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

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

ITA Nos.2705 & 3526/Del/2023
Assessment Years:2020-21 & 2021-22

Tricentis Gmbh, Tricentis Gmbh, 10 Leonard Bernstein Strasse Saturn Tower, Vienna, Austria	**Vs.**	The DCIT, Circle – International Tax - 3(1)(1), New Delhi
PAN :AAECT9861B		
(Appellant)		**(Respondent)**

Assessee by	Sh. Percy Pardiwalla, Sr. Advocate Sh. Ketan Ved, CA
Department by	Sh. Vijay B. Vasanta, CIT(DR)

Date of hearing	08.10.2024
Date of pronouncement	06.11.2024

ORDER

PER SAKTIJIT DEY, VICE-PRESIDENT

Captioned appeals have been filed by the assessee challenging the final assessment orders passed under section 143(3) read with section 144(C)(13) of the Income-tax Act, 1961 (in short 'the Act') pertaining to assessment years 2020-21 and 2021-22, in pursuance to directions of learned Dispute Resolution Panel (DRP).

2. Grounds raised in both the appeals are more or less identical, except variation in figures. Ground No. 1, being a general ground, does not require adjudication. In ground no. 2 of both the appeals the assessee has challenged validity of the assessment orders.

3. Learned counsel appearing for the assessee submitted that the assessee is a foreign company, as per the definition provided under the Act. He submitted, as per notification F. No. 187/3/2020-ITA-1, dated 31st March, 2021 issued by Central Board of Direct Taxes (CBDT), assessment proceedings for a foreign company cannot fall within the purview of faceless assessment scheme prescribed under section 144B of the Act. Whereas, he submitted, notice under section 143(2) of the Act was issued by National Faceless Assessment Centre. Thus, he submitted, in terms with CBDT Notification, on the date of issue of notice under section 143(2) of the Act, National Faceless Assessment Centre did not have jurisdiction to initiate assessment proceedings. Thus, he submitted, the assessment orders passed in pursuance to an invalid notice issued under section 143(2) of the Act, are equally invalid, hence, deserve to be

quashed. However, he fairly submitted that Hon'ble Karnataka High Court in case of Adarsh Developers Vs. DCIT, [2024]158 taxmann.com 81 (Karnataka) has taken a view against the assessee.

4. Learned Departmental Representative submitted that there is no lack of authority/jurisdiction on the part of National Faceless Assessment Centre in issuing notice under section 143(2) of the Act. In support, he relied upon Notification No. F. No. 225/91/2022/ITA-II, dated 28.05.2022. Thus, he submitted, assessee's submission does not merit consideration.

5. Having considered rival submissions, we find, the issue is squarely covered against the assessee by the decision of the Hon'ble Karnataka High Court in case of Adarsh Developers Vs. DCIT (supra). No other contrary decision was brought to our notice by either of the parties. Since, above mentioned decision is the only decision of High Court available before us, respectfully following the ratio laid down therein, we hold that the impugned assessment orders are valid. Accordingly, ground no. 2 in both the appeals are dismissed.

6. In ground nos.3 to 10 in ITA No. 2705/Del/2023 and ground nos.3 to 11 of ITA No.3526/Del/2023, the assessee has challenged the taxability of income earned from sale of software license as business income.

7. Briefly the facts relating to this issue are, the assessee is a non-resident corporate entity incorporated in Austria and a tax resident of Austria. As stated by the Departmental Authorities, the assessee is engaged in the business of providing software quality assurance solutions by selling licenses of its testing software, such as, Tosca, Flood, qTest etc. to various customers across the world, including India. In the assessment years under dispute, the assessee had earned income from third party customers in India for providing End User Licences (EULS) of its testing software and also from provision of support and consultancy services. In the returns of income filed for the assessment years under dispute, the assessee had offered the income from sale of software license as royalty income. Whereas, it offered income from support services and consulting services as Fee for Technical Services (FTS) under the provisions of India – Austria Double Taxation Avoidance Agreement (DTAA).

Subsequently, the assessee filed revised returns of income claiming exemption from taxation qua the income from sale of EULS, relying upon the decision of the Hon'ble Supreme Court in case of M/s. Engineering Analysis Centre of Excellence Pvt. Ltd. Vs. CIT (Civil Appeal) 8733-8744 of 2018).

8. In course of assessment proceedings, the Assessing Officer called upon the assessee to furnish relevant information regarding sale of software licenses, its business activity as well as various other information. After examining the various details including details of registration of the underlying Intellectual Property (IP), he observed that though the assessee claims itself to be the owner of IPs, however, the majority of patents are registered in various other countries, such as, USA, Austria, UK and Singapore, except three patents registered in Austria. He further observed that in spite of specific query raised for furnishing details of expenses incurred for use/maintenance and development of patents and IPs, the assessee did not furnish the documentary evidences.

9. Referring to OECD Guidelines, the Assessing Officer observed that the economic ownership is decided on the basis of

development, enhancement, maintenance, protection and exploitation functions. He observed, the assessee cannot be taken as the economic owner of the IPs as it failed to substantiate that it performs and controls all development related functions and risks. Thus, he observed that the assessee may be the legal owner of the underlying IPs, however, the assessee visibly lacks economic substance with regard to holding of IPs at the level of Austria. While doing so, he referred to the "substance over form" test in deciding the taxation of cross-border transactions. In this context, he also referred to Base Erosion and Profit Shifting (BEPS) Action Plan 8 – 9. He observed that the economic ownership of the underlying IPs of the end user licenses is based mainly in USA. Whereas, the assessee was incorporated in Austria and the software was contractually transferred to the assessee to undertake sale of such software to customers in various market countries, including India to avoid payment of tax not only in India, but also in USA and Austria.

10. Thus, he observed that the entire arrangement was made for treaty shopping by using base company arrangement. He observed, the income from sale of software licenses should have

been taken into the tax base in the country of economic owner of the IPs i.e. in USA, which taxes its residents on a worldwide basis. He further alleged that even in Austria the assessee does not show any profits but shows losses. Thus, he concluded that the assessee is not a legitimate tax resident of Austria as it has been incorporated with the object of avoiding payment of legitimate tax in India, Austria and USA, through treaty shopping by exploitation of both the tax treaty Rules and favourable domestic tax regime. Hence, he concluded that the assessee is not entitled to take benefit under India – Austria DTAA and its income from sale of software has to be treated as business income in terms of the ratio laid down by the Hon'ble Supreme Court in case of M/s. Engineering Analysis Centre of Excellence Pvt. Ltd. (supra) and has to be brought to tax in India under the provisions of domestic law. He further held that the assessee had business connection in India.

11. Having held so, the Assessing Officer proceeded to compute the profit in relation to sale of software licenses by estimating at 15% and brought such profit to tax by applying the rate of 40% in both the assessment years under dispute.

12. Against the draft assessment orders so passed, the assessee raised objections before learned DRP. While disposing of the objections in assessment year 2020-21, learned DRP directed the Assessing Officer to re-examine claim of treaty benefits keeping in view the additional evidences furnished by the assessee. Whereas, in assessment years 2021-22, learned DRP upheld the view expressed by the Assessing Officer. In terms with the directions of learned DRP, the Assessing Officer finalized the assessments in both the assessment years under dispute by taxing the income from sale of software as business income under the Act denying treaty benefits.

13. Opening his arguments, Sh. Percy Pardiwala, learned Senior Counsel appearing for the assessee submitted that the assessee was in existence and operating in Austria in a non-company form, as early as, the year 1997. He submitted, the assessee was incorporated as company in Austria in the year 2007 and was carrying on the same business of developing and selling various testing software. Thus, he submitted, the allegation of the Departmental Authorities that the assessee was set up without any commercial substance and only for deriving treaty benefits is

a baseless allegation, without being backed by any evidence. In this context, he drew our attention to a certificate of incorporation as company. He submitted, assessee's status as a tax resident of Austria has been duly recognized by the Austrian Revenue Authorities while issuing Tax Residency Certificates (TRC) on year-on-year basis. Thus, he submitted, once the assessee is the holder of a valid TRC, it cannot be denied treaty benefits. To support such proposition, he relied upon the following decisions:

1. *Bid Services Division (Mauritius) Ltd. Vs. Authority for Advance Ruling (Income-tax), [2023] 148 taxmann.com 215 (Bombay).*
2. *Blackstone Capital Partners (Singapore) Vi Fdi Three Pte. Ltd. Vs. ACIT (International Taxation), [2023] 146 taxmann.com 569 (Delhi)*
3. *CIT, International Taxation -3 Vs. SAIF I-SE Investment Mauritius Ltd., ITA 124/2024, dated 19.02.2024 (Delhi High Court)*
4. *Tiger Global International III Holdings Vs. The Authority for Advance Rulings (Income Tax) & Ors., WP(C) 6764/2020 Ors., Judgment dated 28th August, 2024 (Delhi High Court)*

14. Proceeding further, he submitted, the departmental authorities have completely misdirected themselves while holding that the assessee lacks commercial substance and has been formed in Austria to avoid payment of genuine tax liability in India, USA and Austria. He submitted, the assessee has been in operation in Austria since 2007 and continuing with its business

activity. He submitted, the assessee files regular returns of income and is also assessed to tax in Austria. In support of such contention, he drew our attention to the tax returns filed in Austria and the assessment orders passed by the Austrian Revenue Authorities. He submitted, the assessee is also offering all its income including the revenue earned in India and Austria. Thus, he submitted, the allegation of the departmental authorities that the assessee is not offering its income to tax in Austria is contrary to facts on record. In this context, he drew our attention to the financial statements containing balance-sheet and profit and loss account.

15. He submitted, the assessee is in operation in India since the year 2007 and offering the income from sale of software as royalty income under the treaty provisions. He submitted, the department had all along assessed the royalty income under the treaty provisions. He submitted, due to change in legal position, when the assessee claimed the royalty income to be not taxable in India in terms of treaty provisions, the Assessing Officer introduced theory of "substance over form", lack of commercial substance etc. He submitted, the assessee is not only the legal

owner but even the economic owner of all software licenses and registered IPs across various geographical locations. He submitted, once the Assessing Officer accepts the assessee as the legal owner of the IPs, in the same breath, he cannot hold that assessee is not the economic owner but someone else. He submitted, the assessee has furnished substantial evidence before learned DRP and Assessing Officer to demonstrate that it has employed adequate number of employees and incurred expenditure on research and development. He submitted, merely because the IPs are registered in various countries, assessee's ownership over such IPs cannot get divested.

16. He submitted, the assessee, being a legally incorporated entity in Austria having established business operations in Austria and being a recognized tax resident of Austria, is entitled to avail benefits under India – Austria DTAA. He submitted, in assessment year 2021-22, the Assessing Officer has denied treaty benefits to the assessee going beyond the TRC, relying upon two decisions of the Authority for Advance Ruling (AAR), which have subsequently been reversed by the Hon'ble High Courts. Thus, he submitted, the very basis for denying treaty benefits to the

assessee has been knocked down. He submitted, unless the department brings on record strong corroborative evidence to establish that the assessee is a sham/shell company having no legal or commercial substance, the sanctity of the TRC cannot be doubted. Thus, he submitted, the assessee is entitled to avail treaty benefits under which business income is not taxable in absence of Permanent Establishment (PE) in India.

17. Without prejudice, he submitted, even the business income cannot be taxed under the domestic law in terms of section 9(1)(i)of the Act, as, the assessee has sold the software licenses to third party customers in India on principal-to-principal basis from outside India and no part of the sale transaction was carried out in India. In this context, learned counsel drew our attention to Explanation 1(a) of section 9(1)(i) as it existed prior to its amendment by Finance Act, 2020 w.e.f. 01.04.2022. He further submitted, estimation of profit at certain percentage is without any basis. He submitted, while denying treaty benefits, the Assessing Officer has permitted his mind to be clouded by irrelevant materials, such as, BEPS Action Plan. In this context, he drew our attention to a decision of the Coordinate Bench in

case of Additional Director of International Taxation Vs. Baker Hughes [2015] 57 taxmann.com 191 (Delhi – Trib.). He submitted, BEPS Action Plan is a tax policy, which may be relevant to law making, but it cannot have any role in judicial decision making process. Thus, learned counsel submitted, additions made, being unsustainable, should be deleted.

18. Sh. Vijay B. Vasanta, learned CIT(DR), drawing our attention to the observations made by the Assessing Officer as well as learned DRP, submitted that the Assessing Officer has clearly establish on record that the assessee lacks commercial substance to be treated as tax resident of Austria. He submitted, not only majority of the IPs have been registered in jurisdictions outside Austria, but the assessee failed to prove that it has incurred any expense in respect of the IPs registered outside Austria.

19. Thus, facts on record clearly reveal that the assessee has no role to play in development of the software registered outside Austria. He submitted, since, the assessee had a clear tax advantage in Austria, it has been incorporated to derive treaty benefits. Thus, he submitted, the departmental authorities have proceeded in the right direction.

20. We have considered rival submissions in the light of decisions relied upon and perused the materials on record. The short issue arising for consideration is whether the receipts from sale of software licenses to Indian customers is taxable in India as business income. Insofar as the factual aspect of the issue is concerned, there is no dispute that the assessee has been incorporated as a company in Austria in the year 2007. Upon incorporation in Austria, the assessee also started its operations in India since the year 2007. It would be relevant to observe, the ultimate parent company of the assessee is Inside Venture Management LLC, an USA based company.

21. Facts on record reveal that the assessee had been selling testing software licenses to various entities across the globe including the entities in India and from past years and was offering them to tax as royalty income under the respective treaty provisions. Even, in the impugned assessment years, the assessee had sold software licenses to Indian customers and earned revenue. In the original returns of income filed for the current years, the assessee, being unsure about the taxability or otherwise of the receipts from sale of software licenses, offered

them as royalty income. Subsequently, when the legal position regarding non- taxability of copyrighted articles as royalty income became transparent after the decision of the Hon'ble Supreme Court in case of Engineering Analysis Centre of Excellence Pvt. Ltd. (supra), the assessee filed revised returns of income claiming exemption from taxation of the receipts from sale of software licenses, in terms of Article 13 of India – Austria DTAA.

22. Pertinently, the Assessing Officer had no issue regarding taxability of the receipts from sale of software licenses as royalty income under the treaty, till the assessee accepted and agreed to such position. However, once the assessee started claiming exemption under the treaty provisions qua the receipts from sale of software licenses, due to change in legal position, the Assessing Officer also shifted his stance by saying that not only the receipts are in the nature of business income but the assessee is not entitled to treaty benefits. Though, the Assessing Officer had never earlier raised any issue regarding assessee's entitlement to treaty benefits.

23. Undisputedly, in course of assessment proceedings the assessee has furnished all statutorily required documents,

including TRC, for claiming benefits under India – Austria DTAA. The Assessing Officer has denied treaty benefits to the assessee broadly on the following reasons:

(a) The assessee lacks any economic or commercial substance and has been incorporated solely for the purpose of deriving benefits under the treaty provisions.

(b) The assessee cannot be treated as economic owner of IPs registered in USA, Austria, UK and Singapore. Hence, the receipts from sale of software registered in other countries would be governed by the treaties entered into between those countries.

(c) As per the BEPS Action Plan 8-10 under cost share arrangement, assessee's incorporation in Austria and booking of sales proceeds and software lacks any commercial rationale as this could have been carried out in location of the owner of the IPs.

(d) Since, the economic owner of IPs is based mainly in USA and as per India- USA DTAA, the global income of USA tax resident is taxable in USA, to avoid such taxability, assessee was incorporated in Austria.

24. Now, it is fairly well established through series of judicial precedents that the sanctity of TRC cannot be doubted by the tax authorities in India, unless, there are strong evidences in the possession of the tax authorities to demonstrate that the entity claiming benefit is a sham/shell company and has been involved in fraud or illegal activity. In case of Bid Services Division (Mauritius) Ltd. Vs. Authority for Advance Ruling (supra), the Hon'ble Bombay High Court, while dealing with the acceptability or otherwise of TRC has observed as under:

> *"45. No doubt mere holding of a TRC cannot prevent an enquiry if it can be established that the interposed entity was a device to avoid tax. However, the decisions of the Apex Court cited above have clearly upheld the conclusivity of the TRC absent fraud or illegal activities. Nowhere in the impugned ruling the existence of TRC has been denied. In fact, in paragraph 2 of the impugned Ruling, the Authority has itself set out the existence of a valid TRC in the name of the Petitioner. Further, except bald allegations, no material has been placed on record to demonstrate or establish that Petitioner was a device to avoid tax or that there was fraud or any illegal activity. There is hardly any discussion in the impugned Ruling on the applicability of the said Circulars No. 682, 789 or the Press Releases by the CBDT / Ministry of Finance discussed above.*
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> *46. From the facts on record it cannot be said that the Indian Authorities were not aware of the change or the introduction of the Petitioner as part of the Consortium. Parties arrange their affairs in a manner as to make their businesses viable and profitable and it is part of that exercise that the Petitioner appears have been introduced into the Consortium with full knowledge of all the authorities concerned. The entire structure as well as the transaction of sale was in the full knowledge of the Indian Authorities including the tax authorities."*

25. In case of Tiger Global International III holdings Vs. The Authority of Advance Rulings (supra) the Hon'ble Delhi High Court has observed as under:

> *"J. The establishment of investment vehicles in tax friendly jurisdictions cannot be considered to be an anomaly or give rise to a presumption of being situate in those destinations for the purpose of evading tax or engaging in treaty abuse. The decision of Azadi Bachao Andolan acknowledged how nations seek to compete with each other by highlighting treaty benefits that could be obtained by investors from its treaty networks, because of which there was nothing inherently objectionable about treaty shopping but that any concerns surrounding the practice of treaty shopping is best left for the consideration of the executive which may examine the political and economic implications of any measures taken by it to combat treaty shopping, particularly in light of the changing world order requiring nations to adopt measures to attract capital and technological inflows.*
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> *K. In a similar vein the decision of Vodafone noted that there has been a steady increase in multinational corporations seeking to invest in markets and businesses across the globe, which would thus lend credence to the position that establishment of offshore companies could be motivated by bona fide commercial purposes. Accordingly, the decisions of the Supreme Court accepted the changed world order necessitating cross-border movement of capital and investments and those in turn resulting in the creation of trans-national corporations, the incorporation of entities in different jurisdictions and thus facilitating investments in diverse parts of the world which inevitably led to entities seeking to reside in jurisdictions with established treaty networks. The creation of new investment pathways ought not be halted by skepticism or mistrust except on the basis of well- established parameters.*
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> *L. The principles of substance over form must be considered to be the prevailing norm and the Revenue entitled to doubt the bona fides of a transaction only in those situations where it be found that the transaction involves a sham device intended to achieve illegal objectives or formulated based on illegal motives. In light of the decisions rendered in Azadi Bachao Andolan and Vodafone, treaty shopping in itself cannot be rendered abhorrent unless it were categorically established that the*

device was incorporated with a view to evade tax and in a manner contrary to the intent of the Contracting States to the treaty. Therefore, it is only in those situations where no other conclusion can be drawn other than the entity being a conduit or lacking in commercial substance and intending to perpetuate fraud that the Revenue would be justified in doubting the nature and character of that transaction.

M. *The issuance of a TRC by the competent authority must be considered to be sacrosanct and due weightage must be accorded to the same as it constitutes certification of the TRC holding entity being a bona fide entity having beneficial ownership domiciled in a Contracting State to pursue a legitimate business purpose in a Contracting State. The Revenue would thus not be justified in doubting the presumption of validity attached to the TRC as it would inevitably result in an erosion of faith and trust reposed by Contracting States in each other.*

N. *The circumstances under which the Revenue could pierce the corporate veil of a TRC holding entity is restricted to extremely narrow circumstances of tax fraud, sham transactions, camouflaging of illegal activities and the complete absence of economic substance and the establishment of those charges would have to meet stringent and onerous standards of proof and the Revenue being required to base such conclusions on cogent and convincing evidence and not suspicion alone. It is only when the Revenue is able to meet such a threshold that it can disregard the presumption of validity which would be attracted the moment the TRC is produced and LOB conditions are fulfilled.*

O. *Treaties are entered into by Contracting States in exercise of their sovereign powers and based on economic and political considerations. In view of the same, such reciprocal arrangements cannot be subjected to aspersions cast on its validity. It would accordingly be erroneous for courts to manufacture grounds of disqualification from treaty benefits over and above those as formulated by the Contracting States. Section 90 of the Act itself formulates the legislative intent to lend primacy to treaty enactments. Courts have accordingly taken the consistent stand that treaty benefits ought not be overridden by provisions and that the sanctity which attaches to a treaty restrains parties from attempting to subvert the same by way of unilateral amendments."*

26. In case of CIT Vs. SAIF II-SE Investment Mauritius Ltd., the Hon'ble Jurisdictional High Court, while dealing with the sanctity of TRC has held as under:

> *"3. As would be manifest from a reading of the order impugned before us, the ITAT has essentially based its conclusions on the valid Tax Residency Certificate ['TRC') which was held by the assessee and the following principles as laid down by this Court in Blackstone Capital Partners v. Asst. CIT [2023 SCC OnLine Del 475] :-*
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> > *"93. Accordingly, this court is of the view that the respondent-Revenue cannot go behind the tax residency certificate issued by the other tax jurisdiction as the same is sufficient evidence to claim treaty eligibility, residence status, legal ownership and accordingly there is no capital gain earned by the petitioner liable to tax in India. Even the clarificatory press release dated March 1, 2013 issued by the Finance Ministry pursuant to the 2013 amendment makes it clear that a tax residency certificate is to be accepted and the tax authorities cannot go behind it. Further, since on the basis of repeated assurances by the Government of India which have been upheld by the apex court, the petitioner had invested in India, the respondent is estopped from arguing to the contrary."*
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> *4. In view of the aforesaid, we find no ground to interfere with the order impugned. The appeal raises no substantial question of law. Consequently, it fails and shall stand dismissed."*

27. Identical view has been expressed by the Hon'ble Delhi High Court in case of Black Stone Capital Partners Vs. ACIT (supra). Thus, if we examine the issue of validity of TRC on the touchstone of the ratio laid down in the judicial precedents discussed above, it can be safely concluded that the sanctity of TRC, ordinarily, cannot be doubted. However, the Revenue Authorities are not

totally prevented from looking beyond the TRC, provided, there is sufficient evidence brought on record by the Revenue Authorities to establish that through illegal means the entity has been interposed as a device to avoid tax. It has further been held that the TRC is the most vital piece of evidence to determine tax residency absent fraud or illegal activities. Therefore, the burden is entirely on the Revenue to establish fraud or illegal activity to go beyond the TRC to treat a particular entity as non-genuine tax resident of a particular country, hence, not entitled to treaty benefits.

28. Keeping in view the aforesaid legal propositions, if we examine the facts of assessee's case, it can be seen that the primary allegation of the Assessing Officer is to the effect that the assessee is not the economic owner of the IPs as majority of them have been registered outside Austria and mostly in USA and further the assessee has not incurred any expenditure for developing such IPs. It is the allegation of the Assessing Officer that to avoid payment of tax in USA, whose tax resident is taxable on the entire global income as per the relevant treaty, the

assessee has been incorporated in Austria to derive benefit of taxation.

29. In our view, the aforesaid observations of the Assessing Officer are completely contrary to facts on record and lacks substance. In course of hearing, the assessee has brought to our notice the financial statements of the assessee, which reveal that the assessee has earned substantial revenue from its operations in different geographical jurisdictions, including Austria. The assessee also files its tax returns regularly in Austria and has been assessed to tax by the Austrian Revenue Authorities. Copies of the assessment orders clearly establish the aforesaid factual position. The financial statement further reveal that the assessee has incurred expenditure in Research and Development (R&D) segment towards employee cost and other R&D. It is also observed that the receipts from sale of software licenses in India formed a very small part of the total revenue earned by the assessee from its operations. Therefore, the allegation of the department that the assessee has entered into treaty shopping arrangement to escape taxation, is without any credible reasoning

and merely based on conjectures and surmises rather than corroborative evidence.

30. Further, allegation of the Assessing Officer that the assessee has been incorporated in Austria as part of treaty shopping arrangement to avoid taxation in USA, in our view, is totally irrelevant and should not have bothered the Assessing Officer. In any case of the matter, there cannot be any manner of doubt that the Revenue earned from sale of software licenses could not have been taxed as royalty income in India in view of the ratio laid down by the Hon'ble Supreme Court in case of Engineering Analysis Centre of Excellence Pvt. Ltd. (supra) and various other judicial precedents. Therefore, it is immaterial whether the assessee is located in Austria or USA. Even, assuming that in place of assessee, the entity earning revenue from sale of software licenses would have been located in USA, still, the revenue earned would not have been taxable in India as royalty income, in view of the law laid down by the Hon'ble Supreme Court.

31. Therefore, the receipts in dispute would not have been taxable in India, irrespective of the jurisdiction where the entity earning Revenue from sale of software is located. Whether the

assessee has been set up in Austria to avoid tax liability in USA is a matter which should concern the tax authorities in USA and not the Assessing Officer in India. There is no mandate on the Assessing Officer in India to take up cudgel on behalf of the USA tax authorities. We may further add, there is nothing on record to suggest that the USA tax authorities or tax authorities of other overseas jurisdictions have raised any dispute regarding the genuineness of assessee company and the status of its tax residency. When other tax jurisdictions including USA have not raised any doubt regarding the tax residency of the assessee, in our view, the Assessing Officer in India cannot question the tax residency of the assessee, that too, in absence of any corroborative evidence to establish any fraud or illegal activity of the assessee.

32. Thus, in the aforesaid factual position, in our view, the Assessing Officer could not have doubted the tax residency and the genuineness of the assessee company in the teeth of the TRC issued by the Austrian tax authorities.

33. Insofar as reference to BEPS Action Plan by the Assessing Officer is concerned, as held by the coordinate Bench in case of

Additional Director of Income Tax Vs. Bakers Hughes (Singapore) Pte. Ltd., it cannot have a role in judicial decision-making process. That too, in absence of any material brought on record by the Assessing Officer to conclusively establish that the assessee has no commercial or economic substance. Merely because, majority of the IPs are registered in different jurisdictions, that by itself would not divest the ownership rights of the assessee over the IPs. More so, when the Assessing Officer accepts that the assessee is the legal owner of the IPs. Though, there is a passing observation by the Assessing Officer that there is a back to back arrangement of passing over of income to some other entities located in other jurisdictions, however, he has failed to identify even a single such entity which can be held as the beneficial owner of income and not the assessee. No evidence has been brought on record by the Departmental authorities to demonstrate that revenue earned by the assessee has been repatriated to either the parent company or any other related party.

34. It is relevant to observe, in assessment year 2021-22, the Assessing Officer, while dishonoring the TRC, has relied upon

certain judicial precedents including AAR Rulings in case of Bid Services Division (Mauritius) Limited and Tiger Global International Holdings. However, both the aforesaid decisions relied upon by the Assessing Officer have subsequently been reversed by Hon'ble Bombay High Court and Hon'ble Delhi High Court, respectively, while upholding the sanctity of TRC. Thus, for this reason also the conclusion drawn by the Assessing Officer has become perverse.

35. Thus, on overall consideration of facts and circumstances of the case and keeping in view the ratio laid down in the judicial precedents cited before us, we hold that the assessee is entitled to the benefits under India – Austria DTAA.

36. Therefore, once the receipts from sale of software licenses are held as business income, they cannot be taxed in India in absence of PE. Accordingly, we direct the Assessing Officer to delete the additions. In view of our decision above, we refrain from examining as to whether the receipts are taxable under section 9(1)(i) through business connection.

37. In view of our decision above, the other grounds raised by the assessee, being consequential and premature, do not require adjudication.

38. In the result, appeals are allowed, as indicated above.

Order pronounced in the open court on 6th November, 2024

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

Dated: 6th November, 2024.
RK/-
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi