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

BEFORE SHRI SAKTIJIT DEY, VICE PRESIDENT
AND
SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER

ITA No. 3350/DEL/2023
(Assessment Year : 2021-22

Sumo Logic, Inc. **3rd Floor, 305 Main Street,** **Redwood City, California, Foreign,** **United States.** **C/o Deloitte Haskins & Sells LLP,** **Tower-B, 7th Floor, Building 10,** **DLF Cyber City Complex, Phase-II,** **Gurgaon-122002.**	**Vs.**	**ACIT, Circle Int. Tax 3(1)(2),** **Delhi.**
(PAN: ABECS 9368 P)		
(APPELLANT)		(RESPONDENT)

ASSESSEE BY : Shri Sachit Jolly, Adv. &
Shri Aditya Rathore, Adv.
REVENUE BY : Shri Vijay B Vasanta, CIT DR

Date of Hearing : 03.10.2024
Date of Order : 27.12.2024

O R D E R

PER S. RIFAUR RAHMAN, AM :

1. The captioned appeal preferred by the assessee is directed against the assessment order dated 28.09.2023 passed by the learned Assistant Commissioner

of Income Tax, Circle Int. Tax 3(1)(2), Delhi u/s 143(3) read with section 144C(13) of the Income-tax Act, 1961 (for short 'the Act") for Assessment Year 2021-22. Pursuant to directions of the Dispute Resolution Panel u/s 144C(5) of the Act.

2. Brief facts of the case are, assessee is a company registered in United States of America ("USA" in short), in 2010 in Delaware. The assessee also submitted a tax resident certificate issued by the USA.

3. The assessee operates a cloud-native machine data analytics solution (Sumo Logic Solution). It offers a software platform that enables organizations to address the challenges and opportunities presented by digital transformation, modern applications and cloud computing. It enables to automate the collection, ingestion and analysis of application, infrastructure, security and IT data to derive actionable insights.

4. At the time of assessment, assessee submitted that the receipts received from Indian customers did not constitute consideration for the use or right to use of any copyright or equipment or for information concerning industrial, commercial or scientific knowledge/ experience etc. The receipts are not in consideration of make available any technical knowledge/ skill etc. to the customers. It was submitted that the above said revenues are neither taxable as royalty nor as fees for technical services (FTS) under the Income tax Act, 1961 as well as the India-US tax treaty. The assessee has received following receipts from India:

S. No.	Nature of Receipts	Name of the payer	Amount INR	Taxability
1.	Service fee for providing subscription to Sumo Logic solution	Rupeek Fintech Pvt. Ltd.	9,19,280/-	Not offered to tax
2		Razorpay Software Private Limited	8,04,66,028/-	
3		Ibibo Group Private Limited	2,91,89,924/-	
4.		ANI Technologies Pvt. Ltd.	91,24,314/-	
5.		Open Financial Technologies Pvt. Ltd.	11,49,070/-	
6.		Brain4ce Education Solution Pvt. Ltd.	4,12,116/-	
7.		Camden Town Technologies Pvt. Ltd.	51,94,452/-	
8		Amazon Web Series (Customer)	1,10,16,877/-	
9.		Cars24 Services Pvt. Ltd.	6,26,174	
10.		Minfy	3,77,731/-	
11.		Ethichat cyber Secuurity Pvt. Ltd.	7,53,405/-	
12.		Mahaveer Infoway Limited	12,44,289/-	
13.		Zaloni, Inc	4,36,308	

The total receipts from India for the year under consideration arising out of subscription fee amounting to Rs. 14,09,09,968.

5. Assessee has submitted case study of successful solutions offered to Razorpay, Goibibo and the same are reproduced by the assessing Officer in his order. After considering the submissions of the assessee, the Assessing Officer observed that though the assessee has put in place an elaborate architecture to make available services through technology to the end-user without stating the same explicitly in its End-User Licence Agreement, the underlying information, technology and services are not “standard”. It is evident from the fact that every agreement executed by the assessee contains within it’s a confidentiality clause

which places defined, systematic and extensive restriction on its users as well as resellers on the ways in which they can use the technology/ service so made available to them. The Assessing Officer has reproduced the stated confidential information in his order. Further, Assessing Officer discussed the conduct of the assessee and ways in which taxable presence is adverted in digital business.

6. After elaborately discussing the method of consultancy services, the services rendered outside India, services as standard facility; taxability of income under India-USA DTAA; the issue of technical training provided by the assessee; and the issue of ownership of intellectual property, in his view the income in the hands of the assessee is in the nature of FTS and further observed that from the details of ITRs filed by the assessee that assessee has not paid any tax in India for assessment years 2019-20 to 2021-22 and further observed that tax returns filed by the assessee in USA for the years 2018 to 2020 filed during the course of assessment proceedings shows that the income received from Indian customers and end-users was not effectively taxed in USA. He observed that on perusal of Financial data of the assessee reveals that assessee has shown huge losses in all the years 2019 to 2021. Therefore, it is amply clear that the said income has not suffered tax anywhere, neither in India nor in USA. He also observed that assessee has carried on similar business operations in other countries and it failed to provide the details of tax statement in their source countries on identical transactions.

Accordingly, he treated the income received by the assessee in the nature of consultancy and its taxability as FTS under the provisions of Income-tax Act under the relevant provisions of India-US DTAA. Accordingly, he made the addition of Rs. 14,09,09,968/-.

7. Further, proposed above income to the tax as FTS @ 10% on the other provisions of Income tax and India-US DTAA.

8. Aggrieved, with the above order assessee preferred objections before learned Dispute Resolution Panel-2 ("DRP" in short), New Delhi. The learned DRP has dismissed the grounds of objections raised by the assessee. Accordingly, final assessment order was passed dated 28.09.2023. Aggrieved with the above order assessee is in appeal before us.

9. At the time of hearing learned AR brought to our notice findings of the Assessing Officer in final assessment order and submitted that the assessee has developed software generated data at machine language and its recurring services offered to the clients in India on monthly and quarterly basis. Further, he brought to our notice observations of the Assessing Officer that the foreign AE makes losses globally, therefore, income earned in India are not subjected to tax effectively, therefore, assessee is not eligible. Further, he brought to our notice directions of the learned DRP and further submitted that there is no findings given by the learned DRP. In this regard, he brought to our notice page 18 of the case law

paper book, which is the decision of the Hon'ble Supreme Court in the case of Azadi Bachao Andolan (2003) 263 ITR 706 (SC) in which Hon'ble Court has discussed the issue of physical residence. Further, he brought to our notice various observations of the Hon'ble Court decision of the Indian Authority for Advance Ruling in Mohsinally Alimohammed Rafik and finally it is held that it is, therefore, not possible for us to accept the contentions so strenuously urged on behalf of the respondents that avoidance of double taxation can arise only when tax is actually paid in one of the Contracting States. Further, he brought to our notice page 120 of the paper book, which is a copy of the tax resident certificate submitted by the assessee and it was filed before lower authorities. Further, he brought to our notice page 144 of case law paper book and he brought to our notice findings of the Hon'ble Delhi High Court in the case of International Management Group (UK) Ltd. v. CIT (2024) 466 ITR 514 in which Hon'ble Court has observed that "as we read article 13(4)(c) of the Double Taxation Avoidance Agreement, it becomes manifest that the mere furnishing of service would not suffice and a liability of tax would be triggered only if the technical or consultancy service were coupled with a transfer of the expertise itself. The expression "make available" must be construed as an enablement, conferral of knowledge and which would lead to the payer becoming skilled to perform those functions independently. Therefore, he submitted that without the presence of "make available" there is no transfer of

technology. Further, he relied on the decision of the ITAT in the case of Coursera Inc. v. ACIT in ITA nos. 2416 & 3646/Del/2023 dated 21.08.2024; decision of ITAT in Mixpanel Inc. v. ACIT (pages 192 to 200 of case law paper book) and he prayed that the assessee has not rendered any service to the customers in India and has not transferred any technology which will fall under the category of FTS.

10. On the other hand, learned DR relied on the detailed findings of the Assessing Officer and DRP.

11. Considered the rival submissions and material placed on record. We observe that assessee has provided cloud-native machine data analytics solution to various customers in India on the basis of monthly/ quarterly. Further, it was brought to our notice that assessee has not made available the relevant technology nor transferred the same to its customers in India. We further notice that assessee also filed tax resident certificate before the lower authorities. The Assessing Officer considered the submissions of the assessee and he merely observed that global income of the parent company is loss, therefore, he was of the opinion that the income derived by the assessee in India were not offered to tax effectively and he further observed that there is no evidence to show that the relevant income was offered to tax anywhere outside India. He also rejected TRC certificate submitted by the assessee and proceeded to treat the income derived by the assessee in India as taxable in India as FTS. After careful consideration we observe that similar

issue was considered by the Coordinate Bench in Coursera Inc. (supra), wherein coordinate Bench has considered the similar issue/ facts on record, for the sake of brevity, we reproduce the facts and findings of the Bench as under:

> "*4. Briefly the facts are, the assessee is a non-resident corporate entity incorporated in United States of America (USA) and a tax resident of USA. As stated, the assessee operates a global online learning platform, which offers anyone, anywhere access to online courses and degrees from leading universities and companies. For this purpose, the assessee has developed a proprietary platform to host multimedia courses for consumption by end-users. Through its platform, assessee offers online education/courses in various disciplines, including but not limited to management, arts, humanities, data analysis and philosophy etc. For this purpose, the assessee has entered into agreements with Indian customers including universities from outside India to provide access to its platform in India. The assessee had provided services to individuals, educational institutions and corporates. For providing such services, the assessee had earned fees of Rs. 75,66,52,591/-. In the return of income filed for the assessment year under dispute, the assessee had offered income of Rs. 17,98,07,270/-.*
>
> *5. However, as far as the receipts of Rs.75,66,52,591/-, the assessee claimed that such receipts are neither in the nature of royalty nor FIS, hence, not taxable in India. The Assessing Officer, however, was not convinced with the submission of the assessee. After verifying the agreements with one of the Indian customers, viz., Gandhi Institute of Technology and Management, the Assessing Officer observed that the assessee provides two types of services, such as, Content Services and User Services. He observed, under the User Services, the assessee provides (i) customized landing page featuring the Organization logo and selected courses, (ii) user engagement reports, (iii) payment solution(s) that allow users to seamlessly access premium course experiences and skip checkout, and (iv) enterprise-level user support. Whereas, Content Services means, access to assessee's course and/or Specialization certificate services, including access to course assessments and grades through online open content offerings.*
>
> *…… ……. .*
>
> *11. We have considered rival submissions in the light of decisions relied*

upon and perused the materials on record. Insofar as the activity of the assessee is concerned, it is established on record that the assessee provides a global online learning platform, wherein, various courses and degrees from leading universities and companies are provided. It is a fact on record that the contents of such courses and degrees are created by the concerned universities and companies and not by the assessee. The assessee acts as a mere facilitator between the concerned university/companies and the customers who want to undertake the courses of the concerned university/companies.The assessee merely provides access to the contents of the universities/companies through the platform on receipt of fees.

12. In fact, the Assessing Officer in the draft assessment order has clearly observed that the assessee is not an educational institution but an aggregation service provider, which brings educational learning on one platform. He has further stated that the course contents were not created by the assessee, but by the educational institutions. The customers who want to undertake course/degree get access to the contents/study materials through the platform provided by the assessee. Tests/examinations are also conducted by the concerned universities and companies and not by the assessee. Certificate for completion of course/degrees are also issued by the concerned universities/companies along with the logo of the assessee. These facts clearly indicate that while providing access to various courses/degrees, the assessee does not provide services of technical nature to the customers. In fact, while disposing of the objections raised by the assessee against the draft assessment order, learned DRP has clearly observed that the Assessing Officer has neither properly examined the agreement with Gandhi Institute of Technology and Management, nor has factually examined assessee's contention that the terms and conditions of the agreement do not make the assessee a technical service provider. However, while passing the final assessment order, the Assessing Officer has completely ignored the directions of learned DRP. This is evident from the following observations of the Assessing Officer in the final assessment order

> *"13. In response to the directions of Hon'ble DRP, the agreement of the assessee with GITAM was perused. It is seen that the observations regarding the agreement of the assessee with GITAM has been discussed in the Draft assessment order (refer to para 8.2 and 8.3). Accordingly, the final assessment order is being passed at total assessed income of Rs. 75,66,52,591/- taxable at as per provisions of*

the Income Tax Act, 1961 and applicable surcharge and cess. Necessary forms to be issued, applicable interest to be charged and credit of taxes, if any after verification from the ITD system are to be allowed. Penalty u/s 270A is being proposed to initiate as discussed in earlier paragraphs of the order. Detailed computation of tax payable and interest charged u/s 234A, 234B and 234C of the Act is being attached as part of the final order. Notice of demand is being issued."

…….

14. Be that as it may, Assessing Officer's findings/observations on the role of assessee are self-contradictory. While on one hand, the Assessing Officer has acknowledged the fact that the assessee is an aggregation service provider and not a content creator, in the same breath, he says that assessee's contention that it is a mere aggregator of educational courses is not correct. The Assessing Officer has not brought on record any material to establish the fact that the assessee provides technical services through its online platform. Merely because the assessee has a customized landing page, it does not mean that the assessee provides technical services, that too, through human intervention. The Assessing Officer, in our view, has not been able to prove such fact. Even, assuming for argument's sake, the services provided by the assessee is of technical nature, that by itself would not be enough to bring such receipts within the purview of Article 12(4) of India USA DTAA, unless the make available condition is satisfied. Burden is entirely on the Revenue to prove that in course of rendition of services, the assessee has transferred technical knowledge, know-how, skill etc. to the service recipient, which enables him to utilize such technical knowledge, know-how, skill etc. independently without aid and assistance of the service provider.

15. In case of Elsevier Information Systems GmbH Vs. DCIT (supra), wherein identical nature of dispute was involved, the Coordinate Bench has held as under:

"15. A customer/subscriber can access the data stored in the database by paying subscription. The Department held the subscription paid to Dun & Brad Street Espana, S.A., for accessing the data to be in the nature of royalty. The Authority for Advance Ruling after dealing with the issue ultimately concluded that the subscription received by Dun & Brad Street Espana, S.A., for allowing access to the database is not

in the nature of royalty/fees for technical services. Following the aforesaid decision, the Tribunal, Ahmedabad Bench, in ITO v/s Cedilla Healthcare Ltd. [2017] 77 taxmann.com 309, while considering the nature of subscription paid to a U.S. based company viz. Chemical Abstract Services, which is in the same line of business and is stated to be the competitor of the assessee, held that the subscription paid for online access to the database system "scifinder" is not in the nature of royalty. The observations of the Tribunal, while deciding the issue in favour of the assessee, are as under:-

> *"17. We find that as the treaty provision unambiguously requires, it is only when the use is of the copyright that the taxability can be triggered in the source country. In the present case, the payment is for the use of copyrighted material rather than for the use of copyright. The distinction between the copyright and copyrighted article has been very well pointed out by the decisions of Hon'ble Delhi High Court in the case of DIT v. Nokia Networks OY [2013] 358 ITR 259/212 Taxman 68/25 taxmann.com 225. In this case all that the assessee gets right is to access the copyrighted material and there is no dispute about. As a matter of fact, the AO righty noted that 'royalty' has been defined as "payment of any kind received as a consideration for the use of, or right to use of, any copyright of literary, artistic or scientific work" and that the expression "literary work", under section 2(0) of the Copyright Act, includes 'literary database' but then he fell in error of reasoning inasmuch as the payment was not for use of copyright of literary database but only for access to the literary database under limited non exclusive and non transferable licence. Even during the course of hearing before us, learned Departmental Representative could not demonstrate as to how there was use of copyright. In our considered view, it was simply a case of copyrighted material and therefore the impugned payments cannot be treated as royalty payments. This view is also supported by Hon'ble Bombay High Court's judgment in the case of DIT (International Taxation) v. Dun & Bradstreet Information Services India (P.) Ltd.*

16. The same view was again expressed by the Tribunal in DCIT v/s

Welspun Corporation Ltd., (2017) 77 taxmann.com 165. If we examine the facts of the present appeal in juxtaposition to the facts of the decisions referred to herein before, it can be seen that the facts are almost identical and akin. In the referred cases the assessees were also maintaining databases of information collated from various journals and articles and allowed access to the users to use such material as required by them. Keeping in view the ratio laid down in the decisions (supra), the payment received by the assessee has to be held to have been received for use of copyrighted article rather than for use of or right to use of copyright.

17. Having held so, the next issue which arises for consideration is, whether the subscription fee can be treated as fees for technical services. As discussed earlier, it is evident that the assessee has collated data from various journals and articles and put them in a structured manner in the database to make it more user friendly and beneficial to the users/customers who want to access the database. The assessee has neither employed any technical/skilled person to provide any managerial or technical service nor there is any direct interaction between the customer/user of the database and the employees of the assessee. The customer/user is allowed access to the online database through various search engines provided through internet connection. There is no material on record to demonstrate that while providing access to the database there is any human intervention. As held by the Hon'ble Supreme Court in CIT v/s Bharati Cellular Ltd., (2010) 193 taxman 97 (SC) and DIT u/s A.P. Moller Maersk A.S., [2017] 392 ITR 186 (SC), for providing technical/managerial service human intervention is a sin qua non. Further, Article-12(4) of India-Germany Tax Treaty provides that payment for the service of managerial, technical or consultancy nature including the provisions of services by technical or other personnel can be termed as fees for technical services. None of the features of fees for technical services as provided under Article 12(4) of the India- Germany Tax Treaty can be found in the subscription fee received by the assessee. Further, the Department has not brought any material on record to demonstrate that the assessee has employed any skilled personnel having knowledge of chemical industry either to assist in collating articles from journals / magazines which are publicly available or through them the assessee provides instructions

to subscribers for accessing the online database. The assessee even does not alter or modify in any manner the articles collated and stored in the database. In the aforesaid view of the matter, the subscription fee received cannot be considered as a fee for technical services as well. By way of illustration we may further observe, online databases are provided by Taxman, CTR online, etc. which are accessible on subscription not only to professionals but also any person who may be having interest in the subject of law. When a subscriber accesses the online database maintained by Taxman/CTR online etc. he only gets access to a copyrighted article or judgment and not the copyright. Similar is the case with the assessee. Therefore, in the facts of the present case, the subscription fee received by the assessee cannot be treated as royalty under Artile-12(3) of India-Germany Tax Treaty."

16. Similar view was expressed by another Coordinate Bench in case of Relx Inc. Vs. ACIT (supra). In our view, the ratio laid down in these decisions squarely apply to the facts of the present appeal. In view of the aforesaid, we hold that the receipts do not qualify as FIS under Article 12(4) of India - USA tax treaty. 17. Thus, our decision above, would apply mutatis mutandis to ITA No. 3646/Del/2023 as well."

12. The above decision squarely applies to assessee's facts. We observe that the assessee has submitted TRC and also offered income generated in India in the resident country and offered the same as income and it does not make any difference whether the global income assessed to tax are income or loss, as long as, the income generated are offered in the resident country as business income which is the requirement of law. In view of the above discussions we hold that receipt did not qualify as FTS under Article 12(4) of the India-US tax treaty. Thus, grounds of appeal nos. 1 to 6 filed by the assessee are allowed.

13. With regard to ground no. 7, the issue of TDS credit, we observe that TDS

granted by the Assessing Officer and claimed by the assessee are different. We direct the Assessing Officer to verify the same and allow the same as per law.

14. With regard to ground no. 8, it is consequential in nature, the same is not adjudicated at this stage.

15. Similarly in ground no.9 assessee has raised the issue that Assessing Officer has erred in holding that he has refunded Rs. 2,69,343/-. However, assessee denies the same as no such refund was granted. This issue is also remitted back to Assessing Officer to verify the same and allow after verification as per law.

16. With regard to ground no. 10 on initiation of penalty u/s 270A of the Act, since it is premature ground, accordingly dismissed.

17. In the result, appeal of the assessee is partly allowed as indicated above.

Order pronounced in the open court on this 27th day of December, 2024.

Sd/-	**sd/-**
(SAKTIJIT DEY)	**(S. RIFAUR RAHMAN)**
VICE PRESIDENT	**ACCOUNTANT MEMBER**

Dated : 27.12.2024
MP
Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)-26, New Delhi.
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI