2024:DHC:1910-DB

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Judgment reserved on: 21 February, 2024**
Judgment pronounced on: 11 March, 2024

\+ W.P.(C) 14636/2023 & CM APPL. 58218/2023 (Interim Relief)

SFDC IRELAND LIMITED ..... Petitioner

Through: Mr. Ajay Vohra, Sr. Adv. with Mr. Aniket D. Agrawal and Mr. Samarth Chaudhari, Advs.

versus

COMMISSIONER OF INCOME TAX & ANR..... Respondents

Through: Mr. Aseem Chawla, Sr.SC with Ms. Pratishtha Chaudhary and Mr. Aditya Gupta, Advs for Revenue.

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

J U D G M E N T

YASHWANT VARMA, J.

1. This writ petition impugns the certificate dated 16 October 2023 as also the order dated 18 October 2023 issued and passed by the second respondent in purported exercise of powers conferred by Section 197 of the **Income Tax Act, 1961**[1]. The petitioner had moved the second respondent certifying that the petitioner would be entitled to a Nil/lower rate withholding tax certificate in respect of payments

[1] Act

received from **salesforce.com India Private Limited**[2].

2. The payments were received by the petitioner **SFDC Ireland Limited**[3] pursuant to the arrangement embodied in the **Amended and Restated Reseller Agreement**[4] dated 01 February 2023. While proceeding to evaluate the application as made, the second respondent has denied the withholding tax certificate in terms as requested by SFDC Ireland and permitted it to receive payment upon deduction of 10% as TDS on the entire amount of INR 518,21,03,624/- which it was to receive from SFDC India for **Financial Year**[5] 2023-2024.

3. The impugned order rests on the second respondent finding that SFDC Ireland was not selling standard off-the-shelf and non-customized downloadable software and that it was in fact offering a comprehensive service experience or solution with the help of technology embedded in the software. It has held that the remittances so received are liable to be taxed as **fee for technical services**[6] within the meaning of Section 9(1)(vii) of the Act read along with Article 12 of the India-Ireland **Double Taxation Avoidance Agreement**[7]**.**

4. For the purposes of evaluating the challenge which stands raised, it would be apposite to notice the following salient facts. The petitioner, SFDC Ireland, is stated to be a tax resident of the Republic of Ireland holding a valid **Tax Residency Certificate**[8] under Article 4 of the DTAA. The petitioner asserts that since it does not have a place of business, employees or any other sort of presence for that matter in

[2] SFDC India
[3] SFDC Ireland
[4] Reseller Agreement
[5] FY
[6] FTS
[7] DTAA
[8] TRC

India, it does not have a **Permanent Establishment**[9] as contemplated under Article 5 of the DTAA. SFDC Ireland is stated to be engaged in the business of operating **customer relationship management**[10] offerings, applications, and platforms, including sales, service, marketing, commerce, integration, analytics and related products and services which shall, for the sake of brevity, hereinafter be collectively referred to as "**SFDC products"**.

5. On 01 February 2023, the petitioner entered into a Reseller Agreement with SFDC India, as a consequence of which the latter came to be appointed as the non-exclusive reseller of SFDC products for onward resale to end customers in India. According to the writ petitioner, SFDC India was to procure SFDC products from it for the purposes of onward resale. As per the terms of the Reseller Agreement, the relationship between the two parties was that of seller and buyer and all transactions were to be undertaken on a principal-to-principal basis.

6. SFDC India in terms of the Reseller Agreement was to market, distribute and sell SFDC products in India. However, it was accorded no rights over the intellectual property rights existing in SFDC products. According to the writ petitioner, SFDC India was also not transferred the right to manage, control, adapt, alter, modify, decompile, translate, disassemble or reverse engineer the content of SFDC products.

7. The SFDC products themselves are explained to be a software which enables businesses to manage customers and prospect

[9] PE
[10] CRM

relationships with data. The writ petitioners in their brief synopsis have explained the nature of the SFDC products in the following terms: -

> "SFDC product(s) is a software that allows businesses to manage customers and prospect relationships with data. The users can store, track, and analyze customers and prospect information in one central location, including contact and account information, sales opportunities, service cases and marketing campaigns etc. These products are standardized and the customers, at their own behest, are free to pick any or combination of products that are best suited for their business requirements. The supply of SFDC products helps the customers/ clients in generating reports and summaries of the data which is fed into the 'Salesforce' software by the client itself. The customers input, store and retrieve their proprietary data through the CRM application software portal. The Petitioner's products provide access for customer's own use to generate reports, basis the information fed in by the customer in the desired format. Lastly, access to the Petitioner's products is for a limited duration and the period for which the subscription fee is paid by the customer. A high-level overview of the SFDC Products sold by the Petitioner and marketed/ resold by SFDC India in the territory of India, are annexed herewith as ANNEXURE 'P-1' to this submission."

8. During FY 2023-24, the petitioner estimated receipts of INR 518,21,03,624/- as being receivable from SFDC India in terms of the Reseller Agreement. Seeking consideration of its assertion of being entitled to a Nil withholding tax certificate, the petitioner moved the respondents by way of an application dated 28 July 2023. Along with the detailed submissions which were filed with the second respondent in this respect, the petitioner raised the following issues: -

> "a. The Petitioner is tax resident of Ireland in terms of Article 4, and, admittedly and undisputedly, does not have a PE in India in terms of Article 5 of India-Ireland DTAA;
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> b. The payments made by SFDC India to the Petitioner do not partake the character of 'Royalty' [under Article 12(3)(a)] and/or 'Fees for Technical Services' ('FTS') [under Article 12(3)(b) of the India-Ireland DTAA] – ergo, in the absence of a PE in India in terms of Article 7 of the India-Ireland DTAA, the payment by SFDC India to the Petitioner, being in the nature of business profits, is not liable to tax in India;

> c. The payments made by SFDC India to the Petitioner is subject to EL @ 2% of the gross amount of consideration in the hands of the latter, in terms of section 165A of the Finance Act, 2016 as amended by Finance Acts of 2020 and 2021 – as a matter of fact, the Petitioner has been paying EL to the Government of India; the Petitioner has deposited EL amounting to Rs.7,64,11,243 for the period from 01.04.2023 till 31.12.2023;
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> d. Consequently, in terms of section 10(50) of the Act, the payments made by SFDC India to the Petitioner for sale of SFDC products, being subject to EL and accepted as such by the Government of India, is exempt from taxation under the Act in the hands of the Petitioner;"

9. It may at this stage itself be clarified that we had heard learned counsels for respective sides restricted to the claim for issuance of a Nil withholding tax certificate and the same being examined solely on the anvil of Section 9(1)(vii) of the Act read along with Article 12 of the DTAA. Learned counsels had also agreed that the contention of SFDC Ireland being absolved from the payment of any tax by virtue of the imposition of an equalization levy in terms of Section 165A of the Finance Act, 2016 would be a question which should be left open.

10. Appearing for the writ petitioner, Mr. Vohra, learned senior counsel submitted that the second respondent has clearly erred in treating the remittances made by SFDC India as constituting FTS by ignoring the undisputed position that SFDC products were standardized with the customers having the option to pick any combination of products best suited to their business requirements. Mr. Vohra submitted that SFDC products assist the clients in generating reports and summaries of the data which is fed into the software by the client itself. Learned senior counsel pointed out that customers input, store and retrieve their proprietary data through the CRM application software portal. It was additionally pointed out that pursuant to the

access granted to clients, subscribers are enabled to use the software to generate appropriate reports on the basis of information fed into the software and as per the format as desired. Mr. Vohra pointed out that the clients are provided access to the CRM application software portal based on the subscription fee that may be paid.

11. According to Mr. Vohra, the payments made by SFDC India do not partake the character of royalty nor can they be viewed as constituting FTS under Article 12(3)(b) of the DTAA. According to Mr. Vohra, since all that SFDC Ireland was providing was access to a software on a standardized basis as opposed to providing a customized solution, the remittances received by it would not fall within the scope of FTS.

12. It was further submitted that the access to the software portal was without any human intervention and consequently the same would not qualify under Article 12(3)(b) of the DTAA. Mr. Vohra in this regard placed reliance on the following decisions. Our attention was firstly drawn to the following passages as appearing in **Commissioner of Income Tax vs. Bharti Cellular Limited**[11]**:-**

> "**12.** The aforesaid Explanation makes it clear that "fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any "managerial, technical or consultancy services" but does not include consideration for any construction, assembly, mining or like products in the country by the recipients or consideration which would be income of the recipients chargeable under the head "Salaries". The said definition is in two parts. The first part is "means and includes" type of definition and the second part is does not include definition. In the present appeals we are not concerned with the second part. The entire focus is on attracted to the first part and that, too, to the expression "consideration. .. for the rendering of any " managerial, technical for consultancy

[11] 2008 SCC OnLine Del 1452

services". It is only if the payments made by the respondents/assessees to MTNL/other companies in respect of interconnect/port access charges fall within the ambit of this expression that the said payments could be regarded as fees for technical services as contemplated under section 194J of the said Act.

13. In Skycell Communications Ltd. [2001] 251 ITR 53 (Mad), a learned single judge of the Madras High Court noted that installation and operation of sophisticated equipment with a view to earn income by allowing customers to avail of the benefit of the user of such equipment does not result in the provision of technical service to the customer for a fee. It was also held that technical service referred to in Explanation 2 to section 9(1)(vii) contemplated the rendering of a "service" to the payer of the fee and that mere collection of a "fee" for use of a standard facility provided to all those willing to pay for it did not amount to the fee having been received for technical services. We find ourselves to be in agreement with the views expressed by the learned single judge of the Madras High Court in Skycell Communications Ltd. [2001] 251 ITR 53. However, we still have to deal with the submissions made by the learned counsel for the appellants/Revenue that the payments that were considered in the case of Skycell Communications Ltd. [2001] 251 ITR 53 (Mad) were those made by a subscriber to the cellular mobile telephone facility provider and not by one cellular network provider to another. For this purpose, we must examine the appeals at hand de hors the decision of the Madras High Court in Skycell Communications Ltd. [2001] 251 ITR 53.

14. We have already pointed out that the expression "fees for technical services" as appearing in section 194J of the said Act has the same meaning as given to the expression in Explanation 2 to section 9(1)(vii) of the said Act. In the said Explanation the expression "fees for technical services" means any consideration for rendering of any "managerial, technical or consultancy services". The word "technical" is preceded by the word "managerial" and succeeded by the word "consultancy". Since the expression "technical services" is in doubt and is unclear, the rule of noscitur a sociis is clearly applicable. The said rule is explained in Maxwell on the Interpretation of Statutes (Twelfth Edition) in the following words (page 289) :

"Where two or more words which are susceptible of analogous meaning are coupled together, noscuntur a sociis, they are understood to be used in their cognate sense. They take, as it were, their colour from each other, the meaning of the more

general being restricted to a sense analogous to that of the less general."

15. This would mean that the word "technical" would take colour from the words "managerial" and "consultancy", between which it is sandwiched. The word "managerial" has been defined in the Shorter Oxford English Dictionary, Fifth Edition as : "of pertaining to, or characteristic of a manager, esp. a professional manager of or within an organization, business, establishment, etc."

16. The word "manager" has been defined, inter alia, as :
"a person whose office it is to manage an organization, business establishment, or public institution, or part of one ; a person with the primarily executive or supervisory function within an organization, etc., a person controlling the activities of a person or team in sports, entertainment, etc."

17. It is, therefore, clear that a managerial service would be one which pertains to or has the characteristic of a manager. It is obvious that the expression "manager" and consequently "managerial service" has a definite human element attached to it. To put it bluntly, a machine cannot be a manager.

18. Similarly, the word "consultancy" has been defined in the said Dictionary as the work or position of a consultant ; a department of consultants. "Consultant" itself has been defined, inter alia, "as a person who gives professional advice or services in a specialized field". It is obvious that the word "consultant" is a derivative of the word "consult" which entails deliberations, consideration, conferring with someone, conferring about or upon a matter. Consult has also been defined in the said Dictionary as " ask advice for, seek counsel or a professional opinion from ; refer to (a source of information) ; seek permission or approval from for a proposed action". It is obvious that the service of consultancy also necessarily entails human intervention. The consultant, who provides the consultancy service, has to be a human being. A machine cannot be regarded as a consultant.

19. From the above discussion, it is apparent that both the words "managerial" and "consultancy" involve a human element. And, both, managerial service and consultancy service, are provided by humans. Consequently, applying the rule of noscitur a sociis, the word "technical" as appearing in Explanation 2 to section 9(1)(vii) would also have to be construed as involving a human element. But, the facility provided by MTNL/ other companies

for interconnection/port access is one which is provided automatically by machines.

20. It is independently provided by the use of technology and that too, sophisticated technology, but that does not mean that MTNL/other companies which provide such facilities are rendering any technical services as contemplated in Explanation 2 to section 9(1)(vii) of the said Act. This is so because the expression "technical services" takes colour from the expressions "managerial services" and "consultancy services" which necessarily involve a human element or, what is now a days fashionably called, human interface. In the facts of the present appeals, the services rendered qua interconnection/port access do not involve any human interface and, therefore, the same cannot be regarded as "technical services" as contemplated under section 194J of the said Act.

22. In the appeals before us it is obvious that the meaning of the expression "technical services" by itself, is far from clear. It is also clear that the word "technical" has been used in the "society" of the words "managerial" and "consultancy". In such a situation, the rule would clearly apply and, therefore, the expression "technical services" would have to take colour from the expressions "managerial services" and "consultancy services"

13. The Supreme Court in appeal in **Commissioner of Income Tax, Delhi vs. Bharti Cellular Limited**[12] held:-

"**4.** The question basically involved in the lead case is: whether TDS was deductible by M/s Bharti Cellular Ltd. when it paid interconnect charges/access/port charges to BSNL? For that purpose, we are required to examine the meaning of the words "fees for technical services" under Section 194-J read with clause (b) of the Explanation to Section 194-J of the Income Tax Act, 1961 ("the Act", for short) which, inter alia, states that "fees for technical services" shall have the same meaning as contained in Explanation 2 to clause (vii) of Section 9(1) of the Act.

5. Right from 1979 various judgments of the High Courts and tribunals have taken the view that the words "technical services" have got to be read in the narrower sense by applying the rule of noscitur a sociis, particularly, because the words "technical services" in Section 9(1)(vii) read with Explanation 2 comes in between the words "managerial and consultancy services."

[12](2014) 6 SCC 401

14. We also find it apposite to notice the following principles which came to be laid down in **Commissioner of Income Tax vs. Kotak Securities**[13]:-

> **"6.** What meaning should be ascribed to the words "technical services" appearing in Explanation 2 to clause (*vii*) to Section 9(1) of the Act is the moot question. In *CIT* v. *Bharti Cellular Ltd.* [*CIT* v. *Bharti Cellular Ltd.*, (2014) 6 SCC 401 : (2011) 330 ITR 239] this Court has observed as follows: (SCC p. 402, para 5)
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> > "5. Right from 1979, various judgments of the High Courts and Tribunals have taken the view that the words "technical services" have got to be read in the narrower sense by applying the rule of noscitur a sociis, particularly, because the words "technical services" in Section 9(1)(*vii*) read with Explanation 2 comes in between the words "managerial and consultancy services."
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> **7.** Managerial and consultancy services" and, therefore, necessarily "technical services", would obviously involve services rendered by human efforts. This has been the consistent view taken by the courts including this Court in *Bharti Cellular Ltd.* [*CIT* v. *Bharti Cellular Ltd.*, (2014) 6 SCC 401 : (2011) 330 ITR 239] However, it cannot be lost sight of that modern day scientific and technological developments may tend to blur the specific human element in an otherwise fully automated process by which such services may be provided. The search for a more effective basis, therefore, must be made."

15. Appearing for the respondents, Mr. Chawla took a preliminary objection to the maintainability of the writ petition and submitted that against the certification as granted, the petitioner has statutory alternative remedies including by way of invocation of the revisionary power that stands incorporated in Section 264 of the Act. In view of the aforesaid, Mr. Chawla, contended that the writ petition should be dismissed on this ground alone.

[13](2016) 11 SCC 424

16. It was further submitted that the certification which is granted under Section 197 of the Act is based on the formation of a tentative opinion alone and thus merits no interference by this Court in exercise of its extraordinary writ jurisdiction. It was in this connection further urged that the rights of the assessee are in any case fully safeguarded since the sum ultimately determined as chargeable to tax would be available to be offset from the tax already deducted at source. Mr. Chawla also commended for our consideration the underlying principle imbuing the grant of a withholding tax certificate as being premised on the maxim "*abundans cautela non nocet*" (abundant caution does no harm).

17. The preliminary objection concerned with an alternative remedy is noticed only to be rejected bearing in mind the undisputed position that the impugned order has come to be passed with due approval of the Commissioner. Viewed in that light, it is manifest that relegating the petitioner to pursue an alternative remedy would be an empty formality. We in this regard take note of the decision rendered by the Court in **Manpowergroup Services India Pvt. Ltd. vs Commissioner of Income Tax (TDS) and Anr.**[14] wherein the following was observed:-

> "Court's reasoning Since the impugned order was passed after an approval from the Commissioner of Income-tax, it cannot be challenged by way of a revision petition before the Commissioner of Income-tax under section 264 of the Act. To hold otherwise, would amount to directing the petitioner to file an "appeal from Caesar to Caesar"
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> **18.** This court is of the view that the present writ petition is maintainable as there is no efficacious alternate remedy available to the petitioner to challenge the impugned order. In fact, the Commissioner of Income-tax can entertain a revision petition under section 264 only when the order, which is the subject

[14] 2020 SCC OnLine Del 1844

matter of revision is passed by an authority subordinate to him. Further, Notification No. 8 of 2018 dated December 31, 2018 issued by the Central Board of Direct Taxes mandates that the decision under section 197 with effect from December 31, 2018 has to be taken by the Commissioner, i. e., after a conscious application of mind. It has also been unequivocally admitted by the respondent in para 7 of the impugned order that approval of higher authorities was taken on the online TRACES portal.

19. Consequently, this court finds merit in the submission of the petitioner that since the impugned order was passed after an approval from the Commissioner of Income-tax, it cannot be challenged by way of a revision petition before the Commissioner of Income-tax under section 264 of the Act. To hold otherwise, would amount to directing the petitioner to file an "appeal from Caesar to Caesar".

20. The Karnataka High Court in CIT v. Smt. Annapoornama Chandrashekar (supra), while discussing the scope of revisional jurisdiction of the Commissioner of Income-tax with respect to an order passed after approval of the Commissioner of Income-tax under section 158BC read with section 158BG, held as under (page 37 of 2 ITR-OL) :

"It was contended that it is an administrative order. Even the order of assessment is an administrative order and, therefore, the previous approval to make such an order valid cannot be other than an administrative approval. But the question is, once an approval is accorded by the Commissioner can he sit in judgment over such an order and find fault with such order on the ground that it is erroneous and is prejudicial to the interests of the Revenue. The question arises is to make the said order, previous approval of the Commissioner is a condition precedent, was the Commissioner not expected to look into the draft block assessment order placed before him for approval to find out whether the said order is lawful and whether the said order is prejudicial to the interests of the Revenue. If it was prejudicial to the interests of the Revenue or if it is not lawful he was not obliged to accord approval. What he proposes to do under section 263 of the Act he should have done at the stage of approval. Because in block assessment proceedings, the tax to be levied under section 113 of the Act is 60 per cent. and it is in respect of an undisclosed income which will have serious consequences on the assessee the Legislature thought it fit to introduce section 158BG providing for previous approval, to ensure that the said provision is not abused by the lower authorities, in fact the word 'approval' is not defined under the Act. The dictionary meaning of the word 'approval' means 'to agree'. In P. Ramanatha Aiyar's The

Law Lexicon the word 'approval' and 'permission' is clearly brought about as under :

"Approval" ' and "permission" ordinarily the difference between approval and permission is, that in the first the act holds good until disapproved, while in the other case it does not become effective until permission is obtained. But permission subsequently obtained, may all the same validate the previous act.

Approval of a person means that, and only that which he has, with full knowledge, approved.

Approve. To accept, as good, or sufficient for the purpose intended. To pronounce good. To accept as good or sufficient for the purpose intended : to confirm authoritatively.

Approved. When one of the parties to a bargain writes 'approved' at the end of the draft of the agreement and adds his signature, he thereby makes the draft a binding contract, and does not merely express approval of its form after the manner of conveyencers'.. .

Therefore, it is clear 'approval' means to agree with full knowledge of the contents of what is approved and pronounce it as good. In other words confirm authoritatively. When the power of such approval is vested in a higher authority, when such higher authority approves an order of the lower authority, which means he has gone through the order of the lower authority, he has no reason to disagree he finds no fault with that order and, therefore, he confirms the order by his approval. It is to be seen that the statute has not used merely the word 'approval'. The words used are 'previous approval'. Therefore, unless the approval is previously taken, the assessment order would have no value at all. Therefore, when previous approval is a condition precedent and 'approval' means to 'agree', i.e., to concur to give mutual assent, to come into harmony, it is possible only after application of mind by the authority according approval.. ..

Therefore, this power conferred on the Commissioner is in the nature of supervisory power. If he finds that the order passed by the Assessing Officer is erroneous and also prejudicial to the interests of the Revenue, after examining the record of any proceedings under the Act to rectify such error and to protect the interests of the Revenue he can exercise the said power because the Commissioner becomes aware of such erroneous orders prejudicial to the Revenue after looking into the record. But if he has looked into the record, applied his mind and agreed with the order of the assessing authority, this power of revision under section 263 is not available to him after according approval to such order."(emphasis supplied)

> **21.** The Bombay High Court in Tata Teleservices (Maharashtra) Ltd. v. Dy CIT (TDS) [2018] 402 ITR 384 (Bom) (Writ Petition No. 2701 of 2017, decided on January 25, 2018), has also held as under (page 393 of 402 ITR) :
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> "However, as correctly pointed out by the petitioner in this case, the impugned order dated October 23, 2017 as recorded therein, has been issued/decided with the concurrence of the Commissioner of Income-tax (TDS). This was not so in the case of Larsen and Toubro Ltd. v. Asst. CIT (TDS) [2010] 326 ITR 514 (Bom). It is also not disputed before us that in this case, the revision would be before the same authority who gave the concurrence or to an authority of equal rank/ designation.
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> In the above view, the decision of this court in Larsen and Toubro Ltd. (supra) would not apply to the present facts. As in this case, the revision, i.e., alternative remedy would in facts be from 'Caesar to Caesar'. Therefore, in such a case an alternative remedy would be a futile/empty formality and not an efficacious remedy. (Please see Ram and Shyam Co. v. State of Haryana (1985) 3 SCC 267). "(emphasis supplied)

18. While Mr. Chawla is correct that on a fundamental plane, the power to grant a withholding tax certificate is merely a preliminary examination of the issue of taxability and has no implication on the ultimate assessment that may be made, we must also be cognizant of the serious repercussions that ensue the denial of such a certificate without due consideration being accorded upon the question of chargeability to tax. We recently had an occasion to consider this aspect in **Lionbridge Technologies LLC vs. Deputy Commissioner of Income Tax, International Taxation, Cirlce 2 (2) (1), New Delhi**[15] and where we had emphasized the imperatives of striking a just balance and ensuring that merely because the examination of taxability at the stage of grant of a withholding tax certificate may not be determinative or have attributes of finality, the authority dealing with such an application is not relieved of the obligation to confer due consideration

[15] W.P (C) 3403/2023

upon factors which are germane to the question of taxability. We deem it appropriate to extract the following passages from our decision in *Lionbridge Technologies*:-

> "**13.** It becomes pertinent to observe that Section 197 of the Act lays and places a statutory procedure enabling a person to obtain a certificate in respect of withholding tax at either a lower rate or one which certifies that no deduction towards tax is mandated. While the view that the authority may take at the stage of consideration of a Section 197 application is undoubedtly provisional, the same does not detract from the obligation of the AO to at least examine and undertake a prima facie evaluation of whether the income is chargeable to tax at all.
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> **14.** We note that the scheme underlying Section 195 of the Act and which requires the issue of chargeability of tax being examined was succinctly explained by the Supreme Court in *Engineering Analysis* in the following terms:-
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> > "32. The machinery provision contained in Section 195 of the Income Tax Act is inextricably linked with the charging provision contained in Section 9 read with Section 4 of the Income Tax Act, as a result of which, a person resident in India, responsible for paying a sum of money, "chargeable under the provisions of [the] Act", to a non-resident, shall at the time of credit of such amount to the account of the payee in any mode, deduct tax at source at the rate in force which, under Section 2(37-A)(iii) of the Income Tax Act, is the rate in force prescribed by the DTAA. Importantly, such deduction is only to be made if the non-resident is liable to pay tax under the charging provision contained in Section 9 read with Section 4 of the Income Tax Act, read with the DTAA. Thus, it is only when the non-resident is liable to pay income tax in India on income deemed to arise in India and no deduction of TDS is made under Section 195(1) of the Income Tax Act, or such person has, after applying Section 195(2) of the Income Tax Act, not deducted such proportion of tax as is required, that the consequences of a failure to deduct and pay, reflected in Section 201 of the Income Tax Act, follow, by virtue of which the resident-payee is deemed an "assessee in default", and thus, is made liable to pay tax, interest and penalty thereon. This position is also made amply clear by the referral order in the appeals concerned from the

High Court of Karnataka, namely, the judgment of this Court in GE Technology [GE (India) Technology Centre (P) Ltd. v. CIT, (2010) 10 SCC 29].

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36. It will be seen that Section 194-E of the Income Tax Act belongs to a set of various provisions which deal with TDS, without any reference to chargeability of tax under the Income Tax Act by the non-resident assessee concerned. This section is similar to Sections 193 and 194 of the Income Tax Act by which deductions have to be made without any reference to the chargeability of a sum received by a non-resident assessee under the Income Tax Act. On the other hand, as has been noted in *GE Technology [GE (India) Technology Centre (P) Ltd. v. CIT*, (2010) 10 SCC 29] , at the heart of Section 195 of the Income Tax Act is the fact that deductions can only be made if the non-resident assessee is liable to pay tax under the provisions of the Income Tax Act in the first place.

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66. What is made clear by the judgment in *GE Technology [GE (India) Technology Centre (P) Ltd. v. CIT*, (2010) 10 SCC 29] is the fact that the "person" spoken of in Section 195(1) of the Income Tax Act is liable to make the necessary deductions only if the non-resident is liable to pay tax as an assessee under the Income Tax Act, and not otherwise. This judgment also clarifies, after referring to CBDT Circular No. 728 dated 30-10-1995, that the tax deductor must take into consideration the effect of the DTAA provisions. The crucial link, therefore, is that a deduction is to be made only if tax is payable by the non-resident assessee, which is underscored by this judgment, stating that the charging and machinery provisions contained in Sections 9 and 195 of the Income Tax Act are interlinked.

67. This conclusion is also echoed in Vodafone International Holdings BV v. Union of India [Vodafone International Holdings BV v. Union of India, (2012) 6 SCC 613 : (2012) 3 SCC (Civ) 867] , wherein the following observations were made on the scope and applicability of Section 195 of the Income Tax Act : (SCC pp. 690-91, paras 171-73)

> "*171*. Section 195 casts an obligation on the payer to deduct tax at source ("TAS", for short) from payments made to non-residents which payments are

chargeable to tax. Such payment(s) must have an element of income embedded in it which is chargeable to tax in India. If the sum paid or credited by the payer is not chargeable to tax then no obligation to deduct the tax would arise. Shareholding in companies incorporated outside India (CGP) is property located outside India. Where such shares become subject-matter of offshore transfer between two non-residents, there is no liability for capital gains tax. In such a case, question of deduction of TAS would not arise.

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

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

15. We in this regard also take note of Rule 28AA of the **Income Tax Rules, 1962** and which stands framed in the following terms:-

"**Certificate for deduction at lower rates or no deduction of tax from income other than dividends.**

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

deduction of tax at such lower rate or no deduction of tax.

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

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

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

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

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

(v) & (vi) [***]

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

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

Provided that where the number of persons responsible for deducting the tax is likely to exceed one hundred and the details of such persons are not available at the time of making application with the person making such application, the certificate for deduction of tax at lower rate may be issued to the person who made an application for issue of such certificate, authorising him to receive income or sum after deduction of tax at lower rate.

(5) The certificates referred to in sub-rule (4) shall be valid only with regard to the person responsible for deducting the tax and named therein and certificate referred to in proviso to the sub-rule (4) shall be valid with regard to the person who made an application for issue of such certificate.

(6) The Principal Director General of Income-tax (Systems) or the Director General of Income-tax

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

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

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

19. Insofar as the merits are concerned, Mr. Chawla submitted that the second respondent has on a due consideration of the provisions contained in the Reseller Agreement including Section 4.3 found that SFDC Ireland was obliged to extend technical assistance and training and thus clearly qualifying technical service which forms the subject matter of Article 12(3)(b) of the DTAA.

20. Mr. Chawla also placed the following comparative chart seeking to highlight the key elements of Article 12(3)(b) of the DTAA and Section 9(1)(vii) to buttress his aforenoted submissions:-

Relevant extract of Article 12 of India- Ireland DTAA	**Section 9(1)(vii) of Income deemed to accrue or arise in India**
ARTICLE 12 ROYALTIES AND FEES FOR TECHNICAL SERVICES	(vii) Income by way of fees for technical services payable

3. (b) The term "fees for technical services" means payment of any kind in consideration for the rendering of any managerial, technical or consultancy services including the provision of services by technical or other personnel but does not include payments for services mentioned in Articles 14 and 15 of this Convention.	by— (a) the Government; or (b) a person who is a resident, except where the fees are payable in respect of services utilised in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India; or (c) a person who is a non-resident, where the fees are payable in respect of services utilized in a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India: 'Provided that nothing contained in this clause shall apply in relation to any income by way of fees for technical services payable in pursuance of an agreement made before the 1st day of April, 1976, and approved by the Central Government. Explanation 1.-For the purposes of the foregoing proviso, an agreement made on or after the 1st day of April, 1976, shall be deemed to have been made before that date if the agreement is made in accordance with proposals approved by the Central Government before that date. Explanation 2 —For the purposes of this clause, "fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which

	would be income of the recipient chargeable under the head "Salaries";

21. According to learned counsel, the nature of services provided by the petitioner and the assistance offered to SFDC India are aspects which clearly warrant a further and more detailed examination and which could not have possibly been the remit in Section 197 proceedings. In order to appreciate the scope of Article 12(3)(b), Mr. Chawla also took us through the **India-Ireland Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting**[16], as well as the **United Nations Model Double Taxation Convention Handbook**[17] and which material shall be considered in the subsequent parts of this decision.

22. As noticed hereinabove, the dispute in relation to withholding tax arises out of the payments received by the petitioner from SFDC India, the Reseller appointed by the former in terms of the Reseller Agreement. The solitary question which arises for our consideration is whether those payments were liable to be subjected to a withholding tax and treated as "FTS" as per Article 12(3)(b) of the DTAA.

23. As is manifest from a reading of the Reseller Agreement, SFDC India came to be appointed as the non-exclusive reseller by SFDC Ireland for its products. We deem it apposite to extract the relevant clauses of the Reseller Agreement hereunder: -

" **RECITALS**

A. Vendor and Reseller are part of a network of affiliated companies.

[16] MLI
[17] UN Handbook

Vendor is in the business of marketing and selling SFDC Products in both Europe, Middle East, and Africa ("EMEA") and Asia Pacific ("APAC") regions providing consulting services and support to customers and desires to sell SFDC Products to the Reseller for onward sale to customers in the Territory.

Reseller is engaged in the business of inter alia marketing and sales support services and desires to serve as a third-party reseller of SFDC Products for sale to customers in the Territory.

B. Vendor does not desire to sell the SFDC Products directly to customers in the Territory.

C. Vendor therefore wishes to appoint Reseller as its non-exclusive reseller of the SFDC Products in the Territory.

D. Reseller has represented to Vendor that it has the facilities, personnel and expertise to serve effectively as a reseller of the SFDC Products within the Territory.

xxxxx xxxxx xxxxx

Section 1 - Definitions

For purposes of this Agreement, the following terms shall have the meanings and definitions set forth below:

xxxxx xxxxx xxxxx

1.3 "Confidential Information" shall mean and include all information that either Party makes available to the other Party relating to this Agreement, in any format, including information that relates to (a) the design, development, commercialization, and maintenance of the SFDC Products, or (b) the business, plans, products, services, finances, technology, or affairs of either of the Parties. All information disclosed or revealed by either of the Parties orally, electronically, in writing, or in other tangible form, shall be deemed to be Confidential Information if (a) it has been marked "confidential", (b) the recipient of such information has been placed on notice, orally or in writing, of its confidential nature, or (c) due to its character or nature, a reasonable person under similar circumstances would treat such information as confidential.

1.4 "Customer Contracts" shall mean and include Reseller's contracts with its customers for the SFDC Products.

1.5 "Intellectual Property Rights" shall mean and include any and all inventions, patents and patent applications, works of authorship, copyrights, Marks, trade secrets, and other intellectual property and proprietary rights, anywhere in the world, and all applications and registrations, which pertain to the SFDC Products.

xxxxx xxxxx xxxxx

1.9 "SFDC Products" shall mean and include individually and/or collectively, as the context requires, customer relationship management ("CRM") offerings, applications, and platforms including sales, service, marketing, commerce, integration, analytics, and related products and services procured by the Reseller from Vendor exclusively for resale or provision of trial use to customers in the Territory, excluding, however, SFDC Products for Reseller's Internal Use.

1.10 "SFDC Products for Reseller's Internal Use" shall mean and include individually and/or collectively, as the context requires, all SFDC Products made available by Vendor to Reseller for internal business purposes at no extra cost to permit Reseller to perform its obligations under this Agreement. Such SFDC Products for Reseller's Internal Use include, without limitation, SFDC Products made available to Reseller and used by Reseller (i) to demonstrate the functionality of the SFDC Products (e.g., in trade shows and exhibitions), (ii) to train its customers and/or employees on the use of SFDC Products, (iii) to administer and manage its own customer accounts, and (iv) all other SFDC Products made available to Reseller and used by Reseller for internal business purposes including any related documentation. The use by Reseller of SFDC Products for Reseller's Internal Use shall be exclusively governed by the SFDC Products for Reseller's Internal Use Agreement, a copy of which is attached hereto as Exhibit B.

xxxxx xxxxx xxxxx

Section 2 - Appointment of Reseller

2.1 Appointment. Subject to the terms and conditions set forth in this Agreement, Vendor hereby appoints Reseller as its non-exclusive reseller of the SFDC Products in the Territory, and Reseller hereby accepts such appointment. Further, Reseller shall

have the right to appoint one or more Additional Resellers within the Territory, and to enter into Partner Contracts with partners in the Territory. Nothing in this Agreement shall be construed to limit Vendor's right to appoint one or more Additional Resellers within the Territory.

2.2 Relationship between the Parties. The relationship of Vendor and Reseller established by this Agreement is of seller and buyer. The transactions between Vendor and Reseller will be undertaken on principal-to-principal basis. Vendor and Reseller hereby agree that, in the performance of their respective obligations hereunder, they are and shall remain independent contractors. Nothing in this Agreement shall be construed to constitute either Party as the agent of the other Party for any purpose whatsoever, and neither Party shall have the power to bind the other Party to any contract or the performance of any other obligation, or represent to any third party that it has any right to enter into any binding obligation on the other Party's behalf. Reseller shall advise its customers that the customers will contract solely with Reseller and the customers will have no contractual relationship with Vendor.

2.3 Reseller's Appointment of Sub-contractors. Reseller shall have the right to appoint sub-contractors (other than its employees) to provide marketing, resale, and sales support services (including post-sale support services) for the SFDC Products to customers in the Territory, subject to the policies established by Vendor from time to time. Reseller shall require sub-contractors appointed by Reseller pursuant to this Section 2.3 to agree in writing to adhere to the same obligations as Vendor has imposed on Reseller under this Agreement for the purpose of protecting Vendor's Confidential Information and Intellectual Property Rights.

xxxxx xxxxx xxxxx

Section 4 - Obligations of Vendor

4.1 Provisioning of SFDC Products. Upon notification that Reseller has entered into a contract with a customer, partner, or Additional Reseller for the provision of the SFDC Products, Vendor shall provision the SFDC Products as soon as reasonably practicable, subject to the contract being compliant with Vendor's policies for the provisioning of the SFDC Products as notified to Reseller from time to time.

4.2 Marketing Materials. Vendor shall, at no cost, provide Reseller with a reasonable quantity of marketing and promotional materials to assist Reseller in its marketing activities hereunder.

4.3 Technical Support. Vendor shall provide Reseller with reasonable technical assistance and training with respect to the marketing, distribution, support, and sale of SFDC Products by Reseller in the Territory.

Section 5 - Pricing and Payment Terms

5.1 Purchase Price, and Shortfall Payment. The purchase price payable by Reseller for the SFDC Products shall be as specified in Exhibit A attached hereto (the "Purchase Price"); provided however, that under certain circumstances related to the profitability of Reseller (as described in Exhibit A), Vendor shall instead be required to make a Shortfall payment as set forth in Exhibit A ("Shortfall Payment"). The Parties agree to periodically review the Purchase Price (and, as the case may be, the Shortfall Payments) and to make adjustments as deemed appropriate to maintain arm's-length compensation.

5.2 Amendments. The Parties will amend Exhibit A as necessary to maintain an arm's length price reflecting changes in economic conditions, Reseller's business operations and practices, and the ongoing development of Reseller's business. From time to time, the Parties will execute a written memorialization to document the updated Exhibit A.

5.3 Payment. Vendor will invoice Reseller for the amount of the Purchase Price for the SFDC Products supplied to Reseller hereunder on a monthly basis. Reseller shall pay the full amount of the Purchase Price (and, as the case may be, Vendor shall pay the full amount of the Shortfall Payment) as set forth in Section 5.1 hereof within ninety (90) calendar days after the end of each month. All payments hereunder shall be made in INR or in such other currency as the Parties may agree to from time to time.

5.4 Adjustments. In the event of a proposed adjustment to the amounts payable hereunder by any government authority, the Parties will take all reasonable efforts to avoid double taxation, as they may agree upon, including the payment of the amount of such adjustment plus applicable interest at the arm's length rate.

5.5 Withholding tax. If and to the extent that Reseller is required under applicable law, including the circulars of the local tax administration, to deduct, report, and remit any withholding taxes in respect of the payments (including by way of set-off) made by Reseller to Vendor hereunder, Reseller (a) shall deduct such withholding taxes from the amounts otherwise payable by it hereunder for payment to the relevant tax authority on behalf of Vendor, (b) shall timely pay such withholding taxes to the relevant tax authority in accordance with the applicable laws and regulations, and (c) shall provide Vendor, as soon as reasonably practicable, with a receipt or other satisfactory evidence of payment of the tax to the relevant tax authority. Any amounts of withholding tax deducted by Reseller in accordance with the terms of this Agreement and applicable law shall be deemed to have been paid to Vendor and shall accordingly reduce any amount owed by Reseller to Vendor hereunder. Reseller agrees to reasonably cooperate with Vendor in the event that Vendor claims exemption from such withholding tax or seeks refunds or deductions under the applicable double taxation treaty, the applicable directive, or under applicable domestic tax law, such cooperation to include providing Vendor with any and all information / documentation available to Reseller and reasonably requested by Vendor to make the necessary filings. Upon the provision of a withholding tax exemption certificate issued by the relevant tax authority, Reseller shall abstain from further withholding in accordance with the withholding tax exemption certificate issued. Any refunds of withholding taxes received by Reseller shall be received for the account and the benefit of Vendor and Reseller agrees to inform Vendor of such refunds and to forward such refunds to Vendor, in each case without undue delay.

Indirect Taxes, Tariffs and Fees. The Purchase Price is exclusive of all indirect taxes, including GST, central and local sales, or value added taxes, services tax, customs duties, or similar charges imposed by any governmental entity in respect of the resale of SFDC Products. Reseller shall payfor all such taxes, assessments, or charges, without reduction in the purchase price charged by Vendor.

Section 6 - Intellectual Property Rights

6.1 Ownership. Reseller acknowledges Vendor's (or its licensor's) right, title, and interest in, and to, any and all Intellectual Property Rights and that, except as specified in this Agreement, Reseller shall acquire no rights whatsoever in, or to, any Intellectual Property Rights. Without limiting the foregoing, except as expressly provided herein, this Agreement does not constitute a license, sale, or any other transfer of the Intellectual Property Rights. Reseller shall not take any action that may adversely affect or impair Vendor's right, title, or interest in or to the Intellectual Property Rights.

6.2 Notices, Marks, Legends, and Name. Reseller may use the Marks solely in connection with its marketing and distribution of the SFDC Products in the Territory. Such use shall be strictly in accordance with the trademark guidelines communicated by Vendor to Reseller from time to time. Reseller shall not market or resell the SFDC Products under any name, sign, or logo other than the Marks. Any and all goodwill generated from the use of the Marks by Reseller hereunder shall inure to the benefit of the legal owner of the Marks, and Reseller shall acquire no rights whatsoever to the Marks. Reseller shall not alter, remove, cover, or add to, in any manner whatsoever, any patent notice, copyright notice, brand name, or legend that Vendor or its designee
may display with respect to the SFDC Products.

6.3 Assistance. Reseller shall promptly notify Vendor (a) of any claims or objections that its use of the Intellectual Property Rights in connection with its marketing or distribution of the SFDC Products may or will infringe the patent, copyright, trademark, or other proprietary right of any other Person, and (b) of any and all infringements, imitations, illegal use, or misuse, by any Person, of the Intellectual Property Rights which come to its attention; provided, however, that Reseller shall not take any legal action relating to the protection of such Intellectual Property Rights without the prior written approval of Vendor; and provided further that Reseller shall render Vendor or its designee, at Vendor's expense, all reasonable assistance in connection with any matter pertaining to the protection of such Intellectual Property Rights."

24. Of equal significance are Exhibits A and B of the aforesaid agreement which are reproduced hereinbelow: -

"**Exhibit A**

Purchase Price and Shortfall Payment

This Exhibit A sets forth the means of computing payments required under the Agreement (Purchase Price, and in some circumstances described herein, Shortfall Payments).

1. Payment Obligations. Pursuant to Section 5.1 of this Agreement, if a Shortfall exists, Vendor shall pay Reseller a Shortfall Payment described in this Exhibit A. If no such Shortfall exists, Reseller shall pay Vendor the Purchase Price described in this Exhibit A.

2. Shortfall Payment. A "Shortfall" exists if in any annual accounting period, Costs exceed the difference between (i) Reseller's Net Revenue as determined under Indian Generally Accepted Accounting Principles ("GAAP"), and (ii) 2.75% of Indian Territory Revenue. For any annual accounting period in which a Shortfall exists, Vendor shall pay Reseller a Shortfall Payment equal to an amount that allows Reseller to earn an operating margin equal to two point seven five percent (2.75%) of Indian Territory Revenue, or a rate agreed to by the Parties.

3. Purchase Price. Except as set forth herein, Reseller shall pay to Vendor a Purchase Price equal to Reseller's Net Revenue as determined under Indian GAAP less the sum of (i) its Costs and (ii) 2.75% of Indian Territory Revenue, or a rate agreed to by the Parties. For the avoidance of doubt, the Purchase Price for SFDC products charged by Vendor to Reseller would include all incidental costs incurred by Vendor pertaining to the sale of the SFDC Products to Reseller in the Territory.

4. Net Revenue. For purposes of this Exhibit A, "Net Revenue" shall mean recognized revenue from the resale of SFDC Products in the Territory and from the sale of services ancillary to the SFDC Products in the Territory, net of all non-recoverable sales, use, value added, or similar taxes, duties, and other similar charges, and less all credits, discounts, and amounts refunded to customers.

5. Indian Territory Revenue. For purposes of this Exhibit A, "Indian Territory Revenue" shall mean the sum of 1) Reseller's Net Revenue as determined under Indian GAAP and 2) Net Revenue of all Affiliates under US GAAP.

6. Costs. For purposes of this Exhibit A, Reseller's "Costs" shall be an amount equal to Reseller's ordinary and necessary costs, as calculated in accordance with Indian GAAP, including, without limitation, employee salaries, travel expenses, professional fees, rent, depreciation, stock option expenses, non-recoverable goods and services taxes ("GST"), third party costs incurred by Reseller in its operation of the SFDC Business in the Territory, compensation or reimbursements paid to an Affiliate, and any other costs agreed to by the Parties; but excluding interest, penalties, income taxes, goodwill, one-time charges, other non-operating expenses, and any costs incurred by Reseller for which it is compensated or reimbursed by an Affiliate. For the avoidance of doubt, Costs shall not include the Purchase Price set forth herein.

7. GST. The payments payable hereunder by Reseller is exclusive of any GST, which shall be invoiced as applicable.

8. Foreign Exchange Gains or Losses. The Parties agree to make appropriate adjustments to the payments determined under this Exhibit A so that Reseller neither derives any gain nor incurs any loss attributable to foreign exchange rate fluctuations in connection with this Agreement."

"Exhibit B

SFDC Products for Reseller's Internal Use Agreement

This SFDC PRODUCTS FOR RESELLER'S INTERNAL USE AGREEMENT ("RIUA") constitutes a separate agreement made and entered into effective as of February 1, 2023 ("Effective Date") by and between:

SFDC Ireland Limited ("SFDC Ireland" or "Vendor"), a company organized and existing under the laws of Ireland and having its principal place of business located at Salesforce Tower, 60 R801, North Dock, Dublin, Ireland,

and

salesforce.com India Private Limited ("SFDC India" or "Reseller"), a company organized and existing under the laws of India and having its principal place of business located at Torrey Pines, 3rd Floor Embassy Golflinks Software Business Park, Bangalore, Karnataka, 560075, India.

(Vendor and Reseller are collectively referred to as the "Parties" and individually referred to as "Party").

RECITALS

A. Vendor and Reseller are part of a network of affiliated companies.

Vendor is in the business of marketing and selling SFDC Products in both EMEA and APAC regions, providing consulting services and support to customers and desires to sell SFDC Products to the Reseller for onward sale to customers in the Territory.

Reseller is engaged in the business of inter alia marketing and sales support services and desires to serve as a third-party reseller of SFDC Products for sale to customers in the Territory.

B. Vendor and Reseller intend to enter into a Amended and Restated Reseller Agreement (the "Agreement") as of the Effective Date. Reseller has represented to Vendor that it has the facilities, personnel and expertise to serve effectively as a reseller of the SFDC Products within the Territory.

C. Vendor wishes to make available to Reseller certain SFDC Products for Reseller's Internal Use in order to enable the Reseller to perform its sales and marketing obligations vis-à-vis Vendor under the Agreement.

The Parties now agree as follows:

Section 1 – Definitions

1.1 "Documentation" means the applicable Service's Trust and Compliance documentation, and its usage guides and policies, as updated from time to time, accessible viahelp.salesforce.com or login to the applicable Service.

1.2 "SFDC Products" shall mean and include individually and/or collectively, as the context requires, customer relationship management ("CRM") offerings, applications, and platforms including sales, service, marketing, commerce, integration, analytics, and related products and services procured by Reseller from Vendor exclusively for resale or provision of trial use to

customers in the Territory, excluding, however, SFDC Products for Reseller's Internal Use.

1.3 "SFDC Products for Reseller's Internal Use" shall mean and include individually and/or collectively, as the context requires, all SFDC Products made available by Vendor to Reseller for internal business purposes at no extra cost to permit Reseller to perform its obligations under the Agreement, including, without limitation, SFDC Products made available to Reseller and used by Reseller (i) to demonstrate the functionality of the SFDC Products (e.g., in trade shows and exhibitions), (ii) to train its customers and/or employees on the use of SFDC Products, (iii) to administer and manage its own customer accounts, and (iv) all other SFDC Products made available to Reseller and used by Reseller for internal business purposes including any related documentation.

1.4 "SFDC Terms of Use" means the terms set forth athttps://www.salesforce.com/company/legal/agreements.jsp (or such successor URL as may be published by SFDC from time to time).

1.5 "Territory" shall mean and include India, or as agreed to by the Parties from time to time.

Section 2 - Reseller's Internal Use.

2.1 During the term of this RIUA, Vendor may make available to Reseller, at no extra cost, SFDC Products for Reseller's Internal Use to support Reseller's sales and marketing activities in the Territory.

2.2 Reseller may use such SFDC Products for Reseller's Internal Use solely to perform its sales and marketing obligations vis-à-vis Vendor, provided that such use is in accordance with the terms and conditions of this RIUA, the Agreement, the SFDC Terms of Use, the Documentation and any other terms as may be specified in an Order Form or otherwise by Vendor from time to time.

2.3 Where Reseller uses SFDC Products for Reseller's Internal Use to perform its sales and marketing activities in the Territory, Reseller is the "Customer" in terms of the SFDC Terms of Use with respect to such use and will fully comply with the agreed usage restrictions and limitations, it being understood that the use

of SFDC Products for Reseller's Internal Use in accordance with the Agreement, this RIUA and the specifications by Vendor shall constitute a permitted use in terms of the SFDC Terms of Use.

2.4 This RIUA can be terminated by the Parties in accordance with the provisions of the Agreement and the SFDC Terms of Use.

Section 3 - Choice of Law

This RIUA, and any disputes arising out of or in connection with this RIUA, shall be governed by and construed in accordance with the laws of the State of California, U.S.A., excluding rules governing conflicts of laws.

Section 4 - General Provisions

4.1 No Waiver. The failure of either Party to assert any of its rights under this RIUA shall not be deemed to constitute a waiver of that Party's right thereafter to enforce each and every provision of this RIUA in accordance with its terms.

4.2 Subject Headings. The subject headings of this RIUA are included for purposes of convenience only and shall not affect the construction or interpretation of any of its provisions.

4.3 Severability. In the event that any provision hereof is found invalid or unenforceable pursuant to a final judicial decree or decision, the remainder of this RIUA will remain valid and enforceable according to its terms. In the event of such partial invalidity, the Parties shall seek in good faith to agree on replacing any such legally invalid provision with a provision which, in effect, will most nearly and fairly approach the effect of the invalid provision.

4.4 Language of the Contract; Counterparts. The Parties agree that the English language shall be the language of interpretation of this RIUA. This RIUA may be executed in two or more counterparts, each of which will be deemed an original, but all of which together constitute one and the same instrument.

> 4.5 Entire Agreement and Amendments. This RIUA constitutes the entire agreement between the Parties, and supersedes all prior agreements, understandings and communications between the Parties with respect to the subject matter hereof. No modification or amendment to this RIUA shall be effective unless in writing and executed by the duly authorized representative of each of the Parties. The Parties have caused this RIUA to be executed by their duly authorized representatives effective as of the Effective Date.

25. The Reseller Agreement defines both *"SFDC Products"* as well as *"SFDC Products for Reseller's Internal Use"*. While the former are those which are intended to be provided to the end consumers in the territory, the latter are defined to include those which have been made available to the Reseller to enable it to demonstrate the functionality of SFDC products, to train customers or employees on the use of SFDC products, to administer customer accounts and other SFDC products made available to the Reseller. The use of "*SFDC Products for Reseller's Internal Use*" is regulated by the Agreement which stands placed as Exhibit B of the Reseller Agreement.

26. In order to evaluate the challenge which stands raised, it would be appropriate to briefly notice the nature of the products that are offered by SFDC Ireland. The assessee has along with its Brief Submissions placed an overview of its products which is reproduced below: -

- "Sales Cloud : Salesforce Sales Cloud is a cloud-based customer relationship management (CRM) platform that helps businesses manage their sales processes, customer data, and interactions. It's designed to support sales, marketing, and customer support in both business-to-business (B2B) and business-to-customer (B2C) contexts.
  Demo : https://www.youtube.com/watch?v=2ZkjhgBNI-Y

- Service Cloud : Salesforce Service Cloud is focused on providing support and help to the customers. This helps in retaining the customers, increasing their satisfaction and loyalty. Its uniqueness lies in providing faster service compared to traditional methods, giving individual attention to each customer's needs and taking a proactive approach to customer issues. That ultimately enhances the customer's experience hence loyalty which in turn creates a good impact on sales.
  Demo : https://www.youtube.com/watch?v=tRhzdHSMgLI

- Marketing Cloud : Salesforce Marketing Cloud is the name of Salesforce's platform for multi-channel customer engagement, digital marketing, marketing automation, analytics, and personalization. The platform is a set of software as a service (SaaS) products with different types of functionality and additional add-on features offered from salesforce.
  Demo : https://www.youtube.com/watch?v=tWPsPEWdRlM

- Commerce Cloud : Salesforce Commerce cloud is an ecommerce solution for B2C (business to consumer) and B2B (business to business) customers. That means that organizations purchase Commerce Cloud to provide the best ecommerce websites to their customers who are shopping online—whether they are consumers buying the latest fashion or businesses making a large wholesale purchase.
  Demo : https://www.youtube.com/watch?v=mXAMMeo70ZE

- Data Cloud : Salesforce's Data Cloud Organize and unify data across Salesforce and other external data sources. After data has been ingested into Data Cloud, it can be used to drive personalization and engagement through the creation of audience segments. Additionally, through identity resolution one can achieve a single, actionable view of the customer.
  Demo : https://www.youtube.com/watch?v=dhkuzFbrIG8

- Tableau : Tableau helps to democratize and automate data analytics with innovative, no-code, AI-powered solutions like machine learning (ML), natural language processing (NLP), smart data preparation, and more. With a proprietary query language (VizQL) at the heart of its functionality, Tableau effortlessly renders visuals of data sets with a simple drag-and-drop action.
  Demo : https://www.youtube.com/watch?v=YfE9jBq002"

27. As is manifest from the above, SFDC Ireland provides a cloud-based customer management platform which enables its customers to track sales, collate customer data, enabling its users to track customer requests, digital marketing, marketing automation, creation of ecommerce platforms and a host of other functions. The cloud-based software driven platform appears to be an automated managerial software as well as an analytical and predictive tool with marketing and customer engagement constituting some of its primary attributes. It must at the outset be noted that undisputedly, the Reseller has not transferred any Intellectual Property Rights as is evident from Section 6 of the Reseller Agreement.

28. Section 2 of the Reseller Agreement defines the relationship between the petitioner and the Reseller as being on a principal-to-principal basis and that of a buyer and seller. The right of sale of SFDC Products as conferred upon the Reseller is on a non-exclusive basis. The Reseller is also not vested with any right to bind SFDC Ireland by its actions. SFDC Products are defined to mean customer relationship offerings, applications and platforms. These products, since they are cloud based, are accessed over the internet by end customers.

29. FTS under the DTAA is defined to mean consideration received for the rendering of managerial, technical or consultancy services. The payment which the party of the Contracting State receives in order to fall within the ambit of FTS must constitute consideration for technical services. In *CIT vs. Bharti Cellular*, the Court upon noticing how the word technical stood sandwiched between managerial and consultancy had held that the rendering of services would have to necessarily

include a human element. We deem it apposite to extract the following passages from that decision: -

> "**12.** The aforesaid Explanation makes it clear that "fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any "managerial, technical or consultancy services" but does not include consideration for any construction, assembly, mining or like products in the country by the recipients or consideration which would be income of the recipients chargeable under the head "Salaries". The said definition is in two parts. The first part is "means and includes" type of definition and the second part is does not include definition. In the present appeals we are not concerned with the second part. The entire focus is on attracted to the first part and that, too, to the expression "consideration. .. for the rendering of any " managerial, technical for consultancy services". It is only if the payments made by the respondents/assessees to MTNL/other companies in respect of interconnect/port access charges fall within the ambit of this expression that the said payments could be regarded as fees for technical services as contemplated under section 194J of the said Act.
>
> **13.** In Skycell Communications Ltd. [2001] 251 ITR 53 (Mad), a learned single judge of the Madras High Court noted that installation and operation of sophisticated equipment with a view to earn income by allowing customers to avail of the benefit of the user of such equipment does not result in the provision of technical service to the customer for a fee. It was also held that technical service referred to in Explanation 2 to section 9(1)(vii) contemplated the rendering of a "service" to the payer of the fee and that mere collection of a "fee" for use of a standard facility provided to all those willing to pay for it did not amount to the fee having been received for technical services. We find ourselves to be in agreement with the views expressed by the learned single judge of the Madras High Court in Skycell Communications Ltd. [2001] 251 ITR 53. However, we still have to deal with the submissions made by the learned counsel for the appellants/Revenue that the payments that were considered in the case of Skycell Communications Ltd. [2001] 251 ITR 53 (Mad) were those made by a subscriber to the cellular mobile telephone facility provider and not by one cellular network provider to another. For this purpose, we must examine the appeals at hand de hors the decision of the Madras High Court in Skycell Communications Ltd. [2001] 251 ITR 53.

14. We have already pointed out that the expression "fees for technical services" as appearing in section 194J of the said Act has the same meaning as given to the expression in Explanation 2 to section 9(1)(vii) of the said Act. In the said Explanation the expression "fees for technical services" means any consideration for rendering of any "managerial, technical or consultancy services". The word "technical" is preceded by the word "managerial" and succeeded by the word "consultancy". Since the expression "technical services" is in doubt and is unclear, the rule of noscitur a sociis is clearly applicable. The said rule is explained in Maxwell on the Interpretation of Statutes (Twelfth Edition) in the following words (page 289) :
"Where two or more words which are susceptible of analogous meaning are coupled together, noscuntur a sociis, they are understood to be used in their cognate sense. They take, as it were, their colour from each other, the meaning of the more general being restricted to a sense analogous to that of the less general."

15. This would mean that the word "technical" would take colour from the words "managerial" and "consultancy", between which it is sandwiched. The word "managerial" has been defined in the Shorter Oxford English Dictionary, Fifth Edition as : "of pertaining to, or characteristic of a manager, esp. a professional manager of or within an organization, business, establishment, etc."

16. The word "manager" has been defined, inter alia, as :
"a person whose office it is to manage an organization, business establishment, or public institution, or part of one ; a person with the primarily executive or supervisory function within an organization, etc., a person controlling the activities of a person or team in sports, entertainment, etc."

17. It is, therefore, clear that a managerial service would be one which pertains to or has the characteristic of a manager. It is obvious that the expression "manager" and consequently "managerial service" has a definite human element attached to it. To put it bluntly, a machine cannot be a manager.

18. Similarly, the word "consultancy" has been defined in the said Dictionary as the work or position of a consultant ; a department of consultants. "Consultant" itself has been defined, inter alia, "as a person who gives professional advice or services in a specialized field". It is obvious that the word "consultant" is a derivative of the word "consult" which entails deliberations,

consideration, conferring with someone, conferring about or upon a matter. Consult has also been defined in the said Dictionary as " ask advice for, seek counsel or a professional opinion from ; refer to (a source of information) ; seek permission or approval from for a proposed action". It is obvious that the service of consultancy also necessarily entails human intervention. The consultant, who provides the consultancy service, has to be a human being. A machine cannot be regarded as a consultant.

19. From the above discussion, it is apparent that both the words "managerial" and "consultancy" involve a human element. And, both, managerial service and consultancy service, are provided by humans. Consequently, applying the rule of noscitur a sociis, the word "technical" as appearing in Explanation 2 to section 9(1)(vii) would also have to be construed as involving a human element. But, the facility provided by MTNL/ other companies for interconnection/port access is one which is provided automatically by machines.

20. It is independently provided by the use of technology and that too, sophisticated technology, but that does not mean that MTNL/other companies which provide such facilities are rendering any technical services as contemplated in Explanation 2 to section 9(1)(vii) of the said Act. This is so because the expression "technical services" takes colour from the expressions "managerial services" and "consultancy services" which necessarily involve a human element or, what is now a days fashionably called, human interface. In the facts of the present appeals, the services rendered qua interconnection/port access do not involve any human interface and, therefore, the same cannot be regarded as "technical services" as contemplated under section 194J of the said Act.

22. In the appeals before us it is obvious that the meaning of the expression "technical services" by itself, is far from clear. It is also clear that the word "technical" has been used in the "society" of the words "managerial" and "consultancy". In such a situation, the rule would clearly apply and, therefore, the expression "technical services" would have to take colour from the expressions "managerial services" and "consultancy services"

30. The aforenoted view was upheld by the Supreme Court in *Bharti Cellular* when it observed:

"**4.** The question basically involved in the lead case is: whether TDS was deductible by M/s Bharti Cellular Ltd. when it paid interconnect charges/access/port charges to BSNL? For that

purpose, we are required to examine the meaning of the words "fees for technical services" under Section 194-J read with clause (b) of the Explanation to Section 194-J of the Income Tax Act, 1961 ("the Act", for short) which, inter alia, states that "fees for technical services" shall have the same meaning as contained in Explanation 2 to clause (vii) of Section 9(1) of the Act.

5. Right from 1979 various judgments of the High Courts and tribunals have taken the view that the words "technical services" have got to be read in the narrower sense by applying the rule of noscitur a sociis, particularly, because the words "technical services" in Section 9(1)(vii) read with Explanation 2 comes in between the words "managerial and consultancy services."

31. However, while noticing the march of technology since that decision had been pronounced and science and technology today tending to blur or obviate the requirement of human intervention, the Supreme Court in *Kotak Securities* pertinently observed as follows: -

"6. What meaning should be ascribed to the words "technical services" appearing in Explanation 2 to clause (*vii*) to Section 9(1) of the Act is the moot question. In *CIT* v. *Bharti Cellular Ltd.* [*CIT* v. *Bharti Cellular Ltd.*, (2014) 6 SCC 401 : (2011) 330 ITR 239] this Court has observed as follows: (SCC p. 402, para 5)

"5. Right from 1979, various judgments of the High Courts and Tribunals have taken the view that the words "technical services" have got to be read in the narrower sense by applying the rule of noscitur a sociis, particularly, because the words "technical services" in Section 9(1)(*vii*) read with Explanation 2 comes in between the words "managerial and consultancy services"."

7. Managerial and consultancy services" and, therefore, necessarily "technical services", would obviously involve services rendered by human efforts. This has been the consistent view taken by the courts including this Court in *Bharti Cellular Ltd.* [*CIT* v. *Bharti Cellular Ltd.*, (2014) 6 SCC 401 : (2011) 330 ITR 239] However, it cannot be lost sight of that modern day scientific and technological developments may tend to blur the specific human element in an otherwise fully automated process by which such services may be provided. The search for a more effective basis, therefore, must be made."

32. Proceeding to explain the meaning liable to be attributed to the expression technical services, the Court in *Kotak Securities* held:

> "**8.** A reading of the very elaborate order of the assessing officer containing a lengthy discourse on the services made available by the Stock Exchange would go to show that apart from facilities of a faceless screen based transaction, a constant upgradation of the services made available and surveillance of the essential parameters connected with the trade including those of a particular/single transaction that would lead credence to its authenticity is provided for by the Stock Exchange. All such services, fully automated, are available to all members of the Stock Exchange in respect of every transaction that is entered into. There is nothing special, exclusive or customised service that is rendered by the Stock Exchange. "Technical services" like "managerial and consultancy service" would denote seeking of services to cater to the special needs of the consumer/user as may be felt necessary and the making of the same available by the service provider. It is the above feature that would distinguish/identify a service provided from a facility offered. While the former is special and exclusive to the seeker of the service, the latter, even if termed as a service, is available to all and would, therefore, stand out in distinction to the former. The service provided by the Stock Exchange for which transaction charges are paid fails to satisfy the aforesaid test of specialised, exclusive and individual requirement of the user or consumer who may approach the service provider for such assistance/service. It is only service of the above kind that, according to us, should come within the ambit of the expression "technical services" appearing in Explanation 2 to Section 9(1)(*vii*) of the Act. In the absence of the above distinguishing feature, service, though rendered, would be mere in the nature of a facility offered or available which would not be covered by the aforesaid provision of the Act.
>
> **9.** There is yet another aspect of the matter which, in our considered view, would require a specific notice. The service made available by the Bombay Stock Exchange [BSE Online Trading (BOLT) System] for which the charges in question had been paid by the appellant assessee are common services that every member of the Stock Exchange is necessarily required to avail of to carry out trading in securities in the Stock Exchange. The view taken by the High Court that a member of the Stock Exchange has an option of trading through an alternative mode is not correct. A member who wants to conduct his daily business in the Stock Exchange has no option but to avail of such services. Each and every transaction by a member involves the use of the

> services provided by the Stock Exchange for which a member is compulsorily required to pay an additional charge (based on the transaction value) over and above the charges for the membership in the Stock Exchange. The above features of the services provided by the Stock Exchange would make the same a kind of a facility provided by the Stock Exchange for transacting business rather than a technical service provided to one or a section of the members of the Stock Exchange to deal with special situations faced by such a member(s) or the special needs of such member(s) in the conduct of business in the Stock Exchange. In other words, there is no exclusivity to the services rendered by the Stock Exchange and each and every member has to necessarily avail of such services in the normal course of trading in securities in the Stock Exchange. Such services, therefore, would undoubtedly be appropriate to be termed as facilities provided by the Stock Exchange on payment and does not amount to "technical services" provided by the Stock Exchange, not being services specifically sought for by the user or the consumer. It is the aforesaid latter feature of a service rendered which is the essential hallmark of the expression "technical services" as appearing in Explanation 2 to Section 9(1)(*vii*) of the Act."

33. Reiterating the aforesaid principles, the Supreme Court in **Director of Income Tax (IT)-I vs. A.P. Moller Maersk A S**[18] observed: -

> "**8.** The facts which emerge on record are that the assessee is having its IT system, which is called the Maersk Net. As the assessee is in the business of shipping, chartering and related business, it has appointed agents in various countries for booking of cargo and servicing customers in those countries, preparing documentation, etc. through these agents. Aforementioned three agents are appointed in India for the said purpose. All these agents of the assessee, including the three agents in India, used the Maersk Net System. This system is a facility which enables the agents to access several information like tracking of cargo of a customer, transportation schedule, customer information, documentation system and several other informations. For the sake of convenience of all these agents, a centralised system is maintained so that agents are not required to have the same system at their places to avoid unnecessary cost. The system comprises of booking and communication software, hardware and a data communications network. The system is, thus, integral

[18] (2017) 5 SCC 651

part of the international shipping business of the assessee and runs on a combination of mainframe and non-mainframe servers located in Denmark. The expenditure which is incurred for running this business is shared by all the agents. In this manner, the systems enable the agents to coordinate cargos and ports of call for its fleet.

9. Aforesaid are the findings of facts. It is clearly held that no technical services are provided by the assessee to the agents. Once these are accepted, by no stretch of imagination, payments made by the agents can be treated as fee for technical service. It is in the nature of reimbursement of cost whereby the three agents paid their proportionate share of the expenses incurred on these said systems and for maintaining those systems. It is re-emphasised that neither AO nor CIT (A) has stated that there was any profit element embedded in the payments received by the assessee from its agents in India. Record shows that the assessee had given the calculations of the total costs and pro rata division thereof among the agents for reimbursement. Not only that, the assessee has even submitted before the Transfer Pricing Officer that these payments were reimbursement in the hands of the assessee and the reimbursement was accepted as such at arm's length. Once the character of the payment is found to be in the nature of reimbursement of the expenses, it cannot be income chargeable to tax.

10. Pertinently, the Revenue itself has given the benefit of Indo-Danish DTAA to the assessee by accepting that under Article 9 thereof, freight income generated by the assessee in these assessment years is not chargeable to tax as it arises from the operation of ships in international waters. Once that is accepted and it is also found that the Maersk Net System is an integral part of the shipping business and the business cannot be conducted without the same, which was allowed to be used by the agents of the assessee as well in order to enable them to discharge their role more effectively as agents, it is only a facility that was allowed to be shared by the agents. By no stretch of imagination it can be treated as any technical services provided to the agents. In such a situation, “profit” from operation of ships under Article 19 of DTAA would necessarily include expenses for earning that income and cannot be separated, more so, when it is found that the business cannot be run without these expenses. This Court in CIT v. Kotak Securities Ltd. [CIT v. Kotak Securities Ltd., (2016) 11 SCC 424 : (2016) 383 ITR 1] has categorically held that use of facility does not amount to technical services, as technical services denote services catering to the special needs of the person using them and not a facility provided to all.”

34. The aforenoted observations of the Supreme Court were not only apt but also prophetic when viewed in the context of software driven platforms. However, while explaining what would constitute "technical services", the Supreme Court in *Kotak Securities* had observed that it must be a service which is provided to cater to the special needs of the client. A self-automatized analytical or predictive software or platform which caters to the requirement of multifarious clients as opposed to one created with special attributes or characteristics tailored to the need of a particular client was stated to fall outside the ken of technical services. It was in the above context pertinently observed that a distinction must be acknowledged to exist between a *"service provided"* and a *"facility offered"*.

35. This would be an appropriate juncture to briefly notice some of the additional material which was placed for our consideration by Mr. Chawla, learned counsel for the respondent, who with his characteristic erudition had additionally highlighted some of the issues which were noticed in the MLI**,** the aspects relating to Base Erosion Profit Sharing as well as some instructive passages which find place in the UN Handbook. While the MLI does not shed any additional light on the question which stands posited, the UN Handbook while noticing Article 12A of the Model Convention has some instructive passages which are worthy of notice.

36. It is pertinent to note that within the United Nations Committee of Experts itself there appeared to be a divergence of opinion in respect of how the FTS issue was to be tackled. While some members were of the view that FTS must be tied to the service provider having a sufficient nexus to the payer's State, another group was concerned with

the ambiguity surrounding the term "technical service" and even advocating the adoption of the "fee for services" language. However, and insofar as the India-Ireland DTAA is concerned, it has chosen to adhere to the managerial, technical and consultative services model as opposed to the word services being used generally or for that matter services being specifically enumerated. This is evident from the following extracts of the UN Handbook: -

> "**17.** In the view of these members of the Committee, as a policy matter, taxation of fees for technical services is warranted only when the service provider has a sufficient nexus to the payer's State, which typically is in the form of a permanent establishment or fixed base.
>
> **18.** In other words, to justify taxation of technical services in a State, the services should be provided in that State with the degree of nexus required by Articles 5 (Permanent Establishment), 7 (Business Profits) and 14 (Independent Personal Services).
>
> **19.** Those members of the Committee that did not agree with the inclusion of Article 12A in bilateral tax treaties were also concerned that the term "technical services" as used in the Article is not adequately defined. These members were therefore concerned that the application of the Article would result in increased uncertainty, inconsistent treatment, and lengthy disputes between taxpayers and tax authorities.
>
> **20.** In the view of those members of the Committee that did not agree with the inclusion of Article 12A, a further problem with taxation of fees for technical services on a gross basis is that it can lead to double taxation. The imposition of a tax on a gross basis denies the taxpayer the ability to take into account expenses that were incurred in connection with the provision of the services, which wouldddeductible if tax were imposed on a net basis. Thus, it is possible that the residence State's remedies for relieving double taxation may not be adequate to fully relieve the gross-basis taxation imposed by the other State.
>
> **21.** As a matter of broader economic policy, those members that opposed the inclusion of Article 12A were concerned that, as a result of the Article, consumers of technical services in the source State may encounter higher prices for those services, because foreign service providers could pass added tax costs on to the

consumer through means such as so-called "gross-up" clauses in contracts. Typically, a gross-up clause will specify a net amount that the provider will receive, effectively passing the burden of any withholding tax on to the consumer of the services. The use of gross-up clauses could result in the tax being shifted to the consumer and make it more expensive to purchase the services. This can put a foreign service provider at a competitive dis-advantage, effectively foreclosing access to a market that imposes such a withholding tax and restricting the consumer's legitimate choice of suppliers.

22. These members were also concerned that the inclusion of Article 12A would lead to trade distortions as the taxation of goods and services would operate on a different basis. The reason for this is that the profits of an exporter of goods are taxable only in its State of residence, whereas, under Article 12A, what is in effect an import tarifi would be applied to technical services.

23. In summary, these members did not accept the analysis in paragraphs 2 to 15 above, and regarded any expanded taxing jurisdiction on fees for technical services as an unjustified shift of the balance of taxation from the place where services are provided to the place where services are consumed. Countries sharing these concerns may wish not to include Article 12A in their bilateral tax treaties.

24. Alternatively, countries, which wish to obtain additional taxing rights on fees for technical services, but are concerned with the broad scope of article 12A, may consider agreeing to amend article 12 (royalties) to permit taxation of certain "fees for included services," an approach that is found in a number of bilateral tax treaties between developing and developed countries. The underlying policy rationalefor this narrower approach is that, in order to justify taxation by the State from which the payment is made even in cases where the services are not performed in that State, fees for services must be directly related to the enjoyment of property for which a royalty as otherwise defined in Article 12 is paid. Wording for this narrower alternative approach is set forth in paragraphs 25 and 26 of the Commentary on Article 12.

25. However, a majority of the members of the Committee of Experts was of the view that the alternative referred to in paragraph 24 is not an acceptable alternative to Article 12A for developing countries because, in essence, those members considered that there is no principled justification for restricting the taxation of fees for technical services to services directly related to property producing royalties. Moreover, those members

took the view that the alternative supported by a minority of the members of the Committee contains many vague terms of uncertain meaning, which may lead to frequent disputes about the interpretation of that provision.

26. Instead, countries concerned about the scope of Article 12A and the uncertainty associated with the definition of "fees for technical services" in Article 12A, paragraph 3 might consider an alternative version of Article 12A under which Article 12A would potentially apply to all fees for services (technical and other services) provided in a Contracting State, and also to fees for services provided outside that State by closely related persons, other than payments expressly excluded under paragraphs 3(a), (b), and (c). Under this alternative provision, paragraphs 1, 2, 4, and 7 of Article 12A would remain unchanged except that the term "fees for technical services" in those paragraphs would be replaced by the term "fees for services." However, paragraphs 3, 5 and 6 would be replaced by the following paragraphs:

> 3. The term "fees for services" as used in this Article means any payment in considerationfor any service, unless the payment is made:
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> (a) to an employee of the person making the payment;
>
> (b) for teaching in an educational institution or for teaching by an educational institution; or
>
> (c) by an individual for services for the personal use of an individual.
>
> 5. For the purposes of this Article, fees for services shall be deemed to arise in a Contracting State if:
>
> (a) the services are performed in that State; or
>
> (b) the payer is a resident of that State and the fees are paid to a closely related enterprise or person unless the payer carries on business in the other Contracting State or a third State through a permanent establishment situated in that State, or performs independent personal services through a fixed base situated in the other Contracting State or a third State and such fees are borne by that permanent establishment or fixed base; or
>
> (c) the payer has in that State a permanent establishment or a fixed base in connection with which the obligation to pay the fees for services was incurred, and such fees are borne by such permanent establishment or fixed base, and are paid to a closely related enterprise or person.

> For the purposes of this Article, a person is closely related to an enterprise if, based on all the relevant facts and circum-stances, one has control of the other or both are under the control of the same persons or enterprises. In any case, a person shall be considered to be closely related to an enterprise if one possesses directly or indirectly more than 50 per cent of the beneficial interest in the other (or, in the case of a company, more than 50 per cent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the com-pany) or if another person possesses directly or indirectly more than 50 per cent of the beneficial interest (or, in the case of a company, more than 50 per cent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) in the person and the enterprise. For the purposes of this Article, an individual shall be a closely related person with respect to another individual if the individual is related to that other individual by blood relationship, marriage or adoption."

37. Equally instructive is the following discussion on the subject of FTS:-

> "**60.** The paragraph lays down nothing about the mode of taxation in the State in which fees for technical services arise. Therefore, it leaves that State free to apply its own laws and, in particular, to levy the tax either by deduction at source or individual assessment. As with other provisions of the United Nations Model Convention, procedural questions are not dealt with in the Article. Each State is able to apply the procedure provided in domestic law.
>
> **61.** This paragraph specifies the meaning of the phrase "fees for technical services" for purposes of Article 12A. The definition of "fees for technical services" in paragraph 3 is exhaustive. "Fees for technical services" are limited to the payments described in paragraph 3; other payments for services are not included in the definition and are not dealt with in Article 12A.
>
> **62.** Article 12A applies only to fees for technical services, and not to all payments for services. Paragraph 3 defines "fees for technicalservices" as payments for managerial, technical or consultancy ser-vices. Given the ordinary meanings of the

terms "managerial," "tech-nical" and "consultancy," the fundamental concept underlying the definition of fees for technical services is that the services must involve the application by the service provider of specialized knowledge, skill or expertise on behalf of a client or the transfer of knowledge, skill or expertise to the client, other than a transfer of information covered by the definition of "royalties" in Article 12, paragraph 3. Services of a routine nature that do not involve the application of such specialized knowledge, skill or expertise are not within the scope of Article 12A.

63. The ordinary meaning of the term "management" involves the application of knowledge, skill or expertise in the control or administration of the conduct of a commercial enterprise or organization. Thus, if the management of all or a significant part of an enterprise is contracted out to persons other than the directors, officers or employees of the enterprise, payments made by the enterprise for those management services would be fees for technical services within the meaning of paragraph 3. Similarly, payments made to a consultant for advice related to the management of an enterprise (or of the business of an enterprise) would be fees for technical services.

64. The ordinary meaning of the term "technical" involves the application of specialized knowledge, skill or expertise with respect to a particular art, science, profession or occupation. Therefore, fees received for services provided by regulated professions such as law, accounting, architecture, medicine, engineering and dentistry would be fees for technical services within the meaning of paragraph 3. Thus, if an individual receives payments for professional services referred to in Article 14, paragraph 2 from a resident of a Contracting State, those payments would be fees for technical services. If the payments arise in that Contracting State because they are made by a resident of that State or borne by a permanent establishment or fixed base in that State, the payments would be subject to tax by that State in accordance with paragraph 2 irrespective of the fact that the services are not performed in that State through a fixed base in that State.

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85. It is often necessary to distinguish between fees for services, including fees for technical services, and royalties in order to

determine whether Article 12 or another Article of the Convention (Article 12A in the case of "fees for technical services") is applicable. The distinction between fees for services and royalties is clear in principle. Under Article 12, paragraph 3, royalties are payments for the use, or the right to use, certain types of property or information concerning industrial, commercial or scientific experience (so-called know-how).In contrast, the performance of services does not involve any transfer of the use of, or the right to use, property. However, in practice it is often difficult to distinguish between royalties and fees for services, including technical services, especially with respect to so-called mixed contracts. Guidance with respect to the distinction between fees for services and royalties is provided in paragraph 12 of the Commentary on Article 12 of the United Nations Model Convention, which reproduces paragraphs 11.2-11.6 of the Commentary on Article 12 of the OECD Model Convention.

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90. Example 3: R Company is a resident of State R. R Company's business is the collection, organization and maintenance of various databases. R Company sells access to these databases to its clients. One of R Company's clients is Company S, a resident of State S. State R and State S have entered into a tax treaty that contains a provision identical to Article 12A of the United Nations Model Convention. The payments that R Company receives from S Company for access to its databases would not be fees for technical services within the meaning of paragraph 3. Although R Company used its knowledge, skill and expertise in creating the database, the services that R Company provides to S Company- access to the database - are routine services that do not involve the application of R Company's knowledge, skill and expertise for the benefit of S Company, Accordingly, Article 12A would not apply to the payments.

91. If, however, S Company entered into a contract with R Company under which R Company created a specialized database customizedfor S Company's use from information supplied by S Company or collected by R Company, the payments by S Company to R Company would be "fees for technical services" under paragraph 3. In this situ-ation, R Company would be applying its knowledge, skill and expertise for the benefit of S Company. As a result, the payments would be taxable by State S in accordance with paragraph 2. It would not matter whether R

> Company performed all or any part of the services of creating the database in State S."

38. As is manifest from the above, the Committee of Experts understood the word "technical" to entail the application of specialised knowledge, skill or art to a particular art, science, skill or expertise. Equally instructive in this context is the exemplar discussed in paras 90 and 91 and which reemphasized the existence of specialised rendering and solution providing as being key elements to answering the question of FTS. However, and insofar as we are concerned, the issue of technical service has to be examined on the anvil of not only a specially crafted and individualised rendition but additionally upon it being found that services of a technical character were provided. The Reseller Agreement may now be tested on the aforenoted precepts.

39. In order for receipts of SFDC Ireland being characterized as FTS, one would have to discern and find the existence of an exclusive and special service of a technical character which was provided to the recipient. Not only would that service have to be unique and tailored to the requirements of the seeker, it must also be technical. Unless one finds the transfer of technological knowledge which is exclusive and specialised to the need of the recipient, it would clearly not fall within the scope of technical service. While in today's age it may not be appropriate to understand the word technical to be confined to industrial or applied sciences or for that matter the use of an instrument or facility, the test of exclusivity, individualization and specially crafted solutions would continue to govern.

40. As we read the terms of the Reseller Agreement, its stipulations do not appear to contemplate any technology transfer to SFDC India.

The Indian entity appears to have been designated merely to act as the Reseller which would engage with and onboard customers within the territory for use of SFDC products. As is evident from the definition of SFDC Products, it speaks of customer relationship management offerings, applications, platforms, products and offerings exclusively for resale in the territory. The obligation of SFDC Ireland as per Section 4 of the Reseller Agreement was to provide SFDC products as notified from time to time. The price for those products was to be as per the stipulations contained in Exhibit A. The aforesaid clauses merely speak of the Reseller being accorded the right to sell SFDC products as distinct from what would constitute technical service.

41. The technical assistance and training imparted to SFDC India staff appears to be aimed at enabling them to understand the various attributes and capabilities of SFDC Products so as to be informed when interacting with prospective customers in the territory. The technical assistance and training which is spoken of in Section 4.3 of the Reseller Agreement does not appear to bear the characteristics of a conferral of specialised or exclusive technical service. In any case, the training and assistance proffered by SFDC was a concomitant to the sale of its principal products in the territory and fundamentally aimed at readying SFDC India to undertake the marketing of those products. The technical assistance and training did not constitute either the core or the foundational basis of the consideration which was received by SFDC Ireland.

42. Insofar as the products for SFDC India's internal use were concerned, they stood restricted to those which would enable SFDC India to demonstrate the functionality of SFDC products in trade shows

and exhibitions, to train its customers and employees on the use of those products and products to administer and manage customer accounts. None of these aspects would appear to be imbued with a technical hue. Imparting training or educating a person with respect to the functionality and attributes of a software or application would clearly not amount to the rendering of technical service under the DTAA. More importantly, the technical assistance and training which the petitioner proposed to provide was confined to marketing, distribution, support and sale of SFDC products. The assistance and training which Section 4.3 of the Reseller Agreement speaks of was concerned with fields wholly unrelated to providing technical service.

43. Similarly Exhibit B speaks of the products being concerned with assisting the Reseller in the performance of its sales and marketing obligations. All of the above was thus aimed at merely equipping and educating the representatives of SFDC India to be in a position to comprehensively brief potential customers. The training and assistance was thus primarily aimed at the sale of SFDC products and customer related issues. This does not appear to comprise a transmission of specialised knowledge or skill. This more so when we bear in mind the indubitable fact that the phrase "technical service" is to be read in conjunction with "managerial" and "consultation" and it being the settled position in law that the principle of *noscitur a sociis* is to apply.

44. With advancements in computing capabilities and the range of software applications that stretch the boundaries of analytics and predictive abilities each day, business enterprises are empowered to plan, review and evaluate data in ways unknown in the past. However, these attributes and hallmarks alone would not justify jettisoning the

tests formulated in the decisions aforenoted and which have while interpreting FTS consistently recognised them to be the rendering of specialised and customized service of a technical character. It is this precept which would continue to constitute the lodestar for answering the issues which arise from Article 12(3)(b) of the DTAA.

45. In any case the respondent has failed to allude to any material which would have lent credence to its conclusion that SFDC Ireland was not selling a *"standard off the shelf/non customized/electronically downloadable software*". The respondent fails to found this conclusion on any stipulation of the contract or any other material that was gathered in the course of evaluation of the application of SFDC Ireland. The impugned order also fails to advert to any material to indicate that the supply of SFDC Products departed from a standard scope of services. Even before us, the respondents failed to allude to any material which may have even remotely established that the platform or for that matter the software was being customized or specially designed for a consumer and which constituted the basis of the consideration received.

46. The respondent holds against the petitioner additionally on the ground that it was providing *"comprehensive services experience or solutions with the help of technology embedded in the software"*. Even if that were to be accepted as a correct appreciation of the SFDC bouquet of products, it would remain a facet or attribute of the software application available to any customer. This would again fall within the standard scope of service as opposed to an individualization of the application. In any case, a service experience or solution cannot

possibly be countenanced as the correct test for the purposes of answering the issue of technical services.

47. More fundamentally, the allusion to "*non-standardized software*" and "*comprehensive service experiences*" would have been pertinent provided those were applicable to the position in which SFDC India stood placed under the Reseller Agreement. The said entity was merely designated as the Reseller with rights as specified in that agreement. It was merely tasked with the marketing, sale and distribution of SFDC Products as also the onboarding of potential customers. It was not the ultimate recipient of those products or of those services. The respondent was thus required to confine the scope of the enquiry to the nature of the service extended by SFDC Ireland to SFDC India as opposed to the potential benefits that could have been derived from the products in question by the end customer.

48. We also bear in mind the indubitable fact that in order to fall within the ambit of FTS, it was incumbent upon the respondents to establish an indelible link between the payment received by SFDC Ireland and the same constituting "consideration" for providing technical services. Presently and on the state of the record as it exists today, the respondents do not appear to have evaluated the claim for withholding tax as raised on the touchstone of whether the remittances made to SFDC Ireland was for customized technical services. The impugned order does not proceed on the basis of any material or evidence which may have indicated that the moneys remitted to the assessee could be said to constitute consideration for technical services. Support, training and assistance provided by the assessee was asserted to be free of charge. According to SFDC Ireland, no remuneration is

charged or received for providing technical assistance and training. It is also unclear from the record whether SFDC Products for Resellers Internal Use and which were restricted to training of customers and employees on the use of SFDC Products as also for managing customer accounts are charged for. The aforenoted conclusions thus clearly merit the impugned order being quashed and set aside with liberty being reserved to the respondent to examine the issue in light of the above.

49. There remains one other important aspect which remains unresolved and does not appear to have been evaluated by the respondents while passing the impugned order. Exhibit A while dealing with Purchase Price does not speak of individual or institutional sales of applications or subscriptions to the platform but of the Reseller's Net Revenue. The purchase price is thus not linked to a particular sale of SFDC products or access fee to the platform. The various streams and heads of revenue of SFDC India, earnings from customization or individualization of the SFDC suite of products, if any, are aspects which do not appear to have been examined. The present, in that sense, is unlike cases where an agency may have been designated to merely market, sale and distribute a prepackaged software product or application and remit the cost thereof. Whether the remittance of 2.75% of the Reseller's Indian Territory Revenue would include supply of customized technical services is an aspect which does not appear to have either fallen for notice or consideration of the respondent.

50. Accordingly, and for the aforesaid reasons, we allow the instant writ petition and quash the order dated 16 October 2023 as well as the certification dated 18 October 2023. The matter shall in consequence stand remitted to the respondent for considering the application of

SFDC Ireland afresh bearing in mind the observations entered hereinabove especially those highlighted in paras 48 and 49.

51. Pending application also stands disposed of.

YASHWANT VARMA, J.

PURUSHAINDRA KUMAR KAURAV, J.

MARCH 11, 2024/*neha*