

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D": NEW DELHI**

BEFORE

SHRI G.S. PANNU, HON'BLE PRESIDENT

AND

MS. ASTHA CHANDRA, JUDICIAL MEMBER

ITA No. 2573/Del/2022
Asstt. Year: 2017-18

CAE Simulation Training P. Ltd. 3 rd Floor, Dr. Gopal Das Bhawan, 28, Barakhamba Road, New Delhi – 110 001 PAN AAEECC7113K	Vs.	DCIT, Circle 4(2), New Delhi.
(Appellant)		(Respondent)

Assessee by:	S/Sh. Rohit Jain, Advocate, Anshul Sachhar & Ms. Somya Jain, CA
Department by:	Shri Sanjay Kumar, Sr. DR
Date of Hearing:	17.07.2023
Date of pronouncement:	18 09.2023

ORDER

PER ASTHA CHANDRA, JM

The appeal filed by the assessee is directed against the order dated 30.08.2022 of the Ld. Commissioner of Income Tax, (Appeals), National Faceless Appeals Centre (NFAC), Delhi (**"CIT(A)"**) pertaining to Assessment Year (**"AY"**) 2017-18.

2. The assessee has raised the following grounds of appeal:

- '1. *That on the facts and circumstances of the case and in law, the assessment order dated 27.12.2019 and also the impugned order dated 30.08.2022 passed by the Ld. Commissioner of Income Tax (Appeal Unit)-1 ["CIT(A)"] under section 250 of the Income Tax Act, 1961 (the Act) is illegal, bad-in-law and liable to be quashed/ set-aside*
- 1.1. *That the CIT(A) erred in passing the impugned order on mere conjectures and surmises, without considering the submissions made during the course of proceedings and without providing any opportunity of being heard, which is in gross violation of principles of natural justice.*
- 1.2. *That the CIT(A) erred on facts and in law in not quashing/ setting aside the assessment order dated 27.12.2019 passed under section 143(3) of the Act passed in violation of principles of natural justice and the mandatory procedure of assessment.*

Re: Disallowance of depreciation on CISCO IP Phone

2. *That the CIT(AVAO erred on facts and in law in restricting depreciation on CISCO IP Phones to Rs.47,713 computed @15 percent as against Rs.1,90,854 computed @60 percent claimed by the appellant.*
- 2.1 *That the CIT(AVAO failed to appreciate that on application of the functional test, since CISCO IP Phone performed functions similar to a computer, the same is eligible for depreciation at higher rate of 60 percent.*

Re: Disallowance under section 40(a)(1) for alleged non-deduction of tax at source 249 2525 132 0484 law.com

3. *That the CIT(A) erred on facts and in law in confirming the disallowance of Rs.1,03,45,058 under section 40(a)(i) on account of alleged non-deduction of tax at source under section 195 of the Act out of remittances outside India to Symbiotic Ltd., UK (in short "Symbiotic").*
- 3.1. *That the Ld. CIT(A) grossly erred on facts and in law in holding the payment/ remittances to Symbiotic to be in the nature of royalty' covered both under section 9(1)(vi) of the Act and Article 13(3) of the DTAA between India and UK.*
- 3.2 *That the CIT(A)/AO erred on facts and in law in holding that payment to Symbiotic was towards license/ right to use the intellectual property of Symbiotic and hence payment is in the nature of "royalty".*
- 3.3 *That the CIT(A) AO failed to appreciate that the definition of royalty under the India-UK DTAA is much narrower in scope than the definition provided under the Act and the payment made is not covered by the said definition.*
- 3.4. *That the CIT(A) erred on facts and in law in holding that the software Adapt, used by Symbiotic to prepare "candidate written report' has access to UK located file servers and such servers fall within the meaning of model, design, secret formula or a process etc. stated*

in Explanation 2 to section 9(vi) of the Act without appreciating that the report is sold/transmitted by Symbiotic to the appellant electronically which is in the nature of copyrighted product and the appellant is not provided with access to any software of Symbiotic.

3.5 That the CIT(A)/AO failed to appreciate that Symbiotic is merely testing the ability of the candidates as per the parameters/ standards of the appellant so as to ascertain whether the candidates meet the quality/performance criteria of the appellant company.

3.6 That the CIT(A) failed to appreciate that in the absence of the amount remitted being determined as taxable in the hands of the non-resident recipient, the same could not have been disallowed under section 40(a) of the Act.

3.7 That that disallowance under section 40(a)(i) should, if at all, be directed to be made having regard to the clarificatory/curative amendment made under section 40(a)(ia) of the Act which provides that disallowance should be restricted to 30% of the expenditure.”

3. The assessee is a private limited company engaged in the business of training pilots and also providing services in relation to assessment of pilot candidates for its customers. For AY 2017-18, the assessee filed its return declaring income of Rs. 15,03,98,960/-. The case of the assessee was selected for complete scrutiny through CASS. Statutory notices were issued to the assessee in response to which the assessee filed necessary details online through ITBA, which are placed on record.

4. The reply/submission of the assessee was not found tenable by the Ld. Assessing Officer (**“AO”**). The Ld. AO treated the CISCO IP Phones as part of plant and machinery and did not allow the depreciation rate of 60% applicable for computers claimed by the assessee, thereby restricting depreciation on CISCO IP Phones to Rs. 47,713/- computed at 15% as against Rs. 1,90,854/- computed at the rate of 60% claimed by the assessee. He also made disallowance of Rs. 1,03,45,058/- under section 40(a)(i) of the Income Tax Act, 1961 (**the “Act”**) on account of failure to deduct tax at source under section 195 of the Act out of payments made by the assessee outside India to Symbiotics Ltd., UK holding such payments to be in the nature of royalty under the Act as well as India-UK DTAA. The Ld. AO therefore completed the assessment under section 143(3) of the Act vide his order dated 27.12.2019 on total income of Rs. 16,08,87,158/- after making the following additions:-

Total Income as per Return of Income	Rs. 15,03,98,960/-
Add: Incorrect depreciation claim	Rs. 1,43,140/-
Add: Non deduction of withholding tax	Rs. 1,03,45,058/-
Total income	Rs. 16,08,87,158/-

5. Aggrieved, the assessee challenged the above additions/disallowances made by the Ld. AO before the Ld. CIT(A) who dismissed the appeal of the assessee. This has brought the assessee before the Tribunal.

6. We have heard the Ld. Representative of the parties, considered their submissions and perused the material on records.

7. As regards the issue of eligible rate of depreciation allowable to CISCO IP Phones challenged by the assessee in ground No. 2 and 2.1, the Ld. AR submitted that this issue is squarely covered by the decision of the Co-ordinate Bench of the Tribunal vide order dated 20.01.2023 in assessee's own case for AY 2016-17 in ITA No. 7317/Del/2019. The Ld. DR conceded to the submission of the Ld. AR.

8. We have perused the order of the Tribunal (supra) and observed that the Tribunal remitted the issue to the file of the Ld. AO directing him to follow the ratio laid down by the Tribunal in the case of M/s. CISCO Systems Capital (India) Pvt. Ltd. vs Addl. CIT in IT(TP)A No. 1158/Bang./2012 for AY 2008-09 vide order dated 19.09.2014. The relevant extract of the decision of the Tribunal for AY 2016-17 (supra) is reproduced herein below:

“8. Ld. Counsel for the assessee contended that the identical issue was considered by the ITAT in the case of M/s. Cisco Systems Capital (India) Pvt. Ltd. vs. Addl.CIT in IT (TP)A.No.1558/Bang/2012 for AY 2008-09 order dated 19.09.2014. ITAT on this subject has expounded as under:-

8.3 In the case before us also, all the components of the equipment are necessary for fulfillment of the objective of the audio-visual conferencing and

video streaming. Some of the components may exist independently and may also be functioning independently but in the assessee's business they are only performing the functions as input and output devices. The assessee can also use this equipment independent of the computer system used in the audio visual conferencing and video streaming activity. But did the assessee use them independently is the question. In view of the same, we are of the opinion that the AO, instead of classifying the entire equipment as plant and machinery and not computer, is required to examine each item in detail as regards its functional dependency on the computer and its independent existence. The items which are, functional dependent on computers are definitely part of computer and the items with independent existence may not be computers but wherever it is found that the device is not used independent of the computer system and the purpose of audio visual conferencing and video streaming, the same shall be treated as computers and wherever it is used independently for any other purpose it shall be treated as plant and machinery. The AO, shall, thus allow depreciation at the rate of 60% on the equipment which could be classified as computer and at the rate of 15% on the equipment which could be classified as plant and machinery. This issue is accordingly set aside to the file of the AO for re-adjudication in accordance with law and our observation above."

9. In this regard, Id. Counsel of the assessee contended that ITAT has dealt with the issue and held that if the items which are functionally dependent on computers are definitely part of computer and the items with independent existence may not be computers but wherever it is found that the device is not used independent of the computer system and the purpose of audio visual conferencing and video streaming, the same shall be treated as computers and wherever it is used independently for any other purpose it shall be treated as plant and machinery. Hence, he agreed that the issue can be remitted to the file of AO to examine the issue from the ratio laid down by the ITAT in the aforesaid order.

10. Ld. DR for the Revenue fairly agreed to the above proposition.

11. Accordingly, in the interest of justice, we remit the file to the AO. AO is directed to follow the ratio laid down by the ITAT in the aforesaid order."

9. Respectfully following the decision of the Tribunal (supra), we remit this issue to the file of the Ld. AO with the direction to decide this issue afresh accordingly.

10. As regards ground No. 3 to 3.7 relating to disallowance under section 40(a)(i) on account of alleged non-deduction of tax at source by the assessee while making remittance to Symbiotics Ltd., UK challenged by the assessee, the Ld. AO held the payments made to Symbiotics Ltd.UK to be in the

nature of “royalty” by recordings his findings in para 4.5, 4.6, 4.7, 4.10, 4.11 and 4.12 of the assessment order, which is reproduced herein below:

“4.5 A perusal of the contract establishes that the Symbiotic is providing these services from their registered office in the UK and the file servers running the aforementioned software are also based in the UK. The reports are prepared and shipped/exported to India and as such no software is installed or runs on the systems of the assessee company. It is also evident from the contract that a customized online questionnaire is developed by Symbiotics to support the software selection and assessment process. The whole process leverages the analytics ability of the software Adapt developed by Symbiotics which results in a candidate written report which is essentially a software generated report. The test is software based and uses custom algorithms and expert profiles to do the evaluation, which makes the software a custom-made software specifically developed for the assessee company's candidates or clients. The contract also makes it clear that Adapt software as well as other software used along with Adapt shall remain the property of Symbiotics and the assessee company shall have no rights on it Clause 70v) of the Agreement also establishes that the software captures feedback from its users based on the final outcomes and this feedback is used by the software to learn/improve/fine-tune the results. This makes the software a result of improvements made through various other users of Symbiotic's Adapt which essentially results in a fine-tuned software which is the intellectual property of Symbiotics which is used in making custom made testing software/algorithms for its clients and is not a shrink-wrap software with hard wired instructions.

*4.6 A perusal of the Appendix B of the Agreement, it is established that Symbiotic develops custom profiles which includes building new algorithms and report templates and the resulting profiles are charged on a per report basis. **This clearly establishes that the payment made every time for making a customized template, profile or algorithm or generation of a personalized report from the software is a payment of the nature of Royalty towards the intellectual property like algorithms, questions and testing methodologies developed by Symbiotics.***

*4.7 From the rates given above, it is clear that the payments made by the assessee company are for these proprietary tests on as per user or candidate basis, **which makes the payment in the nature of Royalty.***

*4.10 The website also mentions the manner in which the licenses are acquired and used by the candidates(s). The section **Reducing Your Preparation Effort** mentions that "Instead of having to set up and manage candidate user accounts, your candidates register themselves onto our Adapt system using a licence key specific to your assessment programme. You can purchase a set of licences from us and issue them to your candidates, or we can provide an e-commerce gateway to allow candidates to purchase licences for your assessment directly from us. If required, we can organise psychology service activities directly with candidates **which clearly establishes that each test set/process is sold as a license and that license gives the user the right to use the intellectual property of Symbiotics and hence the payment is in the nature of Royalty.***

4.11 The website gives a glimpse of the actual assessment dashboard, the screenshots of the same are as given below, as Exhibit-6:.....

*4.12 From the above screenshots it can be established that the **client purchases a set of license codes** (as can be seen from the screenshots the codes are like software license keys) and assigns each of the license codes to a candidate through which he/she can take the test. It is to be noted that*

these license codes are not perpetual in nature and come with an expiry date before which the tests need to be taken. The candidate takes the set of tests in each license, as has been shown in one of the screenshots the list of tests includes Adapt Personality Questionnaire, Aspects Personality Questionnaire which is a copyrighted Leadership assessment method of Symbiotics, Cognitive Foundation Test, English Test, Logical Reasoning Test, Progressive Maths Test, Progressive Physics Test, Fast- Variant A Test and Mind Q test which is a proprietary test of mental wellbeing. Once the tests are completed, the reports are available immediately on the portal. A sample report cover can also be seen in the screenshot above, the report lists all the tests undertaken by the candidate and their detailed report and analysis. It can also be seen that the report has an expiry date after which it is not valid."

11. When the assessee carried the matter in appeal to CIT(A), the Ld. CIT(A) upheld the order of the Ld. AO without considering the submission of the assessee observing as under:

"5.2.9. In the order u/s 143(3) dated 27.12.2019, the A.O has analysed as to how the payments made by the appellant to Symbiotic, U.K. would tantamount to 'Royalty (paragraph 4.7 of A.O) and for use of licence' of Symbiotic, U.K.(paragraph 4.10 of A.O).

Further the AO has analysed the relevant provisions of DTAA between India and U,K while holding how the payments made by the appellant to Symbiotic, U,.K. would tantamount to ' Royalty' and attracts the provisions of sec. 195 and 40(a)(i)."

11.1 The CIT(A) also did not consider the judicial precedents relied upon by the assessee holding that the principles of res judicata are not applicable to income tax proceedings.

12. Before us, the Ld. AR submitted that the assessee has no access to software, equipment etc. of Symbiotics Ltd. UK; what the assessee gets is just a report via e-mail. The Ld. AR submitted that the consideration paid by the assessee for candidate reports provided by Symbiotics Ltd. UK cannot by any stretch of imagination fall within the meaning of "royalty" in terms of Article 13 of the India-UK DTAA since the assessee has not been provided use of or the right to use, any copyright of a literary, artistic or scientific work or any patent, trade mark, design or model, plan, secret formula or process and the report provided by Symbiotics Ltd. UK to the assessee merely contains candidate's score against the measured attributes and a performance appraisal against the high level training objectives of the assessee so as to ascertain the ability of the candidates as per the parameters/standards of the assessee.

12.1 Rebutting each of the allegations of the Ld. AO extracted above, the Ld. AR made the following submissions:

(i) Para 4.5 and 4.6 of the Ld. AO's order

“It is respectfully submitted that the assessing officer has failed to appreciate that Symbiotics does not provide any customized software to the appellant. Symbiotics merely provides a candidate report/score card to the appellant which contains candidate's score against the measured attributes and a performance appraisal against the high level training objectives of the appellant so as to ascertain the ability of the candidates as per the parameters/ standards of the appellant.

Further, the appellant fails to understand as to how the software used by Symbiotics to prepare the algorithms, questions and testing methodologies so as to provide the candidate report to the appellant constitute royalty in terms of Article 13 of the India- UK DTAA since the appellant has not been provided use of or the right to use, any copyright of a literary, artistic or scientific work or any patent, trade mark, design or model, plan, secret formula or process.”

(ii) Para 4.7 of the Ld. AO's order

“In this regard, the appellant fails to understand as to how can payment arrangement between the parties be a determinative factor for characterizing the nature of the payment to be made by the payer. The appellant has agreed with Symbiotics to provide the candidate report/scorecard to it and for each such report, the appellant shall pay an agreed amount to Symbiotics.

Instead of making the payment on per report basis, if the appellant had, for instance, agreed to pay a fixed monthly fee to Symbiotics then as a necessary corollary and as per the understanding/ allegation levelled by the assessing officer the payment would not constitute royalty under the DTAA.”

(iii) Para 4.10 to 4.12 of the Ld. AO's order

“The assessing officer has alleged that as per the website of Symbiotics, the client purchases a set of license codes and assigns each of the license codes: of to a candidate through which he/she can take the test. It is to be noted that these license codes are not perpetual in nature and come with an expiry date before which the tests need to be taken. The candidate takes the set of tests

in each license. Once the tests are completed, the reports are available immediately on the portal.

The assessing officer has, on the basis of conjectures and surmises, alleged that the client purchases a set of license codes and assigns each of the license codes to a candidate through which he/she can take the test without appreciating that no licence code is provided by Symbiotics to the appellant/candidate.

The candidates merely log into the website of Symbiotics and take the test and thereafter a report is generated by Symbiotics which is shared with the appellant. In the entire process, no licence or software is used by the appellant since the appellant is only provided the result of the test in the form of candidate written report.”

(iv) Non consideration of case laws relied upon by the assessee

“In this regard, it is submitted that the principle of res judicata provides that if a certain issue between the same parties has been decided by Court, then, the same issue between the same parties should not be tried by another Court provided there is no change in the facts Further, the rule res judicata is not strictly applicable to (income) tax proceedings inasmuch as each assessment year is to be considered a separate and distinct unit warranting consideration and adjudication on its own merits.

The appellant fails to appreciate the reliance placed by the CIT(A) on the principle of res-judicata, which is grossly misplaced. The law declared by the Supreme Court is binding on all the authorities, whether or not party to the dispute before the Court.

*It is further submitted that it is a settled judicial principle that the orders of the higher forum/ appellate authorities are binding on the subordinate authorities and it is not permissible for the subordinate authorities to deviate from the direction/orders of the higher/ appellate authorities. In other words, the judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities (refer **Union of India and others vs. Kamlakshi Finance Corporation Limited: AIR 1992 SC 711/1992 Supp (1) Supreme Court Cases 443/55 ELT 433**)”*

12.2 The Ld. AR then drew our attention to the agreement dated 19.04.2016 entered by the assessee with Symbiotics Ltd. UK in respect of the services rendered by Symbiotics Ltd. UK to the assessee and referred to relevant clauses of the agreement dealing with scope of work/services, deliverables and ownership of software and data contained therein. He

submitted that the consideration received by Symbiotics Ltd. UK is treated as business income which is not chargeable to tax in India in the absence of a Permanent Establishment (**“PE”**) of Symbiotics Ltd. UK in India in terms of Article 7 of the India-UK DTAA. He submitted that since the payments made to Symbiotics Ltd. UK are not chargeable to tax in India, no liability to deduct TDS on such payments arises in the hands of the assessee and therefore prayed for the deletion of the disallowance under section 40(a)(i) of the Act.

13. The Ld. DR supported the order of the Ld. AO/CIT(A).

14. We have considered the rival submissions of the parties and considered the material placed on record. Since the assessee is a tax resident of UK it can opt to be governed by the provisions of the India-UK DTAA being more beneficial to it. Accordingly, we have considered the taxability of the impugned payment by the assessee to Symbiotics Ltd. UK under the provisions of India-UK DTAA. Briefly, the undisputed facts pertaining to this issue are that the assessee is engaged in the business of training pilots and also providing services in relation to assessment of pilot candidates for its customers. Symbiotics Ltd. UK is engaged in the business of providing services in relation to profiling and evaluating suitability of candidates and preparing requisite reports for its customers. During the AY 2017-18, for the purpose of evaluating and profiling of candidates being trained by the assessee and providing desirable report(s), the assessee entered into an agreement dated 19.04.2016 with Symbiotics Ltd. UK (“the Agreement”) (copy at pages 80-92 of the Paper Book). In terms of the Agreement Symbiotics Ltd. UK was required to provide candidate profiling services from their office in UK, by utilising their UK developed and maintained software, Adapt that accesses UK located file servers to collect information from wherever the candidate is being tested at that time. The said information was then analysed by Symbiotics and converted into “Candidate written report” to be delivered to the assessee. The “Candidate written report” is the collective term used for the document that provides the

candidates “trainability index” (i.e. details of candidates score against the measured attributes and provides an overall assessment of their likely performance against a given syllabus or training profile) and “performance profile” (i.e. a predicted performance against the high level training objectives of the training pipeline of the syllabus, highlighting areas where mitigation strategies will need to be implemented if the candidate is to progress satisfactorily).

15. The relevant clauses of the Agreement are reproduced herein below:-

“1. Scope

Subject to this agreement, Symbiotics shall provide certain deliverables to CSTPL in relation to evaluation and profiling of candidates basis their suitability and preparation of prescribed reports along with related support, as detailed under this agreement ("services").

2. Deliverables

Symbiotics shall provide the services from their registered office in UK utilizing their UK developed and maintained software ("Adapt") that accesses UK located fileservers to collect information from wherever the candidate is being tested at the time. Symbiotics shall provide the prepare the prescribe reports which will be shipped or exported to CSTPL in India. The following deliverables will be provided by Symbiotics to CSTPL within the time lines as mutually agreed between the parties ("Deliverables");

a. Online questionnaire

The online questionnaire is developed by Symbiotics to support its software selection and assessment process.

- i. The online questionnaire will be administered using the internet.*
- ii. The analysis of the completed questionnaire will be conducted by Symbiotic's personnel at Symbiotic's facility.*
- iii. The online questionnaire will be made available to incoming candidate within 3 days notification of the candidates' details from CSTPL.*

b. Observer Comment Sheet/Computerized Tick-sheets

- i. CSTPL will be provided with observer comment sheets for each phase of the assessment process (structured interview, physical*

assessment, debrief) after recording the observed behaviours and responses during the various phases of the test.

- ii. The data collected via the observer comment sheets and automatically generated telemetry data will be transmitted to Symbiotics to allow its analysis which will be conducted by Symbiotics personnel at the Symbiotics' facility.*

c. Expert Profile

Symbiotics will deliver to CSTPL expert profiles as and when requested. These expert profiles will be used in the assessment process to help determine candidate suitability for given roles or organizations and will be built to cover specific geographical regions or a specific customer airline, as required.

d. Candidate Report

Upon successful collection of candidate data Symbiotics will produce the candidate written report. The candidate written report is the collective term used for the document that provides both the candidates trainability risk index (details the candidate's score against the measured attributes and provides and overall assessment of their likely performance against a given syllabus or training profile) and performance profile (the performance profile provides a predicted performance against the high level training objectives of the training pipeline of Syllabus, highlighting areas where mitigation strategies will need to be implemented if the candidate is to progress satisfactorily).

7. Ownership of Software and Data

- 1) The Parties acknowledge that the Adapt along with all other software used in conjunction with the Adapt shall, at all times, remain the property of Symbiotics and CSTPL shall have no rights on the same.*
- 2) Symbiotics retains the rights to scientifically validate the efficacy of the Adapt and associated process. In the event that they wish to publish such results, Symbiotics shall respect the anonymity of all customers and candidates of CSTPL and shall additionally obtain prior written permission of CSTPL in the event of publishing data or results which pertain to CSTPL.*
- 3) The Parties acknowledge that CSTPL shall have exclusive ownership rights of all Deliverables provided by Symbiotics while providing the Services under this Agreement, including on any related reports produced and generated by Symbiotics for CSTPL.*
- 4) The Parties recognize that the value of ADAPT Service and Software is the proven ability of the system to select pilot candidates who, the*

process predicts, would perform well in the training and later organization environments. It is in the best interest of both parties to continuously aim to improve the results from the process. Symbiotics will seek access to pilot candidate performance data from CSTPL which Symbiotics will analyse to validate the performance of the ADAPT Software, and to enable any appropriate improvements that will be beneficial for CSTPL.”

16. It is also worthwhile here to look into Article 14 of India-UK DTAA dealing with taxation of 'Royalty'. The relevant extract of Article 13 is reproduced below:-

“ARTICLE 13

ROYALTIES AND FEES FOR TECHNICAL SERVICES

1. *Royalties and fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.*

3. *For the purposes of this Article, the term "royalties" means:*

(a) payments of any kind received as a consideration for the use of, or the right to use, any copyright of a literary, artistic or scientific work, including cinematography films or work on films, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience; and

(b) payments of any kind received as consideration for the use of, or the right to use, any industrial, commercial or scientific equipment, other than income derived by an enterprise of a Contracting State from the operation of ships or aircraft in international traffic."

17. In the backdrop of the above facts and the relevant clauses of the Agreement, the assessee has submitted that - i) the assessee is neither granted right to control any equipment, network, infrastructure etc. nor any right to modify the source code; ii) the source code behind any of the applications / software is accessed only by Symbiotics Ltd. UK and the assessee does not have any right to access, modify or duplicate such source code; iii) the assessee is not granted the right of commercial exploitation of the intellectual property / software contained therein; iv) the title/ownership and proprietary rights to the systems and software owned by Symbiotics Ltd. UK remain with it the assessee shall not reverse engineer, decompiled,

disassemble the software or lease or sub-licence it to third parties and shall have no right to make copies, modify the said software etc. which means that the copyright in the software / systems shall continue to be owned by Symbiotics Ltd. UK; v) the infrastructure / software used by Symbiotics Ltd. UK for preparing the “Candidate written reports” is located, owned and managed by it outside India; vi) the assessee only receives a report / document which contains details of candidate’s score against the measured attributes and provides an overall assessment of their likely performance against a given syllabus or training profile. The said deliverables in the form of candidate’s report are provided to the assessee.

18. From the above, it is abundantly clear that the assessee is provided with a report / document by Symbiotics Ltd. UK containing the requisite details as per the terms of the Agreement. The assessee is not provided with access to any software of Symbiotics Ltd. UK. The candidate’s report is delivered to the assessee electronically which is in the nature of copyrighted product and a mere access to use the server / software to download the reports cannot be regarded as transfer of any licence / copyright in the software so as to fall within the definition of “royalty” under Article 13 of the India-UK DTAA. What the assessee gets is merely the report in the form of deliverables prepared from the analysis undertaken by Symbiotics Ltd. UK using Adapt software. The source code of the software is accessed only by Symbiotics Ltd. UK and the assessee has no right to access, modify or duplicate such source code which is evident from clause vii of the Agreement. The assessee had not been granted the right of commercial exploitation of the IT/software contained therein. Further the infrastructure / software used for preparing the reports are located, owned and managed by Symbiotics Ltd. UK outside India and the assessee has no right to control the equipment / network / infrastructure etc. used by Symbiotics Ltd. UK. The software Adapt is being used to generate the required report after conducting evaluation on the basis of criterias provided by the assessee. In our considered view it cannot tantamount to granting of licence to the software and the right to use the IP of Symbiotics Ltd. UK. It can thus be

concluded that there is no grant of licence to the assessee for any software which allows it to modify the source code. The assessee does not get any right to use the copyright in the software as it merely has access to the information / data processed by the software / application which is owned and executed by Symbiotics Ltd. UK in its server located in UK. What the appellant gets is only a copyrighted article to use the product for its internal business purpose and not any right in any copyright to exploit the same for commercial reasons so as to constitute the payment received in consideration thereof as royalty in terms of Article 13 of the India UK DTAA. Support may be drawn by the decision of the Apex Court in the case of Engineering Analysis Centre of Excellence Pvt. Ltd. vs. CIT 125 taxmann.com 42 (SC). In sum and substance what Symbiotics Ltd. UK is doing for the assessee is merely testing the ability of the candidates as per the parameters / standards of the assessee so as to ascertain whether the candidates meet the quality / performance criteria of the assessee. Having considered all the above aspects, we are of the view that the consideration paid by the assessee to Symbiotics Ltd. UK for provision of candidate's reports do not fall within the purview of royalty under Article 13 of the India-UK DTAA.

19. Having held above that the impugned payment to Symbiotics Ltd. UK is not royalty and the fact that the Symbiotics Ltd. UK has no PE in India and therefore not assessed to tax in India, the assessee has no obligation to withhold tax on the impugned payment made by it to Symbiotics Ltd. UK under section 195 of the Act. It is well settled position of law that the tax is required to be withheld in respect of payments made to a non resident only if such payment is chargeable to tax in India. Support is drawn by the decision of the Hon'ble Supreme Court in the case of GE India Technology Centre (P) Ltd. vs. CIT 327 ITR 456 (SC) and Engineering Analysis Centre of Excellence Pvt. Ltd. (supra). Accordingly, the disallowance of the payment of Rs. 1,03,45,058/- made to Symbiotics Ltd. UK under section 40(a)(i) for non deduction of tax at source is hereby deleted. Ground No. 3 to 3.7 are decided in favour of the assessee.

20. In the result, the appeal of the assessee is allowed for statistical purposes subject to the direction contained in para 9 above.

Order pronounced in the open court on 18th September, 2023.

**sd/-
(G.S. PANNU)
PRESIDENT**

**sd/-
(ASTHA CHANDRA)
JUDICIAL MEMBER**

Dated: 18/09/2023

Veena

Copy forwarded to -

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	