

# The Commissioner Of Income Tax - ... vs Relx Inc on 7 February, 2024

**Author: Yashwant Varma**

**Bench: Yashwant Varma, Purushaindra Kumar Kaurav**

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IN THE HIGH COURT OF DELHI AT NEW DELHI

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ITA 630/2023

THE COMMISSIONER OF INCOME TAX -

INTERNATIONAL TAXATION -3 ..... Appellant

Through: Mr. Ruchir Bhatia, SSC with

Ms. Deeksha Gupta & Mr.

Pratyaksh Gupta, Advs.

versus

RELX INC

Through:

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

HON'BLE MR. JUSTICE PURUSHAINDR KUMAR

KAURAV

ORDER

% 07.02.2024

1. The Income Tax Department<sup>1</sup> questions the correctness of the view taken by the Income Tax Appellate Tribunal<sup>2</sup> as comprised in the impugned order dated 05 April 2023 and seeks consideration of the following proposed questions of law:

A. Whether the Tribunal has erred in law in holding that receipts of subscription fees is in the nature of business income and is not taxable as assessee has no Permanent Establishment<sup>3</sup> in India without taking into account the fact that the solution provided by the assessee has attributes of independent performance and as per the examples provided in the MoU in this case, imparting of a technical training is Department Tribunal PE 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 23/02/2024 at 21:15:33 indicative of fulfilment of a 'make available' clause in terms of Article 12(4)(b) of the India-USA Double Taxation Avoidance Agreement<sup>4</sup> as well as Explanation- 2 of Section 9(1)(vii) of the Income Tax Act, 1961<sup>5</sup>?

2. The basic facts leading up to the matter travelling to the Tribunal do not appear to be in dispute. However, in order to render context to the question which stands posed, we deem it appropriate to notice the following salient facts.

3. The assessee filed a Return of Income on 30 November 2018 declaring 'Nil' income and thus asserting that no part of it is taxable under the Act. The case is stated to have been picked up for scrutiny assessment and the issue revolved upon the subscription fee of Rs. 18,65,00,000/-, which was received by the assessee from Indian subscribers for the use of its legal database. The database in question is titled 'Lexis Nexis' and enables Indian subscribers to access judgments, articles, legislations and other research material relevant to the legal field. The assessee is stated to have asserted that the income earned from subscription fee is in the nature of 'business income' and in the absence of it having a PE in India, it would not be subject to tax as per Article 7 of the DTAA. It was also explained that the aforesaid income would also not fall within the ambit of Article 12(4)(b) of the DTAA, since the access accorded to the Indian consumer was neither a transfer of copyright nor would it satisfy the requirement of 'included service' comprising of an element where technical knowledge, experience, skill, know-how or processes was made available. The assessee thus took the position that subscription fee DTAA Act This is a digitally signed order.

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4. The Department by virtue of Section 144C of the Act proceeded to hold that the income was in the nature of technical consultancy and would thus fall within the ambit of Article 12(4) and which deals with 'Fees for included services'. Aggrieved by the Draft Assessment Order so framed, the assessee approached the Dispute Resolution Panel which rejected the objections vide its order dated 28 April 2022 and confirmed the proposed assessment as framed by the Assessing Officer. Pursuant thereto, a Final Assessment Order came to be passed on 22 June 2022. It was this order which came to be impugned before the Tribunal.

5. The Tribunal has proceeded to allow the appeal of the assessee observing as under:

¶3. In the case of Elsevier Information System GmbH (supra) held that receipt of the assessee therein do not qualify as FTS as per the provisions Section 9(1)(vii) of the Act, wherein the Tribunal Bench of Mumbai adjudicated the issue regarding treaty of 'Indo-German Tax Treaty' wherein the provisions of FTS are similar to Section 9(1)(7) of the Act. The only difference to the present appeal is that the applicable treaty is Indo-US Tax Treaty. The Article 7 of India-US DTAA, the income from subscription to Assessee's data base is in the nature of business profit, therefore, the same is not taxable in India as the assessee has no permanent establishment in India. By respectfully following the ratio laid down by the Mumbai Tribunal in the case of Elsevier Information System GmbH (supra), in the absence of

any material available on record to prove that the assessee is providing full fledged service and solutions for legal professions, we are of the opinion that the A.O. has committed an error in making the addition. In view of the same, the payment received by the assessee is in the nature of Business Profit which cannot be FTS 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 23/02/2024 at 21:15:34 brought to tax in India in the absence of PE. Accordingly, the ground of both the appeal of the assessee are allowed.

6. It becomes pertinent to note that it was never the case of the Department that the assessee had a fixed place of business and which is a sine qua non for Article 7 of the DTAA getting attracted. It is in the aforesaid context that the assessee appears to have asserted that subscription fee as earned would constitute business profit and would have been taxable only if such income was attributable to a Permanent Establishment<sup>7</sup> as contemplated under Article 7 read with Article 5 of the DTAA. This stand that the assessee does not have a fixed place of business in India was not questioned even before us in the present appeal.

7. Mr. Bhatia, learned counsel appearing for the Department had essentially sought to place the income generated from subscription fee under Article 12 and Section 9(1)(vii) of the Act. It becomes pertinent to note that Article 12(3) of the DTAA defines the term 'Royalties' as follows:

□Article 12 - Royalties and fees for included services-

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3. The term 'Royalties' as used in this Article means:

(a) payments of any kind received as a consideration for the use of, or the right to use, any copyright or a literary, artistic, or scientific work, including cinematograph films or work on film, 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, including gains derived from the alienation of any such right or property which are contingent on the productivity, use, or disposition thereof; and

(b) payments of any kind received as consideration for the use of, or the right to use, any industrial, commercial, or scientific PE This is a digitally signed order.

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8. The subject of 'Fees for included services' is governed by Article 12(4), which reads as under:

Article 12 - Royalties and fees for included services-

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4. For purposes of this Article, 'Fees for included services' means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services :

(a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received ; or

(b) make available technical knowledge, experience, skill, know how, or processes, or consist of the development and transfer of a technical plan or technical design.

9. The income of an assessee which may be discerned to fall within the ambit of Fee for Technical Services would be governed by Section 9(1)(vii) of the Act and which reads as follows:

9. Income deemed to accrue or arise in India. - (1) The following incomes shall be deemed to accrue or arise in India-

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(vii) income by way of fees for technical services payable by--

(a) the Government; or

(b) a person who is a resident, except where the fees are payable in respect of services utilised in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India; or

(c) a person who is a non-resident, where the fees are payable in respect of services utilised in a business or profession carried on by such person in India or for the This is a digitally signed order.

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Provided that nothing contained in this clause shall apply in relation to any income by way of fees for technical services payable in pursuance of an agreement made before the 1st day of April, 1976, and approved by the Central Government.

Explanation 1.--For the purposes of the foregoing proviso, an agreement made on or after the 1st day of April, 1976, shall be deemed to have been made before that date if the agreement is made in accordance with proposals approved by the Central Government before that date.

Explanation 2.--For the purposes of this clause, "fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient, or consideration which would be income of the recipient chargeable under the head "Salaries" .

10. It must at the outset be noted that Section 9(1)(vii) of the Act could have been resorted to, provided it were found to be more beneficial to the assessee when compared to the provisions of the DTAA. However, notwithstanding the above, it is apparent that the submissions addressed on this score are clearly unmerited. As is plainly evident from a reading of Explanation 2 of Section 9(1)(vii) of the Act and which defines FTS, it contemplates consideration which may be said to fall within the ambit of rendering of a managerial, technical or consultancy service. The mere access granted to a subscriber to the legal data base would clearly not fall within the ambit of Section 9(1)(vii) of the Act. All that the assessee does is provide access to the database. It has not been shown to be providing any further managerial, technical or consultancy service to a This is a digitally signed order.

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11. We find that similar would be the position which would obtain when subscription fee is examined on the anvil of Article 12 of the DTAA. If the Department were to describe subscription fee as "royalty", they would necessarily have to establish that the payments so received by the assessee was consideration for the use of or the right to use any copyright or a literary, artistic or scientific work as defined by Article 12(3) of the DTAA. Granting access to the database would clearly not amount to a transfer of a right to use a copyright. We must bear in mind the clear distinction that must be recognised to exist between the transfer of a copyright and the mere grant of the right to use and take advantage of copyrighted material. Neither the subscription agreement nor the advantages accorded to a subscriber can possibly be considered in law to be a transfer of a copyright. In fact, it was the categorical assertion of the assessee that the copyright remains with it at all times.

12. This issue in any case no longer appears to be res integra in light of the judgment of this Court in Director of Income Tax Vs. Infrasoftware. We deem it apposite to extract the following passages from that decision:-

¶89. There is a clear distinction between royalty paid on transfer of copyright rights and consideration for transfer of copyrighted articles. Right to use a copyrighted article or product with the owner retaining his copyright, is not the same thing as transferring or assigning rights in relation to the copyright. The enjoyment of some or all the rights which the copyright owner has, is necessary to invoke the royalty definition. Viewed from this angle, a non-exclusive and non-transferable licence enabling the use of a copyrighted product cannot be construed as an 2013 SCC OnLine Del 4694 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 23/02/2024 at 21:15:34 authority to enjoy any or all of the enumerated rights ingrained in Article 12 of DTAA. Where the purpose of the licence or the transaction is only to restrict use of the copyrighted product for internal business purpose, it would not be legally correct to state that the copyright itself or right to use copyright has been transferred to any extent. The parting of intellectual property rights inherent in and attached to the software product in favour of the licensee/customer is what is contemplated by the Treaty. Merely authorising or enabling a customer to have the benefit of data or instructions contained therein without any further right to deal with them independently does not, amount to transfer of rights in relation to copyright or conferment of the right of using the copyright. The transfer of rights in or over copyright or the conferment of the right of use of copyright implies that the transferee/licensee should acquire rights either in entirety or partially co-extensive with the owner/transferor who divests himself of the rights he possesses pro tanto.

90. The licence granted to the licensee permitting him to download the computer programme and storing it in the computer for his own use is only incidental to the facility extended to the licensee to make use of the copyrighted product for his internal business purpose. The said process is necessary to make the programme functional and to have access to it and is qualitatively different from the right contemplated by the said paragraph because it is only integral to the use of copyrighted product. Apart from such incidental facility, the licensee has no right to deal with the product just as the owner would be in a position to do.

91. There is no transfer of any right in respect of copyright by the Assessee and it is a case of mere transfer of a copyrighted article. The payment is for a copyrighted article and represents the purchase price of an article and cannot be considered as royalty either under the Income Tax Act or under the DTAA.

92. The licensees are not allowed to exploit the computer software commercially, they have acquired under licence agreement, only the copyrighted software which by itself is an article and they have not acquired any copyright in the software. In the case of the Assessee Company, the licensee to whom the Assessee Company has

sold/licenced the software were allowed to make only one copy of the software and associated support information for backup purposes with a condition that such copyright shall include Infracsoft copyright and all copies of the software shall be exclusive properties of Infracsoft.

Licencee was allowed to use the software only for its own business as specifically identified and was not permitted to loan/rent/sale/sub- licence or transfer the copy of software to any third party without the consent of Infracsoft.

93. The licensee has been prohibited from copying, de-compiling, de-

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94. The incorporeal right to the software i.e. copyright remains with the owner and the same was not transferred by the Assessee. The right to use a copyright in a programme is totally different from the right to use a programme embedded in a cassette or a CD which may be a software and the payment made for the same cannot be said to be received as consideration for the use of or right to use of any copyright to bring it within the definition of royalty as given in the DTAA. What the licensee has acquired is only a copy of the copyright article whereas the copyright remains with the owner and the Licensees have acquired a computer programme for being used in their business and no right is granted to them to utilize the copyright of a computer programme and thus the payment for the same is not in the nature of royalty.

13. The distinction between the transfer of a copyright as distinct from a mere right to use copyrighted material was again highlighted by the Supreme Court in Engineering Analysis Centre for Excellence Vs. CIT9 when it observed-

¶79. The Revenue, therefore, when referring to ¶royalties under the DTAA, makes a distinction between such royalties, no doubt in the context of technical services, and remittances for supply of computer software, which is then treated as business profits, taxable under the relevant DTAA depending upon whether there is a PE through which the assessee operates in India. This is one more circumstance to show that the Revenue has itself appreciated the difference between the payment of royalty and the supply/use of computer software in the form of goods, which is then treated as business income of the assessee taxable in India if it has a PE in India.

## Conclusion

180. Given the definition of Royalties contained in Article 12 of the DTAA's mentioned in para 46 of this judgment, it is clear that there is no obligation on the persons mentioned in Section 195 of the Income Tax Act to deduct tax at source, as the distribution agreements/EULAs (2022) 3 SCC 321 This is a digitally signed order.

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181. Our answer to the question posed before us, is that the amounts paid by resident Indian end-users/distributors to non-resident computer software manufacturers/suppliers, as consideration for the resale/use of the computer software through EULAs/distribution agreements, is not the payment of royalty for the use of copyright in the computer software, and that the same does not give rise to any income taxable in India, as a result of which the persons referred to in Section 195 of the Income Tax Act were not liable to deduct any TDS under Section 195 of the Income Tax Act. The answer to this question will apply to all four categories of cases enumerated by us in para 3 of this judgment.

14. The distinction between the right of access to copyrighted content as opposed to parting with the copyright itself was again explained by our Court in CIT Vs. Microsoft Corporation<sup>10</sup> where the following pertinent observations were made:-

4. Having heard learned counsel for the appellant, this court finds that the issue raised in the present appeals is no longer res integra as the Supreme Court in Engineering Analysis Centre of Excellence Pvt. Ltd. v. CIT [2021] 432 ITR 471 (SC) ; [2021] SCC OnLine SC 159 has held as under (page 488 of 432 ITR):

"The appeals before us may be grouped into four categories :

(i) The first category deals with cases in which computer software is purchased directly by an end-user, resident in India, from a foreign, non-resident supplier or manufacturer.

(ii) The second category of cases deals with resident Indian companies that act as distributors or resellers, by purchasing computer software from foreign, non-resident suppliers or manufacturers and then reselling the same to resident Indian end-users.

(iii) The third category concerns cases wherein the distributor happens to be a foreign, non-resident vendor, who, after purchasing software from a foreign,



non-resident seller, resells the same to resident Indian distributors or end-users.

(iv) The fourth category includes cases wherein computer software is affixed onto hardware and is sold as an integrated unit/ equipment by foreign, non-resident suppliers to resident Indian distributors or end-

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The Authority for Advance Rulings then reasoned that the fact that a licence had been granted would be sufficient to conclude that there was a transfer of copyright, and that there was no justification for the use of the doctrine of noscitur a sociis to confine the transfer by way of a licence to only include a licence which transferred rights in respect of copyright, by referring to Explanation 2 to section 9(1)(vi) of the Income-tax Act. It then held:

'Considerable arguments are raised on the so-called distinction between a copyright and copyrighted articles. What is a copyrighted article ? It is nothing but an article which incorporates the copyright of the owner, the assignee, the exclusive licensee or the licensee. So, when a copyrighted article is permitted or licensed to be used for a fee, the permission involves not only the physical or electronic manifestation of a programme, but also the use of or the right to use the copyright embedded therein. That apart, the Copyright Act or the Income-tax Act or the DTAC does not use the expression "copyrighted article", which could have been used if the intention was as claimed by the applicant. In the circumstances, the distinction sought to be made appears to be illusory.' This ruling of the Authority for Advance Rulings flies in the face of certain principles. When, under a non-exclusive licence, an end-user gets the right to use computer software in the form of a CD, the end- user only receives a right to use the software and nothing more. The end-user does not get any of the rights that the owner continues to retain under section 14(b) of the Copyright Act read with sub-section (a)(i)-

(vii) thereof. Thus, the conclusion that when computer software is licensed for use under an EULA, what is also licensed is the right to use the copyright embedded therein, is wholly incorrect. The licence for the use of a product under an EULA cannot be construed as the licence spoken of in section 30 of the Copyright Act, as such EULA only imposes restrictive conditions upon the end-user and does not part with any interest relatable to any rights mentioned in sections 14(a) and 14(b) of the Copyright Act.. ..

Also, any ruling on the more expansive language contained in the Explanations to section 9(1)(vi) of the Income-tax Act would have to be ignored if it is wider and less beneficial to the assessee than the

definition contained in the DTAA, as per section 90(2) of the Income- tax Act read with Explanation 4 thereof, and article 3(2) of the DTAA. Further, the expression 'copyright' has to be understood in the context of the statute which deals with it, it being accepted that municipal laws which apply in the Contracting States must be applied unless there is any repugnancy to the terms of the DTAA. For all these reasons, the determination of the Authority for Advance Rulings in Citrix Systems (AAR) (supra) does not state the law correctly and is thus set aside.. .. Our answer to the question posed before us, is that the amounts paid by resident Indian end-users/distributors to non-resident computer software 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 23/02/2024 at 21:15:34 manufacturers/suppliers, as consideration for the resale/use of the computer software through EULAs/distribution agreements, is not the payment of royalty for the use of copyright in the computer software, and that the same does not give rise to any income taxable in India, as a result of which the persons referred to in section 195 of the Income-tax Act were not liable to deduct any TDS under section 195 of the Income- tax Act. The answer to this question will apply to all four categories of cases enumerated by us in paragraph 4 of this judgment. The appeals from the impugned judgments of the High Court of Karnataka are allowed, and the aforesaid judgments are set aside. The ruling of the Authority for Advance Rulings in Citrix Systems (AAR) (supra) is set aside. The appeals from the impugned judgments of the High Court of Delhi are dismissed."

5. Further, this court on similar facts has allowed writ petitions filed by the similarly placed assessee in EY Global Services Ltd. v. Asst. CIT W. P. (C) No. 11957 of 2016 and EYGBS (India) Pvt. Ltd. v. Joint CIT W. P. (C) No. 12003 of 2016 [2022] 441 ITR 54 (Delhi). The relevant portion of the said judgment is reproduced hereinbelow (page 69 of 441 ITR) :

"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'. 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). We may also note that the learned Authority for Advance Rulings in

its impugned order has relied upon its earlier view in Citrix Systems Asia Pacific Pty. Ltd., In re [2012] 343 ITR 1 (AAR), which has been expressly stated to be bad law in Engineering Analysis Centre (supra). The submission of the learned counsel for the Revenue that the judgment of the Supreme Court in Engineering Analysis Centre (supra) cannot be applied because it This is a digitally signed order.

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In view of the above, the impugned rulings dated August 10, 2016 passed by the learned Authority for Advance Rulings are set aside and it is held that the payment received by EYGSL (UK) for providing access to computer software to its member firms of EY Network located in India, that is, EYGBS (India), does not amount to 'royalty' liable to be taxed in India under the provisions of the Income-tax Act, 1961 and the India-UK DTAA."

6. Since, the issue of law raised in the present appeals has been conclusively decided in favour of the assessee by the Supreme Court, no substantial question of law arises for consideration in the present appeals. It is also pertinent to mention that the appellant had admitted before the Income-tax Appellate Tribunal that the dispute in question had been decided in favour of the assessee by the Tribunal in the earlier years. Accordingly, the present appeals are dismissed.

15. Similarly, in order for that income to fall within the ambit of 'fees for included services', it was imperative for the Department to establish that the assessee was rendering technical or consultancy services and which included making available technical knowledge, experience, skill, know-how or processes. As has been found by the Tribunal, the access to the database did not constitute the rendering of any technical or consultancy services and in any case did not amount to technical knowledge, experience, skill, know-how or processes being made available.

16. We note that while explaining the meaning liable to be ascribed to the expression 'make available', the Court in Commissioner of Income Tax (International Taxation) v. Bio-Rad Lab (Singapore) This is a digitally signed order.

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reading of paras 14, 14.1 and 15, which is extracted below:

"14. According to the Tribunal, the agreement between the respondent-assessee and its Indian affiliate had been effective from January 1, 2010, and if, as contended by the appellant- Revenue, technical knowledge, experience, skill, and other processes had been made available to the Indian affiliate, the agreement would not have run its course for such a long period. 14.1 Notably, this aspect is adverted to in paragraphs 17 to 23 of the impugned order. For convenience, the relevant paragraphs are extracted hereafter (page 463 of 33 ITR (Trib)-OL) :

"A perusal of the aforementioned provision shows that in order to qualify as fees for technical services, the services rendered ought to satisfy the 'make available' test. Therefore, in our considered opinion, in order to bring the alleged managerial services within the ambit of fees for technical services under the India-Singapore Double Taxation Avoidance Agreement, the services would have to satisfy the 'make available' test and such services should enable the person acquiring the services to apply the technology contained therein.. . . . agreement is effective from January 1, 2010 and we are in the assessment years 2018-19 and 2019-20. In our considered opinion, if the assessee had enabled the service recipient to apply the technology on its own, then why would the service recipient require such service year after year every year since 2009 ? This undisputed fact in itself demolishes the action of the Assessing Officer/Dispute Resolution Panel. The facts on record show that the recipient of the services is not enabled to provide the same service without recourse to the service provider, i.e, the assessee.

In our humble opinion, mere incidental advantage to the recipient of services is not enough. The real test is the transfer of technology and on the given facts of the case, there is no transfer of technology and what has been appreciated by the Assessing Officer/learned Commissioner of Income-tax (Appeals) is the incidental benefit to the assessee which has been considered to be of enduring advantage.

(2023) SCC OnLine Del 6770 This is a digitally signed order.

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15. We tend to agree with the analysis and conclusion arrived at by the Tribunal.

17. As we examine the nature of the transaction between an Indian subscriber and the assessee, it becomes manifest and apparent that it neither comprises of a transfer of copyright nor does it include a transfer of a right to apply technology and other related aspects which are spoken of in Article 12(4)(b) of the DTAA.

18. We thus find no justification to interfere with the view as expressed by the Tribunal. The appeal fails and shall consequently stand dismissed on the aforesaid terms.

YASHWANT VARMA, J PURUSHAINDRA KUMAR KAURAV, J FEBRUARY 7, 2024/kk This is a digitally signed order.

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