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

BEFORE SHRI G.S. PANNU, PRESIDENT
AND
SHRI SAKTIJIT DEY, VICE PRESIDENT

ITA No.404/Del/2023
Assessment Year: 2020-21

GE Precision Healthcare LLC, C/o- Wipro GE Healthcare Private Ltd., No. 4, Kadugodi Industrial Area Whitefield, Bangalore, Karnataka	**Vs.**	Assistant Commissioner of Income Tax, Circle- International Tax - 1(3)(1), New Delhi
PAN :AAHCG6915E		
(Appellant)		**(Respondent)**

Assessee by	Sh. Ravi Sharma, Adv. Sh. Anubhav Rastogi, CA
Department by	Sh. Vizay B. Vasanta, CIT(DR)

Date of hearing	16.05.2023
Date of pronouncement	14.08.2023

ORDER

This is an appeal by the assessee against final assessment order dated 23.01.2023 passed under section 143(3) read with section 144C(13) of the Income-tax Act, 1961 (in short 'the Act') pertaining to assessment year 2020-21, in pursuance to the directions of learned Dispute Resolution Panel (DRP).

2. Ground no. 1 is a general ground, hence, does not require adjudication.

3. The common issue raised in ground nos. 2 to 5 relates to taxability of receipts towards software sub-licence fee as income from other sources under section 56 of the Act and Article 23(3) of India – USA Double Taxation Avoidance Agreement (DTAA).

4. Briefly the facts relating to this issue are, the assessee is a non-resident corporate entity and a tax resident of United States of America (USA). As stated, the assessee is engaged in healthcare business for the General Electric (GE) group, and is a global medical device provider that designs, develops, manufactures and distributes diagnostic imaging and clinical system, products and services for drugs discovery, bio-pharmaceutical manufacturing, and cellular technologies, imaging agents used during medicinal scanning procedures, and a range of healthcare Information Technology (IT) solutions.

5. In the assessment year under dispute, the assessee received income in the nature of Fee for Technical Services (FTS)/Fee for Included Services (FIS) amounting to Rs. 3,32,12,204/-, which was offered to tax in India under section 9(1)(vii) read with section 115A of the Act. The assessee also received an amount of Rs.10,66,35,790/- towards software licence fee cross charged to its affiliates in India, namely, Wipro GE Healthcare Pvt. Ltd., GE

BE Pvt. Ltd. and GE India Industrial Pvt. Ltd. However, the software licence fee received as reimbursement from the affiliates was not offered to tax in India by the assessee. In course of assessment proceedings, the Assessing Officer issued a show-cause notice to the assessee seeking response, as to why, the amount received towards software licence fee should not be brought to tax. The assessee filed its response explaining the nature of transaction and further stating that the amount received, being in the nature of business income under Article 7 of India - USA DTAA, is not taxable in India in absence of a Permanent Establishment (PE). The Assessing Officer, however, did not accept the claim of the assessee. He issued a second show-cause notice to the assessee seeking explanation, as to why the receipts should not be treated as income from other sources in terms of section 56(1) of the Act and Article 23(3) of India – USA DTAA and brought to tax in India. Though, the assessee objected to the proposed addition, however, rejecting the objections of the assessee, the Assessing Officer proceeded to frame the draft assessment order by holding that the reimbursement of software licence fee is to be treated as income

from other sources under section 56(1) of the Act and Article 23(3) of the tax treaty.

6. Though, the assessee contested the aforesaid decision by filing objections before learned DRP, however, the view of the Assessing Officer was endorsed by learned DRP.

7. Before us, explaining the nature of transaction, learned counsel submitted that in the year under consideration, the assessee purchased certain standard commercial software licences from third party software licensors and further sublicensed them to affiliates in India. He submitted, the software licences sublicensed to the affiliates are nothing but copyrighted articles in the nature of standardized business software, which are required by affiliates as business tool to smoothly conduct their business operation. To demonstrate the nature of transaction, learned counsel drew our attention to Intercompany Reimbursement Agreement, dated 01.01.2020. He submitted, the assessee only recovers cost of the software licences which the assessee has paid to the third party licensor. Thus, he submitted, since, the amount received from the affiliates was towards sale of copyrighted articles and not for use or right to use of copyright, the receipts are not taxable as royalty income either under section

9(1)(vi) of the Act or under the tax treaty in view of the decision of Hon'ble Supreme Court in case of Engineering Analysis Centre of Excellence Pvt. Ltd. Vs. CIT (432 ITR 471) and the decision of Hon'ble Delhi High Court in case of DIT Vs. Infrasoft Ltd. (2014) 264 CTR 329.

8. He submitted, once the receipts are not in the nature of royalty, it can only be treated as business income under Article 7 of the tax treaty and in absence of PE in India, it is not taxable. He submitted, though, the receipts are purely in the nature of business income, however, the departmental authorities have wrongly treated it as income from other sources under section 56 of the Act read with Article 23(3) of the tax treaty. He submitted, in the first show-cause notice, the Assessing Officer himself wanted to treat the receipts as royalty income. However, being conscious of the fact that the amount cannot be treated as royalty income in view of the decision of Hon'ble Supreme Court in case of Engineering Analysis Centre of Excellence Pvt. Ltd., he proceeded to invoke section 56 of the Act read with Article 23(3) of DTAA only for the purpose of bringing to tax an otherwise non-taxable receipt.

9. Strongly contesting the reasoning of the departmental authorities in not treating the receipts as business income, learned counsel submitted that as per definition of "business" in section 2(13) of the Act, it includes any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture. He submitted, the definition of "business" is of wide import and would cover activities performed by the assessee in the normal course of business. He submitted, undisputedly, the assessee had procured and sublicensed standardized software licences to its affiliates in course of its normal business and not as a standalone activity. He submitted, the assessee carries on healthcare business for the GE group and such model of centralized procurement of standard software licences is, in fact, aimed at bringing the cost and usage efficiency for its healthcare business around the globe owing to the economies of scale and dynamic availability of the licences as and when required. Thus, he submitted, since, the software licences were sold as tools of business in furtherance of assessee's business activity, the receipts therefrom have to be treated as business income.

10. As regards the allegation of the departmental authorities that there is no continuity in the activity to consider it to be in the nature of business, learned counsel submitted, the assessee was incorporated in the year 2019-20 and the impugned year is the second year of operation, wherein, the agreement to sublicense the software was entered into and is operational till date. He submitted, even in the subsequent assessment years, i.e., 2021-22 and 2022-23, there are similar transactions between the parties, which demonstrate the continuity in the activity. Thus, all these factors demolish the basic argument of the regularity, continuity and frequency.

11. Reverting back to the issue of applicability of section 56(1) of the Act and Article 23(3) of the tax treaty, learned counsel submitted, if the nature and character of a particular item is specifically identifiable, it cannot be brought within the residuary clause of other income, as provided under section 56(1) of the Act read with Article 23(3) of the tax treaty. He submitted, other income can only be those types of income, which would not fall under any other head of income. He submitted, if a particular item of income falls under any other head of income but is not taxable due to non-satisfaction of conditions mentioned under

those heads, it cannot automatically be treated as other income and brought under section 56(1) of the Act or Article 23(3) of DTAA. In this context, he drew our attention to Article 21 of the UN Model Commentary. Thus, he submitted, the amount cannot be treated as other income under section 56(1) of the Act read with Article 23(3) of the tax treaty. In this context, he relied upon the following decisions:

i. *Husco International Inc. Vs. ACIT [2021] 133 taxmann.com 196 (Pune – Trib.)*
ii. *CSC Technology Singapore Pte. Ltd. Vs. ADIT, 19 taxmann.com 123 (ITAT-Delhi)*
iii. *JCIT (OSD) Vs. Merrill Lynch Capital Market Espana SA SV, 112 taxmann.com 119*
iv. *Bangkok Glass Industry Co. Ltd. Vs. ACIT, 34 taxmann.com 77 (Madras HC)*
v. *Mc Kinsey & Company (Thailand) Co. Ltd. Vs. DDIT, 36 taxmann.com 375 (ITAT – Mumbai)*

12. Learned Departmental Representative strongly relied upon the observations of departmental authorities.

13. We have considered rival submissions in the light of the decisions relied upon and perused materials on record. The lis between the parties is regarding the nature and character of the receipts from sublicensing of software licences by assessee to its Indian Associated Enterprises (AEs). There is no dispute between the parties that the assessee is neither manufacturer nor creator

of the software licences sold to the AEs. The assessee purchases software licences from third party software licensors and sublicenses them to Indian affiliates/AEs to be used in healthcare business. Upfront, the assessee pays licence fees of the software to the third party licensors and thereafter cross charges them to the affiliates on cost to cost basis. Undoubtedly, in course of assessment proceeding, the assessee has claimed the reimbursement of software licence cost as business income in terms of Article 7 of the tax treaty and claimed that in absence of PE, it is not taxable in India.

14. It is observed, in the first show-cause notice dated 27.02.2022 issued by the Assessing Officer in course of assessment proceeding, he called upon the assessee to explain, as to why the receipts should not be treated as royalty taxable under section 9(1)(vi) of the Act and Article 12 of the tax treaty. In response to the show-cause notice, the assessee furnished its reply on 7th March, 2022, stating therein that what has been sold to the affiliates are copyrighted articles and not any right to use copyright, hence, the receipts cannot be taxable as royalty income in view of the decision of the Hon'ble Supreme Court in case of Engineering Analysis Centre of Excellence Pvt. Ltd. (supra) and

the decision of Hon'ble Bombay High Court in case of DIT Vs. Infrasoft Ltd. (supra).

15. After going through the submissions of the assessee, the Assessing Officer, having realized that the receipts cannot be taxed as royalty income, either under section 9(1)(vi) of the Act or Article 12 of India – Singapore DTAA, re-characterized the receipts as other income falling under section 56(1) of the Act and Article 23(3) of the tax treaty. While doing so, the Assessing Officer rejected assessee's claim of business income on the following reasons:

i. With respect to the activity of software licenses, the assessee is involved with solely its affiliates/GE group entitles.

ii. The assessee takes no risk nor entrepreneurial activity in sub-licensing these software applications from third parties and further sub-licensing them to its affiliates, included Wipro GE.

iii. For all software sub-licensed by the assessee to the Wipro-GE (Indian AE), the AE makes use of the software to earn service income which constitutes 21% of its overall revenue from operations. During the subject year, 97% of this

software income was earned by the AE through sale of software services to the assessee.

iv. Thus, through the software sub-licensed by the assessee to the AE on a per-user per-month basis, sales are made back to the assessee.

16. On going through the aforesaid reasonings of the Assessing Officer, it is very much clear that the Assessing Officer has accepted the position that the assessee buys software licenses from third party vendors and sublicenses them to its affiliates. He has also observed that by using the sublicensed software the affiliates carry on their business activity and generate income from services provided to the assessee. From the aforesaid observations of the Assessing Officer, two facts are very much clear. Firstly, the assessee is not the owner and manufacturer of the software, and secondly, the licenced softwares are used as business tools by the affiliates to generate service income from the assessee. If that is the case, we fail to understand how the receipts from sublicensing of softwares can be treated as other income under section 56(1) of the Act and Article 23(3) of the tax treaty. It is established on record that the assessee has not sublicensed standardized software licenses on standalone basis.

The details of software licenses sublicensed by the assessee to its affiliates and their functionality are described as under:

S.No.	Software Licenses	Brief description
1.	Apttus CPQ	Apttus Configure Price Quote is a sales tool that can help quote for complex and configurable products with ease and consistency.
2.	Apttus CLM	Contract Management solution ends the era of manual and disjointed contract processes, helping legal teams drive contract compliance while reducing cycle times, avoiding bottlenecks, improving negotiation outcomes & eliminating errors & risk
3.	X-Arthur Designer	X-Author lets you use Microsoft Excel natively as a user interface (UI) for tasks that need Excel rather than a browser UI.
4.	Apptus Promotion Management	With the Promotions Management application, the user can manage, execute, and analyze promotions using the CPQ product line. With the Promotions Management application, marketing managers can create new promotions, get internal approvals for such promotions, and roll these promotions to their sales channels.
5.	SFDC Einstein Analytics	Empower customer-facing teams with intelligent analytics and predictions in Salesforce workflows.
6.	SFDC ELTON	Used for information technology inventory, tool tracking, spare parts, evaluation, demonstration equipment and assets.
7.	SFDC Chatter Plus	The Chatter Plus license is for users who don't have Salesforce licenses but must have access to Chatter and some additional Salesforce objects. Chatter Plus users can be Chatter moderators and have access to standard Chatter people, profiles, groups, and files pages.
8.	Oracle Variable Compensation	Variable Compensation is a software related to human resource function that is used to create and manage multiple variable compensation plans. These plans can encompass everything from onetime ad hoc awards to stock options, bonus plans, non-cash incentives, and holiday gifts or bonuses.

17. From the description of the software licences sublicensed to the affiliates, it is very much clear that the sublicensed softwares were meant to be used by the affiliates in their day-to-day business activity of healthcare, which is the business of the entire group. Therefore, it cannot be said that the receipt from sublicensing of software is not in course of assessee's business activity, hence, cannot be characterized as business income. Further, from the details available on record, it is observed that sublicensing of software is not an one off activity but an activity carried on with regularity, continuity and frequency. Therefore, in our view, it cannot be treated as a passive activity.

18. Reverting back to the issue, whether the receipts can be re-characterized as other income as envisaged under section 56(1) of the Act and Article 23(3) of the Act, it is very much clear, as per the provisions of domestic law, an item of income, which does not fall under any specific heads of income, such as, salary, house property, business and profession and capital gain, will fall under the residuary head 'income from other sources' as per section 56(1) of the Act. Similarly, Article 23(3) of the tax treaty provides for taxation of residuary items of income which are not dealt with in the other Articles of the tax treaty. In the facts of the present

appeal, admittedly, the item of income sought to be taxed is the receipts from sublicensing of software licences. Therefore, ordinarily, the income can be characterized as royalty under section 9(1)(vi) of the Act and Article 12 of the DTAA. In case, it is not taxable as royalty income, it can be treated as business income under Article 7 of the tax treaty. Thus, to our understanding, the residuary provision under Article 23 can come into play when an item of income is not expressly dealt with in other articles preceding article 23 of the tax treaty.

19. Characterization of an item of income under a particular Article is different from taxability of that income under the said Article. A particular item of income can fall either under Article 7 or Article 12. However, their taxability under these articles is subject to fulfillment of conditions enumerated therein. If the particular item of income falling under these articles is not taxable due to non-fulfillment of the conditions mentioned therein, it cannot automatically be re-characterized as other income under Article 23 of the tax treaty. In other words, the residuary provisions of Article 23 will not apply to items of income, which can be classified under other provisions of the tax

treaty, but their taxability is subject to fulfillment of conditions mentioned therein.

20. In the facts of the present appeal, to our understanding, the receipts in dispute could have been characterized either as royalty income falling under Article 12 or business income under Article 7 of the tax treaty. However, in view of the ratio laid down in judicial precedents, the income is not taxable as royalty. Alternatively, it could have been taxed as business income under Article 7 of the tax treaty. However, in absence of a PE, it cannot be taxed in India. Thus, in our view, the income in dispute, since can be classified under other Articles of the tax treaty, they cannot be brought under the residuary provision contained under Article 23 of the tax treaty. In this context, we are supported by the decisions cited before us by learned counsel for the assessee. Therefore, we conclude that the income cannot be treated as other income under Article 23(3) of the tax treaty. The only provision under which it could have been taxed is as business income under Article 7. However, in absence of a PE in India, it cannot be taxed under that provision as well. Therefore, we direct the Assessing Officer to delete the addition.

21. Ground no. 6 and 7, being consequential and premature, are dismissed.

22. In the result, appeal is allowed, as indicated above.

Order pronounced in the open court on 14th August, 2023

Sd/-	***Sd/-***
(G.S. PANNU)	**(SAKTIJIT DEY)**
PRESIDENT	**VICE PRESIDENT**

Dated: 14th August, 2023.
RK/-
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi