आयकर अपीलीय अधिकरण
दिल्ली पीठ "डी", दिल्ली
श्री विकास अवस्थी, न्यायिक सदस्य एवं
श्री एम. बालगणेश, लेखाकार सदस्य के समक्ष

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D", DELHI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI M. BALAGANESH, ACCOUNTANT MEMBER

आअसं.1978/दिल्ली/2025(नि.व. 2022-23)
ITA No.1978/DEL/2025 (A.Y.2022-23)

Computer Modelling Group Ltd.,
3710 33 Street NW, Calgary, Canada 999999 ..... अपीलार्थी/Appellant
PAN AADCC-9658-E

बनाम Vs.

Assistant Commissioner of Income Tax,
Circle International Taxation 1(2)(1),
Civic Centre, Minto Road, Ajmeri Gate,
New Delhi 110002 ..... प्रतिवादी/Respondent

अपीलार्थी द्वारा/ Appellant by : Shri S K Aggarwal, Advocate
प्रतिवादीद्वारा/Respondent by : Ms. Ekta Jain, CIT-DR
सुनवाई की तिथि/ Date of hearing : 02/12/2025
घोषणा की तिथि/ Date of pronouncement: 27/02/2026

आदेश/ORDER

PER VIKAS AWASTHY, JM:

This appeal by the assessee is directed against the Assessment Order dated 29.01.2025 passed u/s. 143(3) r.w.s 144C(13) of the Income Tax Act,1961(hereinafter referred to as 'the Act'), for Assessment Year 2022-23.

2. The assessee in appeal has assailed the assessment order raising following grounds of appeal:-

"1. That, on the facts and in the circumstances of the case and in law, the order passed by the Ld. AO u/s 143(3) read with Section 144C (13) of the Act is wrong and bad in law and

should be quashed and the order passed by the Hon'ble Dispute Resolution Panel - 1, Delhi ('DRP') and the directions given therein are erroneous.

2. That, on the facts and in the circumstances of the case and in law, the DRP and Ld. AO erred in holding that the licensed software receipts are taxable in India as Royalty' under Article 12(3) of India-Canada DTAA;

3. That, on the facts and in the circumstances of the case and in law, the DRP and Ld. AO erred in holding that the software maintenance fee is taxable in India as Fee for Included Services ('FIS') under Article 12(4) of India-Canada DAA;

4. That, on the facts and in the circumstances of the case and in law, the DRP and Ld. AO have grossly erred in concluding that the Appellant has Permanent Establishment (PE') in India under Article 5 of India-Canada DTAA;

5. That, on the facts and in the circumstances of the case and in law, the DRP and Ld. AO have grossly erred in holding that the entire receipt of the Appellant is taxable u/s 44BB of the Act in the absence of constituting any PE of the Appellant in India;

6. Without prejudice to the aforesaid grounds, on the facts and in the circumstances of the case and in law, the Ld. AO has grossly erred in not complying with the provisions of Article 12(6) of India-Canada DTAA;

7. That on the facts and circumstances of the case and in law, the LD. AO has erred in not appreciating that the protective and substantive additions of an income can be made only when the identity of the real owner of the income is unclear and have no applicability in the present case where both substantive and protective additions have been made on the same person.

8. That on the facts and the circumstances of the case and in law, the Ld. AO has erred in imposing the interest under Section 234B of the Act;

9. That on the facts and the circumstances of the case and in law, the Ld. AO has erred in proposing to levy penalty under Section 270A of the Act;

10. That on the facts and circumstances of the case and in law, the Ld. AO has erred in passing the order in a contradictory manner;

11. The above grounds of appeal are independent and without prejudice to one another."

3. Shri S K Aggarwal, appearing on behalf of the assessee narrating facts of the case submits that the assessee/appellant was incorporated in Canada and is a tax resident of Canada. The assessee is engaged in the business of selling reservoir simulation software used in oil and gas exploration industry. The assessee is also providing software maintenance and support services to the customers in oil and

gas exploration sector worldwide. In India, the assessee grants software licences for the use of software by entering into software licence agreements with various customers engaged in oil and gas sector and educational institution. The assessee claimed that the receipts from sale of software and income from rendering software maintenance support services are exempt under the provisions of India-Canada Double Tax Avoidance Agreement (DTAA). The Assessing Officer (AO) in Draft Assessment Order (DAO) held the receipts from sale of software licenses Rs.3,04,78,620/-as 'royalty'. When the assessee filed objections against the DAO before the Dispute Resolution Panel (DRP), the DRP recharacterized 'royalty' as equipment 'royalty' under Article 12(3)(b) of India-Canada DTAA and further, the DRP upheld addition of Rs.9,62,34,954/- proposed by the AO holding software maintenance fee as, 'Fee for Included Services' (FIS) under Article 12(4) of India-Canada DTAA.

4. The ld. Counsel submits that both issues on which addition has been made by the AO were considered by the Tribunal in immediate preceding assessment years. He contended that in fact these issues are legacy issues and for the first time the addition was made for similar reasons in AY 2012-13. The assessee carried the issue in appeal before the Tribunal. The Tribunal vide order dated 03.05.2024 reported as Computer Modelling Group Ltd. vs. ACIT (IT), 162 taxmann.com 437 deleted the additions. Further, the ld. Counsel pointed that the AO in the DAO has recorded the fact that there is no difference in the nature of receipts during the impugned assessment year and AY 2021-22. In fact, the AO in para 4 of the assessment order has narrated entire history of the addition right from AY 2012-13 onwards. The DRP also acknowledges that the issue on which additions have been made are similar to the one raised in AY 2021-21 and 2021-22.

5. The ld. Counsel for the assessee submits that in ground no. 5 of grounds of appeal, the assessee has assailed findings of the AO in holding that the entire receipts are taxable u/s.44BB of the Income Tax Act,1961(hereinafter referred to as 'the Act'). The AO and the DRP have erred in coming to the such conclusion without discharging the onus of proving that the assessee has PE in India. The DRP merely on surmises and conjectures came to the conclusion that provision of software licenses by the assessee to the Indian customers is in the nature of 'equipment royalty', therefore, it has to be held that the assessee has PE in India through which the services are rendered by the assessee to the Indian customer.

5.1. The ld. Counsel submits that the DRP has erred in holding that the receipts from sale of license of software is in the nature of 'equipment royalty'. The term 'equipment' has been explained by the Hon'ble Delhi High Court in the case of Asia Satellite Telecommunications Co. Ltd. vs. Director of Income Tax, reported as 332 ITR 340. He contended that in para 66 of said judgment, the Hon'ble High Court in a lucid manner has explained the term 'equipment'. If software is examined with reference to said explanation, it would be evident that since the software is unable to perform any activity in itself and is dependent on hardware for execution of any task, the software cannot be held as equipment.

5.2. The ld. Counsel for the assessee asserted that from the documents on record it would be evident that the assessee is selling off the shelf standardized software with a restricted right to use by the end customer. To further buttress his arguments, the ld. Counsel referred to the some of sample software license agreements at pages 242 to 292 of the paper book. He further referred to some sample annual maintenance contracts entered into with various Indian customers at pages 295 to 436 of the paper book.

6. Per contra, Ms. Ekta Jain representing the department vehemently defending the impugned order submits that the software sold by the assessee is not off the shelf software but is customized according to the requirement of the customers. He further placed reliance on the decision rendered in the case of *Paradigm Geophysical Pty. Ltd. vs. CIT, 115 taxmann.com 254 (Delhi)* to contend that where customize software and annual maintenance services are provided to oil and gas exploration industry and the assessee has not segregated its activities into supply of software and maintenance support services, the entire income derived under contract was liable for taxation u/s.44BB of the Act.

7. We have heard the submissions made by rival sides and have examined the orders of authorities below. We have also considered documents and the decisions on which rival sides have placed reliance in support of their respective submissions. The assessee based in Canada is engaged in selling software used by the customers engaged in exploration of oil and gas. The assessee also providing software maintenance services to its customers in India engaged in exploration of oil and gas. The assessee claimed revenue from sale of software licences and software maintenance fee as exempt under India-Canada DTAA. The AO in the Final Assessment Order passed in compliance with directions of the DRP held receipts from sale of software licences as 'equipment royalty' under Article 12(3)(b) of the DTAA and fee received for rendering software maintenance services, taxable in India as FIS under Article 12(4) of India-Canada DTAA.

8. Further, the AO held that entire receipts of the assessee are taxable u/s.44BB of the Act, as the assessee is having PE in India.

9. We find that the additions in respect of sale of software licences and software maintenance services were made in the preceding assessment years i.e. AY 2012-13 and AY 2019-20 to 2021-22 on identical set of facts. This fact is acknowledged by the AO in para 17.1 of the DAO. In the preceding assessment years, the assessee carried the issue in appeal before the Tribunal. The Tribunal vide composite order for AY 2012-13, AY 2019-20 to 2021-22 dated 03.05.2024 (supra) deleted the addition, after considering facts of the case and various decisions including the decisions rendered in the case;*, DIT vs. OHM Ltd., 352 ITR 406 (Delhi) and CIT v. Enron Oil & Gas Expat Services Inc., 29 taxmann.com 419 (Uttarakhand)*. The Co-ordinate Bench of the Tribunal held:-

> ***"14.*** *In view of the factual matrix in relevant AYs under consideration and the decisions (supra) of the Hon'ble jurisdictional Delhi High Court and the Hon'ble Uttrakhand High Court and also following the decision of the Coordinate Bench of the Tribunal (supra), we are of the view that the impugned receipts of the assessee are not taxable in India under the provisions of section 44BB of the Act for the reason that the assessee does not have a PE in India in the relevant AYs under consideration and that being a resident of Canada, the assessee is governed by the more beneficial provisions under the India-Canada DTAA. It is the claim of the Revenue that the assessee's case is covered by the decision of the Apex Court in the case of Oil & Natural Gas Corporation Ltd. (supra). We do not agree with this contention of the Revenue as in our considered view, the assessee's case is distinguishable on facts as the substantial question of law determined in Oil & Natural Gas Corporation Ltd. (supra) case was not concerning the eligibility of tax payers to the beneficial provisions of tax treaty but the taxability of income in the nature of FTS whether under the provisions of section 44D or 44BB of the Act.* ***The Revenue has not been able to bring on record anything to establish the existence/ presence of a PE of the assessee in India either before us or before the lower authorities. It is not even the case of the Revenue that the assessee has PE in India in the relevant AYs under consideration. In this view of the matter, non-existence of PE of the assessee in India is unquestionable. Since the assessee does not have a PE in India in the relevant AYs, its business income (impugned receipts) under dispute in the relevant AYs is not taxable under section 44BB of the Act.***
>
> ***15.*** *The assessee has also, without prejudice to the above, claimed that the impugned receipts are not in the nature of royalty/ FTS in terms of the provisions of Article 12 of the India-Canada DTAA. It is not in dispute that the impugned receipts partake the character of business income of the assessee for the relevant AYs under consideration. In this view*

of the matter, the question of treating the impugned receipts as royalty or FTS is irrelevant and becomes academic in nature. Having said so, as per Article 7 of DTAA, the impugned receipts being the business profit/income of the assessee during the relevant AYs under consideration are not taxable in India in the absence of a PE of the assessee in India. Accordingly, ground No. 2, 4 and 6 in AY 2012-13, ground No. 1 and 2 in AY 2019-20, ground No. 1, 3 and 4 in AY 2020-21 and ground No. 3, 5 and 6 in AY 2021-22 are allowed.

[Emphasized by us]"

10. In the impugned assessment year, the DRP has held that the assessee has PE in India, hence, the provisions of section 44BB of the Act were invoked. Here it would relevant to refer to findings given by the DRP to come to such a conclusion:

"4.3 Once provision of software licence by the assessee to the Indian customers is treated as 'equipment Royalty', it has to be held that assessee has a PE in India through which these services are being rendered to the Indian customers. That being the case, income also becomes liable, in the alternative, also to be taxed under Section 44 BB of the Act. The facts on this issue, arising in order of AY 20-21 which also forms part of AY 21-22 are extracted as under:

" 44BB. [1] Notwithstanding anything to the contrary contained in sections 28 to 41 and sections 43 and 43A, in the case of assessee. being a non-resident, engaged in the business o fproviding services in connection with exploration and extraction of mineral oils, a sum equal to ten per cent of the aggregate of the amounts specified in sub section [2] shall be deemed to be the profits and gains of such business chargeable to tax under the head "Profits and gains of business or profession".

Provided that this sub-section shall not apply in a case where the provisions of section 42 or section 440 or section 440A or section 115A or section 2934 apply for the purposes of computing profits or gains or any other income referred to in those sections.

[2] The amounts referred to in sub-section [1] shall be the following, namely:-

(a) The amounts referred to in sub-section [whether in or out of India) to the assessee or to any person on his behalf on account of the provision of services and facilities in connection with, or supply of plant and machinery on hire used, orto used, in the prospecting for, or extraction or production of, minerals oils in India, and

(b) the amount received or deemed to be received in India by or on behalf of the assessee on account of the provision of service and facilities in connection with, or supply extraction of plant or production and machinery of, mineral on hire oil used,

outside or to be used, in the prospecting for, or extraction or production of, mineral oil outside India.

Explanation: - For the purpose of this section

(1) "Plant" includes ships, aircraft, vehicles, drilling units, scientific apparatus and equipment, used for the purposes of the said business;

(i) "Mineral oil" includes petroleum and natural gas.'

8 In view of the above, the proceedings us 148 for AY 12-13 was completed by assessing the income of the assessee under section 44BB of the IT Act, 1961.

9. In a similar manner, the proceedings were completed u/s 143(3) for A Y 19-20 by passing a Draft Assessment Order dated 22.09.2021."

From bare perusal of findings of the DRP above it is evident that the DRP accepts that facts in the impugned assessment year are identical to AY 2020-21 and 2021-22. The findings of the DRP/AO in the aforesaid assessment years have already been overturned by the Coordinate Bench of Tribunal. The reasoning given by the Tribunal for deciding the issue have already been reproduced above in para 9. Further, the manner in which the DRP has held that the assessee has PE in India, itself speaks volume of perfunctory approach of DRP in holding that the assessee has PE in India. It is no more *res integra* that onus is on the Department to prove that the assessee has PE in India in terms of Article 5 of DTAA. *[Re: Assistant DIT vs. E-funds IT Solution Inc. 86 taxmann.com 240 (SC)].* The tax authorities have failed to discharge this onus. Hence, findings of the DRP that assessee has PE in India are without any merit.

12. The Revenue has placed reliance on the judgment rendered in the case of Paradigm Geophysical Pty. Ltd. vs. CIT (supra), we find that the said judgment is distinguishable on facts. In the said case, the assessee was providing customized software solutions and annual maintenance services used by oil and gas exploration industry. The assessee itself offered the receipts from sale of software and annual

maintenance services to tax u/s.44BB of the Act. Thus, in the said case the assessee therein had opted to offer the receipts from sale of customized software and annual maintenance services under presumptive basis. In the instant case, the software licence provide by the assessee is off the shelf software and not the customized software. Further, the case of the assessee herein is that it has no PE in India. The Revenue has also not been able to establish that the assessee has PE in India. Thus, the facts in the case of assessee are distinguishable from the decision rendered in the case of Paradigm Geophysical Pty. Ltd. vs. CIT (supra). Therefore, the said decision does not support the cause of Revenue.

13. Ergo, in light of undisputed facts of the case, decisions discussed above and the order of Coordinate Bench in assessee's own case in preceding assessment years, where undisputedly factual matrix is identical to AY 2022-23, the impugned order is *set aside* and ground of appeal no. 2 to 5 are allowed.

14. Since, the assessee succeeds on primary issues, other issues have become academic has not deliberated upon.

15. In the result, appeal of assessee is allowed.

Order pronounced in the open court on Friday the 27th day of February, 2026.

Sd/-	Sd/-
(M. BALAGANESH)	(VIKAS AWASTHY)
लेखाकार सदस्य/ACCOUNTANT MEMBER	न्यायिक सदस्य/JUDICIAL MEMBER

दिल्ली/Delhi, दिनांक/Dated 27/02/2026

NV/-

<u>प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. The PCIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि., दिल्ली /DR, ITAT, दिल्ली
5. गार्ड फाइल/Guard file.

ORDER,

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(Asstt. Registrar) ITAT, DELHI