary Rights

"3.1 Ownership. Title to and ownership of the Software, Documentation and any improved, updated, modified or additional parts thereof, and all intellectual property rights in the Offerings, shall at all times remain the property of FireEye or FireEye's licensors."

3.2 Restrictions. Distributor shall not, and shall not permit any third party to, in any form or manner, copy, distribute, reproduce, incorporate, use or allow access to the Offerings or modify, prepare derivative works of, decompile, reverse engineer, disassemble or otherwise attempt to derive source code or object code from the Offerings. except as explicitly permitted under this Agreement or to the extent such a restriction is expressly limited or prohibited by applicable law."

Clause 14 Assignment

"Distributor shall not assign, transfer, or sublicense any obligation or benefit under this Agreement and any attempt to do so shall be void. Subject to the foregoing, this Agreement shall be binding on and inure to the benefit of the parties' respective successors and permitted assigns. FireEye may assign this Agreement in whole or in part

ii) EULA

Clause 1 Grant of License and Restrictions

"Subject to the terms hereof, payment of all fees, and any applicable user/use limitations, FireEye grants Customer a personal, nonsublicensable, nonexclusive, right to use the Product, in accordance with the Agreement and this Product Schedule

Clause 6 Intellectual Property

"6.1. Ownership of FireEye Materials; Restrictions. All Intellectual Property Rights in FireEye Materials, Products, Deliverables, Documentation, and Subscriptions belong exclusively to FireEye and its licensors..."

4.2 Copies of sample invoices for sale of standard Fire Eye software products have also been filed to demonstrate that the software sold is a standard software and not customized and specific to the individual customers. The Id. AR on the basis of these documents has further submitted as under:

"20) From the sample distributor agreement and EULA, it is clear that -

i) The software sold is a standard software by way of grant of restricted license/subscription to use for the use of end-users only.

ii) Does not permit any third party to, in any form or manner, copy, distribute, reproduce, incorporate, use or allow access to the Offerings or modify;

iii) Does not provide customers/ distributors any proprietary interest in the software/products; and

iv) Does not allow customers/ distributors to decompile, reverse engineer, disassemble or attempt to discover any source code or object code;

v) Does not allow customers to sublicense its software/product."

4.3 Thus, it has been contended that the decision of the Hon'ble Apex Court in the case of *Engineering Analysis Centre of Excellence Pvt. Ltd. (supra)* is squarely applicable in the present facts of the case and, therefore, the consideration received from sale of standard fire eye software products is not taxable as Royalty. The Ld. AR has further placed reliance on several decisions of the co-ordinate benches rendered in the light of *Engineering Analysis Centre of Excellence Pvt. Ltd (supra)*, in support of his claim.

4.4 With regard to the support services offered to the customers, the Ld. AR has made the following submissions:

“ 25) The Appellant also submits that it offers support services to its customers, that are primarily in the nature of updates/ upgradations and incidental support. Such support services are incidental and linked to the sale of software products by the Appellant and are required for the effective and better functioning of the software products. Therefore, support should be given the same treatment as sale of software products.

26) In this regard, the Appellant places reliance on the decision of the Delhi High Court in the case of SFDC Ireland Limited v. CIT W.P.(C) 14636/2023, wherein the Hon'ble High Court stated that any training and assistance is linked (i.e., concomitant) to the sale of the principal product -

"41. The technical assistance and training imparted to SFDC India staff appears to be aimed at enabling them to understand the various attributes and capabilities of SFDC Products so as to be informed when interacting with prospective customers in the territory. The technical assistance and training which is spoken of in Section 4.3 of the Reseller Agreement does not appear to bear the characteristics of a conferral of specialised or exclusive technical service. In any case, the training and assistance proffered by SFDC was a concomitant to the sale of its principal products in the territory and fundamentally aimed at readying SFDC India to undertake the marketing of those products."

4.5 Finally, Ld. AR has referred to the relevant clauses of the DTAA as well as proviso to section 9(1)(vii) to argue that software offerings are not taxable as FTS. Relevant portion of the written submission, in this regard, is reproduced as under:

“ 27) Software offerings not taxable as FTS under the provisions of the Act and DTAA

The term 'FTS' is defined under the Act and Tax Treaty as under-

a) As per explanation 2 to section 9(1)(vii) of the Act. FTS is defined as under

"Explanation 2-For the purposes of this clause, "fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries", "

b) As per Article 12(3)(b) of the DTAA, the term FTS is defined as under

"(b) The term "fees for technical services" means payment of any kind in consideration for the rendering of any managerial, technical or consultancy services including the provision of services by technical or other personnel but does not include payments for services mentioned in Articles 14 and 15 of this Convention

c) It is submitted that the provisions of the Act do not define the terms 'managerial', 'technical or consultancy'. In the absence of specific definition, reference may be made to the principles laid down by various judicial precedents and dictionary meanings. Further, these terms have to be interpreted in their commercial sense as well.

i) Managerial services - The term 'managerial services' refers to services rendered in performing management functions such as controlling, administering the business, managing the affairs, laying down certain policies etc. (Refer page 359 and 367 of Case Law Paper book)

ii) Consultancy services The term 'consultancy services' refers to services in relation to giving an advice, opinion, counselling or advisory services. (Refer page 388 and 398 of Case Law Paper book)

iii) Technical services The word 'technical services' is generally understood to mean 'services involving specialised knowledge, experience and skill in a particular field. The word 'technical' has been defined in the Concise Oxford Dictionary -Indian Edition as 'relating to a particular subject, art or craft, or its techniques requiring special knowledge to be understood. (Refer page 404 of Case Law Paper book)

d) In the instant case, the Appellant submits that the sale of standard FireEye software products are in the nature of service but sale of software and does not qualify as FTS as it is not managerial, technical, nor consultancy in nature.

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However, the Appellant submits that in its return of income filed for both AY 2020-21 and AY 2021-22, income derived from consulting services amounting to INR 22,07,61,866 and INR 10,95,03,133, respectively was offered to tax as FTS under 12(3)(b) of the DTAA.

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...

Reference to Intellectual Property: *The Ld. AO has made few observations in the order such as Intellectual Property ('IP') rights/trademarks*

"(ii) Based on the distributor/ re-seller agreement, the end-user enters into an End-User License Agreement with the assessee"

"This value is embedded in the unique Intellectual Property Rights of the "FireEye" trademark."

However, the actual substance of the transaction reveals that customers in India 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."

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b) Incorrect understanding of the nature of standard FireEye software products

The Ld. AO has wrongly considered the facts and erroneously concluded that the Appellant provides services which are customized, individualized and specific to the customers.

In the wide range of standard FireEye software products available, the customer can choose a product based on their requirements, i.e., choose a standardised product that is offered by FireEye. The Company does not cater to any specific customizations for a customer.

The mere fact that the Appellant has a wide range of products that cater to different needs, cannot in any way support a conclusion that they are therefore 'customised' to individual needs.

c) Reliance on other judgements discussing FTS

- *SFDC Ireland Limited (supra)*
- *Amazon Web Services Inc. vs ACIT*
- *Akamai Technologies Inc.*

Conclusion

In view of the above, the Appellant submits that-

i) The consideration received from sale and right to use of software licenses/subscription etc. and related support would not qualify as 'royalty' as per the principles laid down by the Supreme Court in the case of Engineering Analysis (supra):

ii) The consideration received from software offerings (ie, sale of and right to use of software licenses/subscription etc. and related support) cannot be considered as FTS under section 9(1)(vii) of the Act.

...”

5. On the other hand, the Ld. DR has contested the Ld. AR's submissions and asserted that the facts of the assessee's case are clearly distinguishable from those of the *Engineering Analysis Centre of Excellence Pvt. Ltd.* (supra) and that the assessee is engaged in providing high technology consultancy service which is taxable as FTS. Relevant portion of the written submissions made by the Ld. DR are reproduced as below:

“ 1. FireEye Ireland (FE Ireland) offers products, subscription support, and consulting services to its customers in India through distributors and direct sales to customers, ie., consulting services, sale of hardware, and sale and right to use licenses, and also related support. The assessee has offered consulting services as income, while the sale and right to use the software license/subscription have been claimed exempt based on the engineering analysis and Supreme Court judgement, and also the sale of accessories has been held to be exempt based on Ishikawajima Harima Heavy Industries holding that the sale did not happen within India. In AY 2020-21 and AY 2022-23, two years are involved. However, the additions are common, and hence the AY 2020-21 is considered for discussion.

2. The assessee's business is described on page 7 of the assessment order, and the conclusion drawn on page 12 clearly mentions that the FireEye software is a software-as-a-service platform wherein the entire equipment, servers, and software configuration are all provided by the assessee. The services provided include advanced machine learning, behavioral analysis technologies, contextual threat intelligence, advanced threat analytics, machine-based threat detection, and behavioral analysis. Machine learning can mimic security experts' judgment at machine speed in investigation, scoping, and prioritizing security alerts. It is not a set of static standardized services but a customizable one specific to each customer. Most of the product involves advanced

technologies like neural training models and neural architectures and has advanced training models to train the systems. The services are advanced artificial intelligence platforms and mimic human functioning. Now what is being provided is a technical platform that analyzes the various threats and gives a security alert. India-Ireland DTAA, Article 12(3)(b) definition is reproduced below

(b) The term "fees for technical services" means payment of any kind in consideration for the rendering of any managerial, technical or consultancy services including the provision of services by technical or other personnel but does not include payments for services mentioned in Articles 14 and 15 of this Convention.

While the India-US DTAA, the same definition under Article 12(4) is reproduced below

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.

So, it is evident that the India-Ireland DTAA does not have a make-available clause in its definition. Now a perusal of the Income Tax Act, explanation 2 to 9(1)(vii), which is reproduced below

Explanation 2-For the purposes of this clause, "fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical, or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining, or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries";

The above wordings in the act and the India-Ireland DTAA are identical, and any consideration for the rendering of any managerial, technical, or consultancy services is sufficient to bring the fee for technical services under taxation. There appears to be no difference between the definitions in the act and the DTAA. So the test is to see whether the fees are for the rendering of any managerial, technical, or consultancy services. There is no need to ascertain whether services make available technical knowledge, experience, skill, know-how, or process.

Now, in order to understand whether there is rendering of technical or managerial or consultancy services, it is a question of fact, and the same are enumerated below: 1. Page 13 of 29 of the assessment order clearly mentions that they use an XDR technology that uses multiple AI and machine learning capabilities, including integrated reasoning, dynamic scoping and reprioritization, and probabilistic mathematics to mimic security experts' judgment at machine speed in the investigation, scoping, and prioritizing of security alerts. So clearly the platform provides threat intelligence that drives risk assessment. It can be malware, some infrastructure malfunctioning, or any specialized virus that can cause a global cybersecurity threat. Also, it is noticed that the intelligence is customer-specific, and it is tailor-made and not a standardized one. Complex technological services like neural architectures, neural networks, and artificial intelligence are all high-end technology services that enable the detection of a security threat.

2. The activity conducted by the assessee is more of IT security consulting, and its website clearly mentions that they provide solution services to various clients. They mention themselves as consultants wherein they enable data protection, endpoint server protection, network protection, and also cloud protection. This is nothing but high-end technical consulting for safeguarding IT infrastructure, and there is an element of consulting of technical knowledge through the platform. Artificial intelligence and machine learning mimic the judgement of a security analyst.

3. Extended Detection and Response (XDR) is a unified cybersecurity platform that automatically collects and correlates data across multiple security layers to improve threat detection and accelerate incident response. This expands security coverage to include networks, cloud workloads, email, and identity beyond laptops and servers. This automatically correlates data from different security layers and applies analytics to identify complex, multistage attack patterns. This is clearly a high-end technical outcome that the customers make use of. This effectively mimics a high-end IT infrastructure security specialist. In this, artificial intelligence and machine learning are core components that mimic human judgment. Some activities that AI and ML do in XDR, as enumerated from various websites, are as follows:

a. Predictive and real-time threat detection-AI and ML. move threat detection from a reactive, signature-based model to a proactive, behaviour-based one.

i. Anomaly detection: ML. algorithms establish a baseline of normal behaviour for users, devices, and applications by analysing vast amounts of historical data. Any deviations from this normal pattern-such as a user accessing sensitive data at an unusual time or a device connecting to an unknown server-are flagged as potential threats.

ii. Zero-day threat identification: By focusing on behavioural analysis rather than relying solely on known threat signatures, AI-powered XDR can detect never-before-seen (zero-day) attacks that traditional security tools would miss.

b. Advanced threat correlation and analysis-AI and ML. enable XDR to connect seemingly unrelated alerts from different security layers into a single, cohesive narrative of an attack.

I Automated correlation: Instead of security analysts manually sifting through thousands of individual alerts, AI automatically stitches together event data from endpoints, networks, cloud applications, email, and more.

II. Full attack story: By mapping the entire attack chain, XDR provides a rich, contextual understanding of the threat, including its origin, propagation, and potential impact. This gives security teams a clear, actionable picture of the incident.

c. Intelligent alert prioritization-By analysing threat data with AI, XDR reduces the problem of alert fatigue, which is common in Security Operations Centres (SOCs) that use traditional security tools.

i. Risk-based scoring: The platform prioritizes incidents based on their severity and relevance to the organization's critical assets, allowing security teams to focus their efforts on the most urgent threats.

ii. Reduced false positives: Through continuous learning and contextual analysis, AI helps filter out harmless activities that might otherwise trigger false alarms. This boosts the productivity and efficiency of security analysts.

d. Automated and adaptive response AI-driven XDR allows for rapid, automated responses that can contain and neutralize threats in seconds.

i. Automated playbooks: The system can trigger automated response actions, such as isolating a compromised device, terminating a malicious process, or blocking a malicious IP address.

ii. Adaptive security: ML models allow XDR to continuously learn from new attack techniques and automatically refine its detection and response capabilities over time. This makes the security posture more agile and resilient against new threats.

e. Proactive threat hunting-AI and ML enhance a security analyst's ability to proactively hunt for hidden threats that may have evaded initial detection.

i. Behavioral modeling. By comparing user and entity behaviour against established baselines, the system can help hunters spot subtle signs of insider threats or compromised accounts.

ii. Streamlined investigation: AI provides enriched, correlated data that makes investigations more efficient, allowing human analysts to trace attack vectors and identify vulnerabilities more quickly.

So clearly what is provided is a high-technology consulting and IT consulting solution, which is squarely covered under both the Act and DTAA. All the case laws mentioned by the assessee are on DTAA, wherein the "Make Available" Clause is available. However, in this case there is no such clause, and the FTS is taxable both under the Act and the DTAA."

6. We have heard the rival submissions and perused the material available on record. Judicial pronouncements relied upon by the parties have been carefully considered. We note that the issues involved in the present case, have been considered and decided in assessee's favour by the Hon'ble Jurisdictional High Court in the case of *Commissioner of Income-tax, International Taxation-1 v. Amazon Web Services Inc [2025] 174 taxmann.com 1188 (Del.)*, wherein the assessee provided claimed computing services and similar issue regarding chargeability of receipts under Article 12(3) of India-US DTAA was involved. The Hon'ble High Court have held as under:

"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 reassessment 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.

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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.

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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.

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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.

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18. 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."

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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) own 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.

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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.

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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.

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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."

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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 commercial 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] 165 taxmann.com 85/467 ITR 302 (Delhi), Asia Satellite Telecommunications Co. Ltd. v. Director of Income-tax [2011] 9 taxmann.com 168/197 Taxman 263/332 ITR 340 (Delhi) and DIT v. New Skies Satellite BV [2016] 68 taxmann.com 8/238 Taxman 577/382 ITR 114 (Delhi)."

6.1 From above, it is clear that facts and issues of the present case are similar to those discussed and decided in the case of *Amazon Web Services Inc* (supra). Respectfully

following the above decision of the Hon'ble jurisdictional High Court, we hold that the AO erroneously treated the consideration received as FTS, taxable in India as per Article 12(3)(b) of DTAA and section 9(1)(iii) of the Act and hereby delete the impugned addition of Rs. 53,39,55,995/-.

7. Ground nos. 2 & 3 pertain to charging of interest u/s 234A & 234B of the Act. As these grounds are consequential, no adjudicated is called for.

7.1 Ground no. 4 pertains to erroneous adjustment of return of Rs. 8,23,824 /- treating the same as already issued. After hearing both the parties, we consider it appropriate to remand the issue to the AO for limited purpose of verification of assessee's claim and allow relief accordingly,

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8. For A.Y. 2021-22, the assessee has submitted that Ground no. 2, relating to erroneous tax treatment of receipts as FTS, is identical to the A.Y. 2020-21, and Ground no. 1 relating to DIN is not pressed. Further, remaining grounds are consequential in nature. In view of the above, we hold that the above decision in A.Y. 2020-21 will apply mutatis mutandis to this year also.

9. In the result, both the appeals of the assessee are partly allowed.

Order pronounced in the open court on 05.06.2026.

Sd/-
[VIKAS AWASTHY]
JUDICIAL MEMBER

Dated- 05.06.2026.
Pooja.

Sd/-
[RENU JAUHRI]
ACCOUNTANT MEMBER

Copy forwarded to:

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

Asst. Registrar,
ITAT, New Delhi,

1	Date of dictation of Tribunal order	03.06.26
2.	Date on which typed draft order is placed before the dictating Member	04.06.26
3	Date on which typed draft order is placed before the other Member (in the case of DB)	
4.	Date on which the approved draft order comes to P.S./Sr.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 the case of DB)	
7.	Date on which the Order comes back to P.S./Sr.P.S for uploading on ITAT website	
8.	Date of uploading, if not, reason for not uploading	
9.	Date on which the file goes to the Bench Clerk	
10.	Date on which order goes for xerox	
11.	Date on which order goes for endorsement	
12.	Date on which the file goes to the Superintendent/O.S. 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 dispatch section for dispatch the Tribunal Order	
15.	Date of dispatch of order	
16.	Date on which file goes to Record Room after dispatch the order	