IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 7TH DAY OF FEBRUARY, 2025

PRESENT

THE HON'BLE MR JUSTICE V KAMESWAR RAO

AND

THE HON'BLE MR JUSTICE S RACHAIAH

ITA NO. 11 OF 2022
C/W
ITA NO. 12 OF 2022,
ITA NO. 14 OF 2022,
ITA NO. 15 OF 2022

IN ITA NO. 11 OF 2022:

BETWEEN:

1. THE COMMISSIONER OF INCOME TAX,
INTERNATIONAL TAXATION,
4TH FLOOR, BMTC BUILDING,
80 FEET ROAD,
KORAMANGALA,
BENGALURU - 560 095.

2. THE ASSISTANT COMMISSIONER OF INCOME TAX,
INTERNATIONAL TAXATION,
CIRCLE-2(2), 4TH FLOOR,
BMTC BUILDING,
80 FEET ROAD,
KORMANGALA,
BENGALURU - 560 095.

...APPELLANTS

(BY SRI. RAVI RAJ Y V, ADVOCATE)

AND:

M/S URBAN LADDER HOME DÉCOR
SOLUTIONS PVT. LTD.,
1ST, 2ND AND 3RD FLOOR,

NO.259 AND 276,
AMARJYOTHI HBCS LAYOUT,
DOMLUR,
BENGALURU - 560 071.

…RESPONDENT

(BY SRI. SANDEEP HUILGOL AND
SMT. BHAVANA B, ADVOCATES)

THIS ITA IS FILED UNDER SEC.260-A OF INCOME TAX ACT, 1961, PRAYING TO ALLOW THE APPEAL AND SET ASIDE THE ORDERS PASSED BY THE INCOME TAX APPELLATE TRIBUNAL, BENGALURU IN IT(IT)A NO. 617/BANG/2020 DATED 17/08/2021 FOR ASSESSMENT YEAR 2016-2017 (ANNEXURE-C), ETC.

IN ITA NO. 12 OF 2022:

BETWEEN:

1. THE COMMISSIONER OF INCOME TAX,
INTERNATIONAL TAXATION,
4TH FLOOR, BMTC BUILDING,
80 FEET ROAD,
KORAMANGALA,
BENGALURU - 560 095.

2. THE ASSISTANT COMMISSIONER OF INCOME TAX,
INTERNATIONAL TAXATION,
CIRCLE-2(2), 4TH FLOOR,
BMTC BUILDING,
80 FEET ROAD,
KORMANGALA,
BENGALURU - 560 095.

…APPELLANTS

(BY SRI. RAVI RAJ Y V, ADVOCATE)

AND:

M/S URBAN LADDER HOME DÉCOR
SOLUTIONS PVT. LTD.,
1ST, 2ND AND 3RD FLOOR,
NO.259 AND 276,
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IN ITA NO. 14 OF 2022:

BETWEEN:

1. THE COMMISSIONER OF INCOME TAX,
INTERNATIONAL TAXATION,
4TH FLOOR, BMTC BUILDING,
80 FEET ROAD,
KORAMANGALA,
BENGALURU - 560 095.

2. THE ASSISTANT COMMISSIONER OF INCOME TAX,
INTERNATIONAL TAXATION,
CIRCLE-2(2), 4TH FLOOR,
BMTC BUILDING,
80 FEET ROAD, KORMANGALA,
BENGALURU - 560 095.

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(BY SRI. RAVI RAJ Y V, ADVOCATE)

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IN ITA NO. 15 OF 2022:

BETWEEN:

1. THE COMMISSIONER OF INCOME TAX,
   INTERNATIONAL TAXATION,
   4TH FLOOR, BMTC BUILDING,
   80 FEET ROAD,
   KORAMANGALA,
   BENGALURU - 560 095.

2. THE ASSISTANT COMMISSIONER OF INCOME TAX,
   INTERNATIONAL TAXATION,
   CIRCLE-2(2), 4TH FLOOR,
   BMTC BUILDING,
   80 FEET ROAD, KORMANGALA,
   BENGALURU - 560 095.

…APPELLANTS

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M/S URBAN LADDER HOME DÉCOR
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DATED 17/08/2021 FOR ASSESSMENT YEAR 2016-2017 (ANNEXURE-C), ETC.

THESE APPEALS HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 21.10.2024, COMING ON FOR 'PRONOUNCEMENT OF JUDGMENT' THIS DAY, **V KAMESWAR RAO J.,** DELIVERED THE FOLLOWING:

CORAM: THE HON'BLE MR JUSTICE V KAMESWAR RAO
AND
THE HON'BLE MR JUSTICE S RACHAIAH

COMMON CAV JUDGMENT

(PER: THE HON'BLE MR JUSTICE V KAMESWAR RAO)

These appeals raise common substantial questions of law pertaining to the same assessee; moreover, the appeals arise from a common order passed in a batch of appeals and hence, are being disposed of by this common judgment.

2. The challenge in these appeals is primarily to an order dated 17.08.2021 passed by the Income Tax Appellate Tribunal "B" Bench, Bengaluru ('ITAT' for short) disposing of six appeals. These appeals pertain to the appeals being IT(IT)As No.615/Bang/2020, 616/Bang/2020, 617/Bang/2020 and 618/Bang/2020.

3. The assessee-respondent claims to be a Company involved in business of dealing in home décor products. It has placed advertisements in several social medias such as Facebook, Amazon Web services and Rocket Science Group, LLC, US. Assessee has made payments to non-residents without deducting tax at source. Hence, Assessing Officer ('AO' in short) treated assessee in default and passed orders under Section 201(1) and 201(1A) of the Income Tax Act, 1961 ('the Act' for short) for the assessment years 2015-16, 2016-17 and 2017-18 vide orders dated 21.02.2018. Assessee preferred appeals before Commissioner of Income Tax (Appeals) ['CIT(A)' for short] against the said orders. The said Authority passed order on 17.03.2020 confirming the orders passed by the AO. The assessee preferred appeal before the ITAT. The ITAT, vide order dated 17.08.2021, has allowed the appeals for the aforesaid years. The relevant part of the order of the ITAT is reproduced as under:

> *"24. In view of the foregoing discussions, we are of the view that the payments made by the assessee to*

> *the three non-resident companies referred above cannot be considered ad "royalty payments" and hence they do not give rise any income chargeable in India under Indian Income tax Act in all the three years under consideration. In that view of the matter, there is no requirement to deduct tax at source from those payments u/s 195 of the Act. Hence the assessee herein cannot be considered as an assessee in default u/s 201(1) of the Act.*
>
> *25. Accordingly, we set aside the orders passed by Ld CIT(A) for the years under consideration and direct the AO to delete the demand raised u/s 201(1) of the Act and also the consequential interest charged u/s 201(1A) of the Act in all the three years under consideration. ”*

It may be stated here that, the ITAT has mainly relied upon the decision of the Supreme Court in the case of ***Engineering Analysis Centre of Excellence Private Limited -Vs.- Commissioner of Income Tax and Another [2021 SCC OnLine SC 159]*** *[‘Engineering Analysis (supra)’ for short]* to hold that assessee was not liable to deduct TDS on such payments made to non-residents.

4. These appeals have been admitted on the following substantial questions of law:

i) *Whether on the facts and in the circumstances of the case, the Tribunal Order can be said as perverse in nature holding that assessee is not liable to deduct TDS on payments made to non-residents by relying on the decision of Hon'ble Apex Court in case of Engineering Analysis Centre of Excellence Pvt. Ltd. Vs. CIT, when facts of the Present case are entirely different and law laid down in said case cannot be applied to present case?*

ii) *Whether on the facts and in the circumstances of the case, the Tribunal is right in law allowing appeal of the assessee by holding that there was no obligation on part of assessee to deduct TDS on payments made to Facebook Ireland, Ireland, Rocket Science Group, LLC, US and Amazon Web Services, Inc Non-resident companies on the ground that the payments cannot be regarded as 'Royalty' ignoring that nature of usage of technology, model or process and equipments are covered by Explanation 2(iii) to Section 9(1)(vi) of the Act and therefore assessee ought to have deducted TDS on such payments?*

iii) *Whether on the facts and in the circumstances of the case, the Tribunal is right in law allowing appeal of the assessee by holding that there was no obligation on part of assessee to deduct TDS on payments made to non-resident companies without analyzing*

the facts and materials of the present case with provisions of respective DTAA's?

5. The Assessing Officer has, in his order, stated as under:

*"**Conclusion**:*

As the Assessee company, has failed to deduct tax at source as stipulated u/s 195 on the payments made towards: (a) Advertisement charges paid (b) Cloud Computing Services(Web charges) and (c) purchase of Software for the F.Y. 2015-16 relevant to Assessment Year 2016-17, the assessee is held to be an assssee in default as per the provisions of Section 201(1) of the Income Tax Act, 1961, for non deduction of tax at source. The Assessee company, should have deducted tax at the rate of 10% on these payments. However, the assesse has failed to deduct tax at source. Hence, the default for non deduction of tax on the payments made and consequential interest leviable u/s 201(1A) for the above said assessment year, are computed as under:

Sl. No.	*Particulars*	*Rs.*		*Total Amount (Rs.)*
01	*Assess deemed to be in default u/s 201(1) for non deduction of tax at source under section 195:* *(a) Advertisement Charges* *(i) Facebook*	*23,40,43,100*		

	(ii) Rocket Science Group *(b) Web Charges* *(c) Software Purchases*	*51,60,278*	*23,92,03,378* *1,91,22,481* *17,09,209*	*26,00,35,068*
	Tax to be deducted at 10% on Rs.26,58,10,137/-		*2,60,03,506*	
02	*Interest under section 201(1A)(23 months)*		*59,80,804*	
	Total		*3,19,84,310*	

Issue demand notice and challan accordingly."

6. Before noting the submissions made by the learned counsel for the parties, it is necessary to state in brief the nature of payments made to the aforesaid three entities.

(a) Payments made to Facebook, Ireland:

The assessee-Company uses Facebook platform to display its products on the wall of Facebook users. Hence, the assessee makes payments to Facebook for the advertisements hosted on the web for seeking attention of Facebook users.

(b) Payments made to Rocket Science Group, LLC, USA (Mail Chimp):

M/s Rocket Science Group LLC has got "Mail Chimp" platform, which allows its users to send bulk email

advertisements/marketing content to their customers using its marketing automation tools.

(c) Payments made to Amazon Web Services Inc., US:

The assessee-Company has availed cloud computing services from Amazon Web Services Inc. (AWS) for its online business needs. Cloud computing is an arrangement in which the cloud provider hosts the shared computing resources such as hardware, software applications etc., and the cloud user accesses them for storage, data processing etc., via internet on a need basis. In view of Cloud computing technology, Enterprises need not make investment in IT infrastructure (hardware, storage space, application softwares, other IT resources etc.) and they can use the required IT resources on payment of charges.

Submissions:

7. The submissions of Sri. Ravi Raj.Y.V, learned counsel for the appellants-Revenue are, the ITAT had erred in allowing the appeals of the assessee by holding that there was no obligation on the part of the assessee to

deduct TDS on payments made to non-resident Companies without analyzing the facts and materials of the present case with provisions of respective Double Taxation Avoidance Agreements (DTAA). According to him, ITAT has clearly erred to hold that, the payments cannot be regarded as 'Royalty' ignoring that nature of usage of technology, model or process and equipments are covered by Explanation 2(iii) to 9(1)(vi) of the Act and therefore, the assessee ought to have deducted TDS on such payments. He stated that, the reliance placed by the ITAT to hold that assessee is not liable to deduct TDS by relying on the decision of the Supreme Court in the case of ***Engineering Analysis*** (supra) is clearly distinguishable on facts. In support of his submissions, he has heavily relied upon the assessment order and the order in appeal before the CIT(A).

8. On the other hand, Sri. Sandeep Huilgol, learned counsel appearing for the respondent-assessee, at the outset, would submit that, against the same impugned order, two more appeals were filed by the appellants-

Revenue which were numbered as ITAs No.16/2022 and 17/2022 relevant for assessment year 2017-18, which came to be dismissed by this Court vide orders dated 23.09.2024 on the ground that, the tax effect of the issues arising in the said appeals were less than the monetary limits prescribed by the CBDT vide its Circular bearing No.9/2024 dated 17.09.2024 read with Circular No.5/2024 dated 15.03.2024.

9. According to him, even otherwise the aforesaid three non-resident entities admittedly do not have a permanent establishment in India. In the subject assessment years, the respondent made the following payments to Facebook, Mailchimp and Amazon respectively:

Name of the payee	**AY 2015-16 (in Rs./-)**	**AY 2016-17 (in Rs./-)**	**Total to each payee for the subject AYs (in Rs./-)**
Facebook	26,29,79,222	23,40,43,100	49,70,22,322
Mailchimp	9,59,272	51,60,278	61,19,550
Amazon	18,71,643	1,91,22,481	2,09,94,124
Total for all payees for each AY	**26,58,10,137**	**25,83,25,859**	**-**

10. He stated that, the payments made to the Facebook are only for the limited purpose of hosting advertisement campaigns on the walls of Facebook users i.e., to display its products thereon. The payments made to Facebook are thus essentially towards online advertisements hosted on the web.

10.1. Insofar as payments made to Mailchimp are concerned, payee has designed a platform called Mailchimp which allows its users i.e., respondent in the instant case to send bulk e-mails for the purposes of advertisements/marketing content to its customers.

10.2. Insofar as payments made to Amazon Web services are concerned, the payments made were for cloud computing services from Amazon for its online business needs. Cloud computing is an arrangement in which provider i.e., Amazon hosts the shared computing resources such as hardware, software applications, etc., and the cloud user i.e., the respondent accesses them for storage, data processing, etc., via the internet on a need basis. Due to cloud computing technology, enterprises

such as the respondent need not make investment in IT infrastructure (hardware, storage space, application softwares, etc.), and it can instead use the required IT resources on payment of charges to the host i.e., Amazon.

11. It is his submission that, due to these payments, the non-resident payees did not grant the respondent any rights in respect of the respective software nor did the respondent make such payments in consideration for being granted with the right for use of or right to use the copyright embedded in the information on the software. Hence, it is wholly apparent that the above payments do not constitute royalty payments under the applicable DTAAs or, if applicable, under the Act. He stated, since none of the payees has a permanent establishment in India which is undisputed, no income is chargeable to tax under the Act in their hands necessitating the deduction of tax at source by the respondent when making such payments. Thus, it does not withhold tax under Section 195 in making these payments.

12. He also stated, despite the above, vide separate orders, both dated 21.02.2018, the 2nd appellant held that, the respondent erred in not withholding tax under Section 195 while making the aforesaid payments to these payees. According to him, the 2nd appellant had held that these payments tantamount to payments of 'royalty' in terms of Section 9(1)(vi) of the Act and are thus, taxable in India under the Act, as a result of which, the respondent ought to have withheld tax at the rate of 10% at source while making these payments to them and thus, by doing so, the respondent has erred, thereby necessitating passing of the said orders dated 21.02.2018 deeming the respondent to be an assessee in default.

13. According to Sri. Huilgol, even the CIT(A) placed extensive reliance on the order dated 15.10.2011 passed by this Court in the case of ***The Commr. of Income Tax -Vs.- M/s Samsung Electronics Co. Ltd. [ITA No.2808/2005 and connected matters, decided on 15.10.2011]***, which according to him is totally untenable. He by drawing our attention to the impugned order of the

ITAT, would submit that, the ITAT, after examining in detail the agreements entered into by the respondent with each of the payees and by appreciating the nature of payments made by the respondents to them, categorically concluded that the payments made to the aforesaid three entities do not fall within the meaning of royalty as defined in the DTAA. Thus, the ITAT has rightly held that, there was no obligation in law for the respondent to withhold tax while making payments to them.

14. According to Sri. Huilgol, the ITAT has rightly held that, the judgment relied upon by CIT(A) in ***Samsung Electronics Co. Ltd.*** (supra) has been expressly over-ruled by the Supreme Court in the case of ***Engineering Analysis*** (supra). In this regard, he has relied upon paragraph No.23 of the impugned order. He also stated, the ITAT has followed the ratio laid down by the Supreme Court in ***Engineering Analysis*** (supra) to hold that, the payments made to the aforesaid three non-resident Companies do not fall within the meaning of 'royalty' as defined in applicable DTAAs. So, he stated

that, the reliance placed by the CIT(A) on the judgment in the case of ***Samsung Electronics Co. Ltd.*** (supra) is totally misconceived.

15. That apart, it is his submission that, the appellants-Revenue never challenged the CIT(A)'s order by contending that this Court's judgment in ***Samsung Electronics Co. Ltd.***'s case (supra) would not apply to the facts of the instant case. According to him, even during the course of hearing before the ITAT, such a contention was never urged by the appellants-Revenue. That being so, the Revenue cannot now be permitted to approbate and reprobate by contenting that the judgment in ***Engineering Analysis'*** case (supra) would not apply.

16. According to Sri. Huilgol, the arbitrary flip-flop on part of the appellants-Revenue by urging that ***Engineering Analysis'*** case (supra) would not apply is ostensibly because the order which it was extensively relied upon i.e., ***Samsung Electronics Co. Ltd.***'s case (supra) has now been held to be no more good in law in ***Engineering Analysis'*** case (supra). Moreover according

to him, during the pendency of these appeals, the appellants have repeatedly sought adjournments by contending that as against the order of the Supreme Court in ***Engineering Analysis'*** case (supra), a review petition bearing RP(C) No.1422-1497/2021 has been filed and vide order dated 27.01.2022, the Supreme Court is seized of the matter. A bare perusal of the order sheet maintained by this Court would demonstrate the above. According to him, at no point of time until the hearing of these appeals on 30.09.2024 did the Revenue seek to contend that the said order in ***Engineering Analysis'*** case (supra) would not apply to the facts of the instant case. *Per contra*, by seeking repeated adjournments on the ground of pendency of the above review petition, it stands to reason that it accepted the applicability and binding nature of the said decision in ***Engineering Analysis'*** case (supra). They had only sought that this Court exercises its discretion in a lenient manner by adjourning the appeals to await the outcome of the said review petition. Hence, on this ground also, the Revenue ought not to have

contended the decision in ***Engineering Analysis'*** case (supra) does not apply to the instant case.

17. He also contested that, although the aforesaid review petition is pending consideration, numerous other appeals and SLPs have been disposed of by the Supreme Court by following its earlier order in ***Engineering Analysis'*** case (supra). Such orders have been passed despite being specifically informed that the said review petition is pending, thereby demonstrating, the mere fact of pendency thereof would not and must not come in the way of cases being disposed of in the light of the clear ratio in ***Engineering Analysis'*** case (supra). He also stated that, other review petitions filed by the Revenue as against the other cases disposed of by the Supreme Court in the batch of cases in which ***Engineering Analysis'*** case (supra) was the lead matter, have been dismissed by the Supreme Court and that too on merits. According to him, it stands to reason that, as and when the review petition filed as against the lead matter in the ***Engineering Analysis'*** case (supra) batch is taken up for

hearing, that review petition is also bound to meet the same fate by being dismissed. He also stated that, the various fact patterns extensively analyzed by the Supreme Court in ***Engineering Analysis'*** case (supra) do indeed cover the facts of the instant case insofar as it relates to the payments made by the respondent to Facebook, Mailchimp and Amazon given that these payments were made by an end-user resident in India i.e., the respondent herein to a foreign non-resident suppliers i.e., the said three payees. The said category of cases has been expressly dealt with by the Supreme Court. Lastly, without prejudice to his aforesaid contention that the present appeals of the Revenue ought to be dismissed in *limine* by this Court, a similar order was granted by this Court in ***M/s. Sasken Communication -Vs.- The Income Tax Officer [ITA No.267/2013, decided on 02.09.2024]***, disposing of the assessee's appeal by answering the question of law formulated therein in its favour in the light of the decision in ***Engineering Analysis'*** case (supra). This Court has granted liberty to the Revenue to seek review of the said order dated

02.09.2024 based on the outcome of the review petition filed before the Supreme Court as against the lead matter in ***Engineering Analysis'*** case (supra).

18. In the end, it is his submission that, the appeals of the Revenue to be dismissed as they stand squarely covered by the decision in ***Engineering Analysis'*** case (supra).

Analysis:

19. Having heard the learned counsel for the parties and perused the record, before we deal with the rival contentions of the counsel for the parties, we at the outset reproduce the conclusion drawn by the ITAT in its order. The ITAT has analyzed the terms of the aforesaid agreements executed by the respondent with the three entities. The said agreements, as noted by the ITAT, are the following:

> *"15. We shall now advert to the Agreements entered by the assessee with the three non-resident companies mentioned above, in order to understand the nature of services rendered by these companies and also to understand whether the payments made*

to the three non-residents are royalty or not in terms of the provisions of DTAA. The relevant clauses are extracted below for the sake of convenience:-

(A) FACEBOOK

4. License Grant

4.1 In consideration of your compliance with this Agreement for the duration of your subscription to Facebook at Work (unless terminated earlier) we hereby grant you and your Users:

(a) A non-exclusive, personal, non-transferrable, limited, revocable license to access and use Facebook at Work in accordance with this Agreement; and

(b) a non-exclusive, personal, non-transferrable, limited, revocable license to use any tool we may make available to you to create and manage Your Contents.

4.2 This License is not sub-licensable and is subject always to this Agreement.

5. Our Content

5.1 We own or license all Intellectual Property rights in Facebook at Work and Our Content. Facebook at Work and Our Content is protected by copyright laws and other Intellectual Property Laws. All such rights are reserved to us.

5.2 You may, and you must ensure that your Users will;

(a) only use Facebook at Work for its intended purpose within the scope of the License.

(b) not make alterations, copies, extractions, modifications or additions to Facebook at Work and Our Content or any part of it, or sell, copy, disclose, distribute, disseminate or license it or any part of it or misuse it or any part of it in any way or reverse engineer, decompile, disassemble or decipher it or evade technical limitations on the use of Facebook at Work;

(c) not re-publish, sell, extract, reproduce, disseminate or otherwise use Facebook at Work and Our content, except as expressly permitted by this Agreement or with our prior written permission; and

(d) not use our copyrights, trademarks, protected designs and trade dress (including but not limited to Facebook, Facebook at Work, or any of the trademarks listed here (currently available at www.facebookbrand.com/trademarks), or any confusingly similar marks, except with our prior written permission.

5.3 You acknowledge and agree that any breach of this Section 5 may cause us irreparable harm for which damages are not an adequate remedy and that we may seek interim, preliminary or protective relief from any competent court to restrain your or your Users anticipated or actual breach of this Section 5.

5.4 Our Content made available on Facebook at Work is provided for information purposes only, is subject to change and will be updated from time to time without notice to you.

…….

17 Definitions.

In this Agreement, unless otherwise stated

……

"Facebook at Work" means the features and services we make available, including but not limited to through the Facebook at Works websites, apps, and online services that we operate.

……

(B) Rocket Science Group (MailChimp)

MailChimp ("MailChimp,""we,"or"us") is an online marketing platform (the "Service") offered through the URL www.mailchimp.com (we'll refer to it as the "Website") that allows you to, among other things, create, send, and manage certain marketing campaigns, including, without limitation, emails, advertisements, and mailings (each a "Campaign", and collectively, "Campaigns").

……..

13. Proprietary Rights Owned by Us

You will respect our proprietary rights in the Website and the software used to provide the Service (Proprietary rights include, but aren't limited to, patents, trademarks, service marks, trade secrets, copyrights, and other intellectual property). You may only use our brand assets according to our Brand Guidelines.

……..

19. Bandwidth Abuse/Throttling

You may only use our bandwidth for your MailChimp Campaigns. We provide image and data hosting only for your MailChimp Campaigns, so you may not host images on our servers for anything else (like a website). We may throttle your sending or connection through our API at our discretion.

……..

30. Assignments

You may not assign any of your rights under this agreement to anyone else. We may assign our rights to any other individual or entity at our discretion.

(C) AMAZON WEB SERVICES:-

1. Use of the Service Offerings

1.1 Generally, you may access and use the Service Offerings in accordance with this Agreement. Service Level Agreements and Service Terms apply to certain Service Offerings. You will comply with the terms of this Agreement and all laws, rules and regulations applicable to your use of the Service Offerings.

1.2 Your account. To access the Services, you must have an AWS account associated with a valid email address and a valid form of payment. Unless explicitly permitted by the Service Terms, you will only create one account per email address.

1.3 Third-Party content. Third-Party content may be used by you at your election. Third-

Party Content is governed by this Agreement and, if applicable, separate terms and conditions accompanying such Third-Party Content, which terms and conditions may include separate fees and charges.

……..

8.3 Service offerings License. We or our licensors own all right, title and interest in and to the Service Offerings, and all related technology and intellectual property rights. Subject to the terms of this Agreement, we grant you a limited, revocable, non-exclusive, non-sublicenseable, non-transferrable license to do the following: (a) access and use the Services solely in accordance with this Agreement; and (b) copy and use the AWS Content solely in connection with your permitted use of the Services. Except as provided in this Section 8.3, you obtain no rights under this Agreement from us, our affiliates or our licensors to the Service Offerings, including any related intellectual property rights. Some AWS Content and Third-Party Content may be provided to you under a separate license, such as Apache License, Version 2.0, or other open source license. In the event of a conflict between this Agreement and any separate license, the separate license will prevail with respect to the AWS content or Third-Party Content that is the subject of such separate license.

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14. Definitions.

"API" means an application programme interface.

……..

"AWS Content" means Content we or any of our affiliates make available in connection with the Services or on the AWS Site to allow access to and use of the Services, including APIs; WSDLs; Documentation; sample code; software libraries; command line tools; proofs of concept; templates; and other related technology (including any of the foregoing that are provided by our personnel). AWS Content does not include the Services or Third Party content.

……..

"AWS Marks" means any trademark, service marks, service or trade names, logos and other designations of AWS and its affiliates that we may make available to you in connection with the Agreement.

……..

"Service Offerings" means the Services (including associated APIs), the AWS Content, the AWS Marks, and any other product or service provided by us under this Agreement. Service Offerings do not include Third-Party Content."

ITAT has also noted the term 'royalties' as defined under Article 12(3) of India-USA DTAA in paragraph No.14 of the order, which reads as under:

"14. The term "royalties" is defined as under in Article 12(3) of India – USA DTAA:-

> *3. The term "royalties" as used in this Article means:*
>
> *(a) payments of any kind received as a consideration for the use of, or the right to use, any copyright of a literary, artistic, or scientific work, including cinematograph films or work on film, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience, including gains derived from the alienation of any such right or property which are contingent on the productivity, use, or disposition thereof ; and*
>
> *(b) payments of any kind received as consideration for the use of, or the right to use, any industrial, commercial, or scientific equipment, other than payments derived by an enterprise described in paragraph 1 of Article 8 (Shipping and Air Transport) from activities described in paragraph 2(c) or 3 of Article 8."*

20. The conclusion drawn by the ITAT in the impugned order is at paragraphs No.16 to 26, which we reproduce as under:

"16. A careful perusal of the relevant provisions of the agreement entered by the assessee with

Facebook and Rocket Science Group (Mailchimp) would show that both these non-resident companies are allowing the assessee to use the facilities provided in their sites, which includes, inter alia, software facilities also. The purpose of compelling the assessee to use those facilities, as could be inferred by us, is to create an environment of ease in creating the "advertisement content" to suit the platforms of Facebook or Mailchimp. The environment of ease is beneficial and time saving to both the advertiser and the advertising platform. Thus the facilities have been created by the non-resident companies for mutual benefit. However, a person shall get the right to use those facilities only when he enters into an agreement with them for hosting his advertisement or for sending bulk mails, meaning thereby, the use of facilities is intertwined with the activity of placing advertisement in web portal of Facebook or sending bulk mails. In case of web hosting charges paid to AWS, the assessee is allowed to use the information technology infrastructure facilities.

17. We shall now refer to some of the decisions relied upon by Ld AR before us. The Kolkata bench of Tribunal, in the case of ITO vs. Right Florists (2013) (32 taxmann.com 99) (Kol-Trib.), has considered an issue – whether the payments made to foreign search engine portals for online advertising services resulted in accrual of income in India in their hands

in terms of sec.9(1) of the Act. The co-ordinate bench referred to the following decisions rendered by other co-ordinate benches:-

(a) Pinstorm Technologies (P) Ltd vs. ITO (24 taxmann.com 345)(Mum)

(b) Yahoo India (P) Ltd vs. DCIT (2011)(11 taxmann.com 431)(Mum)

In the above said two cases, the Tribunal held that the amount paid by the assessee to M/s Google Ireland Ltd for the services rendered for uploading and display of banner advertisement on its portal was in the nature of business profit on which no tax is deductible at source, since the same was not chargeable to tax in India in the absence of PE of Google Ireland Ltd in India. Finally, the coordinate bench held as under in the case of Right Florists:-

> *"28. In view of the above discussions, we are of the considered view, on the limited facts of the case as produced before us, the receipts in respect of online advertising on Google and Yahoo cannot be brought to tax in India under the provisions of the Income Tax Act, as also under the provisions of India US and India Ireland tax treaty. This observation is subject to the rider that so far as the PE issue is concerned, we have examined the existence of PE only on the basis of website simplicitor, and on no other additional basis, as no case was made out for the same. In any case, revenue has not brought anything on record, either at assessment stage or even before us, to suggest that Google or Yahoo had a PE in*

> *India, and as held by a Special Bench of this Tribunal in the case of Motorola Inc v. Dy. CIT[2005] 95 ITD 269/147 Taxman 39 (Mag.) (Delhi) "DTAA is only an alternate tax regime and not an exemption regime" and, therefore, "the burden is first on the Revenue to show that the assessee has a taxable income under the DTAA, and then the burden is on the assessee to show that that its income is exempt under DTAA". No such burden is discharged by the Revenue. Accordingly, there is no material before us to come to the conclusion that Google or Yahoo had a PE in India, which, in turn, could constitute the basis of their taxability in India."*

18. The taxability of Web hosting charges paid to Amazon Web Services LLC in its hands was examined by Pune bench of Tribunal in the case of EPRSS Prepaid Recharge Services India P Ltd (ITA No.828/Pun/2016 dated 24.10.2018) (2018) (100 taxmann.com 52) (Pune), which was relied upon by Ld A.R. The relevant discussions made and decision taken by Pune Tribunal are extracted below:-

> *"11. We have heard the rival contentions and perused the record. The issue which arises in the present appeal is in respect of charges paid by assessee to AWS. The assessee was engaged in sale of recharge pens and did not have the facility available with it of high technology equipments i.e. servers. So, in order to carry on its activity of distributorship of recharge pens, it used servers of Amazon, for which it paid web*

hosting charges. Before using the services available of Amazon online, it entered

into an agreement, under which fees structure was provided. Copy of agreement is placed at pages 3 to 22 of Paper Book. The agreement is called AWS Customer Agreement, which contains the terms and conditions that governs assessee's access to and use of Service Offerings. It was agreement between Amazon Web Services, Inc. and you i.e. assessee. It is provided that agreement takes effect when you click an "I Accept" button. Clause 1.1 lays down that 'you' (assessee) may access and use the Service Offerings in accordance with agreement. In clause 1.2, it is provided that to access services, 'you' (assessee) must create an AWS account associated with a valid e-mail address. Clause 1.3 provides that if you (assessee) would like support for the services other than the support we generally provide to other users of the services without charge, then you can enroll for customer support in accordance with the terms of AWS Support Guidelines. Clause 2.1 lays down that Amazon could change, discontinue, or deprecate any of the Service Offerings or change or remove features or functionality of the Service Offerings from time to time. As per clause 4.1, you (assessee) are solely responsible for the development, content, operation, maintenance and use of Your Content. Now, coming to clause 5.5, which provides the Service Fees to be paid, agreement provided that Amazon would calculate and bill fees and charges monthly. It is further agreed that you (assessee) have to pay

applicable fees and charges for use of Service Offerings as described on AWS site using one of the payment modes they support. We may refer to clause 8.4 which lays down the Service Offerings License, under which it is provided that Amazon or its affiliates or licensors own and reserve all right, title and interest in and to the Service Offerings. However, limited, revocable, non-exclusive, nonsublicensable, non-transferrable license is granted to you (assessee) to do the following during the term:—

(i) access and use the Service solely in accordance with this agreement; and

(ii) copy and use the AWS Content solely in connection with your permitted use of the Services

12. It is further provided that no rights under this agreement are obtained by you (assessee) from Amazon or its licensor to the Service Offerings, including any related intellectual property rights. The 'terms' between the parties are defined as per clause 14 and the terms which are relatable to the issue raised are as under:—

"AWS Content" means Content we or any of its affiliates make available in connection with the Services or on the AWS Site to allow access to and use of the Services, including WSDLs; Documentation; sample code; software libraries; command line tools; and other related technology. AWS Content does not include the Services.

"AWS Marks" means any trademarks, service marks, service or trade names, logos, and other designations or AWS and

its affiliates that we may make available to you in connection with this Agreement.'

13. The assessee has used services and has made monthly payments to Amazon. The assessee has attached sample invoice of Amazon at pages 23 to 41 of Paper Book and ledger extract of Amazon in its books at pages 1 and 2 of Paper Book. The assessee had filed submissions before the Assessing Officer giving detailed note on web hosting charges, which was as under:—

"Web Hosting Charges:

(a) Primarily EPRSS requires servers to run the various online recharges. Due to this there is a very high requirement of Servers. Since 'purchase/maintenance of servers and its upkeep require skilled manpower, BPRS does not have the same. Hence servers are taken on hire from Amazon, in is cloud units. Ledger copy attached Extract of web agreement also attached."

14. Further, the assessee has also pointed out the nature of its business vide written note before the Assessing Officer and explained as under:—

'1. Primarily the "a" requires servers to run the various online recharges. Due to this there is a very high requirement of servers. Since purchase/maintenance of servers and its upkeep require skilled manpower, the "a" does not have the same. Hence servers are taken on hire from Amazon, in its cloud units. Information about Amazon Web Services and its benefits as provided on website http://aws.amazon.com/what-is-aws is enclosed for your reference.'

…….

18. Now, coming to the next aspect raised by assessee which is linked to as to whether retrospective amendment in Income Tax would override the Treaty Laws where no amendment has been made. It is clear that retrospective amendment has changed the definition of 'royalty' from the year 2012 under the Income Tax Act, but the position of DTAA between two countries has not been effected. No such amendment has been made to the Treaty Laws and in DTAA, position similar to Explanation 5 is not envisaged at all. This is the plea raised by the learned Authorized Representative for the assessee. He further pleaded that in order to construe meaning of royalty as per DTAA, since the provisions of DTAA takes precedent over the provisions of Income Tax Act, where the assessee does not possess and does not have any control over the server or servers space, being deployed by Amazon, while providing e-services as per agreement, then there is no scope to construe that e-service charges paid to Amazon could be described as royalty. There is merit in the plea of assessee. If we construe the meaning of royalty as per DTAA, then we have to consider the possibility of position and control of server/server space, which admittedly, is not possessed by the assessee. Hence, as per Treaty Laws, the assessee cannot be held to have paid royalty to Amazon. Consequently, the payment made by assessee for web hosting services is not taxable in accordance with DTAA and the same cannot be held to be taxable, only

because there was retrospective amendment to section 9(1)(vi) of the Act. In any case, the Courts have held that when there is no amendment to the Treaty Laws, then the said Treaty Laws would override the amendment, if any, whether retrospective or otherwise to the Income Tax Act. Such a view has been taken in New Skies Satelite BV (supra). Consequently, there is no merit in holding that the assessee was liable to deduct withholding tax out of such payments made to Amazon and for such non-deduction or withholding of tax, the assessee can be held to be at default and the payment made by assessee being not allowed as deduction in its hands, in view of provisions of section 40(a)(i) of the Act. We reverse the orders of authorities below in this regard. We are not going into the issue raised by assessee that Amazon is not having PE in India and hence, no liability to deduct tax in India.

19. Now, another issue which needs to be seen is whether charges paid to Amazon for various services provided by it are in the nature of royalty, if any, or not. The assessee has placed on record the copy of agreement with Amazon, which we have referred in the paras hereinabove. He has also placed on record the copies of bills raised by Amazon online. The perusal of details filed by assessee of monthly charges paid, it transpires that the same are fluctuating from month to month and there is no regular payment being made to Amazon. In case of provision of royalty to a person, then as seen from the terms and conditions of various agreements, there is

fixation of price to be paid and there may be variation on account of use of certain services but first there has to be basic price fixed. However, in the facts of present case, looking at the documentation, the billing is segregated into various services i.e. AWS services, storage services, etc. and the assessee before us has filed a chart of summary of services availed. The first such services are on account of service charges for Elastic Compute Cloud. As per clause 1, it is on account of use of service provider Linux; as per clause 1.2, Windows and as per clause 1.3, Windows & SQL Server stanard and clause 1.4 of Bandwidth. The total service charges for Elastic Compute Cloud are USD 40,253.17. The month-wise details of said payments made by assessee from September, 2009 to March, 2010 reflected that in the first month, charges totaled to USD 4269.02, in October at USD 5599.36 and there on.

*20. The Hon'ble High Court of Madras in Skycell Communications Ltd. (supra) have held that web hosting charges are not in the nature of royalty. The said principle has further been applied in various decisions of the Tribunal as relied upon by the learned Authorized Representative for the assessee. (sic.)***

21. The aspect which needs to be seen is whether the assessee is paying consideration for getting any right in respect of any property. The assessee claims that it does not pay for such right but it only pays for the services. The claim of assessee before us was that it was only using services provided by Amazon and was not

concerned with the rights in technology. The fees paid by assessee was for use of technology and cannot be said to be for use of royalty, which stands proved by the factum of charges being not fixed but variable i.e. it varies with the use of technology driven services and also use of such services does not give rise to any right in property of Amazon……."

19. (**) The decision in the case of Skycell Communications Ltd (251 ITR 53) has been rendered by Hon'ble Madras High Court in the context of "Fees for Technical Services" on applicability of sec. 194J r.w. Explanation 2 to 9(1)(vii) of the Act. However, following observations made by Hon'ble Madras High Court are relevant in this case also:-

"7. In the modern day world, almost every facet of one's life is linked to science and technology inasmuch as numerous things used or relied upon in every day life is the result of scientific and technological development. Every instrument or gadget that is used to make life easier is the result of scientific invention or development and involves the use of technology. On that score, every provider of every instrument or facility used by a person cannot be regarded as providing technical service.

8. When a person hires a taxi to move from one place to another, he uses a product of science and technology, viz., an automobile. It cannot on that ground be said that the taxi driver who controls the vehicle and monitors its movement is rendering a technical service to the person who uses the

automobile. Similarly, when a person travels by train or in an aeroplane, it cannot be said that the railways or airlines is rendering a technical service to the passenger and, therefore, the passenger is under an obligation to deduct tax at source on the payments made to the railway or the airline for having used it for travelling from one destination to another. When a person travels by bus, it cannot be said that the undertaking which owns the bus service is rendering technical service to the passenger and, therefore, the passenger must deduct tax at source on the payment made to the bus service provider for having used the bus. The electricity supplied to a consumer cannot, on the ground that generators are used to generate electricity, transmission lines to carry the power, transformers to regulate the flow of current, meters to measure the consumption, be regarded as amounting to provision of technical services to the consumer resulting in the consumer having to deduct tax at source on the payment made for the power consumed and remit the same to the revenue.

9. Satellite television has become ubiquitous and is spreading its area and coverage, and covers millions of homes. When a person receives such transmission of television signals through the cable provided by the cable operator, it cannot be said that the home owner who has such a cable connection is receiving a technical service for which he is required to deduct tax at source on the payments made to the cable operator.

10. Installation and operation of sophisticated equipments 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.

11. When a person decides to subscribe to a cellular telephone service in order to have the facility of being able to communicate with others, he does not contract to receive a technical service. What he does agree to is to pay for the use of the airtime for which he pays a charge. The fact that the telephone service provider has installed sophisticated technical equipment in the exchange to ensure connectivity to its subscriber, does not on that score, make it provision of a technical service to the subscriber. The subscriber is not concerned with the complexity of the equipment installed in the exchange, or the location of the base station. All that he wants is the facility of using the telephone when he wishes to, and being able to, get connected to the person at the number to which he desires to be connected. What applies to cellular mobile telephone is also applicable to fixed telephone service. Neither service can be regarded as 'technical service' for the purpose of section 194J"

The above said decision clarifies the point that mere usage of a facility does not give rise to provision of any technical service. Under same analogy, mere usage of facility provided by the above said non-residents does not render the payments as "royalty

payments", since the core point of parting of any "copy right" attached to the said facilities does not arise at all.

20. In the case of Engineering Analysis Centre of Excellence (P) Ltd (supra), the issue related to "issuing of license to use software", i.e., the software purchased by a person shall be used by the buyer for his own business purposes. Since the license was granted without parting the copy rights attached to the software, the Hon'ble Supreme Court held that the payments received by the non-resident software companies cannot be taxed as "royalty" under the provisions of DTAA and hence there is no requirement to deduct tax at source from the payment made to them by a resident assessee.

21. In the instant case, the recipients, i.e, M/s Facebook and Rocket Science group only allow the assessee to use their facilities for the purpose of creating advertisement content. The payment made to Amazon Web Services (AWS) is only for using the information technology facilities provided by it, that too the billing would depend upon the extent of usage of those facilities. In fact, these non-resident companies do not give any specific license for use or right to of any of the facilities (which include software) and those facilities are not going to be used for the use in the business of the assessee. The right to use those facilities, as stated earlier, is intertwined with the main objective of placing

advertisements in the case of Facebook and Mailchimp. In the case of AWS, the payment is made only for using of information technology infrastructure facilities on rental basis. Hence the question of transferring the copy right over those facilities does not arise at all. The agreements extracted above also make it clear that the copyright over those facilitating software is not shared with the assessee. In any case, the main purpose of making payment is to place advertisements only and not to use the facilities provided by the non-resident companies. Thus the facilities provided by the nonresident companies are only enabling facilities, which help a person to place his advertisement contents on the platform of Facebook or to use MailChimp facility effectively. In case of AWS, the payment is in the nature of rent payments for use of infrastructure facilities.

22. Accordingly, we are of the view that the these non-resident recipients stand on a better footing than those assessees before the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Private Ltd (supra). Accordingly, following the ratio laid down by Hon'ble Supreme Court, we hold thatthe payments made to the above said three non-resident companies do not fall within the meaning of "royalty" as defined in DTAA. The AO has not made out an alternative case that these payments are taxable as business income in India.

Hence, there is no necessity for us to deal with that aspect.

23. We have noticed earlier that the Ld CIT(A) has followed the decision rendered by Hon'ble Karnataka High Court in the case of Samsung Electronics Co Ltd (supra). In the case of Engineering Analysis Centre of Excellence Private Ltd (supra), the decision rendered by Hon'ble Karnataka High Court in the above said case has been overruled by Hon'ble Supreme Court. Hence on this reasoning also, the decision rendered by Ld CIT(A) would fail.

24. In view of the foregoing discussions, we are of the view that the payments made by the assessee to the three non-resident companies referred above cannot be considered ad "royalty payments" and hence they do not give rise any income chargeable in India under Indian Income tax Act in all the three years under consideration. In that view of the matter, there is no requirement to deduct tax at source from those payments u/s 195 of the Act. Hence the assessee herein cannot be considered as an assessee in default u/s 201(1) of the Act.

25. Accordingly, we set aside the orders passed by Ld CIT(A) for the years under consideration and direct the AO to delete the demand raised u/s 201(1) of the Act and also the consequential interest charged u/s 201(1A) of the Act in all the three years under consideration.

26. In the result, all the appeals of the assessee are allowed."

21. The conclusion drawn by the ITAT is that, the recipients of the payments i.e., Facebook and Rocket Science Group only allowed the assessee to use their facilities for the purpose to use their advertisement contents. The payment to Amazon Web Services is only for using information technology facilities provided by it, that too the billing would depend upon the extent of usage of those facilities. The ITAT has come to a conclusion that the facilities provided by the non-resident Companies are only enabling facilities which help a person to place his advertisement contents on the platform of Facebook or to use MailChimp facility effectively. In case of Amazon, the payment is in the nature of rent payments for use of infrastructure facilities. The ITAT has, in paragraph No.22, has come to conclusion that the payments made to above three non-resident Companies do not fall within the meaning of 'royalty' as defined in DTAA. It may also be stated here that, in paragraph No.23, the ITAT has also referred to the judgment relied upon by the CIT(A) in the

case of ***Samsung Electronics Co. Ltd.*** (supra) to hold that the decision as rendered by this Court in the above case has been over-ruled by the Supreme Court in the case of ***Engineering Analysis*** (supra). It is on that ground also, the decision rendered by the CIT(A) was set at naught. We agree with the aforesaid conclusion drawn by the ITAT. The terms of the agreement have been specified in the aforesaid paragraphs. A perusal of the agreements with the aforesaid three entities makes it clear that, copyright remained with the aforesaid three entities. The limited grounds on which the appeal has been filed, have been noted above. The conclusion drawn by the CIT(A) in favour of the Revenue was primarily by relying upon the judgment in the case of ***Samsung Electronics Co. Ltd.*** (supra) and also by holding that the payments received by assessee from two affiliates by granting user right to software is royalty and has been brought to tax in India. The said judgment has been over-ruled. In this regard, we may also refer to the judgment of the Supreme Court in the case of ***Engineering Analysis*** (supra). Paragraphs No.111 to

119 are very clear in that respect. The Supreme Court has referred to the judgments of the Delhi High Court in the case of ***Director of Income Tax -Vs.- Ericsson A.B. [(2012) 343 ITR 470]***, ***Director of Income Tax -Vs.- Nokia Networks OY [(2013) 358 ITR 259]***. Similarly, a reference is also made to the judgments of the Delhi High Court in the case of ***Director of Income Tax -Vs.- Infrasoft Ltd. [(2014) 264 CTR 329]*** and ***CIT -Vs.- ZTE Corporation [(2017) 392 ITR 80]*** to hold in paragraphs No.119 and 120 as under:

> *"119. Fourthly, the High Court is not correct in referring to Section 9(1)(vi) of the Income Tax Act after considering it in the manner that it has and then applying it to interpret the provisions under the Convention between the Government of the Republic of India and the Government of Ireland for the Avoidance of Double Taxation and for the Prevention of Fiscal Evasion with respect to Taxes on Income And Capital Gains, [Notification No. GSR 105(E) [45/2002 (F. No. 503/6/99-FTD)], dated 20-2-2002.] ["India-Ireland DTAA"]. Article 12 of the aforesaid treaty defining "royalties" would alone be relevant to determine taxability under the DTAA, as it is more beneficial to the assessee as compared to Section 9(1)(vi) of the Income Tax Act, as construed*

by the High Court. Here again, Section 90(2) of the Income Tax Act, read with Explanation 4 thereof, has not been properly appreciated.

120. Fifthly, the finding that when a copyrighted article is sold, the end-user gets the right to use the intellectual property rights embodied in the copyright which would therefore amount to transfer of an exclusive right of the copyright owner in the work, is also wholly incorrect. For all these reasons, therefore, the judgment of the High Court of Karnataka in Synopsis Intl. [CIT v. Synopsis International Old Ltd., 2010 SCC OnLine Kar 5512] also does not state the law correctly."

22. So, in view of the aforesaid conclusion, Sri. Huilgol is justified to state that the issue in hand is covered by the judgment of the Supreme Court in the case of ***Engineering Analysis*** (supra). This is primarily because, the CIT(A) holds in its order that the arguments of the appellants i.e., respondent herein that consideration paid for purchase of software, cloud computing, cloud space hiring involving transfer of the right to use software is not royalty, is not acceptable, which has been negated by the ITAT, which order we have already reproduced above. Having said that, we also note that Sri. Huilgol

has placed before us an order passed by the Supreme Court in the case of ***The Commissioner of Income Tax -Vs.- GE India Technology Centre Private Limited [Order dated 23.04.2024 in Review Petition (C) at Diary No.35475/2023]***, wherein the Supreme Court has held as under:

"O R D E R

1. IA No. 174660/2023 is rejected.

2. There is an inordinate delay of 515 days in filing the present review petitions, which has not been satisfactorily explained.

3. Even otherwise, having gone through the review petitions and the connected papers, we do not find any justifiable reason to entertain the review petitions.

4. The review petitions are, accordingly, dismissed on the ground of delay as well as on merits.

5. Pending application(s), if any, shall stand disposed of."

23. We find that, in the aforesaid review petition, the Supreme Court has dismissed the review petition on merits by stating that, there is no justifiable reason to

entertain the same. Having said that, as stated by Sri. Huilgol, the review in the case of ***Engineering Analysis*** (supra) being pending before the Supreme Court. Hence, liberty is granted to the appellants-Revenue to seek review/restoration of these appeals if the review petition filed before the Supreme Court in ***Engineering Analysis*** (supra) is allowed in favour of the Revenue.

24. With the above observation, the present appeals are ***dismissed***.

No costs.

Sd/-
(V KAMESWAR RAO)
JUDGE

Sd/-
(S RACHAIAH)
JUDGE

PA