IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH, 'C' PUNE

BEFORE SHRI R.S. SYAL, VICE PRESIDENT AND
SHRI PARTHA SARATHI CHAUDHURY, JUDICIAL MEMBER

आयकर अपील सं. / ITA No.1003/PUN/2017
निर्धारण वर्ष / Assessment Year : 2012-13

M/s. Bekaert Industries Private Limited, Plot No.127, Sr.No.232/1+2, Friends Co-operative Housing Society, New Airport Road, Sakore Nagar, Vimannagar, Pune 411 014 PAN : AAACB8571E	Vs.	DCIT, Circle-1(1), Pune
Appellant		Respondent

Assessee by	Shri Dhanesh Bafna
Revenue by	Shri Rajeev Kumar
Date of hearing	09-12-2021
Date of pronouncement	13-12-2021

आदेश / ORDER

PER R.S.SYAL, VP :

This appeal by the assessee is directed against the final assessment order dated 20-02-2017 passed by the Assessing Officer (AO) u/s.143(3) r.w.s.144C(13) of the Income-tax Act, 1961 (hereinafter also called 'the Act') in relation to the assessment year 2012-13.

2. The first issue is against the transfer pricing adjustment in the `Manufacturing segment' of the assessee. Pithily put, the facts of the case are that the assessee is an Indian company engaged in the business of manufacturing and dealing in Steel Tyre Cord,

Hose Reinforcement Wire. The return of income was filed declaring total loss of Rs.46.15 crore. Certain international transactions were disclosed in Form No.3CEB. The AO made a reference to the Transfer Pricing Officer (TPO) for determining the Arm's Length Price (ALP) of international transactions. The TPO observed that the assessee had declared several sets of international transactions covered under Purchase of Finished goods/raw materials/ consumables/dies etc.; Sale of finished goods/spares/packing material; Payment/reimbursement/ Allocation of expenses; Providing various services/commission; ECB loans; and Purchase of machinery. Different methods were deployed by the assessee for benchmarking the international transactions even under the single set of transaction. For example, in respect of the first set of international transactions of Purchase of finished goods/raw material/spares/consumables/Dies etc., the assessee applied the Transactional Net Marginal Method (TNMM) for the first transaction; the Cost Plus Method for the second transaction and the Other method for the fifth transaction. Similar position was observed by the TPO for other sets of international transactions. In order to demonstrate that the individual transactions of Purchase of finished goods etc. were at

ALP, the assessee treated Foreign/Associated Enterprise as tested party. The TPO rejected this approach and required the assessee to aggregate the transactions in certain convenient segments. The assessee aggregated the transactions into four major segments, namely, Manufacturing, Trading, Commission and Engineering. At the instance of the TPO, the assessee treated itself as a tested party and proceeded to determine the ALP of the Manufacturing segment by computing its own PLI at (-) 5.46%. The TPO made certain amendments to the list of comparables and computed their mean PLI at 4.72%. Treating the same as a benchmark, he worked out the transfer pricing adjustment at Rs.31.07 crore. The AO notified the draft order with such transfer pricing adjustment. The assessee assailed various aspects of the benchmarking of the Manufacturing segment before the Dispute Resolution Panel (DRP). On the basis of the directions given by the DRP, the TPO computed the assessee's PLI at (-)4.06% and the mean PLI of comparables at 1.13%. This is how, the AO made transfer pricing addition of Rs.15,82,40,997/- in the final assessment order. The assessee has come up in appeal against such addition.

3. We have heard the rival submissions and gone through the relevant material on record. At the outset, the ld AR fairly

submitted that the issue of Foreign/AE selected by the assessee having been rejected as a tested party came up for consideration before the Tribunal in the assessee's own case for earlier years including the assessment year 2010-11 and the Tribunal upheld the stand point of the Revenue in treating the assessee itself as tested party. The ld. AR did not lay any challenge to this aspect of the matter and agreed to follow the earlier Tribunal order on this score. He further did not challenge the aggregation of separate sets of international transactions under four major segments by the TPO or the application of the TNMM to the Manufacturing segment. His only grievance was that the adjustment made by the TPO at entity level should be restricted to the international transactions only. It is seen that such issue also came up for consideration before the Tribunal in the assessee's appeals for the assessment years 2010-11 and 2011-12. Vide order dated 06-12-2009, the Tribunal in ITA No.571/PUN/2015 etc., has directed that the transfer pricing addition should be restricted to the transactions with AEs and not unrelated or non-AEs. Respectfully following the precedent, we set-aside the impugned order on this score and remit the matter to the file of AO/TPO with a direction to confine the transfer pricing addition

only *qua* the international transactions under the Manufacturing segment and not the entity level transactions of the segment.

4. The next issue raised in this appeal is against the disallowance of IT Support Service fee amounting to Rs.1,71,53,803/- paid to N.V. Bekaert SA u/s. 40(a)(ia) of the Act for failure of the assessee to deduct tax at source. The factual matrix of this ground is that one of the international transactions declared by the assessee was Reimbursement of SAP software cost to its Associated enterprise (AE), viz., N.V. Bekaert SA. The TPO observed that the assessee paid its share in allocation of costs at Rs.15,79,70,945/-. He took up for consideration a sum of Rs.9,65,83,544/- paid for availing certain services from its AEs. Adopting Direct Charge method under Rule 10AB of the Income-tax Rules, 1962, he determined the ALP at Rs.3,93,42,668/- and proposed transfer pricing adjustment for the remaining sum of Rs.5,72,40,876/-. The AO, during the course of draft proceedings, noticed that a sum of Rs.4,96,94,258/- was paid by the assessee towards Software Maintenance Support/IT Infrastructure charges. On being called upon to explain as to why no deduction of tax at source was made before making the payment to N.V. Bekaert SA, the assessee initially contended that

the payment was in the nature of reimbursement and hence did not require any deduction of tax at source. Thereafter, it was also put forth that the N.V. Bekaert SA did not have any Permanent Establishment (PE) in India and hence, the provisions of TDS were not applicable. The AO rejected the assessee's stand point. Invoking the Explanation given at the end of section 9 of the Act, which provides that income in the nature of 9(1)(v),(vi) and (vii) shall be included in the total income of the non-resident, whether or not the non-resident has a residence or business connection in India, the TPO opined that the assessee availed IT Support services from N.V. Bekaert SA, which included integrated SAP system, its platform, V-server and its connectivity. Relying on the judgment of Hon'ble Karnataka High Court in *CIT Vs. Synopsis International old Ltd. (2013) 212 Taxman 454,* the TPO treated the payment as software Royalty. By further holding that the amount paid by the assessee also fell within the definition of "Fees for Technical Services", he treated the payment both as Royalty as well as Fees for Technical Services under the Act as well as the Double Taxation Avoidance Agreement between India and Belgium (hereinafter called `the DTAA'). The AO observed that out of total payment of Rs.7,46,51,383/-, the TPO had

already proposed transfer pricing adjustment of Rs.5,72,40,876/-. He, therefore, proposed the disallowance u/s.40(a)(ia) of the Act. The assessee took up the matter before the DRP urging that the disallowance of Rs.4,96,94,258/- proposed by the AO towards payment for IT Support services to its AE, namely, NV Bekaert SA., Belgium u/s.40(a)(ia) of the Act was not justified. The DRP noticed that the AO proposed to disallow Rs.4.96 crore towards payment of IT Support services to the AE. On perusal of the Service Agreement and invoices placed before it, the DRP classified IT Support service payment into three broad categories, namely,

(a) Services in the nature of sub-licensing/licensing of software;

(b) Provision of support and maintenance services in relation to such sub-licensed/licensed software; and

(c) Services in the nature of other support services, such as, IT facilities management, asset management, disaster recovery, full service desk, remote service desk, WAN services, Global Mobile computing, Internet VPN tunnel etc.

5. The DRP held that payment for the above (a) and (b) categories was in the nature of royalty and fees for technical services respectively in the hands of the non-resident entity, N.V.

Bekaert SA and hence the assessee was liable to deduct tax at source thereon before making such payments. As regards the above category (c), it was opined that the same was not chargeable to tax in the hands of non-resident and hence there was neither any failure on the part of the assessee to deduct tax at source, nor did it call for disallowance u/s.40(a)(ia) of the Act. The relief allowed by the DRP under category (c) translated into payment of Rs.3.25 crore not requiring any deduction of tax at source. As against that, the payment for the first two categories of (a) and (b) totalling to Rs.1,71,53,803/- went under hammer for disallowance u/s.40(a)(ia) of the Act, against which the assessee has come up in appeal before the Tribunal.

6. We have heard both the sides and scanned through the relevant material on record. The disallowance of Rs.1,71,53,803/- u/s 40(a)(ia) of the Act is in relation to Sub-licensing/licensing of software having been treated as Royalty and Provision of support and maintenance services in relation to such sub-licensed/licensed software having been treated as Fees for technical services. The assessee had a two-fold attack before the authorities below, viz., first, that the amount paid is in the nature of reimbursement of costs and, second, that the payment was not taxable in the hands

of the recipient AE, requiring any deduction of tax at source. The question in appeal involves consideration of the following points:-

I. What for the payment was made?
II. Is the payment Reimbursement?
III. Is the payment Royalty or Fees for technical services?
IV. Scope of powers of Tribunal in appeal

7. We will espouse the above points *ad seriatim.*

I. <u>What for the payment was made?</u>

8.1. Before deciding the question as to whether the amount received by NV Bekaert SA constituted income chargeable to tax in India requiring deduction of tax at source by the assessee, we need to understand the true nature of the transaction, which has been extensively dealt with by the DRP in para 12.9 onwards of its direction. The assessee entered into an agreement with NV Bekaert SA regarding delivery and use of software and IT services and support in April 2005, that was furnished to the TPO with submissions dated 22-02-2015. The list of services delivered to and used by the assessee is given in Appendix-A to the agreement which includes providing software, such as, MS Enterprise, PC Client Antivirus, Application Support for SAP, Maintenance of SAP, Facilities Management for SAP, WTS, Main Frame, Outlook, Document Management & Asset

Management, maintenance for document management, Disaster recovery for Outlook and office, PC client software distribution, full service desk, remote service desk, WAN services, Global Mobile computing, and Internet VP tunnel etc. Copy of invoices furnished by the assessee before the authorities below with regard to IT support services indicated the cost allocation by the AE to the assessee relating to the following IT services:

- SAP Licenses maintenance
- SAP Applications facilities management
- SAP system – computer centre support
- SAP – user support & Maintenance
- SAP – conference/consultancy
- LAN/VAN services
- LAN rent/lease/facilities management
- Excl. Business Applications maintenance
- Excl. Business Applications facilities management
- Maintenance/support office
- Rent/lease/facilities management office

8.2. The assessee explained the rationale of payment for SAP support cost to the TPO, as has been incorporated on page 22 of his order, that: `the Bekaert group has chosen for a high degree of outsourcing of software and hardware. *The IT department for whole Bekaert group is managed by the Chief Information Technology Officer ('CIO') employed by N.V Bekaert SA.* Therefore, the CIO and his corporate team negotiate global framework contracts with key service providers.' It further gave

to the TPO in writing that: `*The major components included in the IT support services are: an integrated ERP system (SAP), development of SAP platforms, office environment (e.g. hardware, software, etc), servers (e.g. office servers, application servers, etc.) and connectivity (e.g. Communication network LAN and WAN, domain structures, security, etc).'* This clearly shows that NV Bekaert SA created a full-fledged IT Infrastructure facility in the nature of an equipment with the help of ERP system (SAP), SAP platforms, hardware, software, servers, network, domain structures and security.

8.3. Then, the assessee explained to the TPO the so-called nature of services availed from its AE, as under:

"SAP License: NV Bekaert negotiates and concludes contracts with its main external supplier for the use, customization and development of the SAP application

Implementation related services: These services include definition of requirement, development of requirement, testing, documentation, user acceptance etc.

Maintenance of SAP: This service includes maintenance of the EPR.

Support to SAP: These services consist of small enhancements to the system on request of the users, day to day support to use the system in an optimal way, first line regional support, system monitoring, security, continuity and governance. First line support includes incident management, user training and

coaching, problem management, enhancement request handling and guidance to second line technical support.

Operation related services: These services include system administration, hardware support and expert advice service.

Structural IT services: This team takes care of the management of the application of the IT systems for the Wire business. The team will, amongst others, assist in the development of the IT strategy for the business unit, the integration of business processes and the unveiling of application needs of plants.

Project related IT services: This team is responsible for the alignment of the different solutions and ways of working which has been set up in SAP in the post. A harmonised SAP template for all Wire plants has been developed and will be rolled out to the various plants.

Infrastructure facilities management: These services include disaster recovery management, anti-virus applications, video conferencing tools, LAN/WAN services etc.”

8.4. A careful perusal of the above alleged services indicates that these are not really the services rendered by N.V Bekaert SA to the assessee but is a description of the complete IT Infrastructure facility enveloping its Setting up (SAP License; Project related IT services; Structural IT services; and Infrastructure facilities management); Improving; and Maintaining (Maintenance of SAP; Support to SAP; Operation related services; Implementation related services). Thereafter, the assessee explained the Pricing Mechanism to the TPO by stating that: `The cost incurred mainly

consists of people costs, costs for internal (i.e. SAP competence centre) and external (IT partners) consulting and some support costs like travel costs'. A break-up of the costs, which have been allocated to the group companies, reaffirms that these pertain to setting up, improving and maintaining the equipment of IT Infrastructure set up by N.V. Bekaert SA.

8.5. The assessee also submitted the pricing mechanism or the basis of cost allocation to various group entities as follows:

Sr. No.	Service	Basis of cost allocation
1	Cost to run SAP	The costs are allocated based on the number of users and the user class. On a yearly basis, during the budgeting process, the tariffs per user class are determined
2	Cost to support SAP	The costs are allocated based on the system load and modules in use
3	SAP projects	The costs of major SAP projects to the benefit of a large group of Bekaert entities, or to the benefit of the group integration are not allocated. The cost of specific SAP project is charged directly.

8.6. This again shows that the costs incurred by NV Bekaert SA in setting up and maintaining the IT Infrastructure facility have been allocated to group entities *on the number of users and the user class* and *based on the system load and modules in use.*

8.7. The following is the summation of the factual panorama in the instant case:-

i. The IT Infrastructure facility, in the nature of the equipment, was established, maintained and run by N.V Bekaert SA for the worldwide Bekaert group companies;

ii. Such facility admittedly includes, *inter alia,* SAP ERP software solution, which is an integrated business process management software that manages and integrates different aspects of an enterprise including financials, monitoring costs, and human resource activities etc., the input to which goes from the individual users, which is then processed by the IT facility comprising of SAP (Systems Applications Products), generating the necessary output;

iii. The total cost base for such IT support consists of an integrated ERP system (SAP), development of SAP platforms, office environment (e.g. hardware, software, etc), servers (e.g. office servers, application servers, etc.) and connectivity (e.g. Communication network LAN and WAN, domain structures, security, etc. ; and

iv. Such cost base with mark-up is allocated to all the group entities on the basis of number of users and the user class, the

system load and modules in use by each group company. It means that if the level of user by an entity is more, it will have to bear more allocation of costs and *vice versa*. The payment by each entity is directly proportional to the extent of user by it.

8.8. Ergo, it is discernible that NV Bekaert SA created and maintained the centralized integrated IT Infrastructure facility; made it available for use to the group entities; and then allocated the costs with mark-up on the basis of the extent of user by each entity. The payment made by the assessee to NV Bekeart SA, being its share in the total costs, is for the use of the IT Infrastructure facility set up by the latter and not for availing any particular IT service from its AE. Using a facility as one unit is different from using individual components of the facility, such as, software, hardware or networking etc. The IT Infrastructure setup of NV Bekaert SA is the equipment developed and maintained by it and the assessee paid for *using* the same for its business purpose. It is in lieu of the access to the IT Equipment provided by NV Bekaert SA that the assessee paid its proportionate share in the costs incurred. Further, if the extent of user is more, the payment would be more and *vice versa.* The assessee has also described the payment as `Allocation of IT

Infrastructure expenses' in its Transfer Pricing study report, as is divulged from the Table given on page 21 of the TPO's order. The very fact that the costs incurred by the AE have been allocated to the group entities in proportion to their user by the respective entities and there is no charge for any specific IT service, it gets established that the assessee used and paid for the use of the IT Infrastructure facility.

8.9. The ld. AR tried to make out a case that the assessee did not use any IT infrastructure equipment but availed only IT services for which the payment was made. This contention runs contrary to the stand taken by the assessee before the authorities below as has been discussed above threadbare, which ardently proves that the assessee paid for the use of the IT Infrastructure facility set up by its AE and not for availing any separate IT services. Still, in order to provide an opportunity to substantiate his stand that the assessee paid for the IT services, the Bench directed the ld. AR to file details of the total costs incurred by NV Bekeart SA during the year on the IT Infrastructure facility and then the basis of charge to the assessee. Since such details were not readily available with him, the matter was adjourned for a later date. However, on the next date of hearing, again, the ld. AR failed to

file any such details. In fact, our attention has not been drawn towards any specific IT service provided to the assessee by NV Bekaert, SA. Going with what the assessee stated before the authorities below, including the price mechanism as reproduced above, there remains no doubt whatsoever that it is a clear-cut case of allocation of total costs on the basis of *extent of user* of the IT equipment and *not of paying for availing any IT service* from the AE. Self user of an equipment by a person for an output and, simultaneously, another person also providing that very output through his services to the first person, is practically not possible. Presence of one ousts the other. As the extant is a case of user of the IT equipment by the assessee, it cannot be a case of provision of service by the AE.

II. <u>Is the payment Reimbursement?</u>

9.1. Having understood the nature of transaction, now we come to the question as to whether any tax withholding was required to be done by the assessee before making the payment to NV Bekaert SA? As has been seen above that the first contention raised by the assessee before the authorities below was that the payment was in the nature of reimbursement of costs to the AE. The ld. AR candidly submitted at the threshold of his arguments

that he was not pressing the issue from the point of view of Reimbursement of cost. In our opinion, the reimbursement issue has rightly not been pressed because the Transfer pricing study report of the assessee, at internal page no. 79, categorically states that: `The cost sharing arrangement is pertaining to IT support services which are required for all Group companies and allocation of cost is in accordance with reasonable allocation keys that commensurate with the usage/benefit to the beneficiary group entities (including BIPL). *Certain IT support services are charged to Group entities at cost plus 5% mark-up basis.* However, while charging for the said services to BIPL, AE has merely recovered the proportionate costs from BIPL and has not charged any mark-up on the costs'. Albeit, it has been stated that the AE did not recover any mark-up from the assessee, but no evidence was placed on record to substantiate this argument before the TPO as well as the DRP. Position continues to remain the same before the Tribunal as well. In the absence of any evidence to controvert the finding of the authorities below in this regard, the ld. AR rightly did not press this argument before the Tribunal.

III. Is the payment Royalty or Fees for technical services?

10.1. Having found out the true nature of transaction as that of the assessee paying for *using* the IT infrastructure facility set up by to NV Bekaert SA and not for availing any IT Service, we need to find out if the receipt is taxable in India in the hands of the non-resident payee?

10.2. Section 9(1)(vi)(b) provides that income by way of Royalty payable by a person who is resident shall be deemed to accrue or arise in India. Exception clause contained in section 9(1)(vi)(b) is not germane to the issue. Explanation 2 of the provision gives meaning to the term 'Royalty'. It states that Royalty shall mean consideration, other than capital gain in the hands of the recipient, for the items described in clauses (i) to (vi). Whereas the clauses (i), (ii), (iii) and (v) deal with copyright royalty, clause (iv) and (via) deal with industrial royalty. Clause (vi) treats consideration for rendering of services in connection with the activities referred to in any of the clauses (i) to (iv) also as Royalty. Clause (iva), which is relevant for our purpose is a case of an industrial royalty and provides that consideration paid for: `the use or right to use any industrial, commercial or scientific equipment but not including the amounts referred to in section 44BB' shall be

Royalty. Section 44BB of the Act dealing with the business of exploration etc., of mineral oils, is obviously not relevant for the present case. Clause (vi) treats consideration for rendering of services in connection with the activities referred to in clause (iva) also as Royalty. The IT infrastructure set up by NV Bekaert SA is in the nature of an Equipment covered under clause (iva) of Explanation 2 to section 9(1)(vi) of the Act. We have noted above that the assessee paid consideration to NV Bekaert SA for *use* of such equipment. This unmistakably brings the case within the ambit of 'Royalty' u/s.9(1)(vi) of the Act. At this juncture, it is pertinent to have a glance at Explanation 5 to section 9(1)(vi), which states that the Royalty includes and has always included consideration in respect of any *property* etc., whether or not - the possession or control of such property etc. is with the payer; or such property etc. is used directly by the payer; or the location of such property is in India. Explanation 5 has been inserted by the Finance Act, 2012 w.r.e.f. 01-06-1976, which makes it clear that the payer need not have physical possession or dominion over the property during its use and further that the location of such property whether in India or outside India is also immaterial. When we read Explanation 2 (iva) and (vi) in juxtaposition to

Explanation 5 to section 9(1)(vi) of the Act, it becomes graphically palpable that the payment made by the assessee to NV Bekaert SA for the *use* of the IT infrastructure facility set up by the latter is Royalty in terms of section 9(1)(vi) of the Act.

10.3. Now we advert to evaluating the position under the DTAA in terms of section 90(2) of the Act. Article 12 of the DTAA deals with Royalties and Fees for Technical services. Para 2 states that such royalties and fees for technical services may also be taxed in the Contracting State in which they arise and according to the laws of that State. Para 3(a) defines the term 'Royalties' to mean: `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 used 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,* or for information concerning industrial, commercial or scientific experience.'

10.4. Ostensibly, there is no material difference in the definition of the term `Royalty' under section 9(1)(vi) of the Act and the DTAA insofar as clause (iva) of Explanation 2 dealing with

payment of consideration for use or right to use of any industrial, commercial or scientific equipment, is concerned. Both use the same language.

10.5. Protocol to the DTAA contains Most Favoured Nation (MFN) clause. In this hue, when we examine the DTAA between India and Portuguese, it is found that Article 12(3) defining the term 'Royalties' therein also, has employed similar language insofar as the payment of consideration for the use of or right to use industrial, commercial or scientific equipment is concerned.

10.6. In view of the fact that the payment made by the asessee falls within the definition of Royalty u/s.9(1)(vi) and also under the DTAA, there is no escape from its chargeability in the hands of NV Bekaert SA.

10.7. The ld. AR vehemently contended that the payment made by the assessee is in the nature of `fees for technical services' and going with the definition of such term in the DTAA with Portuguese containing `make available' clause, the amount would go outside the purview of taxation in the hands of the AE. The contention is devoid of merits. The relevant criterion to categorize a payment, in the circumstances as are obtaining in this case, as royalty or fees for technical services is to properly examine its

quid pro quo. If the payment is in lieu of the use or right to use an industrial or commercial equipment, it will fit into `royalty', but if the payment is for availing IT services, it will be `fees for technical services'. We have noticed above that the assessee paid for *using* the equipment of IT Infrastructure facility and *not for availing any specific IT services* from NV Bekeart, SA. In that view of the matter, it is vivid that the assessee paid royalty, which is chargeable to tax in the hands of its AE. Failure to deduct tax at source by the assessee from the payment made for use of IT infrastructure facility rightly led to the disallowance u/s.40(a)(ia) of the Act.

10.8. It can be seen that the DRP treated category (a) of payment for sub-licensing/licensing of software as Royalty for copyrighted article and hence chargeable to tax by taking recourse to the judgment of Hon'ble Karnataka High Court in the case of *Samsung Electronics Company Ltd. 345 ITR 494 (Kar.) and CIT Vs. Synopsis International old Ltd.(supra).* Overturning the decision in *Samsung Electronics Company Ltd.,* the Hon'ble Supreme court in *Engineering Analysis Centre of Excellence Pvt. Ltd. Vs. CIT (2021) 432 ITR 472 (SC)* has held that 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. Where the core of a transaction is to authorize the end-user to have access to and make use of the "licensed" computer software product over which the licensee has no exclusive rights, no copyright is parted with. When we view the transaction of the assessee group under consideration in totality, it transpires that it has two components, viz., first, NV Bekaert SA paying for purchasing SAP software and installing them in its IT Infrastructure facility; and, second, various group companies paying to NV Bekaert SA for using the IT Infrastructure facility created by it. Whereas the first is a case of copyright royalty, the second is a case of industrial royalty. The *ratio* of the decision in *Engineering Analysis Centre of Excellence (supra)* has application only on copyright royalty cases and not on industrial royalty cases as the Hon'ble Apex Court dealt only with copyright royalty. It is only that part of the overall transaction under which NV Bekaert SA purchased SAP and other software that would be governed by the decision of the Hon'ble Summit Court. The purchase price of such software will not constitute royalty in the hands of such vendors so as to require any deduction of tax at source by NV Bekaert SA, which acquired the copyrighted article

having no right to make copies of the same. *Howbeit*, the transaction of the assessee is only of availing access to the IT Infrastructure facility set up by its AE, which is a payment of industrial royalty not ruled by the judgment of the Hon'ble Supreme Court. The DRP appears to have been swayed by the decision in *Samsung (supra)* without realizing that it was not applicable to the transaction of the assessee using the IT Infrastructure facility set up by N.V. Bekaert SA, which was, in fact, a royalty as a consideration for use of industrial or commercial equipment in terms of Explanation 2(iva) and (vi) read with Explanation 5 to section 9(1)(vi) of the Act and not a payment for use of any software simpliciter. The Pune Tribunal in *Rieter Machine Works Ltd. VS. ACIT (ITA NO. 19/PUN/2021)* considered a case of Switzerland based non-resident who set up an I.T. Infrastructure facility (analogous to that of NV Bekaert SA in our case). Group entities across the world including its Indian entity, namely, Rieter India Private Ltd. (RIPL) (analogous to the assessee under consideration) had an access to that facility. The non-resident assessee offered a sum of Rs.20.04 crore received from RIPL towards its share in the allocation of costs for granting access to its IT facility, described as IT Service charges, for

taxation in India. However another sum of Rs.3.88 crore received from RIPL, being share of the Indian entity in software license cost, was not offered for taxation on the ground that it was reimbursement of IT license costs incurred towards centrally purchasing software licenses and use by RIPL. The Tribunal observed that the software licenses were purchased for installation in the IT Infrastructure facility of the non-resident assessee and RIPL was given only access to that IT facility, similar to what has happened in the case under consideration. Vide its order dated 21.10.2021, which was duly confronted to both the sides during the course of hearing of the extant appeal, the Tribunal held Rs. 3.88 crore was not different from Rs.20.04 crore and was hence chargeable to tax in India in the hands of the non-resident assessee. The facts of the instant case are on all fours with *Rieter Machine Works Ltd. (supra)* insofar as the taxability of the amount received by foreign entity from the Indian entity for allowing access to its IT Infrastructure facility, is concerned.

10.9. The upshot of the above discussion is that the DRP was not justified in compartmentalizing the payment made by the assessee into three broad categories and then allowing the assessee's claim in respect of the (c) category, being

consideration for other support services, while rejecting for (a) and (b) categories of sub-licensing/licensing of software and its support and maintenance services. Legally speaking, the amount paid by the assessee on this count is chargeable to tax in entirety in the hands of the non-resident. Failure of the assessee to deduct tax at source should have met its logical consequences. Since the part of the direction of the DRP, providing relief under category (c) has not been challenged by the Revenue, the same will remain intact and the consequences of non-deduction of tax at source would visit only the payment for categories (a) and (b), for which the disallowance has been made at Rs.1,71,53,803/-. We accord our imprimatur to the impugned order to this extent.

IV. Scope of powers of Tribunal in appeal

11.1. The ld. AR contended that the Tribunal is not empowered to change the complexion of the case from that made by the AO. He argued that the AO as well as the DRP applied the judgment in the case of *Samsung (supra)* and treated the transaction as that of software royalty, which view is no longer valid in the hue of *Excellence (supra)(SC)* and now the Tribunal cannot view the transaction from a different angle of royalty. *Au contraire,* the ld. DR submitted that the Tribunal can validly do so.

11.2. The Tribunal derives power for passing order from section 254(1) of the Act, which provides that: `The Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit.' On dissection of the above provision, the following constituents are discernible, viz., i) passing such orders as its thinks fit; ii) thereon; and iii) after giving both the parties to the appeal an opportunity of hearing. The first constituent grants the power to the Tribunal to pass such order in appeal as it thinks fit. The second constituent of `thereon' restricts the exercise of power of passing any order to the subject matter before it. The third constituent contains the *audi alteram partem* rule of providing opportunity of hearing. On a conjoint reading of the three constituents, it is explicated that the Tribunal can pass any order in an appeal so long as it does not breach the subject matter before it and an opportunity of hearing has been given to both the sides. The Tribunal can allow a particular deduction if the claim, having been rightly disallowed on one section, is found to be allowable under some other section. Similarly, the Tribunal can disallow a claim on a ground different from that of the AO, if it is rightly disallowable under the latter. As the subject matter of claim in

both the cases remains the same, no fetters can be imposed on the power of the Tribunal to examine the subject matter in appeal from another point of view by applying another provision to the same issue, that was not applied by the AO. This view also gets fortified on reading the exception clause contained in rule 11 of the Income-tax Appellate Tribunal Rules, 1963, which states that: `… the Tribunal, in deciding the appeal, shall not be confined to the grounds set forth in the memorandum of appeal or taken by leave of the Tribunal under this rule' followed by principle of natural justice. Albeit the Tribunal has sweeping powers of passing any order as it thinks fit, but the essential condition is that some material – factual or legal - must exist or should be there to support the view sought to be canvassed by it on the subject matter, which is different from that of the AO. It can be seen from the discussion *supra* that the Tribunal did not decide the issue of royalty from a different standpoint on any non-existing legal or factual position but took cognizance of the correct legal position and the material already available on record from the orders of the authorities below *qua* the transaction under consideration. It is only on consideration of such material that the

subject matter in appeal has been approached from a different perspective and decided on a legally tenable angle.

12. To sum up, the AO was justified in making disallowance u/s 40(a)(ia) of the Act to the tune of Rs.1,71,53,803/- on failure of the assessee to deduct tax at source from the payment to NV Bekeart SA, which is chargeable to tax in the hands of the foreign entity.

13. In the result, the appeal is partly allowed for statistical purposes.

Order pronounced in the Open Court on 13th December, 2021.

Sd/-	Sd/-
(PARTHA SARATHI CHAUDHURY)	**(R.S.SYAL)**
JUDICIAL MEMBER	**VICE PRESIDENT**

पुणे Pune; दिनांक Dated : 13th December, 2021
सतीश

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to:

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The DRP-3, Mumbai-1/ DRP-3, Mumbai-2/ DRP-3, Mumbai-3/
3. The CIT(IT & TP), Pune
4. DR, ITAT, 'C' Bench, Pune
5. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune

		Date	
1.	Draft dictated on	09-12-2021	Sr.PS
2.	Draft placed before author	13-12-2021	Sr.PS
3.	Draft proposed & placed before the second member		JM
4.	Draft discussed/approved by Second Member.		JM
5.	Approved Draft comes to the Sr.PS/PS		Sr.PS
6.	Kept for pronouncement on		Sr.PS
7.	Date of uploading order		Sr.PS
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9.	Date on which file goes to the Head Clerk		
10.	Date on which file goes to the A.R.		
11.	Date of dispatch of Order.		

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