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

BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER
AND
SHRI BRAJESH KUMAR SINGH, ACCOUNTANT MEMBER

ITA No.- 2137/Del/2023
[Assessment Year: 2020-21]

SFDC Ireland Ltd, (being the resulting entity post-merger with Tableau International Unlimited Company-PAN AAECT8018J) C/o MNK & Associates Company Secretaries G-41, Ground Floor, West Patel Nagar, Delhi-110008	Vs	Deputy Commissioner of Income Tax, Circle 3(1)(1), International Taxation, E-2 Block, Civic Centre, Minto Road New Delhi-110002.
PAN- ABLCS0234R		
Assessee		Revenue

Assessee by	Shri Ravi Sharma, Adv & Shri Harmeet Singh, CA
Revenue by	Shri M.S. Nethrapal, CIT(DR)

Date of Hearing	**20.04.2026**
Date of Pronouncement	**17.07.2026**

ORDER

PER BRAJESH KUMAR SINGH, AM.

This appeal filed by the assessee is directed against the Final Assessment Order dated 27.06.2023 (FAO) passed u/s 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 (hereinafter referred to as ‘the Act’) pursuant to the directions of the

Hon’ble Dispute Resolution Panel (DRP) vide order dated 25.05.2023 u/s 144C(5) of the Act for Assessment Year (AY.) 2020-21. The Appellant is successor in interest of the erstwhile entity Tableau International, Unlimited Company, Ireland, which was merged into the Appellant, under the laws of Ireland, with effect from 1 April 2024. Pursuant to the merger, the Appellant filed a revised Form No. 36 before the Tribunal on 22 October 2024.

1.1 The assessee in this appeal has challenged the action of the AO in taxing the receipts of Rs 73,41,69,869/-received by the assessee on account of sale of shrink-wrapped/off-the-shelf/electronically downloadable Tableau software and Provision of Software as a Service(‘SaaS’) to customers in India @ 10% on gross receipts as per section 115A of the Act and under the Article 12 of the India-Ireland DTAA. The said receipts were claimed as exempt by the assessee on the ground that the company had not allowed the use or granted any right to use the copyright in the software to the Indian customers, but the same was limited to only sale of the copyrighted article. This dispute arose for the first time in AY. 2018-19 and it was also in AY. 2019-20 which has also been noted by the Ld. DRP in para nos. 5.6 of its order dated 25.05.2023 for the present assessment year. However, in appeal the Co-ordinate Bench of the Tribunal in the case of the assessee by its respective orders dated 07.11.2023 and 29.12.2023 in ITA Nos. 1874-1875/Del/2022 quashed the impugned assessment order on the ground that the direction of the Ld. DRP did not have a valid computer-generated Document Identification Number ('DIN') and consequently did not adjudicate the other grounds of appeal on merits.

2. Brief facts of the case: The assessee company filed its return of income for Assessment Year ("AY") 2020-21 on 08.02.2021 declaring NIL income and claiming a refund of Rs. 6,12,87,570/-. The AO noticed that as per the ITR the assessee was in receipt of Rs. 60,92,73,679/- from its Indian customers which was claimed to be exempt from tax in India as per the DTAA between India and Ireland, thus claiming whole of TDS as refund. The case was selected for complete scrutiny under CASS. The statutory notice under section 143(2) of the IT Act, 1961, was issued on 29.06.2021 which was duly served upon the assessee. Thereafter, notice u/s 142(1) of the Income tax Act 1961 was issued and duly served on the assessee calling for details and documents. In response to such statutory notices, the assessee furnished responses from time to time.

2.1 Further, the AO noted that the assessee was a company incorporated under the laws of Ireland and during the year was stated to be engaged in the business of distribution of non-customized shrink-wrapped/off-the-shelf/electronically downloadable Tableau software to customers in many countries including in India.

2.2 During the year under consideration, the AO noted that the assessee had received the following payments from its Indian customers:

S. No.	Nature of Revenue (As claimed by the assessee)	Amount (Rs.)
1	Supply of non-customised shrink-wrapped/off the shelf/electronically downloadable software (such as Creator, embedded Analytics, Explorer etc.) and provision of software upgrades to fix security issues, bugs etc. at periodic intervals being incidental to sale of software	64,16,22,654
2	Provision of software as a Service ('SaaS')-standard services (such as Tableau online, creator Online, explorer Online, etc.), which is a fully automated standard facility	6,53,66,384
3	Support and maintenance services incidental to supply of software	2,45,83,137
4	Provision of training services to the Resellers/end-customers via standardized video(s)	76,568
5	Partner fees from resellers for being appointed as Reseller for tableau products	25,21,125
	TOTAL (Rs.)	**73,41,69,869**

2.3 Further, it was also noted by the AO that the assessee claimed the said receipts to be exempt on the ground that the company had not allowed the use or granted any right to use the copyright in the software to the Indian customers, but the same was limited to only sale of the copyrighted article. According to the assessee, the said revenue earned by the assessee company from supply of software products in India was not taxable in India as 'Royalty' under the beneficial provisions of Article 12 of DTAA.

2.4 However, the AO noted that in all the responses filed during the course of the assessment proceedings, the assessee had not given a description of the exact nature of its products/services, which was material in deciding the taxability of the assessee's receipts from India. The AO noted that hence he was relying upon the information available on the assessee's own website to understand the real nature of what was being sold by the assessee in India. Thereafter, the AO discussed about the example of the actual products provided by the assessee in the case of the end user in two companies namely Sysco, an American MNC and DTDC, an Indian customer and came to a finding that the end user was empowered by the assessee company to utilize the software sold in order to advance sales in the form of consistent renewals and new orders. The AO in view of the facts discussed in the assessment order concluded that technology was visibly made available to the end user in said examples so as to ensure independent usage of the same by such user which according to the AO was in the nature of technical services as per Explanation 2 to the provision of the section 9(1)(vii) of the Act, as well as under Article 12 (3)(b) of the India-Ireland DTAA.

2.5 Further the AO observed that while the assessee claimed that its marketing operations are automated but the on-ground reality does not indicate so. The AO observed that the marketing and selling functions are carried out by the assessee's independent partners and Tableau India. Thereafter, the AO referring to the company's website delineating the role of such partners held that Tableau Reseller Partners are technology service providers that resell Tableau in addition to supplying their own deployment, implementation and Bl services and help the customers purchase the right solution from beginning to end. The AO further observed that this was also evident from the Indian case study cited above wherein the assessee's own reseller partner Team Computers Pvt. Ltd. had not only executed the sale of Tableau software to DTDC but had also made available the underlying service and technology in order to facilitate the independent use of such software by DTDC.

2.6 The AO further observed that a plain perusal of the assessee's contractual agreements with its reseller partners reveals that they have to necessarily get a certain number of their own personnel certified as Technology and Sales Representative. Further, the AO noted that the partner agreement also obligates the reseller partner to develop the capability of independently providing necessary training and support services to the end-users.

2.7 The AO regarding the claim of the assessee that its services were fully automated and no human element was involved and therefore the services rendered would not qualify as technical services under Article 12(3) of the India-Ireland DTAA observed that the issue of whether an automated service can constitute a service rendered has been decided by the ITAT Agra Bench in the case of Metro & Metro Vs Additional Commissioner of Income-tax (International taxation) in ITA no.393/Agra 2012 vide order dated 31.10.2013 and the issue was identical to the instant case. The AO noted that the Tribunal in this case did not find any difference whether the services are rendered through human involvement or through automated means and held that automated services would be taxable as FTS under section 9(1)(vii) of the Income-tax Act.

2.8 The AO also held that even if the services are rendered in automation mode but if the nature of services falls within the letter and intent of FTS under section 9(1)(vii) of the Act, the same would be liable for taxation in India. The AO also observed that without prejudice to his findings that the technical services was provided in automation mode, material on record and in the public domain clearly suggests that there was substantial human involvement on the part of the assessee to render the services in question. The AO also noted that in the instant case the consultancy services are of technical nature, therefore, such services are technical services as per the DTAA and the taxability of such services would not require crossing the "make available" clause threshold. The AO also held that without prejudice to this, in the instant case, the Tableau solution was made available to the Indian customer-users so that they can use this for data analytics independently without the support of the assessee company. The AO also noted that the assessee also imparts training to employees of Indian customer-users so as to enable them to act independently and the customer-users are held responsible for any damage to the software, which are attributes of independent performance.

2.9 In view of the above facts, the AO held that such receipts were income in the nature of technical consultancy and was taxable in the hands of the assessee company as "Fees for technical Services" under India-Ireland DTAA. Accordingly in the draft assessment order u/s 144C(1) of the Act dated 23.09.2022, the AO proposed to treat the receipts of Rs. 73,41,69,869/- as fees for technical services liable to be taxed in India @ 10% on gross receipts as per section 115A of the Act and under the Article 12 of the India-Ireland DTAA.

2.10 Further, the findings of the AO for treating the said receipts as taxable has been summarized by the Ld. DRP in its directions passed u/s 144C(5) of the Act dated 25.05.2023 which are reproduced as under:

> *2. (i) In its responses to the notices issued the assessee has not given a description of the exact nature of product/services which are material for deciding the receipt of the assessee from Indian customer, and hence the AO relied upon the assessee's own website to understand the real nature of the products / services supply by the assessee.*
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> *(ii) The assessee company is not reselling a standard off the shelf/non customized/electronically downloadable software but is instead offering comprehensive services experience/solutions with the help of the technology embedded in its software.*
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> *(iii) The end-user has to be empowered by the assessee company to utilize the software in order to advance sales in the form of consistent renewals and new orders. Hence, technology is visibly made available to the end-user in the instant case so as to ensure independent usage of the same by such user.*
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> *(iv) The assessee company operates in India through independent reseller partners, service partners and its own subsidiary i.e. Tableau Software India I'vt. Ltd. ("Tableau India"). It*

follows a standard fixed pricing model that is decided by the group as a whole, leaving no room for discretion. Thus, there is a fixes income stream once a market is established.

(v) The assessee offers a plethora of tutorials, instructional material and support resources at all-time end user of its software services.

(vi) Not only has the assessee company made available solutions, knowledge. information, technology, skill, know-how and process to the end-user for independent use of Tableau software by such user, but it appears that the assessee company has made an all-out effort to do so.

(vii) The digital services in the form of software have clearly been made available to the end-user without explicitly providing for the same in the "legal" relationship established with it. Instead, such responsibility or function of making the services available to the end-user has been entrusted with the independent agent, thereby averting the possibility of taxation in the source country i.e. India.

5.2 In para 6 onwards, the AO has discussed the legal aspects of the taxability of the receipts in the hands of the assessee and proceeded to conclude that the consideration received from the Indian customers for provision of software and related services is taxable as FTS under the Act as well as DTAA."

2.11 Thereafter, the ld DRP noted the main objections filed by the assessee before the ld DRP as under:

"5.3 The assessee has objected to observations and conclusion of the AO vide detailed submissions appended to Form 35A dated 12/10/2022, a synopsis of which has been filed on 07/02/2023. It is submitted that the assessee is primarily engaged in supplying standard, non-customizable, shrink-wrapped/off the shelf/electronically downloadable software as well as new software/upgrades to the customers in India either directly or through resellers in India for which specific contractual arrangements/agreement (EULA/resale agreements) were entered into by the assessee from outside India. It is submitted that the nature of transaction is outright sale of software where the end user is granted a limited non-transferable, non-sub licensable, non-exclusive license to use the software sold. The assessee has relied upon the decision of the Ilon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Pvt. Ltd. in support of its contentions. <u>During DRP proceedings the assessee vide letter dated 21/02/2023 has stated that the AO did not take into consideration the agreements or EULA for supply of software while passing the DAO, and concluded the assessment by simply relying on agreement of SaaS</u>."

2.12 The ld DRP called for a remand report from the AO and thereafter, after considering the remand report of the AO and the rejoinder filed by the assessee, agreed with the findings of the AO in the draft assessment order. The relevant extracts of the said order are reproduced as under:

> "5.4 The panel called for a remand report from the AO in this regard. The remand report of the AO dated 18/04/2023, has been received in this office vide letter dated 25/04/2023 of the Addl. CIT, Range - 3(1), Intl. Taxation Delhi. After examination of the EUL.A of the assessee with the end user and reseller, the AO has commented in para 4 of the remand report as under:-
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> *"4 The EULA of the assessee with the End User and the reseller has been perused and based on the same, following observation is being made:*
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> *(i). As per the point no. 3.2 of the EULA, it is stated that the Tableau grants the user a limited license to modify any sample source code from the software provided to the user for the purpose of designing, developing, testing and otherwise facilitating the use of the software under the EULA. Therefore, it is clear that the Tableau provides a sample source code and user can modify that sample source code for further designing/developing/testing/facilitating the software as per the requirements of the user.*
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> *The same was concluded by the AO in the assessment order wherein the AO states that assessee is not selling a "standard off-the-shelf customized/electronically downloadable software" and instead, it is offering comprehensive service experiences or solutions with the help of the technology embedded in its software. Further, the AO has also stated that the technology is visibly made available to the end user in the instant case so as to ensure independent usage of the same by such user. Whether, the software has been purchased directly by the user or purchased through any reseller, these terms and conditions will remain same.*
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> *Further, the assessee has relied on the decision of the Hon'ble Supreme Court dated 02.03.2021 in the case of M/s Engineering Analysis Centre of Excellence Pvt. Ltd. wherein the Hon'ble SC has held that software payments, where no right or interest is created in favor of the distributor/ end user for the use of or right to use any copyright, can not be regarded as royalties under the DTAA. However, on perusal of the EULA of the assessee it is clear that the assessee has provided a limited license to modify any sample source code from the software provided to the user for the purpose of designing. developing, testing and otherwise facilitating the use of the software under the EULA.*

Since, the said judgement is based on four models of EULA produced by the taxpayers. All these four agreements allow only single use of software on one computer. They do not permit the licensee to copy, modify, reverse engineer, decompile, disassemble or otherwise attempt to discover the source code or algorithm of the software..

It is also noted from the said judgement of the Hon'ble SC that if the license transfer an interest in all or any of the rights contained in section 14(b), r.w.s. 14(a) of the Copyright Act, it would be amount to use of right in copyright and hence royalty. Thus, as per the judgement of the SC if the owner of the software parts with any of the rights that are listed in section 14(b) of the Copyright Act r.w.s. (a)(i)-(vii) thereof, it would be a case of parting with right in copyright and would then amount to royalty. The department has filed a Review petition before the Hon'ble Supreme Court against the above-mentioned decision and which has been admitted by the Hon'ble SC.

Therefore, the assessee is not covered by the decision of the Hon'ble Supreme Court in the case of Ms Engineering Analysis Centre of Excellence Pvt. Ltd.

(ii). As per the point no. 9 of the EULA, it is stated as follows: "Professional Services: Tableau shall provide the number of hours of professional consulting or training services ("Professional Services") purchased in the applicable Ordering Document or online ordering process. No Software license purchases are contingent on any Professional Services. The parties acknowledge that the scope of the Professional Services provided hereunder consists solely of either or both of: (a) training to assist with Software installation, deployment, and usage and (b) training in use of the Software, You shall have a license right to use any deliverables (including any documentation, code. Software, training materials or other work product) delivered as part of the Professional Services ("Deliverables") solely in connection with your licensed use of the Software, subject to all the same terms and conditions as apply to your Software license including in Section 3.9 (License Restrictions)), and subject to any additional terms and conditions provided with the Deliverables, You may order Professional Services under an Ordering Document or a mutually executed Statement of Work ("SOW") describing the work to be performed, fees, and any applicable milestones, dependencies and other technical specifications or related information. You will reimburse Tableau for reasonable travel and lodging expenses as incurred."

In view of the above, it is noted that the AO has also discussed the same in the assessment order wherein it is stated that the assessee company has explicitly provided a provision for professional and support service.

(iii). Similar to the above, the AO has also quoted the point no. 11 of the EULA i.e. Confidential information wherein it has been stated that the assessee has put in place an elaborate Architecture to make available services through technology to the end-user without stating the same explicitly in its End-user License agreement, the underlying information, technology and services are not "standard". Further, it has also been mentioned in the assessment order that every agreement executed by the assessee contains within a confidentiality clause which places defined, systematic and extensive restrictions on its users as well as resellers on the ways in which they can use the technology/service so made available to them.

> *In view of the above, it is clear that the AO has considered the agreements/EULA for the supply of software and concluded that the assessee company made available solutions, knowledge, information, technology, skill, know-how and process to the end user for independent use of Tableau Software by such user."*

5.5 The assessee filed a rejoinder to the remand report vide submission dated 18/05/2023 wherein it has been submitted that the AO, in the remand report, has made observations based on incorrect appreciation of facts and law and has reiterated its contentions that any sample source code provided to end users is solely for internal use, and limited modification rights of the same is only for facilitating the integration of Tableau application with respective end user system. The assessee has reasserted its reliance on the decision of the Hon'ble Supreme Court in Engineering Analysis Centre of Excellence Pvt. Ltd.

5.6 The panel has considered the detailed submission vide Form 35A dated 12/10/2022, the synopsis filed by assessee in this regard dated 07/02/2023, the remand report of the AO dated 18/04/2023 and the rejoinder of the assessee dated 18/05/2023. At the outset, the panel notes that the facts and the issue involved are identical in the case of the assessee for AYs 2018-19 and 2019-20, wherein the panel upheld the action of the AO treating the receipts from sale of software solutions as FTS. The AO has made a detailed analysis of the nature of software and related services supplied/provided by the assessee to the Indian customers. The AO has also made analysis of the EULA and other agreements in connection with supply of software by the assessee to Indian customers and has arrived at a categorical finding on the same in the DAO as well as the Remand Report. As rightly observed by the AO, the assessee company is not selling a standard, off the shelf, non-customizable software to the customers but also allows the users of software, a limited right to modify the source code as per the requirements of the user. The assessee also offers a plethora of tutorials instructional material and support resources at all-time end user of its software services as evidenced by the assessee company's own website. In that sense the assessee has made available to the end-user to make independent usage of the same by customization of software as per their needs. Thus the underlying information, technology and services made available by the assessee to the end customers are not 'standard' and non-customizable as claimed by the assessee. In view of the above the panel is of the considered view that the reliance placed by the assessee upon the decision of the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Pvt. Ltd. is clearly misplaced. The AO has also established that the nature of income in the hands of the assessee is clearly not in the nature of 'business income' as basic attributes of business, like regularity, continuity, frequency, volume etc. are not present. Thus existence of PE for taxability in India, in the instant case, is irrelevant. The nature of income clearly falls within the meaning of FTS as the services provided by the assessee are not only technical in nature but also satisfy the criteria of make available, in terms of the requirements of the DTAA. In view of the above, the panel upholds the conclusion of the AO and rejects the contentions of the assessee raised in ground numbers 2, 3 and 4."

2.13 Upon receipt of the above directions of the Ld. DRP, the AO passed the final assessment order taxing the receipts of Rs. 73,41,69,869/- as fees for technical services @ 10% on gross receipts as per section 115A of the Act and under the Article 12 of the India-Ireland DTAA.

3. Aggrieved with the aforesaid findings in the order, the assessee has filed an appeal before us on the following grounds of appeal:

> *"1. On the facts and circumstances of the case and in law, the final assessment order passed by the Ld. AO pursuant to the directions of the Learned Dispute Resolution Panel ('Ld. Panel) u/s 143(3) r.w.s. 144C(13) of the Act is bad in law and barred by limitation in view of the provisions of Section 153 of the Act.*
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> *2. On the facts and circumstances of the case and in law, the assumption of jurisdiction by the Ld. AO is devoid of any legal merit as the notice u/s 143(2) of the Act was issued by Ld. Asstt. Commissioner of Income Tax, NaFAC-1(1)(2), Delhi instead of the appropriate jurisdictional assessing officer, and thus assessment order passed by Ld. AO is void-ab-initio and bad in law.*
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> *3. On the facts and in the circumstances of the case and in law, the directions passed by the Ld. Panel are issued manually without a valid computer-generated Document Identification Number ('DIN') which is in violation of Circular No. 19/2019 dated August 14, 2019 issued by the Central Board of Direct Taxes ('CBDT'), thereby rendering such directions as invalid and the consequential final assessment order bad in Raw, null and void and liable to be quashed.*
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> *4. On the facts and circumstances of the case and in law, the final assessment order passed by the Ld. AO pursuant to the directions of the Ld. Panel u/s 143(3) r.w.s. 144C(13) of the Act is erroneous and bad in law being passed on:*
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> > *4.1 An incorrect appreciation of facts,*
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> > *4.2 Reference/conclusions that are contrary to the documentation/material on record,*
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> > *4.3 Reference/conclusions based on material available in public domain that is not relevant to the facts of the case,*
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> > *4.4 Moreso, the Ld. AO has erred in erroneously concluding that the Appellant is economically not taxed in its country of residence (i.e., Ireland).*
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> *5. On the facts and circumstances of the case and in law, the Ld. AO/Ld. Panel grossly erred in observing that the consideration received by the Appellant amounting to INR*

73,41,69,869 from its customers is in the nature of 'Fees for Technical Services' ('FTS') as per the provisions of the Act and under Article 12 of the Double Taxation Avoidance Agreement entered between India and Ireland ('DTAA') without appreciating that same is in the nature of business income and thus, not taxable in India in the absence of Permanent Establishment ('PE'). In doing so:

5.1 the Ld. AO/Ld. Panel grossly erred in not appreciating that the substantial consideration received by the Appellant amounting to INR 66,62,05,791 (out of total receipts of INR 73,41,69,869) from its customers pertains to sale of non-customized, standard off the shelf / shrink wrapped software, software upgrades and support and maintenance services incidental to supply of software which is not taxable in India being sale of 'copyrighted article'.

5.2 the Ld. AO/Ld. Panel grossly erred in taxing the consideration received by the Appellant amounting to INR 6,53,66,384 (out of total receipts of INR 73,41,69,869) from the provision of Software as a Service ('SaaS') (including support and maintenance services) without appreciating that the same is a standard facility and not taxable as FTS both under the Act and the DTAA.

5.3 the Ld. AO/Ld. Panel grossly erred in taxing the consideration received by the Appellant amounting to INR 76,568 (out of total receipts of INR 73,41,69,869) from training services without appreciating that the same is a standard facility and not taxable as FTS both under the Act and the DTAA.

5-4 the Ld. AO/Ld. Panel grossly erred in taxing the consideration received by the Appellant amounting to INR 25,21,125 (out of total receipts of INR 73,41,69,869) from its customers as FTS without appreciating that the same pertains to partner(s) fee, which being in the nature of business income, is not taxable in India in the absence of PE.

5.5 the Ld. AO grossly erred in not appreciating that, with respect to 'FTS', the provisions of Section 9(1)(vii) of the Act as well as Article 12 of the India- Ireland DTAA triggers only in the presence of human intervention, which is absent in the facts of the case of the Appellant.

5.6 the Ld. Panel/Ld. AO grossly erred in considering an incorrect revenue stream-wise bifurcation, which is not in line with the bifurcation/details provided during the course of DRP proceedings."

4. Ground Nos. 1, 2 and 3 of the appeal are on the legality of the assessment order framed on the ground that the assessment order is barred by limitation in view of section 153 of the Act, that the notice u/s 143(2) of the Act was issued by Ld. Asstt. Commissioner of Income Tax, NaFAC-1(1)(2), Delhi instead of the appropriate jurisdictional assessing officer, and also in view of the fact that the

directions passed by the ld DRP were issued manually without a valid, computer-generated Document Identification Number (DIN). However, the above grounds of appeal were not pressed by the assessee at the time of hearing before us. Hence, these grounds of appeal are dismissed as not pressed.

5. Ground Nos. 4 to 4.4 and 5 to 5.6 of the appeal are against the action of the AO in treating the receipts of Rs. 73,41,69,869/- as fees for technical services and taxable in India @ 10% on gross receipts as per section 115A of the Act and under the Article 12 of the India-Ireland DTAA. The same was claimed to be received by the assessee primarily on account of sale of non-customised shrink-wrapped/off the shelf/electronically downloadable software (such as Creator, embedded Analytics, Explorer etc.) and provision of software upgrades to fix security issues, bugs etc. at periodic intervals being incidental to sale of software amounting to Rs. 64,16,22,654/- and Provision of software as a Service ('SaaS')-standard services (such as Tableau online, creator Online, explorer Online, etc.), which was claimed to be fully automated standard facility amounting to Rs. 6,53,66,384/-. In this regard, the ld AR of the assessee filed a detailed written submission and relied upon the same. In the submissions made before us, the Ld. AR relied upon decision of the Hon'ble Delhi High Court in the case of DIT v. Infrasoft Ltd. [2013] 39 taxmann.com 88/ [2014] 220 Taxman 273 (Delhi) and submitted that the same was approved by the Hon'ble Supreme Court in Engineering Analysis Centre of

Excellence Pvt. Ltd. v. Commissioner of Income Tax. (2021) 432 ITR 471 (SC) Relying upon the said decision of the Hon'ble Delhi High Court, the Ld. AR submitted that the impugned receipts were not taxable in India as these were simpliciter sales resulting in business profits, which in the absence of the PE of the assessee in India was not taxable in India.

5.1 The Ld. AR further submitted that during the year under consideration the assessee was a tax resident of Ireland within the meaning of the said term under Article 4 of the Double Taxation Avoidance Agreement between India and Ireland ('India-Ireland DTAA') and accordingly was entitled to the beneficial provisions of the India-Ireland DTAA vis-a-vis the provisions of the Act. In this regard, the Ld. AR drew our attention to the copies of tax residency certificate(s) for the calendar year(s) 2019 (pertaining to the period January 01, 2019, to December 31, 2019) and 2020 (pertaining to the period January 01, 2020, to December 31, 2020) placed at page Nos. 69 & 70 of the paper book. It was submitted that since the assessee did not have a Permanent Establishment ('PE') in India, during the year under consideration, in accordance with Article 5 of the India-Ireland DTAA, the revenue earned from customers in India on account of aforesaid activities was duly offered to tax in Ireland in accordance with its domestic tax laws. The Ld. AR submitted that during the year under consideration, the assessee had primarily earned revenue from the sale of licensed software products (non-customized shrink-wrapped/off-the-shelf/electronically downloadable Tableau software) to the customers in India either directly or through resellers in India *(copy of the agreements are available at Page nos. 198-212 for direct sales and Page nos. 213-305 of the paper book for reseller agreements) a*nd provision of services though subscription model *(copy of the agreements are available at Page nos. 309-326 of the paper book for the subscription agreements)*, besides income from training and partner fee. It was further submitted that the business activities/sale operations of the assessee in case of supply were carried out through its employees/personnel who were based outside India and the assessee distributed the software to its Indian customers on a principal-to-principal basis outside India. Further, it was submitted that the contract for distributing the software to the Indian customers was entered by the assessee outside India. Further, drawing attention to the specific contents of EULA/ Reseller agreement, the Ld. AR submitted that it was evident from the nature of the transaction that it is a case of an outright sale of software where the end user is granted a limited, non-transferable, non-sublicensable, non-exclusive license to use the software sold. Accordingly, the Ld. AR submitted that given the fact that the assessee was entitled to the beneficial provisions of the India-Ireland DTAA and in the absence of a PE in India, the impugned receipts were not liable to be taxed in India.

5.2 Further, the Ld. AR submitted that the Hon'ble Delhi High Court in the case of DIT vs Infrasoft Ltd. (Supra) analysed and evaluated the key contents of the Infrasoft Ltd. EULA which as can be inferred from the comparative tabulation submitted in the written submission filed by the assessee before us was largely similar to the EULA applicable in the assessee's case and concluded that the receipts of the seller (Infrasoft Ltd.) were in the nature of business income. It was further submitted that it was important to note that given the fact that the Hon'ble Supreme Court has settled the issue of taxability of supply of software as royalty, the department in order to avoid the applicability of the decision has sought to tax the receipts from sale of software under the head "Fees for Technical services." It was further submitted that be that as it may, it is extremely important to note that the Hon'ble Supreme Court has already determined the nature of the transaction and its taxability thereof i.e., sale of software being business income of an assessee and in absence of PE of the assessee in India the said amount was not taxable in India. Accordingly, the ld AR submitted that the attempt of the department to charge it as fees for technical services is of no consequence as the controversy has already been settled by the Hon'ble Apex Court.

6. On the other hand, the ld CIT(DR) supported the orders of the authorities below and relied upon the order of the Co-ordinate Bench of this Tribunal in the case of Volvo Information Technology AB v. DCIT (International Taxation) [2024]

162 taxmann.com 679 (Delhi – Trib.) in support of the action taken by the AO. The ld CIT(DR) relying upon the findings of the AO and the ld DRP submitted that in the case of present appeal the payments received by the assessee constitute as fees for technical services. For this proposition the ld. CIT(DR) submitted that in Article 12 of the India-Ireland DTAA, there is no "make available" clause and, therefore, there is no requirement of satisfying the make available clause to qualify as fees for technical services. The ld CIT(DR) also submitted that the facts as brought out by the AO in the assessment order shows that by providing various access to its customers as to how to run the computer software sold by the assessee and the technical services can be transferred in a fully automated digital services without any human intervention. The ld CIT(DR) referring to the identical language in respect of the term "fees for technical services" in Article 12(3)(b) of the India-Sweden DTAA as in the case of India-Ireland DTAA referred to the observations of the Co-ordinate Bench of the Tribunal in the case of Volvo Information Technology AB v. DCIT (International Taxation) (supra) to support his contention and relied upon the findings of the Tribunal's order in para nos. 14,15,16 and 17. The relevant extracts of the order of the Tribunal are reproduced as under:

> ***"5.** Briefly the facts relating to this issue are, the assessee is a non-resident corporate entity incorporated in Sweden and a tax resident of that country. As observed by the Assessing Officer, the assessee is a part of the Volvo Group and is engaged in providing Information Technology ('IT') solutions, particularly catering to IT needs of automotive industries. For the assessment year under dispute, the assessee filed its return of income on 11.12.2020, declaring nil income claiming refund of TDS, amounting to Rs.11,43,58,540/- In course of assessment proceedings, the Assessing Officer called upon*

the assessee to furnish the details of receipts earned from India corresponding to the TDS. He also called for various other details. On examining the materials on record, he observed that in terms with agreement entered by the assessee and other entities of Volvo Group with three entities in India, viz., Volvo Group India Pvt. Ltd., Volvo Financial Services (India) Pvt. Ltd. and Volvo Eicher Commercial Vehicle Ltd, the assessee has provided various IT facilities for running their business operations. For providing such services during the year, the assessee has received payment, amounting to Rs.114,31,40,765/-.

***6.** On going through the agreement with the Indian group entities, he observed that the assessee is providing various services, such as, Business Application related Services, End User Services and Shared Infrastructure, Volvo Corporate Network, Business Consultancy (including, projects and professional services), Support to IT Division and Volvo India entities for local services etc. After examining the nature of services, the Assessing Officer was of the view that the receipts earned by the assessee for providing such services are in the nature of FTS under Article 12 of India - Sweden DTAA. Therefore, he issued a show-cause notice to the assessee, as to why the receipts should not be treated as FTS under the treaty provisions. In response to the show-cause notice, the assessee furnished its reply stating that the services rendered to Indian entities are routine standard services, hence, do not fall under the ambit of FTS.*

***14.** We have considered rival submissions and perused the materials on record. We have also applied our mind to the decisions relied upon. Undisputedly, the assessee has entered into an agreement with the Indian group entities for providing various services as discussed elsewhere in the order. Under Business Application Related Services, the assessee provides access to the business application softwares, which are used for various purposes, such as, inventory management, sales management, data warehousing applications, product design and modeling, human resource management etc. Under the End User Services and Shared Infrastructure, the assessee provides facilities and various services keeping in view the End User requirement, such as, emails, personal computer environment, voice/telephone. Under the voice support, mobile and fixed voice services are provided to connect people in local and global context. Under the IT support services, the assessee operates service desk for all types of IT related issues from end users. Under the Volvo Corporate Network, assessee provides a secured access to Volvo Network, which is prerequisite for use of any business application other IT services provided by the assessee. The assessee also provides Business Consultancy Services in terms of which it renders consultancy services with respect to IT services provided by it.*

***15.** Though, the assessee has claimed that these are standard and routine services, however, fact remains that the assessee has provided managerial, consultancy and technical services. Copies of invoices placed in the paper-book do not provide the description/details of services provided. At this stage, we may look into the definition of FTS under Article 12(3)(b) of India -Sweden DTAA, which reads as under:*
"Article 12(3)(b)- The term 'fees for technical services, means payment of any kind in consideration for rendering of any managerial, technical or consultancy services

including the provisions of services by technical or other personnel but does not include payments for services mentioned in Articles 14 and 15 of this Convention."

***16.** As could be seen, the definition of FTS under the treaty covers any kind of payment for rendering of any managerial, technical or consultancy services including provision of services by technical or other personnel. Thus, the definition of FTS under Article 12(3)(b) is wide enough to cover all kinds of payments made towards managerial, technical or consultancy services. It is fairly well settled that rules of interpretation of statute will not apply while interpreting treaty provisions. The treaty provisions are to be interpreted based on the language used in the treaty. If we go by the language used in Article 12(3)(b) of the treaty, one cannot escape the conclusion that the payments received by the assessee are in the nature of FTS. Though, we respectfully agree with the ratio laid down by Hon'ble Supreme Court in case of Kotak Securities Ltd. (supra), however, any attempt to equate the services rendered by the assessee to the services rendered by the Bombay Stock Exchange (BSE) would amount to over simplifying the issue. The facts on record clearly reveal that the services rendered by the assessee are more complex in nature compared to the services rendered by BSE, as considered in case of Kotak Securities Ltd. (supra).*

***17.** In any case of the matter, the issue before us is whether the receipts qualify as FTS in terms of Article 12(3)(b) of India -Sweden DTAA. In our view, the definition of FTS under the aforesaid Article is wide enough to cover the amounts received by the assessee towards various services provided to Indian group entities."*

7. We have heard both the parties and perused the material on record. The issue in this appeal is regarding the action of the AO in taxing the receipts of Rs 73,41,69,869/-received by the assessee on account of sale of shrink-wrapped/off-the-shelf/electronically downloadable Tableau software and Provision of Software as a Service('SaaS') to customers in India as "fees for technical services" @ 10% on gross receipts as per section 115A of the Act and under the Article 12 of the India-Ireland DTAA. The said receipts were claimed as exempt by the assessee on the ground that the company had not allowed the use or granted any right to use the copyright in the software to the Indian customers, but the same was limited to only sale of the copyrighted

Article In this regard, the ld AR relying upon the decision of the Hon'ble Delhi High Court in the case of DIT v. Infrasoft Ltd.(supra) particularly the findings in para no. 88 of the order submitted that receipts in these types of transactions would be dealt with as business income in accordance with Article 5 of the India-Ireland DTAA and in the absence of its PE in India the same would not be taxable in India. The relevant Para no. 88 is reproduced as under:

> *"88. The license granted by the Assessee is limited to those necessary to enable the licensee to operate the program. The rights transferred are specific to the nature of computer programs. Copying the program onto the computer's hard drive or random access memory or making an archival copy is an essential step in utilizing the program. Therefore, rights in relation to these acts of copying, where they do no more than enable the effective operation of the program by the user, should be disregarded in analyzing the character of the transaction for tax purposes.* ***Payments in these types of transactions would be dealt with as business income*** *in accordance with Article 7."*

7.1 The ld AR also submitted that the above findings of the Hon'ble Delhi High Court were confirmed by the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Pvt. Ltd. v. Commissioner of Income Tax. [1, 2] (2021) 432 ITR 471 (SC) in para no. 118 of the order which is reproduced as under:

> *"118. Consequently,* ***the view contained*** *in the determinations of the AAR in Dassault Systems K.K.(supra) and Geoquest Systems B.V. (supra) and the judgments of the High Court of Delhi in Ericsson A.B. (supra), Nokia Networks OY (supra),* ***Infrasoft Ltd.*** *(supra), ZTE Corporation (supra),* ***state the law correctly and have our express approval****. We may add that the view expressed in the aforesaid judgments and determinations also accords with the OECD Commentary on which most of India's DTAAs are based."*

7.2 However, we note that the Hon'ble Delhi High Court in the case of Director of the Income Tax vs Infrasoft Ltd(Supra) was considering as to whether the Income-tax Appellate Tribunal was right in holding that the consideration received by the respondent Assessee on grant of licences for use of software was not royalty within the meaning of Article 12(3) to the Double Taxation Avoidance Agreement between India and the United States of America. This is evident from Para No. 3 of the said order where in the substantial Question of Law framed by the Hon'ble Court was as under:

> *"Whether the Income-tax Appellate Tribunal was right in holding that the consideration received by the respondent Assessee on grant of licences for use of software is not royalty within the meaning of Article 12(3) to the Double Taxation Avoidance Agreement between India and the United States of America?"*

7.3 Further, we notice that the scope of the term "Royalty" under Article 12(3) of the India USA DTAA is distinct and different from the term "fees for technical services" under Article 12(3)(b) of the India-Ireland DTAA. In this regard, the provisions of the term "Royalty" under Article 12(3) of the India USA DTAA and the provisions of "fees for included services" under Article 12(3) of the India USA DTAA and similar provisions of the said terms in the India-Ireland DTAA are reproduced as under:

<u>Relevant extracts of India-USA-DTAA</u>

> *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, trade mark, 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 payments; 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).

Relevant extracts of India-Ireland-DTAA

ARTICLE 12:………..

3. (a) The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films or films or tapes for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process or for the use of or the right to use industrial, commercial or scientific equipment, other *than an aircraft, or for information concerning industrial, commercial or scientific experience;*

(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.

7.4 Thus, in view of the altogether different and distinct scope of the term "fees for technical services" in the India-Ireland DTAA as referred above from the scope of "Royalty" under the India-USA DTAA, the reliance placed by the assessee on the decision of the Hon'ble Delhi High Court in the case of DIT vs Infrasoft Ltd. (Supra) to support its contention that impugned receipts were not taxable in India as these were simpliciter sales, which in the absence of a PE in India was not taxable in India is not acceptable as the issue in the present case is with respect to taxing the said receipts as "fees for technical services" and not as "Royalty" income. As already discussed above the scope of "fees for technical services" and "Royalty" income under the India-Ireland DTAA are distinct and different.

7.5 Further, we note that the AO in para no. 8.8 of the draft assessment order had relied upon the order of the Hon'ble Apex Court in the case of Kotak Securities Ltd 383 ITR 1 (SC) to support his finding that human involvement was not required if the result of providing technical services with the human intervention is satisfied with the automated process also.

7.6 In this regard, the relevant findings of the Hon'ble Apex Court in para nos. 6 to 11 are reproduced as under:

> *"**6.** What meaning should be ascribed to the word "technical services" appearing in Explanation 2 to clause (vii) to Section 9(1) of the Act is the moot question. In CIT v. Bharti Cellular Ltd. [2011] 330 ITR 239/[2010] 193 Taxman 97 this Court has observed as follows:*
>
> > *'Right from 1979, various judgments of the High Courts and Tribunals have taken the view that the words "technical services" have got to be read in the narrower sense by applying the rule of noscitur a sociis, particularly, because the words "technical services" in section 9(1)(vii), read with Explanation 2 comes in between the words "managerial and consultancy services".'*
>
> ***7.** "Managerial and consultancy services" and, therefore, necessarily "technical services", would obviously involve services rendered by human efforts. This has been the consistent view taken by the courts including this Court in Bharti Cellular Ltd's. case (supra). However, it cannot be lost sight of that modern day scientific and technological developments may tend to blur the specific human element in an otherwise fully automated process by which such services may be provided. The search for a more effective basis, therefore, must be made.*
>
> ***8.** A reading of the very elaborate order of the Assessing Officer containing a lengthy discourse on the services made available by the Stock Exchange would go to show that apart from facilities of a faceless screen based transaction, a constant upgradation of the services made available and surveillance of the essential parameters connected with the trade including those of a particular/single transaction that would lead credence to its authenticity is provided for by the Stock Exchange. All such services, fully automated, are available to all members of the stock exchange in respect of every transaction that is entered into. There is nothing special, exclusive or customised service that is rendered by the Stock Exchange. "Technical services" like "Managerial and Consultancy service" would denote seeking of services to cater to the special needs of the consumer/user as may be felt necessary and the making of the same available by the service provider. It is the above feature that would distinguish/identify a service provided from a facility offered. While the former is special and exclusive to the seeker of the service, the latter, even if termed as a service, is available to all and would therefore stand out in distinction to the former. The service provided by the Stock Exchange for which transaction charges are paid fails to satisfy the aforesaid test of specialized, exclusive and individual requirement of the user or consumer who may approach the service provider for such assistance/service. It is only service of the above kind that, according to us, should come within the ambit of the expression "technical services" appearing in Explanation 2 of Section 9(1)(vii) of the Act. In the absence of the above distinguishing feature, service, though rendered, would be mere in the nature of a facility offered or available which would not be covered by the aforesaid provision of the Act.*

9. *There is yet another aspect of the matter which, in our considered view, would require a specific notice. The service made available by the Bombay Stock Exchange [BSE Online Trading (BOLT) System] for which the charges in question had been paid by the appellant-assessee are common services that every member of the Stock Exchange is necessarily required to avail of to carry out trading in securities in the Stock Exchange. The view taken by the High Court that a member of the Stock Exchange has an option of trading through an alternative mode is not correct. A member who wants to conduct his daily business in the Stock Exchange has no option but to avail of such services. Each and every transaction by a member involves the use of the services provided by the Stock Exchange for which a member is compulsorily required to pay an additional charge (based on the transaction value) over and above the charges for the membership in the Stock Exchange. The above features of the services provided by the Stock Exchange would make the same a kind of a facility provided by the Stock Exchange for transacting business rather than a technical service provided to one or a section of the members of the Stock Exchange to deal with special situations faced by such a member(s) or the special needs of such member(s) in the conduct of business in the Stock Exchange. In other words, there is no exclusivity to the services rendered by the Stock Exchange and each and every member has to necessarily avail of such services in the normal course of trading in securities in the Stock Exchange. Such services, therefore, would undoubtedly be appropriate to be termed as facilities provided by the Stock Exchange on payment and does not amount to "technical services" provided by the Stock Exchange, not being services specifically sought for by the user or the consumer. It is the aforesaid latter feature of a service rendered which is the essential hallmark of the expression "technical services" as appearing in Explanation 2 to Section 9(1)(vii) of the Act.*

10. *For the aforesaid reasons, we hold that the view taken by the Bombay High Court that the transaction charges paid to the Bombay Stock Exchange by its members are for 'technical services' rendered is not an appropriate view. Such charges, really, are in the nature of payments made for facilities provided by the Stock Exchange. No TDS on such payments would, therefore, be deductible under Section 194J of the Act.*

11. *In view of above conclusions, it will not be necessary for us to examine the correctness of the view taken by the Bombay High Court with regard to the issue of the disallowance under Section 40(a)(ia) of the Act. All the appeals, therefore, shall stand disposed in the light of our views and observations as indicated above."*

(emphasis supplied by us)

7.7 On perusal of the facts brought on record by the AO and counter arguments/ explanation filed by the assessee, we observe that the issue in dispute has not been examined by the AO/Ld. DRP keeping in view the above observations of the Hon'ble Apex Court so as to bring the facts on record as to whether the "technical services" provided by the assessee to its customers in this case in automation mode as stated by the AO has blurred the requirement of specific human element to qualify such services as "technical services" under Article 12(3)(b) India-Ireland DTAA. However, we are also very much mindful of the observations of the Hon'ble Apex Court in this case, in distinguishing the nature of such services provided to the customers as to whether there was any exclusivity to the services rendered by the assessee to its customers or whether each and every customer had to necessarily avail of such services in the normal course of utilizing the said software. In this regard the Hon'ble Apex Court held that such later services would undoubtedly be appropriate to be termed as facilities provided by the assessee on payment but would not amount to "technical services" provided by the assessee, as the same was not being services specifically sought for by the user or the consumer. In this regard, the Hon'ble Apex Court observed that, unless the services are specifically sought for by the user or the consumer it will not amount to "technical services" as appearing in Explanation 2 to Section 9(1)(vii) of the Act. Therefore, the providing of services by the assessee to its customers in automation mode needs to be examined in light of the above observations of the Hon'ble Apex Court. Similarly, the details regarding the manner in which the services/training provided by the assessee/reseller to run the software to the end customers to ascertain whether human intervention was involved as claimed by the AO and its denial by the assessee is not emerging from the facts before us.

7.8 Therefore, in view of the above facts, we set aside the order of the AO/ ld DRP and restore the matter to the file of the AO for fresh adjudication. Ground No. 4 to 4.5 and 5 to 5.6 of the appeal are allowed for statistical purposes.

8. Ground No. 6 of the appeal is without prejudice ground regarding the taxation of FTS @ 10.92% as against the beneficial tax rate of 10% provided under Article 12 of the DTA. The said ground of appeal is reproduced as under:

> "*Without prejudice to the above grounds, on the facts and in the circumstances of the case and in law, the Ld. AO has erred in taxing the receipts derived by the Appellant from India, alleged to be taxable as FTS, at the rate of 10.92% as against the beneficial tax rate of 10% provided under Article 12 of DTAA.*"

8.1 In respect of the above ground, the ld AR has submitted as under:

> *"It is submitted that, Article 2 of the India – Ireland DTAA defines the term 'tax' for the purpose of the DTAA. As per Article 2 of the DTAA, 'tax' is defined to include 'income tax' and is stated to include 'surcharge' thereon, so far as India is concerned.*
>
> *In light of the above, the Appellant submits that the rate prescribed under the India – Ireland DTAA is to be treated to be inclusive of surcharge and therefore, on a without prejudice basis, the liability to pay tax under Article 12 of India – Ireland DTAA should not be further increased by surcharge under the provisions of the Act.*
>
> *Further, Article 2(4) of the India – Ireland DTAA extends the scope of tax by laying down that it shall also cover any identical or substantially similar taxes which are imposed after the date of signature of the Convention in addition to, or in place of, the existing taxes.*
>
> *The Appellant submits that education cess was introduced in India by the Finance Act, 2004 and section 2(11) of the Finance Act, 2004 defined it as follows:*
>
>> *"(11) The amount of income-tax as specified in sub-sections (4) to (10) and as increased by a surcharge for purposes of the Union calculated in the manner provided therein, shall be further increased by an additional surcharge for purposes of the Union, to be called the "Education Cess on income-tax", so as to fulfil the*

commitment of the Government to provide and finance universalized q uality basic education, calculated at the rate of two per cent of such income-tax and surcharge."

(Emphasis supplied by us)

It is thus clear that the education cess, as introduced in India initially in 2004, is nothing but in the nature of additional surcharge and shall be covered within the ambit of Article 2(4) of India – Ireland DTAA.

In this regard, the Appellant places reliance on the decision by Hon'ble Delhi HC in the case of EPCOS Electronic Components S.A. v. Union of India [2019] 107 taxmann.com 227 (Delhi) The relevant extract of the decision is reproduced hereunder:

"20. The Petitioner has sought a clarification regarding the erroneous payment of the surcharge. Indeed, the Court finds that the payment of tax on FTS under the DTAA included surcharge and cess etc. There was no requirement that once the tax rate at the appropriate slab was paid, to separately pay the surcharge and cess.

21. For the aforementioned reasons, the Court quashes the impugned order passed by the Respondent No.2 and directs the Respondents to permit the Assessee to rectify its return by paying tax on FTS at 10%. The excess amount of tax, including the surcharge and cess paid shall be refunded to the Petitioner along with the interest due thereon, not later than eight weeks from today."

Further, the Appellant places reliance on the decision of Hon'ble Mumbai Income-tax Appellant Tribunal ('Hon'ble Mumbai ITAT') in case of DCIT, International Tax v. Marubeni Corporation, [2022] 139 taxmann.com 458 (Mumbai - Trib.), wherein the concerned DTAA was India-Japan DTAA, and the Hon'ble Mumbai ITAT held that the rate prescribed under the DTAA should be treated as the final rate and no addition should be made on account of surcharge and education cess thereto. The relevant extract of the decision is reproduced herein:

"10…………The provisions of the India Japan Double Taxation Avoidance Agreement are in pari materia with the provisions of India Singapore DTAA which was subject matter of consideration in DIC Asia Pacific's case (supra). We, therefore, have no reasons to take any other view of the matter than the view so taken by the coordinate benches. Respectfully following the same, we uphold the plea of the assessee and direct the Assessing Officer to delete the levy of surcharge and health and education cess on the facts of this case. The assessee gets the relief accordingly"

Furthermore, reliance is also placed on the decision of Hon'ble Mumbai ITAT in case of Capgemini SA v. DCIT (International Taxation) [2016] 72 taxmann.com 58 (Mumbai - Trib.), the relevant extract of the decision is reproduced herein:

"11. We have carefully considered the rival submissions. Article 2 of India-France DTAA provides a definition of taxes which are governed by such treaty and the same,

inter alia, prescribes that the expression "income-tax" would include any surcharge thereon. Clause (2) of Article 2 further prescribes that the treaty shall also apply to any "identical or substantially similar taxes" which may be imposed by either of the two countries after the signing of the treaty. In the present context, it is not in dispute that 'education cess' introduced by the Finance Act, 2004 is akin to surcharge and the Kolkata Bench of the Tribunal in the case of DIC Asia Pacific Pte. Ltd. (supra) held the same to be in the nature of an additional surcharge. Now, since clause (1) of Article 2 provides that the taxes governed would include taxes and surcharge thereon, we find no reason for the Revenue to levy the surcharge and education cess, which is also in the nature of surcharge, over and above the cap of 10% prescribed in Article 13 as the tax rate for royalty income. In any case, the provisions of Article 13 of the India-France DTAA, prescribing a cap of 10% on the rate of tax, read with Article 2 thereof would prevail over the provisions of the domestic income-tax law and thus the tax liability on royalty income shall be capped at 10%."

The Appellant further places reliance on the following decisions wherein it has been held that surcharge and education cess cannot be levied in respect of tax liability under the relevant DTAAs:

- *Sunil V. Motiani vs. Income-tax Officer [2013] 33 taxmann.com 252 (Mumbai Tribunal)*
- *Soregam SA vs. Deputy Director of Income-tax [2019] 101 taxmann.com 94 (Delhi Tribunal)*
- *Assistant Commissioner of Income-tax vs. Panasonic Energy India Co. Ltd. ITA No. 2882/Ahd/2016 (Ahmedabad Tribunal)*
- *Deputy Director of Income-tax vs. BOC Group Ltd. [2015] 64 taxmann.com 386 (Kolkata Tribunal)*

In light of the above, the Appellant humbly submits that the rate prescribed under the India – Ireland DTAA is to be treated as the final tax rate inclusive of surcharge and health & education cess and no further surcharge/cess ought to be levied while charging tax under the Act as per the rates prescribed under the India - Ireland DTAA."

8.2 We have heard both the parties and perused the material available on record. The Ld. CIT DR could not cite any case law contrary to the case laws relied upon by the assessee. Upon careful perusal of the provision of Article 2 of the India-Ireland DTAA and in light of the above case laws relied upon by the assessee, we direct the AO to apply the beneficial tax rate of 10% provided under Article 12 of DTAA in case the receipts in dispute are considered as taxable while finalizing the set aside assessment proceedings in respect of ground nos. 4 to 4.5 and 5 to 5.6 of the appeal as held above.

9. Ground No. 7 and 8 are against the non grant of appropriate interest u/s 244A of the Act and adjusting the TDS amount with the amount of amount refund receivable. The said grounds of the appeal are reproduced as under:

> *"7. On the facts and in the circumstances of the case and in law, the Ld. AO has erred in not granting appropriate interest u/s 244A of the Act.*
>
> *8. On the facts and in the circumstances of the case and in law, the Ld. AO has erred in adding back an amount of INR 15,29,736, which pertains to withholding tax deducted by tax authorities on interest granted u/s 244A of the Act but not reflecting in Company's form 26AS."*

9.1 In respect of the above grounds the assessee submitted as under:

> *"It is humbly submitted that these grounds are consequential in nature. It is prayed that appropriate directions may kindly be issued in this regard."*

9.2 The above grounds are consequential in nature. The AO is directed to grant interest u/s 244A of the Act to the assessee as per law. Further, the AO is directed to verify regarding the addition of Rs. 15,29,736/- as submitted by the assessee in its grounds of appeal.

10. Ground No. 9 of the appeal is against the levy of interest u/s 234A and 234B of the Act. This ground is consequential in nature. The AO is directed to charge interest u/s 234A & 234B of the Act as per law.

11. Ground No. 10 is against the initiation of penalty proceedings u/s 270A of the Act. This ground of appeal is premature and hence, dismissed.

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

Order pronounced in the open court on 17.07.2026.

Sd/-	Sd/-
[VIKAS AWASTHY]	**[BRAJESH KUMAR SINGH]**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated-17.07.2026.
Pooja, Sr.PS/Aamir PS

Copy forwarded to:

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

Asst. Registrar,
ITAT, New Delhi