

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : D : NEW DELHI
(Through Virtual Hearing)

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
SHRI MAHAVIR PRASAD, JUDICIAL MEMBER

ITA No.2845/Del/2016
Assessment Year: 2009-10

Bain & Company India Pvt. Ltd., 5 th Floor, Building No.8A, DLF Cyber City, Gurgaon.	Vs	ITO (TDS), International Taxation, Ward-3(2), New Delhi.
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PAN : AACCB8671R

(Appellant)

(Respondent)

Assessee by	:	Shri Himanshu Sinha & Shri Bhuvan Dhupar, Advocates
Revenue by	:	Shri Umesh Takiyar, Sr. DR
Date of Hearing	:	17.08.2021
Date of Pronouncement	:	10.11.2021

ORDER

PER R.K. PANDA, AM:

This appeal filed by the assessee is directed against the order dated 16th March, 2016 of the CIT(A)-42, New Delhi, relating to assessment year 2009-10.

2. Facts of the case, in brief, are that as per Form No.15CA/CB data available on ITD, the AO noted that the assessee has made remittances to non-residents during the F.Y. 2011-12. The AO, therefore, issued a letter dated

30.11.2012 asking the assessee to furnish the details of remittances made mentioning the details of TDS and describing the reasons for nil or lower TDS if any, in respect of such remittances. From the various details furnished by the assessee, the AO noted that the assessee has remitted INR15,13,53,724/- to M/s Bain & Co. Inc., USA (for short 'Bain, USA') for various expenses and reimbursement of cost incurred by Bain USA on behalf of the assessee. He noted that both the companies, i.e., the assessee M/s Bain & Co. India Pvt. Ltd. (in short 'Bain India') and Bain USA are engaged in providing management consultancy services to its clients which includes areas such as strategy, performance improvement, organization enhancement, mergers and acquisitions, private equity, etc. The assessee furnished details of remittances made and copies of service agreement for providing various services and related agreement entered into by the assessee with its parent company i.e., Bain & Co., USA both dated 1st June, 2006. As per Appendix-A to the service agreement, the AO noted that Bain India and Bain USA shall provide to each other the following types of services:-

- a) Consulting services;
- b) Support services; and
- c) Administrative services.

3. He examined in detail the clauses of the service agreement and noted the following facts:-

ó(i) Bain USA desires to engage another party to perform management consulting services in India for certain clients of Bain USA.

(ii) Bain India will provide services to Bain USA in relation to clients of Bain USA but may also develop clients of its own.

(iii) Bain India will assist Bain USA in the performance of consulting services by providing independent consulting services.

(iv) Bain USA will assist Bain India in the performance of consulting services by providing independent consulting services.

(v) Bain USA is assisting Bain India in its daily operations by rendering professional support and administrative services not otherwise available to Bain India which are necessary to enable Bain India to function as an entity rendering consulting services of the highest quality.

(vi) It has been and continues to be the intent of Bain India and Bain USA that the fees and charges referred to in the Service Agreement reflect an arm's length compensation for any particular service provided by one of the parties from which the other derives a benefit. Both the parties to the agreement acknowledge that the term "arm's length compensation" is intended to mean an amount of compensation that would have been agreed upon between unrelated parties engaged in the same or similar transactions under the same or similar conditions in the open market.

(vii) Both parties to the agreement agreed that the fees and charges to be paid in return for the benefits received will be subject to review and adjustment to reflect any change in economic conditions and the ongoing development of intangibles under the agreement under the arrangement.

(viii) Bain India shall perform Consulting Services as described in Appendix 'A' to the agreement relating to clients of Bain USA, including the supply of staff. Similarly, Bain USA shall perform Consulting Services as described in Appendix 'A' to the agreement relating to clients of Bain India, including the supply of staff.

(ix) Bain India has engaged Bain USA to render 'Professional support services' as described in Appendix 'A' to the agreement as may be necessary to meet the direct needs of its current business activities in a manner directly benefiting its interests due to the fact that Bain India is running its business based on its own, restricted capabilities and resources at any given time.

(x) Bain USA will provide to Bain India 'Administrative Services' as described in Appendix 'A' to the agreement as may be necessary to meet the

direct needs of current business activities of Bain India in a manner directly benefitting interests of Bain India.

(xi) For the performance of 'Support Services' and 'Administrative Services' Bain India shall pay to Bain USA the amount. Said Payment shall constitute full compensation to Bain USA for all 'Support Services' and 'Administrative Services' given and expenses incurred.

(xii) Bain USA acknowledges that currently the Indian government may impose a withholding tax of 10 % on payments relating to Information distribution services. This tax may apply to the agreement and if it does apply, the tax shall be borne by Bain USA. Bain USA also acknowledges that 10 % withholding tax may apply to some of the Professional Support charges and where it does apply, the tax shall be borne by Bain USA.ô

4. He noted that apart from computer expenses and royalty, all remittances are related to support services rendered by Bain USA to assessee or for cost for personnel of Bain USA and their related expenditure. He examined the remittances made by Bain India to Bain USA and noted that these are in lieu of or in relation to various services rendered by Bain USA to Bain India under the Agreement under consideration. He, therefore, asked the assessee to show cause as to why the remittances made to non- resident Bain USA in respect of services rendered by it be not taxed as FTS/ royalty.

5. The assessee submitted that the standard support services expenses amounting to Rs. 5,47,89,345/- which Bain USA incurs on behalf of all Bain worldwide subsidiaries represent reimbursement of cost incurred by Bain US for providing support services to Bain India such as cost incurred in performing financial and recruiting administration, computer support assistance, communication and information services, maintenance of bank relationships,

sponsorship of global and regional meetings, etc. The costs incurred by Bain US for rendering these services are allocated to all group entities availing these services, including Bain India, using rational and appropriate basis of allocation such as revenue, headcount etc. The standard support services are rendered by Bain US to all its subsidiaries (located in different parts of the world) to achieve global standardization for the group as a whole so as to ensure that high quality services are provided to Bain clientele.

6. Client related expenses Rs. 2,56,06,279/- as the name suggests , are expenses incurred by Bain India for on behalf of their clients, which the client reimburses to Bain India on actual without any markup. Coming to their precise nature, client related expenses are essentially out of pocket expenses (OPE) incurred which the clients of India have agreed to reimburse at actual without any element of mark-up. These OPE's could be on account of travelling expenses (airfare, hotel, boarding and lodging, food expenses etc.), telephone call charges, printing & stationery, other miscellaneous expenses incurred etc.

7. Out of pocket expenses incurred by Bain USA during the course of setting up of the project for the client of Bain India are characterized as client related expenses. The expenses incurred by Bain USA are directly reimbursed by client of Bain India without any mark-up. As per Auditor's recommendation, Bain India recognizes the aforesaid expenses (incurred by Bain US for and on behalf of Bain India) in its financial statements as being amount payable to Bain

US and receivable from client. The out of pocket expenses incurred are separately recoverable from the client and does not become part of the professional fees received by Bain India from its clients. Computer maintenance charges Rs. 3696067/- are charges incurred for the assessee's business. The above payments are pure reimbursements and do not involve any element of service therein.

8. However, the AO was not satisfied with the arguments advanced by the assessee. Rejecting the various explanations given by the assessee he held that the assessee should have deducted taxes on payments to the tune of INR 7,89,70,432/- on the following amounts:-

- | | | |
|--|---|------------------|
| a) Professional support cost to cost reimbursement | - | Rs.5,47,89,345/- |
| b) Client related expenses | - | Rs.2,04,85,020 |
| c) Computer Maintenance Expenses | - | Rs.36,96,067/- |

9. So far as non-deduction of tax on professional support cost is concerned, the AO held that support services received by the assessee are technical in nature and does not satisfy the "Make Available" clause under the India-USA DTAA. So far as the client related expenses are concerned, the AO took an ad hoc percentage being 80% of client related expenses and held that the assessee was under obligation to deduct tax on 80% of the client related expenses i.e., all expenses amounting to Rs.2,04,85,020/- u/s 195 of the IT Act. In connection with certain expenses like Gerson, Lehrmai charges of Rs.20,48,182 and market

research charges, etc., the AO held that the same are in the nature of consultancy payments and, hence, taxes are required to be withheld on the same. In connection with other expenses under the head "Client related expenses", travel expenses, hotel cost, etc., the AO held that since these expenses are closely linked with the obligation of the assessee to provide consultancy services such expenses cannot be taken out of consultancy fees for withholding tax. So far as the payment on account of "computer maintenance expenses are concerned," the AO made disallowance by holding that the use of software licences by the assessee amounts to royalty/FTS.

10. In appeal, the Id.CIT(A), after complete factual analysis of the services received by the assessee under the head "Professional support cost", held that the services received by the assessee from its AE are neither technical in nature nor do they satisfy the criterion of "Make Available" clause under the treaty between India and USA so as to qualify as Fee for Technical/Included Services. Hence, there was no requirement to withhold taxes on such payments. So far as the client related expenses of Rs.2,04,85,020/- is concerned, he noted that the assessee is liable for tax withholding only in respect of four expenses amounting to Rs.82,34,242/-, the details of which are as under:-

S.No	Particulars	Amount (INR)	Description
1	Market Research	4,162,204	Third party expense pertaining to market research incurred for and on behalf of client
2	Gerson Lehrman call charges	3,566,275	Third party expense pertaining to calls with subject matter experts incurred for and on behalf of client
3	Gartner Charges	279,926	Third party cost of market and industry research services incurred for and on behalf of client
4	Frost and Sullivan Charges	225,837	Third party expense pertaining to market research incurred for and on behalf of client
		8,234,242	

11. While holding so, he held that technical services were made available to the assessee and since the services qualified as Fee for Included Services (FIS) under the India-US tax treaty, the assessee was liable to withhold taxes on the same. He further noted that the assessee could not provide any evidence to substantiate that the payments were made by reimbursement of expenses incurred by Bain US.

12. So far as non-deduction of TDS on computer maintenance expenses is concerned, the Id.CIT(A) decided the issue in favour of the assessee by holding that the payment has been made for using one common global portal shared by all global companies professionally and, thus, does not make available any technology. Thus, in effect, the Id.CIT(A) upheld the action of the AO and held that the assessee is liable to withhold taxes on payment of Rs.82,34,242/-.

13. Aggrieved with such order of the CIT(A), the assessee is in appeal before the Tribunal by raising the following grounds:-

1. That the learned Commissioner of Income Tax (Appeals) (Ld. CIT(A)) has erred on facts and in law in upholding that the Appellant was required to withhold taxes under Section 195 of the Income Tax Act, 1961 (the Act) on payments amounting to Rs. 82,34,240 made by it to its parent company, Bain & Company Inc. (Bain US) on account of payments made to third parties.

2. The Ld. CIT (A) has erred in holding that there is no evidence that such expenses were reimbursement of expenses on a cost to cost basis.

3. That the Ld. CIT (A) has erred on facts and in law in holding that technology was made available to the appellant and hence tax was required to be deducted on these payments under Article 12 of India-USA Double Tax Avoidance Agreement (DTAA).

4. That the Ld. CIT (A) has erred on facts and in law in not appreciating that the services were not technical services so as to fall within the ambit of FIS under the India- USA DTAA.

5. That the appellant reserves its right to add, alter, amend or withdraw any ground of appeal either before or at the time of hearing of this appeal.

14. The ld. counsel for the assessee submitted that the services were not required to be rendered in India and, hence, could not be subjected to taxation in India. Referring to the decision of the Honöble Supreme Court in the case of Ishikawajima-Harima Heavy Industries Ltd., reported in 288 ITR 408, wherein it has been held that for a non-resident to be taxed in India, two conditions have to be fulfilled, i.e., not only should the services be utilized in India, the same should also be rendered in India. He submitted that in assessee's set of facts, there is no dispute that the services were rendered outside India and, therefore, the payments for the services could not qualify as Fee for Technical Services.

He submitted that the above proposition was amended retrospectively by the Finance Act, 2010 w.e.f. 1st June, 1976. Referring to various decisions, he submitted that it is the settled law that retrospective amendment of a provision creating chargeability cannot be valid from the tax withholding stand point. Hence, tax withholding requirement cannot be levied with retrospective effect. He submitted that since, in the instant case, the payments pertained to F.Y. 2008-09 i.e., before the amendment to Finance Act, 2010, therefore, Bain India cannot be held as an assessee in default for not withholding taxes.

15. He submitted that the services provided by third party vendors are not technical in nature. Referring to the order of the CIT(A), he submitted that the ld.CIT(A) has erred in holding that services are technical in nature by ignoring the crucial fact that the impugned payments have been made to obtain market related information which are also available in public domain. He submitted that the services have been rendered by third party only for providing information about the market for various industries and the same cannot qualify as "technical services." The services rendered does not have a threadbare of technical knowledge or any technology which could have been applied by the assessee and, therefore, cannot be treated as fee for included services in terms of Article 12(4)(b) of the Indo-US DTAA. He also relied on the following decisions:-

- i) Deloitte Haskins & Sells v. ACIT [2017] 79 taxmann.com 175 (Mumbai -Trib.),
- ii) Boston Consulting case (280 ITR (AT) 1),
- iii) Bharat Petroleum Corpn. Ltd. vs Jt. DIT 111 TTJ 375 (ITAT Mumbai),
- iv) McKinsey & Co., Inc. (Philippines) v. ADIT [2006] 99 ITD 549 (MUM.),
- v) JCIT v. Telerate [2010] 3 taxmann.com 766 (Mumbai - Trib.)

16. In his another plank of argument, the ld. Counsel for the assessee submitted that the services do not make available technology to Bain India. Referring to the order of the CIT(A), he submitted that the ld.CIT(A) has erred in treating the services as "fee for technical services" without appreciating that the services do not satisfy "make available" clause which is a sine qua non for holding the payments as FTS under the India-USA DTAA. Referring to the India-USA tax treaty, he submitted it requires that in order for a service to qualify as FTS, technology should be "made available" to the recipient of services in a manner that in case the work were to come again to the recipient of services, he should be enabled to himself perform the work without any recourse to the service provider. For the above proposition, he relied on the following decisions:-

- i) CIT v. De Beers India Minerals (P.) Ltd. [(2012) 21 taxmann.com 214 (Kar.)];
- ii) ICICI Bank Ltd. v. DCIT [2008] 20 SOT 453 (MUM.);
- iii) Raymond Ltd. [2003] 86 ITD 791 (Mum.);
- iv) Bovis Lend Lease (India) (P.) Ltd. v. ITO [2010] 36 SOT 166 (Bang.);
- v) Intertek Testing Services India (P) Ltd., In re [2008] 175 Taxman 375 (AAR - New Delhi);
- vi) Akamai Technologies Inc., In re [2018 93 taxmann.com 471 (AAR-Delhi)];
- vii) Jet Lite (India) Ltd. v. CIT [2015 63 taxmann.com 62 (Del)];
- viii) US Technology Resources (P.) Ltd. v. CIT [2018 97 taxmann.com 642 (Ker)];
- ix) DIT (Int. Taxation) v. Sun Microsystems India (P.) Ltd. [2014 48 taxmann.com 93 (Kar)];
- x) Biotech Visioncare 93 Taxmann.com 20 (ITAT Ahd);
- xi) Koninklijke Philips Electronics N.V. [2018] 99 taxmann.com 23 (Kolkata - Trib.);
- xii) Sun Pharmaceutical Laboratories Ltd. (2018) (96 taxmann.com 105) - Ahmedabad Tribunal;
- xiii) ABB Inc. (2015) (59 taxmann.com 159) - Bangalore Tribunal.

17. He submitted that in the instant case, there is no transfer of technical knowledge that will allow or enable Bain India to apply on its own in future. It is not possible in the facts of the case to transfer technology as its specific market information which is subject to frequent change. Therefore, such services of providing market information cannot be treated as fee for included services in terms of Article 12(4)(b) of the Indo-US DTAA. He submitted that in the instant case, there is no human intervention at the time of rendering of services, therefore, when no human intervention is involved in provision of technical services, the payment made for the same cannot constitute as FTS even under the Act. For the above proposition, he relied on the decision of the Hon'ble Supreme Court in the case of Bharti Cellular Ltd. (2009) 319 ITR 139.

18. The ld. Counsel for the assessee submitted that the expenses were reimbursed on cost to cost basis and, therefore, there is no liability to withhold taxes. The TPO, in his order has also observed that cost allocation were duly supported with the required documents and were found to be correct. Referring to the latest decision of the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence (P) Ltd. vs. CIT, reported in 432 ITR 471, he submitted that the Hon'ble Supreme Court has thoroughly decided all the issues involved in the present appeal wherein it is held that the amount paid by resident Indian end user/distributors to non-resident computer software manufacturers/suppliers, as consideration for resale/use of computer software

through EULA/distribution agreement, is not payment of royalty for use of copyright in computer software and, thus, the same does not give rise to any income taxable in India. He submitted that since the assessee, in the instant case, is a management consultancy firm, therefore, there is no technology involved. He accordingly submitted that the order of the CIT(A) be set aside and the grounds raised by the assessee be allowed.

19. The ld. DR, on the other hand, heavily relied on the order of the CIT(A).

20. We have considered the rival arguments made by both the sides, perused the orders of the Assessing Officer and CIT(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find, the assessee, in the instant case, has remitted the amount of Rs.15,13,53,724/- to Bain USA for various expenses and towards reimbursement of cost incurred by Bain USA on behalf of the assessee. We find, out of the aforementioned amount, the AO held that the assessee should have deducted taxes on payments to the tune of Rs.7,89,70,432/- on account of various payments such as:

- (i) Professional support cost - Rs.5,47,89,345/-;
- (ii) Client related expenses - Rs.2,04,85,020/-; &
- (iii) Computer maintenance expenses - Rs.36,96,067/-.

21. We find, the ld.CIT(A) held that the payment for professional support cost for the services received by the assessee from its AE are neither technical

in nature nor do they satisfy the criteria of "make available" clause under the Treaty between India and USA so as to qualify as Fee for Technical/Included Service, therefore, there was no requirement of withholding tax on such payments. Similarly, on account of computer maintenance expenses, the CIT(A) held that the payment has been made for using one common global portal shared by all globally affiliated companies proportionately and, thus, does not make available any technology. He accordingly deleted the addition made by the AO on account of the above two heads. However, so far as the client related expenses of Rs.2,04,85,020/- is concerned, the Id.CIT(A) sustained an amount of Rs.82,34,242/- on account of the following payments holding that the technical services were made available to the assessee and since these services qualify as "fee for included services" under India-USA Tax Treaty, the assessee was liable to withhold taxes on the same.

S.No	Particulars	Amount (INR)	Description
1	Market Research	4,162,204	Third party expense pertaining to market research incurred for and on behalf of client
2	Gerson Lehrman call charges	3,566,275	Third party expense pertaining to calls with subject matter experts incurred for and on behalf of client
3	Gartner Charges	279,926	Third party cost of market and industry research services incurred for and on behalf of client
4	Frost and Sullivan Charges	225,837	Third party expense pertaining to market research incurred for and on behalf of client
		8,234,242	

22. It is the submission of the Id. Counsel that if services were rendered outside India, the payment cannot qualify as fee for technical services. Further, tax withholding requirement cannot be levied with retrospective effect. It is also his submission that market and industry research and expert opinion does not qualify as technical services under Article 12 of Indo-USA DTAA. Further, TDS is not required to be deducted if the reimbursements are made on cost to cost basis. It is also his argument that if no human intervention is involved in provision of technical services, the payment cannot constitute as FTS.

23. We find force in the above argument of the Id. Counsel. We find, the Id.CIT(A) has only held that technical services were made available to the assessee, but, he is silent on whether technology was made available to the assessee or not which, in our opinion, is a sine qua non for holding payment as FIS under the Indo-USA DTAA. Further, the submission of the Id. Counsel that services were rendered outside India and, therefore, payments for the services could not qualify as fee for technical services in view of the decision of the Honöble Supreme Court in the case of Ishikawajima-Harima Heavy Industries Ltd. (supra) which was applicable at the relevant time, could not be controverted by the Id. DR. We find, the Honöble Supreme Court in the case of Ishikawajima-Harima Heavy Industries Ltd. (supra) has held that for a non-resident to be taxed in India, two events need to be fulfilled i.e., not only should the services be utilized in India, but, the same should also be rendered in India.

We find, the above proposition was amended retrospectively by the Finance Act, 2010 with retrospective effect from 1st June, 1976. Therefore, we find merit in the argument of the ld. Counsel that it was under a bona fide belief that the payments were not taxable in India.

24. We find, the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence (P) Ltd. (supra) has thoroughly discussed the issue regarding royalty under the Income-tax Act and has held that a person mentioned in section 195 of the Income-tax Act cannot be expected to do the impossible, namely to apply the expanded definition of 'royalty' inserted by Explanation 4 to section 9(1)(vi) of the Income-tax Act for the assessment years in question at a time when Explanation was not actually and factually in the statute. The relevant observations of the Hon'ble Supreme Court from para 67 to 85 read as under:-

ROYALTY UNDER THE INCOME TAX ACT

67. The insertion of sub-sections (v), (vi) and (vii) in section 9(1) of the Income Tax Act, by way of an amendment through the Finance Act 1976, [Act 66 of 1976, (w.e.f 1-6-1976)] was to introduce source-based taxation for income in the hands of a non-resident by way of interest, royalty and fees for technical services. In *Carborandum & Co. v. CIT*, (1977) 2 SCC 862, this Court, applying residence-based rules of taxation, held that the technical service fees received by the non-resident assessee (relatable to the assessment year 1957-1958) could only be deemed to accrue in India if such income could be attributed to a business connection in India. In the facts of that case, since no part of the foreign assessee's operations were carried on in India, the technical services being rendered wholly in foreign territory, it was held that no part of the technical service fees received by the foreign assessee accrued in India.

68. This position of law was altered by the Finance Act 1976, which introduced a 'source-rule' to tax income by way of royalty in the hands of a non-resident, noted in the Memorandum explaining the provisions of the Finance Bill 1976, as follows:

38. 'Source rule' regarding place of accrual of income by way of interest, royalty and fees for technical services. - A non-resident taxpayer is chargeable to tax in India in respect of income from whatever source derived which is received or is deemed to be received in India or which accrues or arises or is deemed to accrue or arise to him in India. The existing provisions in the Income-tax Act which provide that certain incomes will be deemed to accrue or arise in India are couched in general language. The absence of a clearcut source rule sometimes creates uncertainty about the chargeability of certain types of incomes in the case of nonresidents. In order to avoid any doubt or dispute in regard to the accrual of income by way of interest, royalty and fees for technical services in the case of non-residents, it is proposed to make certain provisions in the Income-tax Act clearly specifying the circumstances in which such income shall be deemed to accrue or arise in India.

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40. Income by way of royalty payable by the Government will be deemed to accrue or arise in India. Royalty payable by a person who is resident in India will also be deemed to accrue or arise in India, except in cases where the royalty is payable for the transfer of any right or the use of any property or information or for utilising the services of the recipient for the purposes of a business or profession carried on outside India or for the purposes of making or earning any income from a source outside India. Royalty payable by a non-resident will be deemed to accrue or arise in India only in cases where the royalty is payable in respect of any right, property or information used or services utilised for the purposes of a business or profession carried on by the nonresident in India or for the purposes of making or earning any income from any source in India.

69. Consequently, section 9(1)(vi) of the Income Tax Act was brought into force. The definition of royalty contained in explanation 2(v) of section 9(1)(vi) of the Income Tax Act includes the transfer of all or any rights (including the granting of a licence) 'in respect of any copyright, literary, artistic or scientific work'.

70. The comma after the word 'copyright' does not fit as copyright is obviously spoken of as existing in a literary, artistic or scientific work. As a matter of fact, this drafting error was rectified in the Draft Taxes Code 2010, (This Code has, however, remained in draft form and was never enacted) under Chapter XIX in Part H thereof, which set out the definition of 'royalty' as follows:

PART H - CHAPTER XIX
INTERPRETATIONS AND CONSTRUCTIONS

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(314)(220) 'royalty' means consideration (including any lump-sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head 'Capital gains') for

xxx xxx xxx

(g) the transfer of all or any rights (including the granting of a licence) in respect of – (i) any copyright of literary, artistic or scientific work; (ii) cinematographic films or work on films, tapes or any other means of reproduction; or (iii) live coverage of any event (emphasis supplied)

71. The transfer of 'all or any rights (including the granting of a licence) in respect of any copyright', in the context of computer software, is referable to sections 14(a), 14(b) and 30 of the Copyright Act. As has been held hereinabove, the expression 'in respect of' is equivalent to 'in' or 'attributable to'. Thus, explanation 2(v) to section 9(1)(vi) of the Income Tax Act, when it speaks of 'all of any rights' in respect of copyright is certainly more expansive than the DTAA provision, which speaks of the 'use of, or the right to use' any copyright. This has been recognised by the High Court of Delhi in CIT v. DCM Limited, ITA Nos. 87-89/1992 in its judgment dated 10.03.2011, as follows:

9. A bare perusal of Article XIII(3) would show that the expression 'payments of any kind' is circumscribed by the latter part of the definition which speaks of consideration received (including in the form of rentals) for "use of" or "right to use" intellectual properties. The Tribunal, in our view, rightly observed that the CIT(A) had erred in coming to the conclusion that the expression 'payments of any kind' was broad enough to include even an outright sale. To drive home this point the

Tribunal, once again, has correctly drawn a distinction between the definition of royalty as appearing in the DTAA and that which finds mention in explanation 2 to section 9(1)(vi) of the I.T. Act. A perusal of the provisions of the said explanation would show that it brings within the ambit of royalty a wider range of transactions which would include payments made for "transfer of all" or "any right" in patents, inventions, model, design, etc. apart from payments based for use of such right, patent, innovation, model, design, secret formula or process or trade mark or similar property. As a matter of fact, a perusal of clause (i) of explanation 2 of section 9(1)(vi) of the I.T. Act would show that "transfer of all" or "any right" could take place by execution of licences as well, which was the methodology adopted by Tate and the assessee in the present case.

72. However, when it comes to the expression "use of, or the right to use", the same position would obtain under explanation 2(v) of section 9(1)(vi) of the Income Tax Act, inasmuch as, there must, under the licence granted or sale made, be a transfer of any of the rights contained in sections 14(a) or 14(b) of the Copyright Act, for explanation 2(v) to apply. To this extent, there will be no difference in the position between the definition of "royalties" in the DTAA and the definition of "royalty" in explanation 2(v) of section 9(1)(vi) of the Income Tax Act.

73. Even if we were to consider the ambit of "royalty" only under the Income Tax Act on the footing that none of the DTAA's apply to the facts of these cases, the definition of royalty that is contained in explanation 2 to section 9(1)(vi) of the Income Tax Act would make it clear that there has to be a transfer of "all or any rights" which includes the grant of a licence in respect of any copyright in a literary work. The expression "including the granting of a licence" in clause (v) of explanation 2 to section 9(1)(vi) of the Income Tax Act, would necessarily mean a licence in which transfer is made of an interest in rights "in respect of" copyright, namely, that there is a parting with an interest in any of the rights mentioned in section 14(b) read with section 14(a) of the Copyright Act. To this extent, there will be no difference between the position under the DTAA and explanation 2 to section 9(1)(vi) of the Income Tax Act.

74. However, the learned Additional Solicitor General presses the application of the amendment made vide the Finance Act 2012 with retrospective effect from 01.06.1976, which added explanation 4 to section 9(1)(vi) of the Income Tax Act.

75. The Memorandum explaining the provisions in the Finance Bill 2012 states:

Section 9(1)(vi) provides that any income payable by way of royalty in respect of any right, property or information is deemed to be accruing or arising in India. The term 'royalty' has been defined in Explanation 2 which means consideration received or receivable for transfer of all or any right in respect of certain rights, property or information. Some judicial decisions have interpreted this definition in a manner which has raised doubts as to whether consideration for use of computer software is royalty or not; whether the right, property or information has to be used directly by the payer or is to be located in India or control or possession of it has to be with the payer. Similarly, doubts have been raised regarding the meaning of the term 'processed'.

Considering the conflicting decisions of various courts in respect of income in nature of royalty and to restate the legislative intent, it is further proposed to amend the Income Tax Act in following manner:-

(i) To amend Section 9(1)(vi) to clarify that the consideration for use or right to use of computer software is royalty by clarifying that transfer of all or any rights in respect of any right, property or information as mentioned in Explanation 2, includes and has always included transfer of all or any right for use or right to use a computer software (including granting of a licence) irrespective of the medium through which such right is transferred.

(ii) To amend section 9(1)(vi) to clarify that royalty includes and has always included consideration in respect of any right, property or information, whether or not

(a) The possession or control of such right, property or information is with the payer;

(b) Such right, property or information is used directly by the payer;

(c) The location of such right, property or information is in India

(iii) To amend section 9(1)(vi) to clarify that the term 'process' includes and shall be deemed to have always included transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal), cable, optic fibre or by any other similar technology, whether or not such process is secret.

These amendments will take effect retrospectively from 1st June, 1976 and will accordingly apply in relation to the assessment year 1977-78 and subsequent assessment years.

76. Shri Pardiwala argued that explanation 4, that was inserted with retrospective effect, uses the language that is contained in section 9(1)(vi)(b) of the Income Tax Act, namely, that the expression "any right, property or information" occurring in section 9(1)(vi)(b) alone is the subject matter of explanation 4, explanation 4 not expanding the scope of the definition of royalty contained in explanation 2, which does not contain the aforesaid expression. A reference to the Memorandum explaining the provisions in the Finance Bill 2012 set out hereinabove, would make it clear that the expression "as mentioned in Explanation 2" in sub-para (i) of the aforesaid Memorandum shows that explanation 4 was inserted retrospectively to expand the scope of explanation 2(v). In any case, explanation 2(v) contains the expression, "the transfer of all or any rights" which is an expression that would subsume "any right, property or information" and is wider than the expression "any right, property or information". It is therefore difficult to accept Shri Pardiwala's argument that explanation 4 does not expand the scope of the expression "royalty" as contained in explanation 2 to section 9(1)(vi) of the Income Tax Act.

77. It is equally difficult to accept the learned Additional Solicitor General's submission that explanation 4 to section 9(1)(vi) of the Income Tax Act is clarificatory of the position as it always stood, since 01.06.1976, for which he strongly relied upon CBDT Circular No. 152 dated 27.11.1974. Quite obviously, such a circular cannot apply as it would then be explanatory of a position that existed even before section 9(1)(vi) was actually inserted in the Income Tax Act vide the Finance Act 1976. Secondly, insofar as section 9(1)(vi) of the Income Tax Act relates to computer software, explanation 3 thereof, refers to "computer software" for the first time with effect from 01.04.1991, when it was introduced, which was then amended vide the Finance Act 2000. Quite clearly, explanation 4 cannot apply to any right for the use of or the right to use computer software even before the term "computer software" was inserted in the statute. Likewise, even qua section 2(o) of the Copyright Act, the term "computer software" was introduced for the first time in the definition of a literary work, and defined under section 2(ffc) only in 1994 (vide Act 38 of 1994).

78. Furthermore, it is equally ludicrous for the aforesaid amendment which also inserted explanation 6 to section 9(1)(vi) of the Income Tax Act, to apply with effect from 01.06.1976, when technology relating to transmission by a satellite, optic fibre or other similar technology, was only regulated by the Parliament for the first time through the Cable Television

Networks (Regulation) Act, 1995, much after 1976. For all these reasons, it is clear that explanation 4 to section 9(1)(vi) of the Income Tax Act is not clarificatory of the position as of 01.06.1976, but in fact, expands that position to include what is stated therein, vide the Finance Act 2012.

79. The learned Additional Solicitor General then relied upon the Finance Minister's statement made before the Lok Sabha on 07.09.1990, which allowed lump sum payments to be made without the deduction of tax at source under section 195(1) of the Income Tax Act and did away with the dual levy, both by way of customs duty and income tax, on royalty payments for the licensing of software. This statement, again, in no manner furthers the case of the Revenue that explanation 4 is merely clarificatory of the legal position as it always stood. Likewise, Notification No. 21/2012 dated 13.06.2012, which deals with section 194J of the Income Tax Act, does no more than providing that a transferee is exempt from deducting TDS under section 194J when TDS has already been deducted under section 195 on the payment made in the previous transfer of the same software which the transferee acquires without any modification. In any case, this notification being issued on 13.06.2012, i.e., after explanation 4 was inserted vide the Finance Act 2012, it would not assist the Revenue in asserting that explanation 4 clarifies the legal position as it always stood.

80. The learned Additional Solicitor General then argued that being covered by explanation 4 of section 9(1)(vi) of the Income Tax Act, the persons liable to deduct TDS under section 195 of the Income Tax Act ought to have deducted tax at source on the footing that explanation 4 existed on the statute book with effect from 1976. We have, therefore, to examine as to whether persons liable to deduct TDS under section 195 of the Income Tax Act can be held liable to deduct such sums at a time when explanation 4 was factually not on the statute book, all deductions liable to be made and the assessment years in question being prior to the year 2012.

81. This question is answered by two latin maxims, *lex non cogit ad impossibilia*, i.e., the law does not demand the impossible and *impotentia excusat legem*, i.e., when there is a disability that makes it impossible to obey the law, the alleged disobedience of the law is excused. Recently, in the judgment in *Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal*, (2020) 7 SCC 1 delivered by this Court, this Court applied the said maxims in the context of the requirement of a certificate to produce evidence by way of electronic record under section 65B of the Evidence Act, 1872 and held that having taken all possible steps to obtain the certificate and yet being unable to obtain it for reasons beyond his control, the respondent in the facts of the case, was relieved of the mandatory obligation to furnish a certificate. In so holding, this Court referred to previous judgments dealing with the doctrine of impossibility and concluded as follows:

647. However, a caveat must be entered here. The facts of the present case show that despite all efforts made by the respondents, both through the High Court and otherwise, to get the requisite certificate under Section 65-B(4) of the Evidence Act from the authorities concerned, yet the authorities concerned wilfully refused, on some pretext or the other, to give such certificate. In a fact-circumstance where the requisite certificate has been applied for from the person or the authority concerned, and the person or authority either refuses to give such certificate, or does not reply to such demand, the party asking for such certificate can apply to the court for its production under the provisions aforementioned of the Evidence Act, CPC or CrPC. Once such application is made to the court, and the court then orders or directs that the requisite certificate be produced by a person to whom it sends a summons to produce such certificate, the party asking for the certificate has done all that he can possibly do to obtain the requisite certificate. Two Latin maxims become important at this stage. The first is *lex non cogit ad impossibilia* i.e. the law does not demand the impossible, and *impotentia excusat legem* i.e. when there is a disability that makes it impossible to obey the law, the alleged disobedience of the law is excused. This was well put by this Court in *Presidential Poll, In re* [Presidential Poll, In re, (1974) 2 SCC 33] as follows : (SCC pp. 49-50, paras 14-15)

614. If the completion of election before the expiration of the term is not possible because of the death of the prospective candidate it is apparent that the election has commenced before the expiration of the term but completion before the expiration of the term is rendered impossible by an act beyond the control of human agency. The necessity for completing the election before the expiration of the term is enjoined by the Constitution in public and State interest to see that the governance of the country is not paralysed by non-compliance with the provision that there shall be a President of India.

15. The impossibility of the completion of the election to fill the vacancy in the office of the President before the expiration of the term of office in the case of death of a candidate as may appear from Section 7 of the 1952 Act does not rob Article 62(1) of its mandatory character. The maxim of law *impotentia excusat legem* is intimately connected with another maxim of law *lex non cogit ad impossibilia*. *Impotentia excusat legem* is that when there is a necessary or invincible disability to

perform the mandatory part of the law that impotentia excuses. The law does not compel one to do that which one cannot possibly perform. "Where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and has no remedy over it, there the law will in general excuse him." Therefore, when it appears that the performance of the formalities prescribed by a statute has been rendered impossible by circumstances over which the persons interested had no control, like the act of God, the circumstances will be taken as a valid excuse. Where the act of God prevents the compliance with the words of a statute, the statutory provision is not denuded of its mandatory character because of supervening impossibility caused by the act of God. (See Broom's Legal Maxims, 10th Edn. at pp. 162-63 and Craies on Statute Law, 6th Edn. at p. 268.)

It is important to note that the provision in question in Presidential Poll, In re [Presidential Poll, In re, (1974) 2 SCC 33] was also mandatory, which could not be satisfied owing to an act of God, in the facts of that case. These maxims have been applied by this Court in different situations in other election cases – See Chandra Kishore Jha v. Mahavir Prasad [Chandra Kishore Jha v. Mahavir Prasad, (1999) 8 SCC 266] (at paras 17 and 21); Special Reference No. 1 of 2002, In re (Gujarat Assembly Election matter) [Special Reference No. 1 of 2002, In re (Gujarat Assembly Election matter), (2002) 8 SCC 237] (at paras 130 and 151) and Raj Kumar Yadav v. Samir Kumar Mahaseth [Raj Kumar Yadav v. Samir Kumar Mahaseth, (2005) 3 SCC 601] (at paras 13 and 14).

48. These Latin maxims have also been applied in several other contexts by this Court. In Cochin State Power & Light Corpn. Ltd. v. State of Kerala [Cochin State Power & Light Corpn. Ltd. v. State of Kerala, (1965) 3 SCR 187 : AIR 1965 SC 1688] , a question arose as to the exercise of an option of purchasing an undertaking by the State Electricity Board under Section 6(4) of the Electricity Act, 1910. The provision required a notice of at least 18 months before the expiry of the relevant period to be given by such State Electricity Board to the State Government. Since this mandatory provision was impossible of compliance, it was held that the State Electricity Board was excused from giving such notice, as follows : (1965) 3 SCR 187, at p. 193 : AIR pp. 1691-92, para 8

68. Sub-section (1) of Section 6 expressly vests in the State Electricity Board the option of purchase on the expiry of the relevant period specified in the licence. But the State Government claims that under sub-section (2) of Section 6 it is now vested with the option. Now, under sub-section (2) of Section 6, the State Government would be vested with the option only "where a State Electricity Board has not been constituted, or if constituted, does not elect to purchase the undertaking". It is common case that the State Electricity Board was duly constituted. But the State Government claims that the State Electricity Board did not elect to purchase the undertaking. For this purpose, the State Government relies upon the deeming provisions of sub-section (4) of Section 6, and contends that as the Board did not send to the State Government any intimation in writing of its intention to exercise the option as required by the sub-section, the Board must be deemed to have elected not to purchase the undertaking. Now, the effect of subsection (4) read with sub-section (2) of Section 6 is that on failure of the Board to give the notice prescribed by sub-section (4), the option vested in the Board under sub-section (1) of Section 6 was liable to be divested. Sub-section (4) of Section 6 imposed upon the Board the duty of giving after the coming into force of Section 6 a notice in writing of its intention to exercise the option at least 18 months before the expiry of the relevant period. Section 6 came into force on 5-9-1959, and the relevant period expired on 3-12-1960. In the circumstances, the giving of the requisite notice of 18 months in respect of the option of purchase on the expiry of 2-12-1960, was impossible from the very commencement of Section 6. The performance of this impossible duty must be excused in accordance with the maxim, *lex non cogit ad impossibilia* (the law does not compel the doing of impossibilities), and sub-section (4) of Section 6 must be construed as not being applicable to a case where compliance with it is impossible. We must, therefore, hold that the State Electricity Board was not required to give the notice under sub-section (4) of Section 6 in respect of its option of purchase on the expiry of 25 years. It must follow that the Board cannot be deemed to have elected not to purchase the undertaking under sub-section (4) of Section 6. By the notice served upon the appellant, the Board duly elected to purchase the undertaking on the expiry of 25 years. Consequently, the

State Government never became vested with the option of purchasing the undertaking under sub-section (2) of Section 6. The State Government must, therefore, be restrained from taking further action under its notice, Ext. G, dated 20-11-1959.

49. In *Raj Kumar Dey v. Tarapada Dey* [*Raj Kumar Dey v. Tarapada Dey*, (1987) 4 SCC 398], the maxim *lex non cogit ad impossibilia* was applied in the context of the applicability of a mandatory provision of the Registration Act, 1908, as follows : (SCC pp. 402-03, paras 6-7)

66. We have to bear in mind two maxims of equity which are well settled, namely, *actus curiae neminem gravabit* ò An act of the court shall prejudice no man. In *Broom's Legal Maxims*, 10th Edn., 1939 at p. 73 this maxim is explained that this maxim was founded upon justice and good sense; and afforded a safe and certain guide for the administration of the law. The above maxim should, however, be applied with caution. The other maxim is *lex non cogit ad impossibilia* (*Broom's Legal Maxims*, p. 162) ò The law does not compel a man to do that which he cannot possibly perform. The law itself and the administration of it, said Sir W. Scott, with reference to an alleged infraction of the revenue laws, must yield to that to which everything must bend, to necessity; the law, in its most positive and peremptory injunctions, is understood to disclaim, as it does in its general aphorisms, all intention of compelling impossibilities, and the administration of laws must adopt that general exception in the consideration of all particular cases.

7. In this case indisputably during the period from 26-7-1978 to December 1982 there was subsisting injunction preventing the arbitrators from taking any steps. Furthermore, as noted before the award was in the custody of the court, that is to say, 28-1-1978 till the return of the award to the arbitrators on 24-11-1983, arbitrators or the parties could not have presented the award for its registration during that time. The award as we have noted before was made on 28-11-1977 and before the expiry of the four months from 28-11-1977, the award was filed in the court pursuant to the order of the court. It was argued that the order made by the court directing the arbitrators to keep the award in the custody

of the court was wrong and without jurisdiction, but no arbitrator could be compelled to disobey the order of the court and if in compliance or obedience with court of doubtful jurisdiction, he could not take back the award from the custody of the court to take any further steps for its registration then it cannot be said that he has failed to get the award registered as the law required. The aforesaid two legal maxims ò the law does not compel a man to do that which he cannot possibly perform and an act of the court shall prejudice no man would, apply with full vigour in the facts of this case and if that is the position then the award as we have noted before was presented before the Sub-Registrar, Arambagh on 25-11-1983 the very next one day of getting possession of the award from the court. The Sub-Registrar pursuant to the order of the High Court on 24-6-1985 found that the award was presented within time as the period during which the judicial proceedings were pending that is to say, from 28-1-1978 to 24-11-1983 should be excluded in view of the principle laid down in Section 15 of the Limitation Act, 1963. The High Court [Tarapada Dey v. District Registrar, Hooghly, 1986 SCC OnLine Cal 101 : AIR 1987 Cal 107] , therefore, in our opinion, was wrong in holding that the only period which should be excluded was from 26-7-1978 till 20-12-1982. We are unable to accept this position. 26-7-1978 was the date of the order of the learned Munsif directing maintenance of status quo and 20-12-1982 was the date when the interim injunction was vacated, but still the award was in the custody of the court and there is ample evidence as it would appear from the narration of events hereinbefore made that the arbitrators had tried to obtain the custody of the award which the court declined to give to them.ô (emphasis in original)

50. These maxims have also been applied to tenancy legislation ò see B.P. Khemka (P) Ltd. v. Birendra Kumar Bhowmick [B.P. Khemka (P) Ltd. v. Birendra Kumar Bhowmick, (1987) 2 SCC 407] (at para 12), and have also been applied to relieve authorities of fulfilling their obligation to allot plots when such plots have been found to be unallottable, owing to the contravention of the Central statutes ò see Hira Tikkoo v. State (UT of Chandigarh) [Hira Tikkoo v. State (UT of Chandigarh), (2004) 6 SCC 765] (at paras 23 and 24).

51. On an application of the aforesaid maxims to the present case, it is clear that though Section 65-B(4) is mandatory, yet, on the facts of this case, the respondents, having done everything possible to obtain the necessary certificate, which was to be given by a third party over whom the respondents had no control, must be relieved of the mandatory obligation contained in the said sub-section.ô

82. As a matter of fact, even under the Income Tax Act, the High Court of Bombay has taken a view, applying the aforesaid maxims in the context of the provisions of the relevant DTAAs, to hold that persons are not obligated to do the impossible, i.e., to apply a provision of a statute when it was not actually and factually on the statute book.

83. In CIT v. NGC Networks (India) Pvt. Ltd., ITA No. 397/2015, a question arose as to the applicability of explanation 6 to Section 9(1)(vi), in the context of section 194J of the Income Tax Act, which explanation was inserted with retrospective effect. The High Court of Bombay, applying the aforesaid maxim, held:

ô(d) We find that [the] view taken by the impugned order dated 9th July, 2014 of the Tribunal that a party cannot be called upon to perform an impossible act i.e. to comply with a provision not in force at the relevant time but introduced later by retrospective amendment. This is in accord with the view taken by this Court in CIT v/s. Cello Plast (2012) 209 Taxmann 617 ñ wherein this Court has applied the legal maxim *lex non cogit ad impossibilia* (law does not compel a man to do what he cannot possibly perform).

(e) In the present facts, the amendment by introduction of Explanation-6 to Section 9(1)(vi) of the Act took place in the year 2012 with retrospective effect from 1976. This could not have been contemplated by the Respondent when he made the payment which was subject to tax deduction at source under Section 194C of the Act during the subject Assessment Year, would require deduction under Section 194J of the Act due to some future amendment with retrospective effect.ô

84. In CIT v. Western Coalfields Ltd., ITA No. 93/2008, the High Court of Bombay dealt with the insertion of an explanation to section 17(2)(ii) of the Income Tax Act with retrospective effect and held:

ô11) We see no merit in the above contentions. The Apex Court in Arun Kumar's case (supra) while upholding the validity of Rule 3 has held that in the absence of any ôdeeming fictionô in the Act, it is open to the assessee to contend that there is no

concession in the matter of accommodation provided by the employer to the employees and the case is not covered by Section 17(2)(ii) of the Act. In other words, even after the substitution of Rule 3 with effect from 1/4/2001, in the absence of any specific provision under the Act, it was open to the assessee not to deduct tax at source relating to the accommodation given to the employees on the ground that no concession in rent has been given to the employees. This contention of the assessee has been in fact upheld by the Apex Court in the case of Arun Kumar (supra). To overcome the above decision, the law has been amended by Finance Act, 2007 with retrospective effect from 1/4/2002. The retrospective amendment merely takes away the above argument, which was available to the assessee. Once the salary is paid by the employer after deducting tax at source as per the law prevailing on the date of paying the salary, then any subsequent amendment in law brought about retrospectively cannot require the employer to deduct tax at source for the past period, because the salary for that period has already been paid. Consequently, the employer cannot be made liable for the consequences set out in Section 201 of the Act on account of the retrospective amendment to Section 17(2) of the Act.

85. It is thus clear that the person mentioned in section 195 of the Income Tax Act cannot be expected to do the impossible, namely, to apply the expanded definition of royalty inserted by explanation 4 to section 9(1)(vi) of the Income Tax Act, for the assessment years in question, at a time when such explanation was not actually and factually in the statute.

24.1 We further find at para 97, the Hon'ble Supreme Court has observed as under:-

¶97. This ruling of the AAR flies in the face of certain principles. When, under a non-exclusive licence, an end-user gets the right to use computer software in the form of a CD, the end-user only receives a right to use the software and nothing more. The end-user does not get any of the rights that the owner continues to retain under section 14(b) of the Copyright Act read with sub-section (a)(i)-(vii) thereof. Thus, the conclusion that when computer software is licensed for use under an EULA, what is also licensed is the right to use the copyright embedded therein, is wholly incorrect. The licence for the use of a product under an EULA cannot be construed as the licence spoken of in section 30 of the Copyright Act, as such EULA only imposes restrictive conditions upon the end-user and does not part with any

interest relatable to any rights mentioned in sections 14(a) and 14(b) of the Copyright Act.

24.2 We find, the Honöble Supreme Court at para 117 has observed as under:-

ó117.The conclusions that can be derived on a reading of the aforesaid judgments are as follows:

- i) Copyright is an exclusive right, which is negative in nature, being a right to restrict others from doing certain acts.
- ii) Copyright is an intangible, incorporeal right, in the nature of a privilege, which is quite independent of any material substance. Ownership of copyright in a work is different from the ownership of the physical material in which the copyrighted work may happen to be embodied. An obvious example is the purchaser of a book or a CD/DVD, who becomes the owner of the physical article, but does not become the owner of the copyright inherent in the work, such copyright remaining exclusively with the owner.
- iii) Parting with copyright entails parting with the right to do any of the acts mentioned in section 14 of the Copyright Act. The transfer of the material substance does not, of itself, serve to transfer the copyright therein. The transfer of the ownership of the physical substance, in which copyright subsists, gives the purchaser the right to do with it whatever he pleases, except the right to reproduce the same and issue it to the public, unless such copies are already in circulation, and the other acts mentioned in section 14 of the Copyright Act.
- iv) A licence from a copyright owner, conferring no proprietary interest on the licensee, does not entail parting with any copyright, and is different from a licence issued under section 30 of the Copyright Act, which is a licence which grants the licensee an interest in the rights mentioned in section 14(a) and 14(b) of the Copyright Act. Where the core of a transaction is to authorize the end-user to have access to and make use of the ólicensedô computer software product over which the licensee has no exclusive rights, no copyright is parted with and consequently, no infringement takes place, as is recognized by section 52(1)(aa) of the Copyright Act. It makes no difference whether the end-user

is enabled to use computer software that is customised to its specifications or otherwise.

- v) A non-exclusive, non-transferable licence, merely enabling the use of a copyrighted product, is in the nature of restrictive conditions which are ancillary to such use, and cannot be construed as a licence to enjoy all or any of the enumerated rights mentioned in section 14 of the Copyright Act, or create any interest in any such rights so as to attract section 30 of the Copyright Act.
- vi) The right to reproduce and the right to use computer software are distinct and separate rights, as has been recognized in SBI v. Collector of Customs, 2000 (1) SCC 727 (see paragraph 21), the former amounting to parting with copyright and the latter, in the context of non-exclusive EULAs, not being so.

25. Applying the above principle, we are of the considered opinion that the assessee was not liable to withhold tax payment of Rs.82,34,242/- on account of the four items the details of which are given at para 12 of this order. Accordingly, the order of the CIT(A) is set aside and the grounds raised by the assessee are allowed.

26. In the result, the appeal filed by the assessee is allowed.

The decision was pronounced in the open court on 10.11.2021.

Sd/-

(MAHAVIR PRASAD)
JUDICIAL MEMBER

Sd/-

(R.K. PANDA)
ACCOUNTANT MEMBER

Dated: 10th November, 2021.

dk

Copy forwarded to :

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

Asstt. Registrar, ITAT, New Delhi