Lionbridge Technologies Llc vs Deputy Commissioner Of Income Tax, ... on 19 February, 2024

Author: Yashwant Varma

Bench: Yashwant Varma, Purushaindra Kumar Kaurav

$~33 & 34
* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ W.P.(C) 3403/2023
LIONBRIDGE TECHNOLOGIES LLC
Through:

versus

DEPUTY COMMISSIONER OF INCOME TAX, INTERNATIONAL TAXATION, CIRCLE 2 (2) (1) NEW DELHI & ANR. ..... Responde
Through: Mr. Kunal Sharma, Sr. Stand Counsel along with Ms. Zehr Khan, Jr. Standing Counsel Mr. Shubhendu Bhattacharyya Adv.

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+ W.P.(C) 8192/2023 & CM APPL. 31414/2023 (Interim
LIONBRIDGE TECHNOLOGIES LLC.
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DEPUTY COMMISSIONER OF INCOME TAX, INTERNATIONAL TAXATION, CIRCLE 2(2)(1), NEW DELHI & ANR. ..... Responde
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W.P.(C) 3403/2023 & W.P.(C) 8192/2023

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV

ORDER

% 19.02.2024

1. The petitioner has approached this Court aggrieved by a failure on the part of the respondents to grant a Nil Withholding Tax Certificate while exercising powers conferred by Section 197 of the Income Tax Act, 19611. While W.P.(C) 3403/2023 is concerned with Financial Year2 2022-23 and consequently Assessment Year3 2023- 24 and impugns the order dated 13 January 2023 and the certificate dated 24 February 2023, W.P.(C) 8192/2023 pertains to FY 2023-24 and consequently AY 2024-25 and assails the order dated 10 May 2023 and the certificate dated 10 May 2023 framed in identical terms.

2. On facts which are undisputed, it appears that the petitioner approached the respondents by way of an application for being accorded Nil Withholding Tax Certificates under Section 197 of the Act in the following circumstances. The petitioner is stated to be a company incorporated under the laws of the United States of America and engaged in providing localization and translation solutions. As part of its business operations, it is stated to provide to its clients various services including detail-critical business processes, translation and localization, digital marketing and global engineering. For the purposes of facilitating outsourcing of projects, it had entered into agreements titled "Contract Localization Services" with its various group entities including with its Indian entity, being Act FY AY This is a digitally signed order.

 Lionbridge Technologies LLP (India)4 on 11 July 2019. As per the said agreement, the Indian entity was to be outsourced work which according to the writ petitioner stood restricted to providing backend support services.

3. The petitioner is also stated to have entered into multiple user master agreements with third parties such as Microsoft, Adobe and Dell for use of programs and softwares such as Microsoft Windows, Outlook, MS Office and others. The software so procured is stated to have been thereafter deployed on the system of users of its group entities by third parties. The aforesaid software was to be used by the group entities for their internal use and who in turn were liable to reimburse the petitioner for the cost of such programs and softwares on the basis of the number of users of such programs/licenses of the concerned entity.

4. Prior to the making of the application for the grant of Nil Withholding Tax Certificate, LB India though being of the view that the reimbursement payments made by it did not constitute income liable to tax under the Act, had as a matter of abundant caution been deducting tax at source at the rate of 10%. The petitioner, while filing its Return of Income5 for AYs 2019-20 and 2020-21 claimed

a refund of the tax so withheld. The ROI of the petitioner for AY 2021- 22 had also claimed a refund on identical grounds.

5. For AY 2020-21, it however appears that the petitioner s return was selected for scrutiny assessment under Computer-Assisted Scrutiny Selection6 and consequent to which a notice under Section 143(2) of the Act came be issued. The aforesaid return was processed LB India ROI CASS This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 08/03/2024 at 21:04:52 under Section 144C(1) of the Act and in the course of which, a Draft Assessment Order dated 21 September 2022 came to be framed by the Assessing Officer7. The AO while drawing that order in draft took the position that the revenue received by the petitioner during the said AY is liable to be treated as "royalty" as defined under the Act as well as under the India-US Double Tax Avoidance Agreement8.

6. The petitioner is stated to have in terms of the procedure prescribed under Section 144C, filed its objections before the Dispute Resolution Panel9 on 20 October 2022. It was during the pendency of the aforesaid proceedings that the application under Section 197 came to be made.

7. While proceeding to dispose of that application, the respondent passed the following order dated 13 January 2023 which is assailed in W.P.(C) 3403/2023:

> "The applicant is a provider of localization and translation solutions. It offer a range of services like details-critical business processes, including translation and localization, digital marketing, global engineering etc.
>
> 2. The applicant has submitted that M/s Lionbridge Technologies LLC (LB US) being the parent entity has entered into license agreements with third parties viz. Microsoft, Adobe etc. for use of programs/ software s such as Microsoft Windows, Outlook, MS office etc. These programs/software s are used by M/s Lionbridge Technologies LLP (LB India) for the internal use of its business. LB US shall proportionately allocated the cost based on the number of users i.e. LB US shall allocate the cost to LB India on the basis of users of these licensed programs/software s and LB India shall make payment to LB US on cost-to-cost basis in the nature of reimbursement of expenses.
>
> 3. The assessee has submitted copy of sample copy of invoices; debit notes raised the company to LB India and copy of agreement between LB LLC and LB India etc. Regarding taxability AO DTAA DRP This is a digitally signed order.
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> The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 08/03/2024 at 21:04:52 of software, the assessee has also relied upon the

judgement of Hon ble Supreme Court in the case of Engineering Analysis Centre of Excellence Pvt. Ltd. vs CIT (2021) 281 taxmann 19(SC). However, the applicant has failed to explain the same.

4. On perusal of contract Localization Service Agreement dated 11.07.2019 at clause 1.2 & 1.3, it has been noticed that description of Mark Up and Marked-up Costs are discussed and mentioned that for the purpose of computing the Mark-up shall be the total cost, excluding the costs incurred the costs incurred of the purpose of projects undertaken in respect of independent third parties, and such other costs, if any, as may be decided by the service provider from time to time. Moreover, on perusal of the copy of agreement between LB LLC and LB India dated 01.01.2020, the mark-up for financial year 31.03.2020 is mentioned as 16.87%.

5. For A.Y. 2020-21, the draft assessment order was passed in the case on 21.09.2022 by holding that the assessee receipts of the assessee falls under the ambit of the Royalty and proposed to tax accordingly. As held in the assessment order, the assessee company purchased the software and installed the same in its infrastructure i.e. it has procured the software through a centralized platform for further licensing it. Clearly, the assessee has been charging its subsidiaries in India and globally in lieu of the provision of usage of the infrastructure in place, which customised for meeting the requirements of its various subsidiaries, and not just the cost of any identified software, as claimed by the assessee. Reliance is placed in the case Vanderlande Industries Private Limited vs ACIT, Circle-13,Pune ITA No. 48/PUN/2018 and Rieter Machine Works Limited Vs. ACIT (International Taxation), Circle-2, Pune 134 taxmann.com 326 while passing the draft assessment order.

6. Considering the facts that the present application and findings of draft assessment order in assessee s case for A.Y. 2020- 21, it is proposed that lower withholding certificate for the receipts of Rs. 7,64,78,480/- may be issued @9.99% (excluding surcharge and education cess) [equivalent to 10%]. Such certificate would be provisional in nature and subject to final assessment.

7. The certificate is provisional and shall remain in force for the aforesaid payments only unless it is modified of cancelled for financial year 2022-23. The facts of cancellation of modification, if required will be intimated. This shall not cater any further benefit/claim under the provision of Income Tax Act, 1961 to the applicant."

8. As is manifest from a reading of the aforesaid order, the This is a digitally signed order.

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on cost-to-cost basis as received by it from its group entity - LB India could not be subjected to tax. However, the respondent while placing its reliance on the Draft Assessment Order dated 21 September 2022 proceeded to hold that since the petitioner had purchased the software and installed the same in the premises of its group entities, the prayer for the grant of Nil Withholding Tax Certificate would not sustain. It proceeded further to observe that it appeared that the petitioner had been charging its subsidiaries in India as well as across the globe "in lieu of provision of usage of the infrastructure in place....". A similar order was passed for FY 2023-24 dated 08 March 2023 which has been impugned before us in W.P.(C) 8192/2023.

9. In view of the above and resting its decision on the Draft Assessment Order, the respondent proposed the Tax Withholding Certificate under Section 197 of the Act being issued at the rate of 9.99% for both FYs 2022-23 and 2023-24 and consequently AYs 2023-24 and 2024-25. It is the aforenoted orders and the certificates issued under Section 197 of the Act which are impugned before us in the present writ petitions.

10. As is evident from a reading of the orders passed by the respondent and which form the subject matter of challenge, the authority clearly appears to have confused the issues which arose out of two distinct revenue streams, namely, the one which pertained to (2022) 3 SCC 321 This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 08/03/2024 at 21:04:52 the outsourcing of backend services and the other which pertained to the providing of licensed software copies to group entities subject to ultimate reimbursement to the petitioner by those entities. As had been noticed hereinabove, the impugned orders are essentially founded on the Draft Assessment Order dated 21 September 2022. It is pertinent to note that the objections which had been preferred by the petitioner before the DRP ultimately came to be rejected with a direction being framed adverse to it. The said directions of the DRP were affirmed by the AO of the respondents vide its assessment order dated 28 April 2023 and it was held that the revenue received by the petitioner for providing translation and localization solutions, content services and other such services to its customers globally was in the nature of „royalty under the Act and the India-US DTAA.

11. The aforesaid order of the AO was thereafter assailed before the Income Tax Appellate Tribunal11. The ITAT vide its order of 20 September 2023 set aside the final Assessment Order dated 28 April 2023 and while allowing the appeal of the petitioner, came to the following significant conclusions:-

> "9. We have considered rival submissions and perused the materials on record. Undisputedly, the assessee has purchased certain software licences from third party vendors, such as, Microsoft, Adobe etc. and distributed them amongst group entities across the globe for internal use in its business. The cost paid to the third party vendors towards acquisition of the software have been cross-charged to the group entities based on certain allocation keys. This is evident from the copies of invoices

> issued by the third party vendors placed in the paper- book. Therefore, the allegation of the Assessing Officer that necessary details relating to the cost of software etc. were not furnished, appears to be unfounded. At this stage, it is necessary to observe that the assessee has entered into a separate agreement with Indian subsidiary, in terms of which, the Indian subsidiary provides certain back office support services to the ITAT This is a digitally signed order.
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> The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 08/03/2024 at 21:04:52 assessee and gets remunerated at cost plus 15°/o mark-up. A reading of the draft assessment order certainly gives an impression that the Assessing Officer has mixed up both the transactions and under a misconceived notation that the assessee has received markup over the cost of software, has proceeded to treat the receipts as royalty. However, neither the Departmental Authorities have brought on record any material to establish that the reimbursement of cost to the assessee is inclusive of markup, nor at the time of hearing before us, learned Departmental Representative could place any evidence on record to demonstrate that the reimbursement of cost includes element of markup. Therefore, in our view, the cost-to-cost reimbursement of price paid towards software cannot be treated as royalty."

12. The aforesaid would have, thus, been sufficient for the impugned orders being quashed and set aside. However, we deem it apposite and necessary to enter the following additional observations.

13. It becomes pertinent to observe that Section 197 of the Act lays and places a statutory procedure enabling a person to obtain a certificate in respect of withholding tax at either a lower rate or one which certifies that no deduction towards tax is mandated. While the view that the authority may take at the stage of consideration of a Section 197 application is undoubedtly provisional, the same does not detract from the obligation of the AO to at least examine and undertake a prima facie evaluation of whether the income is chargeable to tax at all.

14. We note that the scheme underlying Section 195 of the Act and which requires the issue of chargeability of tax being examined was succinctly explained by the Supreme Court in Engineering Analysis in the following terms:-

> "32. The machinery provision contained in Section 195 of the Income Tax Act is inextricably linked with the charging provision contained in Section 9 read with Section 4 of the Income Tax Act, as a result of which, a person resident in India, responsible for paying a sum of money, "chargeable under the provisions of [the] This is a digitally signed order.
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> The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 08/03/2024 at 21:04:52 Act", to a non-resident, shall at the time of credit

> of such amount to the account of the payee in any mode, deduct tax at source at the rate in force which, under Section 2(37-A)(iii) of the Income Tax Act, is the rate in force prescribed by the DTAA. Importantly, such deduction is only to be made if the non-resident is liable to pay tax under the charging provision contained in Section 9 read with Section 4 of the Income Tax Act, read with the DTAA. Thus, it is only when the non-resident is liable to pay income tax in India on income deemed to arise in India and no deduction of TDS is made under Section 195(1) of the Income Tax Act, or such person has, after applying Section 195(2) of the Income Tax Act, not deducted such proportion of tax as is required, that the consequences of a failure to deduct and pay, reflected in Section 201 of the Income Tax Act, follow, by virtue of which the resident-payee is deemed an "assessee in default", and thus, is made liable to pay tax, interest and penalty thereon. This position is also made amply clear by the referral order in the appeals concerned from the High Court of Karnataka, namely, the judgment of this Court in GE Technology [GE (India) Technology Centre (P) Ltd. v. CIT, (2010) 10 SCC 29].
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> 36. It will be seen that Section 194-E of the Income Tax Act belongs to a set of various provisions which deal with TDS, without any reference to chargeability of tax under the Income Tax Act by the non-resident assessee concerned. This section is similar to Sections 193 and 194 of the Income Tax Act by which deductions have to be made without any reference to the chargeability of a sum received by a non-resident assessee under the Income Tax Act. On the other hand, as has been noted in GE Technology [GE (India) Technology Centre (P) Ltd. v. CIT, (2010) 10 SCC 29] , at the heart of Section 195 of the Income Tax Act is the fact that deductions can only be made if the non-

resident assessee is liable to pay tax under the provisions of the Income Tax Act in the first place.

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66. What is made clear by the judgment in GE Technology [GE (India) Technology Centre (P) Ltd. v. CIT, (2010) 10 SCC 29] is the fact that the "person" spoken of in Section 195(1) of the Income Tax Act is liable to make the necessary deductions only if the non-resident is liable to pay tax as an assessee under the Income Tax Act, and not otherwise. This judgment also clarifies, after referring to CBDT Circular No. 728 dated 30-10-1995, that the tax deductor must take into consideration the effect of the DTAA provisions. The crucial link, therefore, is that a deduction This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 08/03/2024 at 21:04:52 is to be made only if tax is payable by the non-resident assessee, which is underscored by this judgment, stating that the charging and machinery provisions contained in Sections 9 and 195 of the

Income Tax Act are interlinked.

67. This conclusion is also echoed in Vodafone International Holdings BV v. Union of India [Vodafone International Holdings BV v. Union of India, (2012) 6 SCC 613 : (2012) 3 SCC (Civ) 867] , wherein the following observations were made on the scope and applicability of Section 195 of the Income Tax Act : (SCC pp. 690-91, paras 171-73) "171. Section 195 casts an obligation on the payer to deduct tax at source ("TAS", for short) from payments made to non-residents which payments are chargeable to tax. Such payment(s) must have an element of income embedded in it which is chargeable to tax in India. If the sum paid or credited by the payer is not chargeable to tax then no obligation to deduct the tax would arise. Shareholding in companies incorporated outside India (CGP) is property located outside India. Where such shares become subject-matter of offshore transfer between two non-residents, there is no liability for capital gains tax. In such a case, question of deduction of TAS would not arise.

172. If in law the responsibility for payment is on a non- resident, the fact that the payment was made, under the instructions of the non-resident, to its agent/nominee in India or its PE/Branch Office will not absolve the payer of his liability under Section 195 to deduct TAS. Section 195(1) casts a duty upon the payer of any income specified therein to a non-resident to deduct therefrom TAS unless such payer is himself liable to pay income tax thereon as an agent of the payee. Section 201 says that if such person fails to so deduct TAS he shall be deemed to be an assessee-in-default in respect of the deductible amount of tax (Section 201).

173. Liability to deduct tax is different from "assessment" under the Act. Thus, the person on whom the obligation to deduct TAS is cast is not the person who has earned the income. Assessment has to be done after liability to deduct TAS has arisen. The object of Section 195 is to ensure that tax due from non-resident persons is secured at the earliest point of time so that there is no difficulty in collection of tax subsequently at the time of regular assessment."

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15. We in this regard also take note of Rule 28AA of the Income Tax Rules, 196212 and which stands framed in the following terms:-

> "Certificate for deduction at lower rates or no deduction of tax from income other than dividends.
>
> 28AA . (1) Where the Assessing Officer, on an application made by a person under sub-rule (1) of rule 28 is satisfied that existing and estimated tax liability of a person justifies the deduction of tax at lower rate or no deduction of tax, as the case may be, the Assessing Officer shall issue a certificate in accordance with the provisions of sub-section (1) of section 197 for deduction of tax at such lower rate or no deduction

of tax.

(2) The existing and estimated liability referred to in sub-rule (1) shall be determined by the Assessing Officer after taking into consideration the following:--

(i) tax payable on estimated income of the previous year relevant to the assessment year;

(ii) tax payable on the assessed or returned [or estimated income, as the case may be, of last four] previous years;

(iii) existing liability under the Income-tax Act, 1961 and Wealth-tax Act, 1957;

(iv) advance tax payment [tax deducted at source and tax collected at source] for the assessment year relevant to the previous year till the date of making application under sub-rule (1) of rule 28];

(v) & (vi) [***] (3) The certificate shall be valid for such period of the previous year as may be specified in the certificate, unless it is cancelled by the Assessing Officer at any time before the expiry of the specified period.

(4) The certificate for deduction of tax at any lower rates or no deduction of tax, as the case may be, shall be issued direct to the person responsible for deducting the tax under advice to the person who made an application for issue of such certificate:

Provided that where the number of persons responsible for deducting the tax is likely to exceed one hundred and the details of such persons are not available at the time of making 1962 Rules This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 08/03/2024 at 21:04:52 application with the person making such application, the certificate for deduction of tax at lower rate may be issued to the person who made an application for issue of such certificate, authorising him to receive income or sum after deduction of tax at lower rate.

(5) The certificates referred to in sub-rule (4) shall be valid only with regard to the person responsible for deducting the tax and named therein and certificate referred to in proviso to the sub-

rule (4) shall be valid with regard to the person who made an application for issue of such certificate.

(6) The Principal Director General of Income-tax (Systems) or the Director General of Income-tax (Systems), as the case may be, shall lay down procedures, formats and standards for issuance of

certificates under sub-rule (4) and proviso thereto and the Principal Director General of Income-tax (Systems) or the Director General of Income-tax (Systems) shall also be responsible for evolving and implementing appropriate security, archival and retrieval policies in relation to the issuance of said certificate."

16. As is apparent from a reading of Rule 28AA(2), the competent authority stands placed under a statutory duty to determine the estimated liability taking into consideration aspects such as tax payable on estimated income, tax payable on the assessed or returned income in the previous years, existing liabilities, advance tax payments as well as tax deducted at source or tax collected at source in the previous years. Rule 28AA of the 1962 Rules thus clearly required the authority to confer and accord due consideration on aspects pertaining to chargeability when raised by the assessee.

17. What needs to be emphasised is that merely because the grant of a certificate under Section 197 of the Act is not accorded finality or may not amount to a definitive determination on the question of taxability, the same would not absolve the authority from considering all aspects in light of the statutory mandate referred to above.

18. We are constrained to observe that while passing the impugned This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 08/03/2024 at 21:04:52 order, the respondent has clearly failed to bear the aforesaid aspects in consideration. Not only was the decision in Engineering Analysis cited for its consideration, it also appears to have been vehemently urged that the supply or licensing of software cannot possibly be viewed as being „royalty either under the Act or the DTAA. The aforesaid submissions could not have possibly been negated merely on the basis of a Draft Assessment Order.

19. In the scheme of Section 144C of the Act, a draft order of assessment is clearly inchoate and does not represent a final or conclusive verdict on the question of chargeability to tax. This, since on receipt of the draft order, the assessee is entitled in law to file objections before the DRP, and if the said objections are not accepted, the same can always be assailed before the ITAT. In any case, the final Assessment Order would have to await the completion of determination by the DRP. Till such time, the Draft Assessment Order clearly does not constitute a determination under the Act of which cognizance could have possibly been taken. We also deem it apposite to notice the following pertinent observations as rendered by a Division Bench of the Court in Milestone Systems A/S vs. Deputy Commissioner of Income Tax13:-

> "11. We find, that there is no reference whatsoever to any of the clauses of the distributor agreement. The concerned officer has, instead, picked up one of the remitters, i. e., the distributor partners, and made observations, which to say the least, do not meet the parameters set forth in rule 28AA of the Income-tax Rules, 1962 (in short, "the Rules") for estimating the income, that the petitioner may have earned in the given financial year. The erroneous approach adopted by the concerned officer comes through upon a perusal of the following paragraphs of the impugned

order:

2023 SCC OnLine Del 1637 This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 08/03/2024 at 21:04:52 "4. Submission of the applicant with reference to Engineering Analysis Centre of Excellence P. Ltd. v. CIT [2021] 432 ITR 471 (SC) is not tenable as the Department has preferred a review petition in this case and it is pending before the hon'ble apex court for adjudication.

Further, the applicant has not provided information about M/ s. Inflow Technologies Pvt. Ltd. to find out whether it is acting independently or not. Further, M/s. Inflow Technologies Pvt. Ltd. working as (DAPE)-dependent agent permanent establishment of the applicant cannot be ruled out and therefore there is a potential for dependent agent permanent establishment which is also not categorically denied by the applicant with necessary documents.

5. In view of the above observation in paras 4 and 197 being a premature stage for determining income for the assessment year 2022-23 and the assessment is not possible at this very point of time. On perusal of the Milestone Distributor Partner contract, it has been observed that the company is providing training, certification and other services to its distributors/customers which is in the nature of fee for technical services (FTS)/royalty."

12. Mr. Kumar's argument, that at this stage, the Assessing Officer (AO) was not required to employ the statutory tools, which an Assessing Officer brings into play while carrying out the assessment, is a submission with which one cannot quibble. That said, clearly, the concerned officer was required to examine the application, in the background of the parameters set forth in rule 28AA of the Rules. Concededly, that exercise has not been carried out.

13. In so far as Mr. Kumar's argument is concerned, that reduction of withholding tax under section 195 is the rule, it is required to be borne in mind, that deduction of withholding tax morphs into an obligation, only if the sum received is chargeable to tax. The petitioner's entire case is, that the sum that it receives under the distributor agreement is not chargeable to tax. It is in that context, that the petitioner has moved an application under section 197 of the Act for being issued a certificate with "nil" rate of withholding tax."

20. Milestone Systems again was a case where certification under Section 197 of the Act was denied merely on the ground that a review This is a digitally signed order.

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respect to royalty and software had allotted finality. Of equal significance is the observation appearing in paragraph 13 of Milestone Systems where the Court observed that an authority while considering the grant of a tax withholding certificate must bear in mind that deduction at a lower rate or rejection would be justified only if the authority had formed the requisite opinion that the sum received was chargeable to tax. These are aspects which have clearly not been accorded due weightage by the respondent while passing the impugned orders.

21. We also deem it apposite to take note of the judgment rendered by our Court in EY Global Services Ltd. vs. Assistant Commissioner of Income Tax & Anr14. In the aforesaid matter, a challenge was laid to an order passed by the Authority for Advance Rulings(Income-tax)15, which had held against the assessee in respect of supply of computer software to associated entities and thus dealing with a situation similar to that which obtains here. This is evident from the submissions which were addressed before the Court and stand noticed in the following terms:-

> "9. The learned counsel for the petitioner submits that the impugned ruling is liable to be set aside as it is contrary to the law declared by the Supreme Court in its recent judgment dated March 2, 2021, Engineering Analysis Centre of Excellence Pvt. Ltd. v. CIT [2021] 432 ITR 471 (SC) ; [2021] SCC OnLine SC
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> 159. He submits that vide the service agreement and the Memorandum of understanding, the EYGSL (UK) provides to 2021 SCC OnLine Del 5254 AAR This is a digitally signed order.
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> The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 08/03/2024 at 21:04:52 EYGBS (India) a non-exclusive non-assignable sub-licence (with no right to grant further sub-licences) to use the deliverables and/or services. The EYGSL (UK) purchases the software from third-party vendors by way of a licence for the use of the same by member Ernst & Young firms. The payment received by EYGSL (UK) from its members is for the use of computer software loaded on its server by the creation of a standard facility for which access is granted to all the Ernst & Young member firms. He submits that in terms of the judgment of the Supreme Court in Engineering Analysis Centre (supra), there is no transfer of copyright in favour of the member firms, including EYGBS (India), and therefore, the payment received from EYGBS (India) by EYGSL (UK) does not amount to royalty under article 13 of the Double Taxation Avoidance Agreement between India and the United Kingdom (hereinafter referred to as the "India-UK DTAA")."

22. While accepting the challenge raised by the assessee, the Court held as under:-

> "13. A reading of the above judgment would clearly show that for the payment received by EYGSL (UK) from EYGBS (India) to be taxed as "royalty", it is essential to show a transfer of copyright in the software to do any of the acts mentioned in section

> 14 of the Copyright Act, 1957. A licence conferring no proprietary interest on the licensee, does not entail parting with the copyright. Where the core of a transaction is to authorise the end- user to have access to and make use of the licenced software over which the licensee has no exclusive rights, no copyright is parted with and therefore, the payment received cannot be termed as "royalty".

14. In the present case, the EYGBS (India), in terms of the service agreement and the memorandum of understanding, merely receives the right to use the software procured by the EYGSL (UK) from third-party vendors. The consideration paid for the use of the same therefore, cannot be termed as "royalty" as held by the Supreme Court in Engineering Analysis Centre (supra). In determining the same, the rights acquired by the EYGSL (UK) from the third-party software vendors are not relevant. What is relevant is the agreement between the EYGSL (UK) and the EYGBS (India). As the same does not create any right to transfer the copyright in the software, the same would not fall within the ambit of the term "royalty" as held by the Supreme Court in Engineering Analysis Centre (supra)."

23. We, accordingly, allow the instant writ petitions and quash the impugned orders dated 13 January 2023 and 08 March 2023 as well as This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 08/03/2024 at 21:04:52 the impugned certificates dated 24 February 2023 and 10 May 2023. The application of the petitioner for grant of Nil Withholding Tax Certificates shall consequently be examined afresh and disposed of in accordance with law bearing in mind the observations made hereinabove.

YASHWANT VARMA, J.

PURUSHAINDRA KUMAR KAURAV, J.

FEBRUARY 19, 2024 RW This is a digitally signed order.

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