IN THE INCOME TAX APPELLATE TRIBUNAL "L" BENCH, MUMBAI
BEFORE SHRI SHAMIM YAHYA, AM AND SHRI RAVISH SOOD, JM

ITA No. 8184/Mum/2011
(**निर्धारण वर्ष** / Assessment Year:2009-10)

Reliance General Insurance Co. Ltd. C/o Jitendra Sanghavi & Co. 405, Churchgate Chambers, 5, New Marin Lines, Mumbai- 400 020	**बनाम**/ Vs.	Income Tax Officer (I.T) TDS-2 Aayakar Bhavan, M.K. Road, Churchgate, Mumbai- 400 020
स्थायी लेखा सं./जीआइआर सं./PAN No. AABCR6747B		
(अपीलार्थी /**Assessee)**	**:**	**(**प्रत्यर्थी / **Revenue)**

अपीलार्थी की ओर से / **Assessee by**	:	Shri Jitendra Sanghvi & Shri Deepak Jain, A.Rs
प्रत्यर्थी की ओर से**/Revenue by**	:	Shri M.V. Rajguru, D.R

सुनवाई की तारीख / **Date of Hearing**	**:**	29.05.2018
घोषणा की तारीख **/** **Date of Pronouncement**	**:**	23.08.2018

आदेश / **O R D E R**

PER RAVISH SOOD, JUDICIAL MEMBER:

The present appeal filed by the assessee is directed against the order passed by the CIT(A)-11, Mumbai, dated 30.09.2011 which in itself arises from the order passed by the A.O under Sec. 201(1) & 201(1A) of the Income Tax Act, 1961 (for short 'Act'), dated 31.03.2010 for A.Y 2009-10. The

assessee assailing the order of the CIT(A) has raised before us the following grounds of appeal:

"1. The learned Commissioner of Income Tax (Appeals) -11 [CIT(A)] erred in confirming the order of the Income tax Officer (IT) - TDS-2, Mumbai (TDS Officer) holding the appellant as an assessee in default for alleged failure to withhold tax on payment to Fair Isaac Corporation (Fair Isaac) and thereby confirming the order u/s 201(1)/201(1A) by the TDS Officer.

Your appellant submits that the order of the CIT(A) is incorrect in law and in facts and that the order u/s.201(1)/201(1A) ought to be cancelled.

2. The learned CIT(A) erred in holding that payment of US $ 1,00,000 to Fair Isaac is covered by the meaning of "royalty" as defined in section 9(1)(vi) of the Income Tax Act (Act) and also under Article 12(3) of the Treaty for Avoidance of Double Taxation between India and USA (Treaty) and thereby holding that the same is liable to withholding tax u/s.195 of the Act and under the Treaty.

Your appellant submits that the payment of US $ 1,00,000 to Fair Isaac was for non exclusive and non transferable licence for use of software and the same is not covered by the meaning of the "royalty" both under the Act and under the Treaty and the same is not liable to tax under the Act and under Article 7 of the Treaty and therefore the provisions of section 195 were not applicable and accordingly the order of TDS Officer u/s.201(1)1/201(1A) ought to be cancelled.

3. The learned CIT(A) erred in holding that the payment of maintenance fees of US $ 15,000 to Fair Isaac is also taxable as royalty and accordingly liable to withholding tax u/s. 195 of the Act and under the Treaty.

Your appellant submits that the payment of US $ 15,000 was towards maintenance fees of the software and the same falls within the meaning "fees for technical services" under the Act but not under the Treaty and accordingly the same was not liable to tax under the Treaty and therefore the provisions of section 195 were not applicable and accordingly the order of TDS Officer u/s. 201(1)1/201(1A) ought to be cancelled.

4. The learned CIT(A) erred in holding that the payment of training fees of US $ 14,000 to Fair Isaac is liable to tax under the Act and under the Treaty as "fees for technical services" and accordingly liable to withholding tax u/s.195 of the Act and under the Treaty.

Your appellant submits that the payment of US $ 14,000 was towards training fees and the same falls within the meaning "fees for technical services" under the Act but not under the Treaty and accordingly the same was not liable to tax under the Treaty and therefore the provisions of section 195 were not applicable and accordingly the order of TDS Officer u/s. 201(1)1/201(1A) ought to be cancelled.

5. *The learned CIT(A) erred in confirming the action of the TDS Officer in grossing up the payment for computing the amount of withholding tax in respect of which the appellant is held to be an assessee in default.*
Your appellant submits that the payment to Fair Isaac ought not to have been grossed up for calculating the withholding tax.

6. *The learned CIT(A) erred in dismissing the ground relating to charging of interest u/s.201(1A) in respect of the amount of withholding tax computed on the payment to Fair Isaac.*
Your appellant submits that the interest u/s.201(1A) ought to have been cancelled.

7. *Your appellant craves leave to add to, alter, amend or vary all or any of the aforesaid ground of appeal as they/their representative may deem fit."*

2. Briefly stated, the A.O was in receipt of information that the assessee had made certain foreign remittances without deduction of tax at source to non-resident entities, as under:

Sr. No.	Name of the beneficiary	Date	Amount in USD	Nature of remittance
1.	M/s Marsh Canada Ltd.	30.12.2008	543455.69	Reinsurance payment
2.	M/s Fair Isaac international Corpn.	27.12.2008	50000	Licence fees

The assessee on being called upon to explain that having failed to withhold tax while making the aforesaid remittances why it may not be treated as being an assessee in default under Sec. 201 of the Act, submitted as under:

(I) <u>M/s Marsh Canada Ltd:</u>

It was submitted by the assessee that the reinsurance premium was received by the aforesaid foreign company viz. M/s Marsh Canada Ltd outside India and was not received in India. Since the aforementioned foreign company viz. M/s Marsh Canada Ltd. did not carry on any operations in India, hence in the absence of any income having accrued or arisen to it in India under Sec. 9 of the Act, no liability was cast upon it to deduct tax at source under Sec. 195 while remitting the aforesaid amount. Alternatively, it was submitted by the assessee that even if the re-insurance

premium paid by the assessee to M/s Marsh Canada Ltd. was to be considered as taxable in India under Sec. 9 of the Act, the taxability of the same would be governed by the India-Canada DTAA. In the backdrop of its aforesaid contention it was submitted by the assessee that as per the India–Canada tax treaty the business profits of a Canadian Enterprise were taxable in India only to the extent the same were directly or indirectly attributable to its Permanent Establishment (for short 'PE') in India. On the basis of its aforesaid deliberations it was submitted by the assessee that as the aforesaid concern viz. M/s Marsh Canada Ltd. did not have a PE in India, therefore, its profit from the business of re-insurance even on the said count could not be brought to tax in India.

(B) M/s Fair Isaac International Corpn:

The A.O observed that the assessee had made the following remittances to the aforementioned foreign concern viz. M/s Fair Isaac International Corporation without deduction of tax at source:

Sr. No.	Name of the beneficiary	Date	Amount in USD	Nature of remittance
1.	M/s Fair Isaac International Corpn.	30.05.2008	15000	Licence fees
2.	M/s Fair Isaac International Corpn.	29.08.2008d	35000	Licence fees
3.	M/s Fair Isaac International Corpn.	27.12.2008	50000	Licence fees
4.	M/s Fair Isaac International Corpn.	05.01.2009	17974.41	Training & reimbursement of expenses
5.	M/s Fair Isaac International Corpn.	13.03.2009	15000	Maintenance fees

(i) It was submitted by the assessee that the taxability of payment of licence fee of USD 100,000 by the assessee to the aforementioned foreign concern viz. M/s Fair Isaac International Corporation was to be considered under the Income Tax Act and the provisions of the India–USA DTAA. The assessee submitted that it had only acquired a copy of the copyrighted article i.e "Blaze advisor" software, the copyright of which had remained with

the aforementioned concern viz. M/s Fair Isaac International Corporation and was not transferred to the assessee. It was the claim of the assessee that the copyright of the software was not transferred by M/s Fair Isaac International Corporation and it had merely purchased a copy of the copyrighted article viz. a computer program i.e "Blaze advisor" software. On the basis of the aforesaid facts, it was the claim of the assessee that as the payment made to the aforementioned foreign company viz. M/s Fair Isaac International Corporation was not covered by the definition of "Royalty", both under the Act and the India–USA tax treaty, hence the said payment was not liable to be taxed as "Royalty". Alternatively, it was further submitted by the assessee that as M/s Fair Isaac International Corporation did not have a PE in India, hence the remittance made by the assessee to the said foreign concern being the latters business profits under Article 7 of the India-USA Tax Treaty could not be brought to tax in India. In the backdrop of the aforesaid facts it was the claim of the assessee that as the income of M/s Fair Isaac International Corporation was not liable to be taxed in India, hence no tax was deducted at source by the assessee at the time of making the remittance of the aforesaid amount.

(iii) That as regards the remittances of US $ 15,000 made by the assessee to M/s Fair Isaac International Corporation towards 'maintenance fees', it was submitted by the assessee that the same pertained to the annual maintenance and support services provided by M/s Fair Isaac International Corporation for the "Blaze advisor" software which was purchased by the assessee company from the said foreign concern. It was submitted by the assessee that as the maintenance services rendered by M/s Fair Isaac International Corporation did not "make available" technology etc., therefore, the remittance made by the assessee as regards the same did not fall within the sweep of Article 12 of the India-USA Tax Treaty. It was thus the claim of the assessee that as the payment made towards maintenance and support services to M/s Fair Isaac International Corporation was not by way of "fees of included services" but were its business profits under Article 7 of the India-USA Tax Treaty, the same in the absence of the latters PE in

India could not be brought to tax in India. On the basis of the aforesaid submissions, it was the claim of the assessee that as the annual maintenance and support services received by M/s Fair Isaac International Corporation were not liable to tax in India, hence no tax was deducted at source by the assessee.

(IV) Training & Reimbursement Expenses:

It was submitted by the assessee that an amount of USD 17974.41 remitted to M/s Fair Isaac International Corporation was on two counts viz. (i) an amount of USD 14,000 was remitted to M/s Fair Isaac International Corporation towards 'training fees' for using blaze advisor software; and (ii) an amount of USD 3974.41 was remitted to M/s Fair Isaac International Corporation towards reimbursement of the travelling expenses of the latters employees on their visit to India. It was the claim of the assessee that as the payment of USD 14,000 towards training fees did not "make available" technology etc. as defined in Article 12(4)(b) of India-USA treaty, therefore, the same could not be characterised as rendering of technical or consultancy services by the said concern to the assessee.

3. On the basis of the aforesaid facts, the assessee taking support of the order of the ITAT, Delhi in the case of Infrasoft Ltd. Vs. ADIT (2009) 125 TTJ 53 (Delhi) submitted before the A.O that the licence fee could not be held as royalty either under the Act or under the India-USA DTAA, while for the other receipts on account of maintenance charges and training fees, being incidental to the software licence receipts would also assume the same character as that of a software licence receipts and would be in the nature of business profits under Article 7 of the India-USA tax treaty. In the backdrop of the aforesaid contentions, it was the claim of the assessee that as the aforementioned concern viz. M/s Fair Isaac International Corporation did not have PE in India, therefore, the maintenance fees and training fees being incidental to the software licence were also not liable to tax in India as business profits. As regards the balance payment of USD 3974.71 it was submitted by the assessee that as the same were towards reimbursement of

pocket expenses which included air tickets, meals, hotel and lodging etc. which were reimbursed at actual cost and were not in the nature of income, thus the same were not liable for being brought to tax in India.

4. The A.O after deliberating on the contentions of the assessee was however not persuaded to be in absolute agreement with the same. Being of the view that the remittance of USD 100,000 made by the assessee to M/s Fair Isaac International Corporation towards 'license fees' was by way of "royalty" and thus taxable in India, the A.O held a conviction that the assessee remained under a statutory obligation to have deducted tax at source under Sec. 195 on the said amount. Observing, that the assessee had neither withheld the tax while making the remittance nor obtained a certificate for non-deduction of tax at source under Sec. 197 of the Act the A.O held the assessee as being in default within the meaning of Sec. 201 of the Act and raised a demand of Rs. 8,15,239/- towards tax under Sec. 201(1) and Rs. 1,33,065/- in respect of interest under Sec. 201(1A) of the Act in the hands of the assessee.

5. Still further, the A.O being of the view that as the remittances of USD 14,000 and USD 15,000 by the assessee to M/s Fair Isaac International Corpn. towards "training fees" and "maintenance charges", respectively, were for rendering of technical or consultancy services in order to enable the assessee to operate the software for its intended purpose, thus the same did fall within the sweep of "fees of included services" as contemplated in Article 12 of the India-USA Tax Treaty and the assessee remained under a statutory obligation to have withheld tax under Sec.195 in respect of the said payments. On the basis of his aforesaid observations, the A.O being of the view that the assessee had failed to deduct tax at source as required under Sec. 195 of the Act, held the latter as being in default within the meaning of Sec.201 of the Act. In the backdrop of the aforesaid observations the A.O raised a demand of Rs.2,56,673/- towards tax under Sec. 201(1) and an amount of Rs.33,217/- in respect of interest under Sec. 201(1A) of the Act.

6. Aggrieved, the assessee carried the matter in appeal before the CIT(A). The CIT(A) after deliberating on the contentions advanced by the assessee was however not persuaded to subscribe to the same and dismissed the appeal.

7. The assessee being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. The ld. Authorized Representative (for short 'A.R') for the assessee at the very outset of the hearing of the appeal submitted that the CIT(A) had erred in holding the assessee as being in default under Sec. 201 in respect of remittances made to M/s Fair Isaac International Corpn. viz. (i) license fees: USD 100,000; (ii) training fees : USD 14,000; and (iii) maintenance fees: USD 15,000. The ld. A.R taking us through the copy of the "Fair Isaac Order Form" (Page 1) of the assesses 'Paper book' (for short 'APB') submitted that the remittance of USD 100,000 was made by the assessee to M/s Fair Isaac International Corpn. by way of consideration for grant of non-exclusive, non-transferable, non-assignable, and non-sublicenseable license to use the Fair Isaac Software Products viz. "Blaze Advisor" software. It was averred by the ld. A.R that as the consideration paid by the assessee was not for use of copyright but for acquiring the copyrighted article i.e. software, therefore, the lower authorities failing to appreciate that the same was not covered by the definition of "Royalty" both under the Act and the India-USA tax treaty had erred in holding that the assessee had failed to withhold tax while making the remittance of the said amount. It was further submitted by the ld. A.R that as there was no transfer of right to use the copyright, hence the payment made by the assessee was not covered by the meaning of "royalty" as appearing in Sec. 9(1)(vi) of the Act. The ld. A.R further averred that the lower authorities had erred in holding the remittance of "maintenance fees" of USD 15,000 by the assessee to M/s Fair Isaac International Corpn. as being in the nature of "fees of included Services" as defined in the India-USA Tax Treaty and therein holding the assessee as being in default for failing to withhold tax while making the remittance of the said amount. It was averred by the ld. A.R that as the aforesaid payment was not chargeable to tax in

India under the India-USA tax treaty, hence the lower authorities had wrongly held the assessee as being in default under Sec. 201 of the Act. It was further submitted by the ld. A.R that the lower authorities while concluding as hereinabove had failed to appreciate that as no technology was made available by M/s Fair Isaac International Corpn. while providing the maintenance services to the assessee, thus the same could not be brought within the meaning of "fees of included services" as defined under the Article 12 of the India-USA tax treaty. It was the contention of the ld. AR that though the remittances made by the assessee towards maintenance services fell within the sweep of business profits under Article 7 of the India-USA Tax Treaty, however the same in the absence of a PE of M/s Fair Isaac International Corpn. in India could not be brought to tax in India. The ld. A.R further adverting to the remittances of "training fees" of USD 14,000 by the assessee to M/s Fair Isaac International Corpn. submitted that the lower authorities had erred in concluding that the assessee was to be held as an assessee in default under Sec. 201 for not having deducted tax at source while remitting the said amount. It was averred by the ld. A.R that as the training services provided by M/s Fair Isaac International Corpn. to the assessee did not "make available" any technology to the latter, hence the same was not covered by the meaning of "fees of included services" as defined in the India-USA Tax Treaty. It was further submitted by the ld. A.R that as M/s Fair Isaac International Corpn. had no PE in India, therefore, the remittance towards training fees also could not be assessed as the its business profits under Article 7 of India-USA Tax Treaty. The ld. A.R relying on the judgment of the Hon'ble High Court of Delhi in the case of DIT Vs. Infrasoft Ltd. (2014) 264 CTR 329 (Delhi) submitted that the amount received by M/s Fair Isaac International Corpn. for granting licence to the assessee to use its copyrighted software for the latters internal business purpose only could not be brought to tax as "royalty" under Article 12(2) of the India-USA Tax Treaty. The ld. A.R in order to support his aforesaid contention also placed reliance on host of other judicial pronouncements. In the backdrop of his aforesaid contention it was the claim of the ld A.R that as the assessee was under no statutory obligation to deduct tax at source on

the remittances made to M/s Fair Isaac International Corpn. for grant of licence to use its copyrighted software viz. "Blaze advisor" software for its internal business purpose only, hence no obligation was cast upon the assessee to withhold tax on the said amount. The ld. A.R further adverting to the remittances made by the assessee to M/s Fair Isaac International Corpn. towards "training fees" and "maintenance fees" submitted that as the same were incidental to the software receipts, thus the same would assume the same character as that of software receipts and would be liable to be taxed accordingly. The ld. A.R in order to drive home his aforesaid contention relied on the order of the ITAT Delhi Bench "F" in the case of Infrasoft Ltd. Vs. ADIT, Circle 2(2), Delhi (2009) 125 TTJ 53 (Delhi). Still further, the ld. A.R in support of his contention that the remittances made by the assessee to M/s Fair Isaac International Corpn. for providing maintenance and other support services to customers in India were not taxable as "royalty" in terms of Sec. 9(1) as well as Article 12 of India-USA tax treaty, relied on the order of a coordinate bench of the Tribunal viz. ITAT Delhi "C" in the case of Halliburton Export Inc. Vs. ADIT (2015) 152 ITD 803 (Del). Per contra, the ld. Departmental Representative (for short D.R) relied on the order passed by the CIT(A) and submitted that as the assessee had failed to deduct tax at source while making the remittances to M/s Fair Isaac International Corpn., therefore, the lower authorities had rightly held it as being in default under Sec. 201 of the Act.

8. We have heard the authorised representatives for both the parties, perused the orders of the lower authorities and the material available on record. We shall first advert to the remittance of USD 100,000 made by the assessee towards licence fees to M/s Fair Isaac International Corpn. We have perused the copy of the agreement entered into by the assessee with M/s Fair Isaac International Corpn i.e "Fair Isaac Order Form-Blaze Advisor", dated 31.03.2008. We find that the assessee had entered into the aforesaid agreement with M/s Fair Isaac International Corpn. for acquiring a non-exclusive, non-transferable, non-assignable and a non-sublicenseable license to use the Fair Isaac Software Product viz. "Blaze Advisor" software

for its internal business purposes, subject to host of additional terms and limitations contemplated in the body of the said agreement. We are of the considered view that from a perusal of the agreement it can safely be gathered that the assessee had made the remittance of USD 100,000 to M/s Fair Isaac International Corpn. for grant of license to use its copyrighted software viz. "Blaze Advisor" software for its internal business purposes. We further find from a perusal of the agreement that the assessee was clearly divested of all its rights to either transfer, assign and sub-license the said software. We are of the considered view that there is a clear distinction between royalty paid on transfer of copyright right and consideration for copyrighted articles. In our considered view the right to use of 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. Rather, we are of a strong conviction that for enjoyment of some or all the rights which the copyright owner has is necessary to invoke the royalty definition. In the backdrop of our aforesaid observations we are of the considered view that a non-exclusive and non-transferable license enabling the use of a copyrighted product cannot be construed as an authority to enjoy any or all of the enumerated rights ingrained in Article 12 of India-USA DTAA. Rather, where the purpose of the license or the transaction is only to restrict the use of the copyrighted product for internal business purpose of the licensee, it would not be legally correct to state that the copyright itself or right to use copyright has been transferred to any extent. We thus, finding ourselves to be in agreement with the contention advanced by the ld. A.R that as the assessee had only been granted a non-exclusive and non-transferable license to use the copyrighted article i.e "Blaze advisor" software by M/s Fair Isaac International Corpn. which had retained with itself the copyrights of the same, therefore, the amount received by the licensor viz. M/s Fair Isaac International Corpn. from the assessee did not give rise to any royalty income within the meaning of Article 12(3) of the India-USA tax treaty. We find that our aforesaid view stands fortified by the judgment of the Hon'ble High Court of Delhi in the case of DIT Vs. Infrasoft Ltd. (2014) 264 CTR 329 (Del), wherein it has been held that the amount received pursuant to

granting of license to use the copyrighted software for the licensees own business could not be brought to tax as "royalty" under Article 12(3) of the India-USA tax treaty. Still further, we find that the aforesaid view of the Hon'ble High Court of Delhi In the case of Infra soft Ltd. (supra) had recently been followed by a coordinate bench of the Tribunal viz. ITAT "C" bench, Mumbai in the bunch matters in the case of a group concern of the assessee i.e DDIT, Mumbai Vs. Reliance Communications Ltd. (ITA No. 837/Mum/2007; dated 02.02.2018). In the aforementioned case the Tribunal had observed that as the payment made by the assessee was for copyrighted article i.e software and there was no transfer of copyright of the software in any manner, thus the same did not amount to royalty within the definition of Article 12/13(3) of the respective tax treaties and resultantly the assessee remained under no obligation to deduct tax at source while making the remittances. We thus respectfully following the view taken by the Hon'ble High court of Delhi in the case of DIT Vs. Infrasoft Ltd. (2014) 264 CTR 329 (Del), therein conclude that the remittance of USD 100,000 made by the assessee to M/s Fair Isaac International Corpn. for grant of license to the assessee to use its copyrighted product viz. "Blaze Advisor" software for its internal business purposes only could not be brought to tax as "royalty" under Article 12(3) of the India-USA DTAA. We thus, in terms of our aforesaid observations conclude that as no liability was cast upon the assessee to deduct tax at source at the time of making of the aforesaid remittance, hence the latter cannot be held as being an assessee in default within the meaning of Sec 201 of the Act. The **Grounds of appeal No. 1 and 2** raised by the assessee are resultantly allowed.

9. We shall now advert to the contention of the assessee that as the remittance of USD 15,000 made towards "maintenance fees" of software to M/s Fair Isaac International Corpn. was not chargeable to tax under the India-USA Tax Treaty, therefore, the lower authorities had erred in holding the assessee as being in default within the meaning of Sec. 201 of the Act. We have deliberated at length on the issue under consideration and find ourselves to be in agreement with the contention of the ld. A.R that as the

maintenance services of the software provided by Fair Isaac International Corpn. did not "make available" any technology to the assessee, hence the payment made for providing such services was not covered within the meaning of "fees of included services" as defined in the India-USA Tax Treaty. Still further, we are also of the view that as M/s Fair Isaac International Corpn. did not have a PE in India, hence its business profits from rendering the maintenance services also could not be brought to tax in India under Article 7 of India-USA Tax Treaty. We may herein observe that our aforesaid view stands fortified by the order of the ITAT Delhi Bench "F" in the case of Infrasoft Ltd. Vs. ADIT, Circle 2(2) (I.T), New Delhi (2009) 125 TTJ 53(Del). In the aforementioned order the Tribunal had observed that as the maintenance charges were incidental to the software receipts, hence the same being of a similar character as that of software receipts were thus liable to be taxed accordingly. We may herein observe that the aforesaid order of the Tribunal had thereafter been approved by the Hon'ble High Court of Delhi in the case of DIT Vs. Infrasoft Ltd. (2014) 263 CTR 329 (Delhi). We further find that following the aforesaid decision of the Hon'ble High Court of Delhi in the case of Infrasoft Ltd. (supra), the coordinate bench of the Tribunal in the case of Halliburton Export Inc. Vs. ADIT ((I.T.), Circle-1(2) (2015) 152 ITD 803 (Del) has held that payment received by the assessee from sale of software and provision of maintenance and other support services to customers in India were not taxable as royalty in terms of Sec. 9(1)(vi) and Article 12 of the India-USA Tax Treaty. We thus, finding ourselves to be in agreement with the view taken by the aforesaid coordinate bench of the Tribunal respectively follow the same and conclude that as the amount received by M/s Fair Isaac International Corpn. towards maintenance fees from the assessee was not liable to tax under the India-USA Tax Treaty, therefore, the assessee could not have been held as being in default within the meaning of the provisions of Sec. 201 of the Act. The **Ground of appeal no. 3** raised by the assessee is resultantly allowed

10. We shall now advert to the contention of the assessee that as the remittance of USD 14,000 towards "training fees" to M/s Fair Isaac

International Corpn. was not liable to tax under the India-USA Tax Treaty, hence the lower authorities had erred in holding the assessee as being in default within the meaning of Sec. 201 of the Act. We have deliberated at length on the issue under consideration and find ourselves to be in agreement with the contention advanced by the ld. A.R that as the training services provided by M/s Fair Isaac International Corpn did not "make available" any technology etc. to the assessee, therefore, the same was not covered by the meaning of "fees of included services" as defined in the India–USA tax treaty. Rather, we are of the considered view that rendering of the training services by M/s Fair Isaac International Corpn. would also assume the same character as that of the software license receipts, and as such would be in the nature of its business profits under Article 7 of the India – USA tax treaty. However, as M/s Fair Isaac International Corpn. did not have a PE in India, therefore, the training fees received by it also could not be subjected to tax under Article 7 of the India-USA Tax Treaty. Before parting, we may herein observe that our aforesaid view that as the fees pertaining to providing training to employees of the end users of software sold by M/s Fair Isaac International Corpn is ancillary and subsidiary to sale of software, thus the same is to be treated as business receipts under Article 7 of the India-USA Tax Treaty finds support from the order of the Hon'ble High Court of Delhi in the case of DIT Vs. Infrasoft Ltd. (2014) 264 CTR 329 (Del) and the order of a coordinate bench of the Tribunal in Datamine International Vs. Additional DIT(IT) (2016) 158 ITD 84 (Del). We thus, in terms of our aforesaid observations herein conclude that as the assessee was under no obligation to deduct tax at source under Sec. 195 of the Act in respect of the training fees remitted to M/s Fair Isaac International Corpn, therefore, it could not be held as being in default within the meaning of Sec. 201 of the Act for having failed to deduct tax at source while remitting the said amount. The **Ground of appeal No. 4** raised by the assessee is resultantly allowed.

11. The **Grounds of appeal No. 5 and 6** being consequential to the adjudication of the grounds of appeal No. 1 to 4 are thus disposed off in the same terms.

12. The **Ground of appeal No. 7** being general in nature is dismissed as not pressed.

13. The appeal of the assessee is allowed.

Order pronounced in the open court on 23.08.2018

Sd/-	Sd/-
(Shamim Yahya)	(Ravish Sood)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

मुंबई Mumbai; दिनांक 23.08.2018
Ps. Rohit

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**