$~

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

% **Judgment reserved on: 27 May 2024**
Judgment pronounced on: 31 May 2024

\+ W.P.(C) 1646/2022

GE CAPITAL US HOLDINGS INC ..... Petitioner

Through: Mr. Sachit Jolly, Ms. Soumya Singh, Ms. Disha Jham, Mr. Devansh Jain, Mr. Aditya Rathore and Mr. Abhyudaya Shankar Bajpai, Advs.

versus

DY COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION) CIRCLE 1(3) (1), NEW DELHI AND ORS
..... Respondents

Through: Mr. Puneet Rai, Mr. Ashvini Kumar, Mr. Rishabh Nangia, SCs and Mr. Nikhil Jain, Advocates for Income Tax Dept.
Mr. Ravi Prakash, CGSC for UOI.

\+ W.P.(C) 3312/2022

GE CAPITAL US HOLDINGS INC ..... Petitioner

Through: Mr. Sachit Jolly, Ms. Soumya Singh, Ms. Disha Jham, Mr. Devansh Jain, Mr. Aditya Rathore and Mr. Abhyudaya Shankar Bajpai, Advs.

versus

DY. COMMISSIONER OF INCOME TAX INTERNATIONAL TAXATION & ORS. ..... Respondents

Through: Mr. Puneet Rai, Mr. Ashvini Kumar, Mr. Rishabh Nangia, SCs and Mr. Nikhil Jain, Advocates for Income Tax Dept.
Mr. Ravi Prakash, CGSC for UOI.

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. These two writ petitions impugn the orders dated 28 December 2021 and 24 January 2022 pursuant to which the applications of the petitioner referable to Section 270AA(4) of the **Income Tax Act, 1961**[1] for being accorded immunity from imposition of penalty have come to be rejected. Pursuant to the amendments which were permitted to be moved in the instant writ petitions, the petitioner has now additionally challenged the notices for levy of penalty under Section 270A of the Act. While the first writ petition, W.P.(C) 1646/2022, is concerned with **Assessment Year**[2] 2018-19, the second writ petition, W.P.(C) 3312/2022, relates to AY 2019-2020. For the purposes of considering the challenge which stands raised, we deem it apposite to notice the following salient facts.

2. For AY 2017-18 and upon due processing of the **Return of Income**[3] which had been submitted, the respondents proceeded to pass an order of assessment on 15 February 2020 holding that the receipts of the petitioner in that year were liable to be taxed as royalty in terms of Section 9(1)(vi) of the Act read along with Article 12 of the India-USA **Double Taxation Avoidance Agreement**[4]. While dealing with the

[1] Act
[2] AY
[3] ROI
[4] DTAA

aspect of royalty, the **Assessing Officer**[5] in that year had held as follows:-

> "vii) Though a software programme finds mention under copyright Act the same does not partake the character of a copyrighted product like the other items listed in the same section as music, architecture, literary work, etc. The limited purpose behind the legislature is deemed to be a protection given to such a programme under the Act to prevent misuse depriving the rightful owner of the commercial or otherwise any other benefits. In fact one observes that the two most distinguished characteristic of the software programme which segregate and separate it from the other items mentioned in the section 2 of the Copyright Act are:
>
> a) It is a process not a product like a literary work, piece of art, musical score because of the inherent and intrinsic nature of a software programme given in the definition stated above having a utility, functional component in its own right.
>
> b) A software programme necessarily involves input-output mechanism for it to produce the deemed result with complex, mediating intervening steps which are not so in any of the items mentioned in said section like a book.
>
> viii) Therefore in the given case, what is being sold is not a copyrighted article or product as contented by the company since no physical product is being delivered but what is being transferred is only a right to use the software. So the payment is clearly in the nature of royalty payment as per Article 12(3) of the India -USA DTAA.
>
> ix) The decision of the Hon'ble Karnataka High Court in this case is squarely applicable extract from the judgement is stated below:
>
> Therefore, the amount paid to the non-resident supplier towards supply of shrink-wrapped software, or off-the-shelf software is not the price of the C.D alone nor software alone nor the price of licence granted. This is a combination of all and in substance, unless licence is granted permitting the end user to copy, and download the software, the dumb C.D containing the software would not in any way be helpful to the end user as software would become operative, only if it is downloaded to the hardware of the designated computer as per the terms and conditions of the agreement and that makes, the difference between the computer software and copyright, in respect of books or pre-recorded music software as book and pre-recorded music C.D can be used once they are purchased, but so far as software stored in dumb C.D is concerned, the transfer of dumb C.D

[5] AO

by itself would not confer any, right, upon the end user and the purpose of the C.D is only to enable the end user to take a copy of the software and to store it in the hard disk of the designated computer if licence is granted in that behalf and in the absence of licence, the same would amount to infringement of copyright, which is exclusively owned by non-resident suppliers, who would continue to be the proprietor of copyright. Therefore, there is no similarity between the transaction of purchase of the book or pre-recorded music C.D or the C.D containing software and in view of the same, the Legislature in its wisdom has treated the literary work like books and other articles separately from "computer software within the meaning of the "copyright" as referred to above under section 14 of the Copyright Act. It is also clear from the above said analysis of the **DTAA, the Income-tax Act, the Copyright Act** that the payment would constitute "royalty" within the meaning of article 12(3) of the DTAA and even as per the provisions of section 9(1)(vi) of the Act as the definition of "royalty" under clause 9(1)(vi) of the Act is broader than the definition of "royalty" under the DTAA as the right that is transferred in the present case is the transfer of copyright including the right to make copy of software for internal business, and payment made in that regard would constitute "royalty for imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill as per clause (iv) of Explanation 2 to section 9(1)(vi) of the Act. In any view of the matter, in view of the provisions of section 90 of the Act, agreements with foreign countries DTAA would override the provisions of the Act. Once it is held that payment made by the respondents to the non-resident companies would amount to "royalty" within the meaning of article 12 of the DTAA with the respective country, it is clear that the payment made by the respondents to the non-resident supplier would amount to royalty. In view of the said finding it is clear that there is obligation on the part of the respondents to deduct tax at source under section 195 of the Act and consequences would follow as held by the hon'ble Supreme Court while remanding these appeals to this court. Accordingly, we answer the substantial question of law in favour of the Revenue and against the assessee by holding that on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal was not justified in holding that the amount is paid by the respondents to the foreign software suppliers was not royalty and that the same did not give rise to any "income" taxable in India and wherefore, the respondent(s) were not liable to deduct any tax at source.

x) The Hon'ble Karnataka High Court in CIT v. Synopsis International Old Ltd. (2013) 212 Taxman 454 (Karn.) (High Court) is also squarely applicable in this case. Brief extracts are as follows:

> Assessee granted a non-exclusive non-transferable software license-without right of sub-licence. Licensee might make a

reasonable number of copies of licensed software for backup and/or archival purposes only, even if it was not transfer of exclusive right in copyright, right to use confidential information embedded in software in terms of aforesaid license which makes it abundantly clear that there was transfer of certain rights which owner of copyright possessed in said computer software/programme in respect of copyright owned. Therefore in terms of DTAA consideration paid for use or right to use said confidential information in form of computer programme software would itself constitute royalty and attract tax. Court held that it is not necessary that there should be a transfer of exclusive right in copyright and where consideration paid was for rights in respect of copyright and for user of confidential information embedded in software/computer programme, it would fall within mischief of Explanation (2) of section 9(1) (vi) and there would be a liability to pay tax. In favour of revenue (2001-02 to 2003-04)

xi) The assessee has also cited various case laws, the fact of those cases are distinguishable from the case of assessee. It also has cited the case law of Hon'ble Delhi High Court in the following cases-

a) CIT vs M Tech India Pvt Lid (2016) 287CTR 213(Delhi HC)

Here payment made on account of purchase of software is treated as not Royalty. So facts of this case is different from the case of assessee

b) DIT vs Infrasoft Ltd (2014)264 CTR 329

The Department has not accepted this judgement and filed SLP being civil Appeal No. 32/2017 which is pending before Hon'ble Supreme Court.

8. In the light of the above, the amount of receipt to the tune of Rs 2,37,97,653/- as IT Support service is taxable as royalty u/s 9(1)(vi) of the Income Tax Act as well as under Article 12 of the DTAA at the rate provided in the DTAA. Since the assessee has under reported its income which is in consequence of misreporting thereof, I consider it a fit case to initiate penalty proceedings u/s 270A of the Act and the same is initiated separately.

9. In view of the above total income was proposed to be assessed u/s 143(3) of the Income Tax Act on a total income of Rs 2,37,97,683/- which is taxable as Royalty @ 10% as per DTAA. Charge interest u/s 234A, 234B, 234C & 234D as applicable."

3. As would be evident from the above, the aforesaid assessment came to be framed prior to the aspect of software and its taxability as

royalty coming to be conclusively answered by the Supreme Court in **Engineering Analysis Centre of Excellence Private Limited v. Commissioner of Income Tax and Anr.**[6]. The order of assessment for AY 2017-18 further reveals that although a decision of our Court in **DIT vs. Infrasoft Limited**[7] and which was subsequently approved in *Engineering Analysis* was also cited, the same was disregarded solely on the ground that a Special Leave Petition had been instituted in respect thereof.

4. For AY 2018-19, the petitioner filed its ROI on 31 October 2018. While framing an order of assessment on 16 November 2021, the respondent reiterated its stand regarding the receipts of the petitioner being taxable in India as royalty. The Court deems it apposite to take note of the following undisputed facts which came to be recorded in that assessment order. Insofar as the amounts received by the petitioner in that AY are concerned, those stand duly chronicled in paragraph 3 of the assessment order and which is extracted hereinbelow:-

> "3. GECUS has received income on account of IT support services from Clix Finance India Private Limited, Clix Capital Services Private Limited and GE Capital Business Process Management Services Private Limited (now known as SBI Business Process Management Services Private Limited) totaling to INR 181,332,765 as follows:

S.No.	**Name of Payer**	**Amount Received (Rs.)**	**Nature of Transaction**
1	Clix Finance India Pvt Ltd	32,875,328	IT Support Services
2	Clix Capital Services Pvt Ltd	3,375,323	IT Support Services
3	SBI Business Process Management Services Pvt Ltd	145,082,114	IT Support Services

[6] (2022) 3 SCC 321
[7] 2013 SCC OnLine Del 6595

	Total	181,332,765/-	

It is found from the contract with Clix Finance India Pvt Ltd & Clix Capital Services Pvt Ltd that the company has provided IT access right and services of various software's to the above mentioned companies for doing their works and these are nothing but Royalty as defined in explanation 2 to section 9(1)(vi) of the Income Tax and taxable u/s 9(1)(vi) of the Act as well as Article 12(3) of the India-USA DTAA."

5. The range of software services which were provided by the petitioner were described in paragraph 6 of the assessment order and which reads as follows:-

"6. As per clause 2 the assessee company has provided IT access right of various software's to the above mentioned companies for doing their works. As a representative basis some these are detailed below:

Type of Service	**Title**	**Summary**	**Description**
IT Application Service and IT Access Right	Email - hosting and forwarding	Provide access to and use of e-Mail hosting and routing Services, SPAM protection, SMTP relay; Email Forwarding to primary SMTP address to the new business email accounts up to 2 months after ending GE email usage>	GECC will provide access to and use of the MS-Exchange server-side application as used by the Company prior to Closing - Use of the @ge.com email address for the Company's employees (Supplier will work with the Company to define and implement a mutually acceptable method of forwarding @ge.com email to corresponding Company's email accounts up to 2 months after ending GE email usage; with

			services such as: - SMTP relay; - Spam filtering, - email routing support to domains registered to the Company; - Snapshot of email boxes of the Company's employees in .pst format for migration to the Company's email system, including only email boxes which reside on GE Exchange servers and excluding locally stored folders and mailboxes. As part of this Transitional Arrangement, GECC will also provide Second-Level Support. In addition, Provide to the Company an IT Access Right to and use of the following applications: - MS Windows Server CALs - MS Exchange CALs - MS Outlook - . X.509 security certificates
IT Application Service and IT Access Right	Mobile device and support services	Mobility Device Management & Support Services	GECC will provide Enterprise Mobility Management & Support Services for access to & use of

			personal mobile devices to access GE Enterprise email, calendar, contacts, browsers, audio, & video services as used by the Company prior to Closing -Blackberry and Exchange ActiveSync message routing EAS -Mobile device management (Mobile Iron) email, calendar, contact solution
IT Application Service	Intranet (SC, MyGE)	Inside GE System	GECC will provide access to the MyGE home page, including access to the named applications in the schedule that reside on the home page as used by the Company prior to Closing. As part of this Service, GECC will also provide to the Company Second-Level Support in relation to the MyGE Intranet.
IT Application Service and IT Access Right	Security Infrastructure & Event Management	Client, server & network security solutions & services	GECC will Provide services and support to follow Security Information & Event Management services as used by

			the Company prior to Closing, these include but are not limited to: -Email & Application Encryption (Digital Certificates) -Antivirus/Anti-Malware (Sophos & McAfee EPO) -Data encryption (Vormetric) - Detection solutions (ESG)
IT Application Service and IT Access Right	Service Now	Service Now Licenses, RTS Support, & Projects	GECC will provide access to and use of the Service Now application, Licenses, Ready-to-Serve support & maintenance, and GE SN project requests as used by the Company prior to Closing
IT Support Service & IT Access Right	Third Party Systems & Security	Third Party Systems & Security	GECC will provide access to and use of third party systems and security as used by the Company prior to Closing. These include but are not limited to: -Third Party Assessment Services: a standardized assessment framework and methodology to

			evaluate information security risk of a third party in order to help GE Businesses make risk-based decisions. We provide a digitized process to track and monitor assessment activity, from initial risk assessment through issue management. -Database Security Services: Scan database layer for technical vulnerabilities and misconfiguration. Provide monitoring of database for segregation of duty issues. Conduct access reviews and highly privileged account monitoring. -Secure Development Life cycle: Provides GE development teams with Secure Development Lifecycle (SOL) education, tools and testing services to ensure that they effectively develop and deploy secure applications.

			Security assessments leverage industry best practices to find critical vulnerabilities and provide customized remediation guidance before code is deployed to a production environment and cause a risk to GE. Secure development experts provide guidance and tools to assist GE developers in creating and deploying secure code, helping to save cost by reducing rework later in the development chain.
IT Access Rights & IT Support Services	General Security Services	Capital Information Security services	GECC will provide General Security Services for the following services used by Company prior to closing: - Security Incident management, tracking, and metrics; Trending information around security incidents can be provided upon request. -Ad-hoc reporting, troubleshooting, report template creating, user access

			provisioning, and act as the liaison between Corporate and Company (Qualys) -Tracking of remedial actions, compensating controls, and mitigation recommendations (3PC) -Regularly scheduled reporting of current open vulnerabilities, and outstanding operational variance and exceptions. -Report on current authentication and scan coverage of the tool set (Vulnerability Mgmt.) - HPA activity reports, alerting, ticketing processing, issue management and metrics -Securonix to detect, monitor, investige and manage information security threats and risks -Identity Governance technologies - One Capital IDM -Global Access control - UNAB -IAM Program Management

6. Proceeding then to deal with the issue of royalty and chargeability of the payments received by the petitioner, the **Assessing Officer**[8] held:-

> "**7.2** From a plain reading of definition of royalty defined under section 9(1)(vi), it can safely be inferred that for the payments to be characterized as "royalty", such payments have to be necessarily for the use of any property mentioned in clause (iii) of Explanation 2 to section 9(1)(vi) of the Act and **the "process" being one of the constituent items occurring in the said definition, it can further be safely assumed that "consideration for use of process would result in the payment being made to be referred as "royalty".**
>
> **7.3** The case of the assessee is differentiated from the judgment of Hon'ble Supreme Court vide order dated 02.03.2021 in case of Engineering Analysis Centre of Excellence Private Limited Vs. CIT & Anr. on the basis of facts that the software provided by the assessee is not a product but an end to end solution using a proprietary process. The undersigned is of the view that the term 'software' as it is being used presently has come a long way from its original intention. In the years gone by (specifically the cases where the Hon'ble Apex court has decided the meaning of term), software was basically a set of instructions which included some interaction between the computer and the human being. A set of instructions were laid down in the form of a program. The said program could be designed formula to compute or give an output of a certain format for which input was required on the machine. This pre-coded information specifically written on a Compact Disk (CD) or a floppy disk and sold as off the shelf by a number of companies. However, this is not the case with the assessee. The software provided by the assessee is a solution and the assessee itself is mentioning it as service, rather than a set of program only. The process by which the solution is provided by the assessee is Intellectual Property Right (IPR) of the assessee and the usage of such IPR attracts Royalty. Hence, the same is taxable as a process royalty under the Act as well as the DTAA.
>
> **7.4** Without prejudice to the above, it can be seen that the income received by the assessee can also be viewed from the perspective of IT Support services provided by the assessee. The nature of services provided is such that it makes available *technical knowledge, experience, skill, know-how or processes* as the service receiver gets wiser by getting such services from the assessee and would not need additional support from the assessee for performing the same role. The service receiver thus learns how to resolve and act on a

[8] AO

> particular issue and this knowledge is enduring in nature. Hence the same is alternately taxable as FTS as well. However, as the tax rate for both royalty and FTS is the same @ 10%, hence the same does not have an impact on the overall tax implication.
>
> **8.** In the light of the above, the amount of receipt to the tune of Rs 181,332,765/- as IT Support service is taxable as royalty u/s 9(1)(vi) of the Income Tax Act as well as under Article 12 of the DTAA at the rate provided in the DTAA. It is alternately also taxable as FTS as per 9(1)(vii) of the Income Tax Act as well as under Article 12 of the DTAA. Since the assessee has under reported its income which is in consequence of misreporting thereof, I consider it a fit case to initiate penalty proceedings u/s 270A of the Act and the same is initiated separately.
>
> **9.** The assessee had not filed objection before DRP within the prescribed time limit."

7. It becomes pertinent to note that by the time the aforesaid assessment order came to be framed, the Supreme Court had pronounced its verdict in *Engineering Analysis* and more particularly on 02 March 2021. However, the aforesaid decision was sought to be distinguished with the AO observing that the process by which the solution is provided by the petitioner constitutes an **Intellectual Property Right**[9] and that the usage of such IPR would attract royalty. It further observed that the nature of services which were extended would also qualify the test of *"make available"*, a phrase oft appearing in tax treaties and thus liable to be taxed as Fee for Technical Services as well. Based on the aforesaid conclusions, it proceeded to frame the following directions:-

> "10. Accordingly, final assessment order u/s 144C (3) r.w.s. 143(3) is being passed as per draft assessment order at total income of Rs. 181,332,765/- which is taxable as Royalty/FTS @ 10% as per DTAA. Charge Interest u/s 234A, 234B, 234C & 234D as applicable. Give credit to the prepaid taxes after verification. Issue copy of the order and demand notice to the assessee. Penalty

[9] IPR

proceedings u/s 270A for misreporting of the Act is being initiated separately."

8. The order of assessment for AY 2019-20 proceeds along similar lines as would be evident from a reading of the following conclusions which stand recorded therein:-

"**7.1** It is clear from the table above that the assessee is providing IT Application Service and IT Access Right to its customers. It is clear that the assessee is allowing the use of its proprietary process embedded in its software for the business purpose of the clients. It has been held in the assessment order in case of the assessee for AY 2018-19 that the consideration received by the assessee is taxable as royalty income both as per the Act and as per the DTAA.

7.2 From a plain reading of definition of royalty defined under section 9(1)(vi), it can safely be inferred that for the payments to be characterized as "royalty", such payments have to be necessarily for the use of any property mentioned in clause (iii) of Explanation 2 to section 9(1)(vi) of the Act and **the "process" being one of the constituent items occurring in the said definition, it can further be safely assumed that "consideration for use of process would result in the payment being made to be referred as "royalty".**

7.3 The case of the assessee is differentiated from the judgment of Hon'ble Supreme Court vide order dated 02.03.2021 in case of Engineering Analysis Centre of Excellence Private Limited Vs. CIT & Anr. on the basis of facts that the software provided by the assessee is not a product but an end to end solution using a proprietary process. The undersigned is of the view that the term 'software' as it is being used presently has come a long way from its original intention. In the years gone by (specifically the cases where the Hon'ble Apex court has decided the meaning of term), software was basically a set of instructions which included some interaction between the computer and the human being. A set of instructions were laid down in the form of a program. The said program could be designed formula to compute or give an output of a certain format for which input was required on the machine. This pre-coded information specifically written on a Compact Disk (CD) or a floppy disk and sold as off the shelf by a number of companies. However, this is not the case with the assessee. The software provided by the assessee is a solution and the assessee itself is mentioning it as service, rather than a set of program only. The process by which the solution is provided by the assessee is Intellectual Property Right (IPR) of the assessee and the usage of such IPR attracts Royalty. Hence, the same is taxable as a process royalty under the Act as well as the DTAA.

> **7.4** Without prejudice to the above, it can be seen that the income received by the assessee can also be viewed from the perspective of IT Support services provided by the assessee. The nature of services provided is such that it makes available *technical knowledge, experience, skill, know-how or processes* as the service receiver gets wiser by getting such services from the assessee and would not need additional support from the assessee for performing the same role. The service receiver thus learns how to resolve and act on a particular issue and this knowledge is enduring in nature. Hence the same is alternately taxable as FTS as well. However, as the tax rate for both royalty and FTS is the same @ 10%, hence the same does not have an impact on the overall tax implication.
>
> **8.** In the light of the above, the amount of receipt to the tune of Rs 3,42,298,126/- as IT Support service is taxable as royalty u/s 9(1)(vi) of the Income Tax Act as well as under Article 12 of the DTAA at the rate provided in the DTAA. It is alternately also taxable as FTS as per 9(1)(vii) of the Income Tax Act as well as under Article 12 of the DTAA. Since the assessee has under reported its income which is in consequence of misreporting thereof, I consider it a fit case to initiate penalty proceedings u/s 270A of the Act and the same is initiated separately.
>
> **9.** The assessee had not filed objection before DRP within the prescribed time limit."

Here too, the AO framed consequential directions for initiation of penalty proceedings under Section 270A of the Act.

9. We are informed by Mr. Jolly that insofar as AY 2017-18 is concerned, the petitioner had chosen to avail of the MAP procedure laid in place in terms of the India-USA DTAA and since the quantum of tax did not merit further challenge, the same came to be closed. However, and insofar as AYs 2018-19 and 2019-20 are concerned, the petitioner was also faced with notices issued under Section 270A of the Act. In order to avoid protracted litigation, the petitioner appears to have accepted the order framed by the AO and also moved an application on 23 November 2021 to avail of the statutory remedy as codified under Section 270AA of the Act. A similar application is stated to have been made for AY 2019-20. In terms of the applications so moved, the

petitioner sought the conferral of immunity in terms as contemplated under Section 270AA of the Act.

10. Before us it was not disputed that the petitioner had duly complied with the conditions precedent and which stand prescribed in terms of clauses (a) and (b) of Section 270AA of the Act. However, the applications for immunity as moved have come to be rejected in terms of the orders impugned before us.

11. For the sake of completeness, we deem it apposite to extract the following recitals as they appear in the order dated 28 December 2021 for AY 2018-19 impugned in the lead writ petition and which view has been reiterated while passing the order dated 24 January 2022 pertaining to AY 2019-20:-

> "Ascertaining the outcome of the penalty proceedings at this stage will be precocious and premature as they are separate and independent proceedings, on which a decision must be taken independently. Mere payment of demand does not, ipso facto, amount to protection against or claim against misreporting as envisaged by section 270A(9) of the Income-tax Act, 1961."

12. Assailing the view as taken, Mr. Jolly, learned counsel for the petitioner, submitted that the respondent has acted wholly arbitrarily in rejecting the application for grant of immunity bearing in mind the undisputed position that the petitioner had duly complied with the conditions prescribed by Section 270AA(1) of the Act. It was the submission of learned counsel that once the petitioner had complied with the aforesaid conditions, the respondent was bound to process the applications for immunity in accordance with Section 270AA(3) of the Act.

13. Mr. Jolly submitted that for the purposes of being eligible to maintain an application under Section 270AA, it is incumbent upon the assesse to establish that the tax and interest payable as per the order of assessment has been duly deposited and that no appeal against the aforesaid order has been preferred. According to learned counsel, once those conditions stood fulfilled, there existed no justification for the applications being rejected. In view of the above, Mr. Jolly submitted, the respondent has committed a manifest illegality in holding that mere payment of the demand would not "*ipso facto*" entitle the petitioner-assessee to protection against any claims or allegations of misreporting as envisaged by Section 270A(9). Mr. Jolly also questioned the legality of the respondent rejecting the applications for immunity holding that the outcome of the penalty proceedings and any assumption of their ultimate fate would not be relevant since they would have to be independently considered.

14. According to learned counsel, the view as taken by the respondent is clearly contrary to the spirit underlying Section 270AA(3). Learned counsel submitted that the aforesaid provision has been clearly misconstrued and misinterpreted by the respondent while passing the impugned orders. Mr. Jolly also sought to underline the fact that the assessment orders had nowhere recorded any findings which may have established a case of misreporting as envisaged under Section 270A(9). Learned counsel contended that in the facts of the present case, an allegation of misrepresentation or suppression would clearly not stand evidenced bearing in mind the asserted stand of the writ petitioner that the income received by it from the sale and distribution of software could not have been treated as royalty. It was Mr. Jolly's

submission that the issue, in any case, stood conclusively answered by the Supreme Court in *Engineering Analysis* and which decision was surprisingly sought to be distinguished by the respondent on wholly specious and untenable grounds.

15. According to learned counsel, in the absence of the AO having rendered a determinative finding with respect to the conduct of the petitioner falling within the ambit of sub-section (9) of Section 270A, the initiation of penalty proceedings founded on an allegation of misreporting would be wholly illegal.

16. On a more fundamental plane, Mr. Jolly submitted that the notices which came to be issued by the respondents seeking to initiate action under Section 270A themselves are rendered illegal bearing in mind the indisputable position which emerges from the record and in light of the respondent failing to indicate the limb of Section 270A, which according to them, had been allegedly breached by the petitioner. Drawing our attention to the **Show Cause Notice**[10] which was issued, Mr. Jolly submitted that the same was founded upon an allegation that the petitioners had indulged in *"under-reporting/misreporting of income"*. According to learned counsel, it was incumbent upon the respondents to categorically indicate whether the petitioner was being charged with underreporting or misreporting. Mr. Jolly submitted that the aforesaid imperatives which must inform a SCN is an aspect which stands settled in light of the judgment rendered by the Court in **CIT vs. Minu Bakshi**[11] and **Schneider Electric South East Asia (HQ) (P)**

[10] SCN
[11] 2022 SCC OnLine Del 4853

Ltd. vs. CIT[12]. Learned counsel submitted that although *Minu Bakshi* was a judgment rendered in the context of Section 271(1)(c) of the Act, the principles propounded therein would equally apply to a notice under Section 270A.

17. It becomes pertinent to note that Section 271(1)(c) speaks of various eventualities and which may expose an assessee to face imposition of penalties. These range from a failure to comply with a notice under Section 115WD or concealment or furnishing of inaccurate particulars of income or fringe benefits. Mr. Jolly sought to draw a parallel between Section 271(1)(c) and Section 270A by highlighting the fact that both under-reporting as well as misreporting are considered to be separate and distinct transgressions. It is in the aforesaid backdrop that learned counsel contended that a SCN, in order to be recognized as valid and sustainable in law, must with due clarity indicate whether the assessee is charged of under-reporting or misreporting. It is in the aforesaid context that Mr. Jolly drew our attention to the following observations as rendered by the Division Bench of the Court in *Minu Bakshi*:

> "**6.3.** Third, if Explanation 5 to section 271(1) of the Act were to be relied upon, the Revenue would have to establish that the assets, such as money, bullion etcetera were seized during the search conducted on the premises of the assessee and that the said assets related to the income of the assessee for the relevant assessment years. Explanation 5, as noted in the said judgement, was inserted in the statute by Taxation Laws (Amendment) Act, 1984, w.e.f. 01.10.1984.
>
> **7.** In our opinion, the conclusion reached by the Tribunal in the instant case that the notice for imposition of penalty under Section 271(1)(c) of the Act, did not specify which limb of the said provision the penalty was sought to be levied, is covered by the following

[12] 2022 SCC OnLine Del 870

decisions, which includes a decision rendered by a coordinate bench of this Court.

(i) *CIT v. SSA's Emerald Meadows*, passed in I.T.A. No. 380/2015, dated November 23, 2015.

(ii) *CIT v. Manjunatha Cotton and Ginning Factory*.

(iii) *Pr. CIT v. Sahara India Life Insurance Company Ltd*. passed in I.T.A. No. 475 of 2019, dated August 2, 2019."

18. The principle of an assessee being apprised of the charge specifically and with due clarity was re-emphasized by a Division Bench of the Court in *Schneider Electric* and which was a decision rendered with reference to Section 270A. This is evident from the following observations as rendered therein:-

"**6.** Having perused the impugned order dated 9-3-2022, this Court is of the view that the respondents' action of denying the benefit of immunity on the ground that the penalty was initiated under Section 270-A of the Act for misreporting of income is not only erroneous but also arbitrary and bereft of any reason as in the penalty notice the respondents have failed to specify the limb — "underreporting" or "misreporting" of income, under which the penalty proceedings had been initiated.

7. This Court also finds that there is not even a whisper as to which limb of Section 270-A of the Act is attracted and how the ingredient of sub-section (9) of Section 270-A is satisfied. In the absence of such particulars, the mere reference to the word "misreporting" by the respondents in the assessment order to deny immunity from imposition of penalty and prosecution makes the impugned order manifestly arbitrary.

8. This Court is of the opinion that the entire edifice of the assessment order framed by Respondent 1 was actually voluntary computation of income filed by the petitioner to buy peace and avoid litigation, which fact has been duly noted and accepted in the assessment order as well and consequently, there is no question of any misreporting.

9. This Court is further of the view that the impugned action of Respondent 1 is contrary to the avowed legislative intent of Section 270-AA of the Act to encourage/incentivise a taxpayer to (*i*) fast track settlement of issue; (*ii*) recover tax demand; and (*iii*) reduce protracted litigation."

According to Mr. Jolly, the initiation of action under Section 270A of the Act is thus liable to be quashed and set aside on the aforesaid grounds.

19. Appearing for the respondents, Mr. Rai submitted that while it is true that the SCNs' referable to Section 270A had referred to both under-reporting/misreporting, the assessment orders had with adequate clarity identified the case against the petitioner as being liable to be viewed as that of misreporting. In view of the aforesaid, learned counsel contended that the petitioner had been placed on due notice of the charge which stood raised against it. According to learned counsel, the aforesaid facets of this particular case would be sufficient to negate the challenge which stands raised to the action under Section 270A.

20. According to Mr. Rai, if the aforesaid position be accepted, it would be apparent that the case of the petitioner would fall within the exclusionary provisions enshrined in sub-section (3) of Section 270AA and thus the Court would hold that the respondent had acted correctly in rejecting the applications for immunity.

21. For the purposes of evaluating the correctness of the rival submissions addressed, we deem it apposite to extract Sections 270A and 270AA hereinbelow:-

> "**270-A. Penalty for under-reporting and misreporting of income**.
>
> (1) The Assessing Officer or [the Joint Commissioner (Appeals) or the Commissioner (Appeals)] or the Principal Commissioner or Commissioner may, during the course of any proceedings under this Act, direct that any person who has under-reported his income shall be liable to pay a penalty in addition to tax, if any, on the under-reported income.
> (2) A person shall be considered to have under-reported his income, if—

(a) the income assessed is greater than the income determined in the return processed under clause (a) of sub-section (1) of Section 143;
(b) the income assessed is greater than the maximum amount not chargeable to tax, where [no return of income has been furnished or where return has been furnished for the first time under Section 148];
(c) the income reassessed is greater than the income assessed or reassessed immediately before such reassessment;
(d) the amount of deemed total income assessed or reassessed as per the provisions of Section 115-JB or Section 115-JC, as the case may be, is greater than the deemed total income determined in the return processed under clause (a) of sub-section (1) of Section 143;
(e) the amount of deemed total income assessed as per the provisions of Section 115JB or Section 115JC is greater than the maximum amount not chargeable to tax, where [no return of income has been furnished or where return has been furnished for the first time under Section 148];
(f) the amount of deemed total income reassessed as per the provisions of Section 115-JB or Section 115-JC, as the case may be, is greater than the deemed total income assessed or reassessed immediately before such reassessment;
(g) the income assessed or reassessed has the effect of reducing the loss or converting such loss into income.

(3) The amount of under-reported income shall be,—

(i) in a case where income has been assessed for the first time,—

(a) if return has been furnished, the difference between the amount of income assessed and the amount of income determined under clause (a) of sub-section (1) of Section 143;
(b) in a case where [no return of income has been furnished or where return has been furnished for the first time under Section 148],—

(A) the amount of income assessed, in the case of a company, firm or local authority; and

(B) the difference between the amount of income assessed and the maximum amount not chargeable to tax, in a case not covered in item (A);

(ii) in any other case, the difference between the amount of income reassessed or recomputed and the amount of income assessed, reassessed or recomputed in a preceding order:

Provided that where under-reported income arises out of determination of deemed total income in accordance with the provisions of Section 115-JB or Section 115-JC, the amount of total

under-reported income shall be determined in accordance with the following formula—

(A — B) + (C — D)
where,
A = the total income assessed as per the provisions other than the provisions contained in section 115JB or section 115JC (herein called general provisions);
B = the total income that would have been chargeable had the total income assessed as per the general provisions been reduced by the amount of under-reported income;
C = the total income assessed as per the provisions contained in section 115JB or section 115JC;
D = the total income that would have been chargeable had the total income assessed as per the provisions contained in section 115JB or section 115JC been reduced by the amount of under-reported income:

Provided further that where the amount of under-reported income on any issue is considered both under the provisions contained in Section 115-JB or Section 115-JC and under general provisions, such amount shall not be reduced from total income assessed while determining the amount under Item D.

Explanation.—For the purposes of this section,—
(a) "preceding order" means an order immediately preceding the order during the course of which the penalty under sub-section (1) has been initiated;
(b) in a case where an assessment or reassessment has the effect of reducing the loss declared in the return or converting that loss into income, the amount of under-reported income shall be the difference between the loss claimed and the income or loss, as the case may be, assessed or reassessed.

(4) Subject to the provisions of sub-section (6), where the source of any receipt, deposit or investment in any assessment year is claimed to be an amount added to income or deducted while computing loss, as the case may be, in the assessment of such person in any year prior to the assessment year in which such receipt, deposit or investment appears (hereinafter referred to as "preceding year") and no penalty was levied for such preceding year, then, the under-reported income shall include such amount as is sufficient to cover such receipt, deposit or investment.

(5) The amount referred to in sub-section (4) shall be deemed to be amount of income under-reported for the preceding year in the following order—

(a) the preceding year immediately before the year in which the receipt, deposit or investment appears, being the first preceding year; and
(b) where the amount added or deducted in the first preceding year is not sufficient to cover the receipt, deposit or investment, the year immediately preceding the first preceding year and so on.

(6) The under-reported income, for the purposes of this section, shall not include the following, namely:—

(a) the amount of income in respect of which the assessee offers an explanation and the Assessing Officer or [the Joint Commissioner (Appeals) or the Commissioner (Appeals)] or the Commissioner or the Principal Commissioner, as the case may be, is satisfied that the explanation is bona fide and the assessee has disclosed all the material facts to substantiate the explanation offered;
(b) the amount of under-reported income determined on the basis of an estimate, if the accounts are correct and complete to the satisfaction of the Assessing Officer or [the Joint Commissioner (Appeals) or the Commissioner (Appeals)] or the Commissioner or the Principal Commissioner, as the case may be, but the method employed is such that the income cannot properly be deduced therefrom;
(c) the amount of under-reported income determined on the basis of an estimate, if the assessee has, on his own, estimated a lower amount of addition or disallowance on the same issue, has included such amount in the computation of his income and has disclosed all the facts material to the addition or disallowance;

(d) the amount of under-reported income represented by any addition made in conformity with the arm's length price determined by the Transfer Pricing Officer, where the assessee had maintained information and documents as prescribed under Section 92D, declared the international transaction under Chapter X, and, disclosed all the material facts relating to the transaction; and
(e) the amount of undisclosed income referred to in Section 271-AAB.

(7) The penalty referred to in sub-section (1) shall be a sum equal to fifty per cent of the amount of tax payable on under-reported income.

(8) Notwithstanding anything contained in sub-section (6) or sub-section (7), where under-reported income is in consequence of any misreporting thereof by any person, the penalty referred to in sub-section (1) shall be equal to two hundred per cent of the amount of tax payable on under-reported income.

(9) The cases of misreporting of income referred to in sub-section (8) shall be the following, namely:—

(a) misrepresentation or suppression of facts;
(b) failure to record investments in the books of account;
(c) claim of expenditure not substantiated by any evidence;
(d) recording of any false entry in the books of account;
(e) failure to record any receipt in books of account having a bearing on total income; and
(f) failure to report any international transaction or any transaction deemed to be an international transaction or any specified domestic transaction, to which the provisions of Chapter X apply.

(10) The tax payable in respect of the under-reported income shall be—

(a) where no return of income has been furnished or where return has been furnished for the first time under section 148 and the income has been assessed for the first time, the amount of tax calculated on the under-reported income as increased by the maximum amount not chargeable to tax as if it were the total income;
(b) where the total income determined under clause (a) of sub-section (1) of Section 143 or assessed, reassessed or recomputed in a preceding order is a loss, the amount of tax calculated on the under-reported income as if it were the total income;
(c) in any other case, determined in accordance with the formula—

(X–Y)

where,
X = the amount of tax calculated on the under-reported income as increased by the total income determined under clause (a) of sub-section (1) of Section 143 or total income assessed, reassessed or recomputed in a preceding order as if it were the total income; and
Y = the amount of tax calculated on the total income determined under clause (a) of sub-section (1) of Section 143 or total income assessed, reassessed or recomputed in a preceding order.

(11) No addition or disallowance of an amount shall form the basis for imposition of penalty, if such addition or disallowance has formed the basis of imposition of penalty in the case of the person for the same or any other assessment year.

(12) The penalty referred to in sub-section (1) shall be imposed, by an order in writing, by the Assessing Officer, the Joint Commissioner (Appeals) or the Commissioner (Appeals), the Commissioner or the Principal Commissioner, as the case may be.

270-AA. Immunity from imposition of penalty, etc.-

(1) An assessee may make an application to the Assessing Officer to grant immunity from imposition of penalty under Section 270-A and initiation of proceedings under Section 276-C or Section 276-CC, if he fulfils the following conditions, namely:—

(a) the tax and interest payable as per the order of assessment or reassessment under sub-section (3) of Section 143 or Section 147, as the case may be, has been paid within the period specified in such notice of demand; and
(b) no appeal against the order referred to in clause (a) has been filed.

(2) An application referred to in sub-section (1) shall be made within one month from the end of the month in which the order referred to in clause (a) of sub-section (1) has been received and shall be made in such form and verified in such manner as may be prescribed.

(3) The Assessing Officer shall, subject to fulfilment of the conditions specified in sub-section (1) and after the expiry of the period of filing the appeal as specified in clause (b) of sub-section (2) of Section 249, grant immunity from imposition of penalty under Section 270A and initiation of proceedings under Section 276-C or Section 276-CC, where the proceedings for penalty under Section 270A has not been initiated under the circumstances referred to in sub-section (9) of the said Section 270A.

(4) The Assessing Officer shall, within a period of one month from the end of the month in which the application under sub-section (1) is received, pass an order accepting or rejecting such application:
Provided that no order rejecting the application shall be passed unless the assessee has been given an opportunity of being heard.

(5) The order made under sub-section (4) shall be final.

(6) No appeal under [Section 246] or Section 246A or an application for revision under Section 264 shall be admissible against the order of assessment or reassessment, referred to in clause (a) of sub-section (1), in a case where an order under sub-section (4) has been made accepting the application."

22. As is evident from a reading of Section 270A(1), a person would be liable to be considered to have under-reported its income if the contingencies spoken of in clauses (a) to (g) of Section 270A(2) were attracted. In terms of Section 270A(3), the under-reported income is thereafter liable to be computed in accordance with the stipulations prescribed therein. However, the subject of misreporting of income is

dealt with separately in accordance with the provisions comprised in sub-sections (9) and (10) of Section 270A. It is thus evident that both under-reporting as well as misreporting are viewed as separate and distinct misdemeanors.

23. However, and as we read the orders of assessment which were passed, the same carry no findings which may be viewed as indicative of the contingencies spelt out in clauses (a) to (f) of Section 270A(9) being attracted. In our considered opinion, in the absence of the AO having specified the transgression of the petitioner and which could be shown to fall within the ambit of sub-section (9) of Section 270A, proceedings for imposition of penalty could not have been mechanically commenced.

24. Notwithstanding the above, we note that the SCNs' which came to be issued for commencement of action under Section 270A were themselves vague and unclear. This since they failed to specify whether the petitioner was being charged with under-reporting or misreporting of income. The aforesaid aspect assumes added significance bearing in mind the indisputable position that a prayer for immunity could have been denied in terms of Section 270AA(3) only if it were a case of misreporting. The SCNs' failed to indicate the specific charge which was sought to be laid against the petitioner. This, since they sought to invoke both sub-sections (2) as well as sub-section (9) of Section 270A. There was thus an abject failure on the part of the respondents to indicate the branch of Section 270A which was sought to be invoked. The SCNs' would thus clearly fall foul of the principles which had been enunciated in *Minu Bakshi* and *Schneider Electric*.

25. Turning then to Section 270AA, we find that sub-section (3) of that provision requires the AO to confer consideration on the following three aspects: -

(a) Whether the conditions precedent specified in sub-section (1) of Section 270AA have been complied with?

(b) The period for filing an appeal under Section 249(2)(b) having passed.

(c) The subject matter of penalty not falling within the ambit of Section 270A (9).

26. Since an application for grant of immunity cannot possibly be pursued unless the assessee complies with clauses (a) and (b) of Section 270AA (1), the observation of the respondent that mere payment of demand would not lead to a prayer for immunity being pursued is wholly unsustainable.

27. We are also of the considered opinion that while examining an application for immunity, it was incumbent upon the AO to ascertain whether the provisions of Section 270A stood attracted either on the anvil of under-reporting or misreporting. This since the AO becomes enabled to reject such an application only if it be found that the imposition of penalty is founded on a charge which was referable to Section 270 A (9).

28. In the facts of the present case, we find that a finding of misrepresentation, failure to record investments, expenditure not substantiated by evidence, recording of false entry in the books of account and the other circumstances alluded to in sub-section (9) of Section 270A has neither been returned nor recorded in the assessment

order. The SCNs' in terms of which the action under Section 270A came to be initiated also failed to specify whether the petitioner was being tried on an allegation of under-reporting or misreporting.

29. Since there was a clear and apparent failure on the part of the respondents to base the impugned proceedings on a contravention relatable to Section 270A (9), the application for immunity could not have been rejected. As was noticed hereinabove, neither the AO nor the impugned SCNs' laid an allegation which could be said to be reflective of the petitioner having been found to have violated Section 270 A (9). In fact, the notices themselves sought to take a wholly ambivalent stance while alleging that the petitioner had indulged in *"under-reporting/misreporting"*. We thus have no hesitation in holding that the impugned SCNs' are rendered unsustainable on this short ground alone.

30. The importance of clarity and comprehensiveness which must imbue show cause notices came to be duly emphasised by us in our decision in **Puri Constructions (P) Ltd. Vs. CIT**[13]:-

> "**78.** The requisites of a valid show-cause notice were lucidly explained by the Supreme Court in *Gorkha Security Services v. Government (NCT of Delhi)* as under:
>
> "Contents of the show-cause notice
>
> 21. The central issue, however, pertains to the requirement of stating the action which is proposed to be taken. The fundamental purpose behind the serving of show-cause notice is to make the noticee understand the precise case set up against him which he has to meet. This would require the statement of imputations detailing out the alleged breaches and defaults he has committed, so that he gets an opportunity to rebut the same. Another requirement, according to us, is the nature of action which is proposed to be taken for such a breach. That should also be stated so that the noticee is able to point out that proposed action is not warranted in the given case, even if

[13] 2024 SCC OnLine Del 939

> the defaults/breaches complained of are not satisfactorily explained. When it comes to blacklisting, this requirement becomes all the more imperative, having regard to the fact that it is harshest possible action."

79. Similar observations find place in *UMC Technologies Pvt. Ltd. v. Food Corporation of India*:

> "13. At the outset, it must be noted that it is the first principle of civilised jurisprudence that a person against whom any action is sought to be taken or whose right or interests are being affected should be given a reasonable opportunity to defend himself. The basic principle of natural justice is that before adjudication starts, the authority concerned should give to the affected party a notice of the case against him so that he can defend himself. Such notice should be adequate and the grounds necessitating action and the penalty/action proposed should be mentioned specifically and unambiguously. An order travelling beyond the bounds of notice is impermissible and without jurisdiction to that extent. This court in *Nasir Ahmad v. Custodian General, Evacuee Property*- has held that it is essential for the notice to specify the particular grounds on the basis of which an action is proposed to be taken so as to enable the noticee to answer the case against him. If these conditions are not satisfied, the person cannot be said to have been granted any reasonable opportunity of being heard."

80. The reliance which is placed by Mr. Hossain on the decisions in *Isha Beevi v. TRO* and *CIT v. Rajinder Nath* is clearly misconceived. We note that in Isha Beevi, the writ petitioner had sought the issuance of a writ of prohibition seeking quashing of notices that were impugned. It was in the aforesaid context and the prerequisites of a writ of prohibition that the Supreme Court observed that the mere mentioning of a wrong provision would not justify the issuance of that prerogative writ and more so where the writ petitioner had failed to establish a total absence of jurisdiction.

xxxx xxxx xxxx

83. The principle of a power otherwise inhering or existing and not being impacted by the mere mention of a wrong provision is one which we apply to ratify, save and uphold a decision which is otherwise found to be valid and sustainable. We would be wary of either readily or unhesitatingly adopting or invoking that precept at the stage of a show-cause notice especially where the noticee is left

> to fathom which of the more than fifty variable obligations it is alleged to have violated."

31. We are further constrained to observe that even the assessment orders fail to base the direction for initiation of proceedings under Section 270A on any considered finding of the conduct of the petitioner being liable to be placed within the sweep of sub-section (9) of that provision. The order of assessment as well as the SCNs' clearly fail to meet the test of "specific limb" as propounded in *Minu Bakshi* and *Schneider Electric*. A case of misreporting, in any case, cannot possibly be said to have been made out bearing in mind the fact that the petitioner had questioned the taxability of income asserting that the same would not constitute royalty. The issue as raised was based on an understanding of the legal regime which prevailed. The contentions addressed on that score can neither be said to be baseless nor specious. In fact, that stand as taken by the petitioner was based on a judgment rendered by the jurisdictional High Court which was indisputably binding upon the AO who, for reasons unfathomable, thought it fit to base its decision on a judgment rendered by the Karnataka High Court. The AO, it would be pertinent to recall, chose to distinguish the judgment of the Supreme Court in *Engineering Analysis* itself. In any event, the position which the petitioner sought to assert and canvass clearly stood redeemed in light of the decision rendered by the Supreme Court.

32. Undisputedly, the petitioner had duly complied with the statutory pre-conditions set out in Section 270AA(1). It was thus incumbent upon the respondent to have come to the firm conclusion that the case of the petitioner fell in the category of misreporting since

that alone would have warranted a rejection of its application for immunity. On an overall conspectus of the aforesaid, we come to the firm conclusion that the impugned orders would not sustain.

33. Accordingly, and for all the aforesaid reasons, we allow the present writ petitions and quash the impugned orders dated 28 December 2021 and 24 January 2022 in terms of which the application under Section 270AA of the Act came to be rejected.

34. We also and for reasons aforenoted issue a writ quashing the SCNs' dated 16 November 2021 on finding that the same would not sustain in light of our judgment in *Schneider Electric*. The petitioner shall be entitled to consequential reliefs. Since the SCNs' themselves stand quashed, there exists no justification for the immunity applications being either pursued or remitted for further consideration.

YASHWANT VARMA, J.

PURUSHAINDRA KUMAR KAURAV, J.

MAY 31, 2024/RW