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IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 17.02.2025

+ **W.P.(C) 12847/2024 and CM APPL. 53630/2024**

SFDC IRELAND LIMITED... Petitioner

versus

COMMISSIONER OF INCOME TAX & ANOTHER..Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Ajay Vohra, Senior Advocate with Mr Aniket D Agarwal and Mr Samarth Chaudhari, Advocates.

For the Respondent : Mr Sunil Aggarwal, Senior Standing Counsel, Mr Shivansh B Panday, Ms Priya Sarka, Mr Viplav Acharya, JSCs and Mr Utkarsh Tiwari, Advocates.

CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU
HON'BLE MR JUSTICE TUSHAR RAO GEDELA

JUDGMENT

VIBHU BAKHRU, J.

1. The petitioner has filed the present petition, *inter alia,* impugning an order dated 09.07.2024 (hereafter **the impugned order**) passed by respondent no.2 under Section 197 of the Income Tax Act, 1961 (hereafter **the Act**) in respect of the Financial Year (FY) 2024-25 relevant to the Assessment Year (AY) 2025-26 authorizing the petitioner to receive the payment (estimated at ₹6,33,34,44,669/-) from

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M/s Salesforce.com India Private Limited (hereafter **SFDC India**) after withholding Tax Deducted at Source (**TDS** is short) at the rate of 2% (excluding cess and surcharges).

2. The petitioner also impugns the certificate dated 09.07.2024 (hereafter **the impugned certificate**) issued under Section 197 of the Act authorising SFDC India to make payments on account of the petitioner after deducting withholding tax at the rate of 2%.

3. According to the petitioner, its income resulting from the receipts from SFDC India is not chargeable to tax in India and, therefore, its application to authorise payments without deducting any withholding tax, ought to have been allowed.

4. Thus, the controversy to be addressed is whether the impugned order and the impugned certificate are liable to interfered with in the present proceedings on account of respondent no.2 (hereafter **the AO**) rejecting the petitioner's request for allowing SFDC India to make payments at Nil rate of withholding tax.

FACTUAL MATRIX

5. The petitioner is a tax resident of the Republic of Ireland within the meaning of Article 4 of the Double Taxation Avoidance Agreement (DTAA) between Ireland and India. The petitioner states that it is engaged in the business of operating Customer Relationship Management (CRM) offerings, applications, and platforms, including sales, service, marketing, commerce, integration, analytics, and related

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products and services (hereafter **SFDC Products**). The petitioner claims that SFDC Products are standardized and its customers are free to pick any product or combination of products that are best suited for their business requirements. The relevant extract of the petition, which describes SFDC Products, is reproduced below: -

> "3.5 The Petitioner, for the sake of clarity, submits that SFDC product(s) is a software that allows businesses to manage customers and prospect relationships with data. The users can store, track, and analyze customers and prospect information in one central location, including contact and account information, sales opportunities, service cases and marketing campaigns etc. These products are standardized and the customers, at their own behest, are free to pick any or combination of products that are best suited for their business requirements. The supply of SFDC products helps the customers/ clients in generating reports and summaries of the data which is fed into the 'Salesforce' software by the client itself. The customers input, store and retrieve their proprietary data through the CRM application software portal. The Petitioner's products provide access for customer's own use to generate reports, basis the information fed in by the customer in the desired format. Lastly, access to the Petitioner's products is for a limited duration and the period for which the subscription fee is paid by the customer. These products are exclusively for resale or provision of trial use to customers in India and excludes the SFDC products provided for reseller's internal use (which are provided to permit the reseller, in this case, SFDC India, to perform its obligations under the Reseller Agreement, at no extra cost)."

6. The petitioner claims that it does not have any place of business in India; has not engaged any employee; and does not have any sort of presence in India. The petitioner has also annexed a copy of the Tax

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Resident Certificate to establish that it is a tax resident of Ireland, as well as a declaration in the Form 10F declaring that it does not have any permanent establishment (hereafter **PE**) in India.

7. On 01.02.2023, the petitioner and SFDC India entered into a "Amended and Restated Reseller Agreement" (hereafter **the Reseller Agreement**), whereby the petitioner appointed SFDC India as a non-exclusive reseller of SFDC Products. The petitioner claims that in terms of the Reseller Agreement, SFDC India procures the SFDC Products from the petitioner for onward resale to its customers in India.

8. The petitioner estimates that during the FY 2024-25 relevant to AY 2025-26, it would receive a sum of ₹6,33,34,44,669/- from SFDC India in terms of the Reseller Agreement. On 17.04.2024, the petitioner filed an application in the prescribed form (Form 13) under Section 197 of the Act requesting the AO to issue the certificate authorizing the petitioner to receive payments from SFDC India without any withholding tax (TDS). In its application, the petitioner referred to the decision of this court in petitioner's own case for the prior year, AY 2024-25, rendered on 11.03.2024, captioned ***SFDC Ireland Limited v. Commissioner of Income Tax & Another***[1]. Pursuant to the said decision, the AO had allowed the petitioner's application under Section 197 of the Act for receiving payments from SFDC India in FY 2023-24 with nil TDS. The petitioner sought a similar certificate for AY 2025-26 as well.

[1] Neutral Citation No.: 2024:DHC:1910-DB

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9. Pursuant to the application, the AO sought various documents and clarifications regarding the business of the petitioner and SDFC India, which the petitioner states were duly furnished to the AO. Thereafter, the AO passed the impugned order and issued the impugned certificate, which are assailed in the present petition.

IMPUGNED ORDER

10. The petitioner claimed that its income was not chargeable to tax as fees for technical services or royalty. Its income from sale of SDFC Products was in the nature of Business Profits under Article 7 of the India-Ireland DTAA. Therefore, the same was not taxable under the Act as it did not have a PE in India. However, the AO did not accept the same. The AO reasoned that since the petitioner company had no assessment / scrutiny history, the said stand could not be accepted at that stage.

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11. The AO referred to certain sections of the Reseller Agreement, which required the purchase price for the SFDC Products to be calculated at a sum equal to SDFC India's net revenue excluding costs incurred by SFDC India, less a margin of 2.75%. Additionally, the AO noted that the revenue stream of SFDC India comprised of (a) revenue earned from sale of the SFDC Products; (b) professional services provided to customers of SFDC India under a separate contract; and, (c) training services provided by SFDC India to customers / support services to group companies.

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12. The AO observed that the petitioner empowered SFDC India to enter into contract with customers on its behalf within Indian territory.

13. The AO also concluded that SFDC India was involved in price determination process. The said conclusion was drawn on the basis of the petitioner's statement that pricing relating to the SFDC products is decided based on the quantity, period, etc. and is finalized on the basis of discussion with customers and internal approvals. The AO reasoned that the same also indicated dependency of SFDC India over the petitioner.

14. The AO noted that in FY 2023-24, the receipts were held to be fees for technical services – a conclusion which was rejected by this court. Subsequently, the certificate issued for AY 2024-25 was revised pursuant to the directions issued by this court. However, the AO did not follow the same course and observed that at the stage of proceedings under Section 197 of the Act, the scope of enquiry is limited and therefore, certain facts could not be verified in detail.

15. The AO also observed (a) at that stage it was difficult to establish the level of dependency of SFDC India over the petitioner; and, (b) it was difficult to determine the level of involvement of SFDC India in determination of final product price of the SFDC Products.

16. The AO declined to issue the certificate for Nil withholding tax, as the AO held that "issuance of tax withholding certificate @ 0% at this stage would literally amount to accepting of facts of the case without suitable enquiry which is not considered desirable from the point of view of revenue"

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RIVAL CONTENTIONS

17. Mr Ajay Vohra, learned counsel appearing for the petitioner submitted that respondent no.2 had failed to appreciate that the SDFC Products provided by the petitioner were standardized and non-customized and akin to off the shelf products. He submitted that SFDC India is a non-exclusive reseller for procuring the SFDC Products from the petitioner and selling the same. He stated that an Indian customer interested in availing the SFDC Products enters into a contract with SDFC India. He further submitted that the SFDC Products can be availed on the internet subject to a lumpsum subscription payment depending on the product in question. He submitted that the facility offered by the petitioner is more akin to an online store, which provides access to a standard automated facility without any human effort.

18. He contended that since the payments received from SFDC India were from sale of the SFDC Products, the same were not chargeable to tax under the Act.

19. Next, he submitted that the respondents have disregarded Rule 28AA of the Income Tax Rules, 1962 (hereafter **the Rules**), which requires the Assessing Officer to consider and give due regard to the TDS in previous years. He contended that the respondents have grossly erred in disregarding the Nil withholding certificate issued in the earlier years.

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20. He also called into question the tentative finding that SFDC India was dependent on the petitioner or that it was involved in the price determination process.

21. Mr. Sunil Aggarwal, learned counsel appearing for the Revenue countered the aforesaid submissions. He contended that the AO had found that the petitioner had a PE in India in the form of SFDC India and that several clauses of the Reseller Agreement *prima facie* disclose existence of the petitioner's PE in India. He referred to the recitals 'A' and 'B' of the Reseller Agreement and countered the submission that the petitioner sells its products to SFDC India for onward sales to customers in India and does not sell its products directly to customers in India.

22. Next, he submitted that Section 5.1 read with Exhibit A of the Reseller Agreement, indicates that the petitioner had paid a commission of 2.75% of the Indian territory revenue to SFDC India for services rendered by SFDC India to the petitioner. He emphasized that the petitioner undertook all the risks and was entitled to all the benefits. SFDC India was merely entitled to commission of 2.75% of the Indian territory revenue with no risk or additional reward. He also referred to Section 3.5 and Section 8 of the Reseller Agreement, which record that the petitioner has a right to inspect books / records of SFDC India and the petitioner has undertaken to fully indemnify SFDC India. He submitted that in the earlier years, the AO had invoked the FTS/Royalty clause, which was found to be inapplicable. However, in FY 2024-25, the AO had invoked the Business Income Clause holding that the

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petitioner had a PE in India. He earnestly contended that each assessment year is a separate unit of assessment and the AO is not precluded from correcting an error or mistake in subsequent years. He also referred to the decision of ***Joshi Technologies International Inc. v. Union of India and Ors.***[2] in support of his contention that the decision of the AO was reasoned and thus was not amenable to challenge in proceedings under Article 226 of the Constitution of India.

23. Lastly, he contended that directing a withholding tax at 2% translates to approximately 5% of the income on gross receipts which was very reasonable and therefore, did not warrant any interference by this court.

REASONS AND CONCLUSION

24. Section 197(1) of the Act enables an assessee to make application for a certificate requiring the deduction of tax at lower rate or no deduction at all, if the Assessing Officer is satisfied that the total income of the recipient justifies such nil deduction or deduction at a lower rate. It is, thus, incumbent upon the Assessing Officer to consider whether in the given facts, a lower rate or nil rate of withholding tax is justifiable. It is well settled law that at this stage, the Assessing Officer is not required to finally determine the question of taxability or the quantum of tax. Grant of a certificate under Section 197(1) of the Act does not preclude the Assessing Officer from framing an appropriate assessment including determining the taxability of the payments/receipts in the

[2] (2015) 7 SCC 728

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assessment proceedings. Thus, the Assessing Officer is not required to arrive at a definite finding as to the liability of an assessee to tax. However, it is essential for the Assessing Officer to examine the question of taxability in the given facts and be guided by the consideration as set out in Rule 28AA of the Rules.

25. It is apposite to refer to Rule 28AA of the Rules, which is set out below:

> "**28AA.** (1) Where the Assessing Officer, on an application made by a person under sub-rule (1) of rule 28 is satisfied that existing and estimated tax liability of a person justifies the deduction of tax at lower rate or no deduction of tax, as the case may be, the Assessing Officer shall issue a certificate in accordance with the provisions of sub-section (1) of section 197 for deduction of tax at such lower rate or no deduction of tax.
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> (2) The existing and estimated liability referred to in sub-rule (1) shall be determined by the Assessing Officer after taking into consideration the following:—
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> (i) tax payable on estimated income of the previous year relevant to the assessment year;
>
> (ii) tax payable on the assessed or returned or estimated income, as the case may be, of last four previous years;
>
> (iii) existing liability under the Income-tax Act, 1961 and Wealth-tax Act, 1957;
>
> (iv) advance tax payment, tax deducted at source and tax collected at source for the assessment year relevant to the previous year till the date of making application under sub-rule (1) of rule 28;
>
> (3) The certificate shall be valid for such period of the previous year as may be specified in the certificate, unless it

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is cancelled by the Assessing Officer at any time before the expiry of the specified period.

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

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

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

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

26. It is clear from the above that the Assessing Officer is also required to examine the tax payable on the assessed, returned or estimated income as the case may be of the last four previous years. Indisputably, the Assessing Officer is required to take a view – even though it may not be a final view – as to the chargeability of the receipt of tax under the Act.

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27. In ***GE India Technology Centre Pvt. Ltd. v. Commissioner of Income Tax and Anr.***[3], the Supreme Court had considered the provisions of Section 195(1) of the Act, which requires the person responsible for making any payment to a foreign company of any interest (other than interest referred to under Section 194LB; Section 194LC and Section 194 LD of the Act) "*or any other sum chargeable under the provisions of this Act to deduct income tax at the rate in force*". The Supreme Court had explained that Section 195 of the Act has to be read in conformity with the charging provisions – Section 4, 5 and 9 of the Act – and the obligation to withhold tax would arise only if the payments made would be chargeable to tax under the Act. It is relevant to refer to the following extract of the said decision:

> "14. One more aspect needs to be highlighted. Section 195 falls in Chapter XVII which deals with collection and recovery Chapter XVII-B deals with deduction at source by the payer. On analysis of various provisions of Chapter XVII, one finds use of different expressions, however, the expression "sum chargeable under the provisions of the Act" is used only in Section 195. For example, Section 194C casts an obligation to deduct TAS in respect of "any sum paid to any resident". Similarly, Sections 194-EE and194F inter alia provide for deduction of tax in respect of "any amount" referred to in the specified provisions. In none of the provisions we find the expression "sum chargeable under the provisions of the Act", which as stated above, is an expression used only in Section 195(1). Therefore, this Court is required to give meaning and effect to the said expression. It follows, therefore, that the obligation to deduct TAS arises only when there is a sum chargeable under the Act.
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> 15. Section 195(2) is not merely a provision to provide information to the ITO(TDS). It is a provision requiring tax to

[3] (2010) 327 ITR 456

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be deducted at source to be paid to the Revenue by the payer who makes payment to a non-resident. Therefore, Section 195 has to be read in conformity with the charging provisions i.e. Sections 4, 5 and 9. This reasoning flows from the words "sum chargeable under the provisions of the Act" in Section 195(1).

16. The fact that the Revenue has not obtained any information per se cannot be a ground to construe Section 195 widely so as to require deduction of TAS even in a case where an amount paid is not chargeable to tax in India at all. We cannot read Section 195, as suggested by the Department, namely, that the moment there is remittance the obligation to deduct TAS arises. If we were to accept such a contention it would mean that on mere payment income would be said to arise or accrue in India. Therefore, as stated earlier, if the contention of the Department was accepted it would mean obliteration of the expression "sum chargeable under the provisions of the Act" from Section 195(1). While interpreting a section one has to give weightage to every word used in that section. While interpreting the provisions of the Income Tax Act one cannot read the charging sections of that Act dehors the machinery sections. The Act is to be read as an integrated code.

17. Section 195 appears in Chapter XVII which deals with collection and recovery As held in the case of *CIT* v. *Eli Lilly and Co. (India) (P.) Ltd.* [2009] 312 ITR 225 the provisions for deduction of TAS which is in Chapter XVII dealing with collection of taxes and the charging provisions of the IT Act form one single integral, inseparable code and, therefore, the provisions relating to TDS applies only to those sums which are "chargeable to tax" under the IT Act. It is true that the judgment in *Eli Lilly* [2009] 312 ITR 225 was confined to Section 192 of the IT Act. However, there is some similarity between the two. If one looks at Section 192 one finds that it imposes statutory obligation on the payer to deduct TAS when he pays any income "chargeable under the head 'Salaries'", Similarly, Section 195 imposes a statutory obligation on any person responsible for paying to a non-resident any sum "chargeable under the provisions of the Act", which expression, as stated above, does not find place in other sections of Chapter XVII. It is in this sense that we hold that

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the IT Act constitutes one single integral inseparable code. Hence, the provisions relating to TDS applies only to those sums which are chargeable to tax under the IT Act.

18. If the contention of the Department that any person making payment to a non-resident is necessarily required to deduct TAS then the consequence would be that the Department would be entitled to appropriate the monies deposited by the payer even if the sum paid is not chargeable to tax because there is no provision in the IT Act by which a payer can obtain refund. Section 237 read with Section 199 implies that only the recipient of the sum i.e. the payee could seek a refund. It must therefore follow, if the Department is right, that the law requires tax to be deducted on all payments. The payer, therefore, has to deduct and pay tax, even if the so-called deduction comes out of his own pocket and he has no remedy whatsoever, even where the sum paid by him is not a sum chargeable under the Act The interpretation of the Department, therefore, not only requires the words “chargeable under the provisions of the Act" to be omitted, it also leads to an absurd consequence, The interpretation placed by the Department would result in a situation where even when the income has no territorial nexus with India or is not chargeable in India, the Government would nonetheless collect tax. In our view, Section 195(2) provides a remedy by which a person may seek a determination of the “appropriate proportion of such sum so chargeable” where a proportion of the sum so chargeable is liable to tax.

19. The entire basis of the Department's contention is based on administrative convenience in support of its interpretation. According to the Department huge seepage of revenue can take place if persons making payments to non-residents are free to deduct TAS or not to deduct TAS. It is the case of the Department that Section 195(2), as interpreted by the High Court, would plug the loophole as the said interpretation requires the payer to make a declaration before the ITO (TDS) of payments made to non-residents. In other words, according to the Department Section 195(2) is a provision by which the payer is required to inform the Department of the remittances he makes to the non-residents by which the Department is able

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to keep track of the remittances being made to non-residents outside India.

20. We find no merit in these contentions. As stated hereinabove, Section 195(1) uses the expression "sum chargeable under the provisions of the Act". We need to give weightage to those words. Further, Section 195 uses the word "payer" and not the word "assessee". The payer is not an assessee. The payer becomes an assessee-in-default only when he fails to fulfil the statutory obligation under section 195(1). If the payment does not contain the element of income the payer cannot be made liable. He cannot be declared to be an assessee-in-default.

21. The abovementioned contention of the Department is based on an apprehension which is ill-founded. The payer is also an assessee under the ordinary provisions of the IT Act. When the payer remits an amount to a non-resident out of India, he claims deduction or allowances under the Income Tax Act for the said sum as an "expenditure". Under Section 40(a)(i), inserted vide the Finance Act, 1988, w.e.f. 1-4-1989, payment in respect of royalty, fees for technical services or other sums chargeable under the Income Tax Act would not get the benefit of deduction if the assessee fails to deduct TAS in respect of payments outside India which are chargeable under the Income Tax Act. This provision ensures effective compliance with Section 195 of the IT Act relating to tax deduction at source in respect of payments outside India in respect of royalties, fees or other sums chargeable under the IT Act. In a given case where the payer is an assessee he will definitely claim deduction under the IT Act for such remittance and on inquiry if the AO finds that the sums remitted outside India come within the definition of royalty or fees for technical service or other sums chargeable under the IT Act then it would be open to the Assessing Officer to disallow such claim for deduction, Similarly, vide the Finance Act, 2008, w.e.f. 1-4-2008, sub-section (6) has been inserted in Section 195 which requires the payer to furnish information relating to payment of any sum in such form and manner as may be prescribed by the Board. This provision is brought into force only from 1-4-2008. It will not apply for the period with which we are concerned in these cases

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before us. Therefore, in our view, there are adequate safeguards in the Act which would prevent revenue leakage."

28. The aforesaid view was reiterated by the Supreme Court in ***Engineering Analysis Centre of Excellence Pvt. Ltd. v. Commissioner of Income Tax and Another*[4],** in the following words:

> "32. The machinery provision contained in Section 195 of the Income Tax Act is inextricably linked with the charging provision contained in Section 9 read with Section 4 of the Income Tax Act, as a result of which, a person resident in India, responsible for paying a sum of money, "chargeable under the provisions of [the] Act", to a non-resident, shall at the time of credit of such amount to the account of the payee in any mode, deduct tax at source at the rate in force which, under Section 2(37-A)(iii) of the Income Tax Act, is the rate in force prescribed by the DTAA. Importantly, such deduction is only to be made if the non-resident is liable to pay tax under the charging provision contained in Section 9 read with Section 4 of the Income Tax Act, read with the DTAA. Thus, it is only when the non-resident is liable to pay income tax in India on income deemed to arise in India and no deduction of TDS is made under Section 195(1) of the Income Tax Act, or such person has, after applying Section 195(2) of the Income Tax Act, not deducted such proportion of tax as is required, that the consequences of a failure to deduct and pay, reflected in Section 201 of the Income Tax Act, follow, by virtue of which the resident-payee is deemed an "assessee in default", and thus, is made liable to pay tax, interest and penalty thereon. This position is also made amply clear by the referral order in the appeals concerned from the High Court of Karnataka, namely, the judgment of this Court in GE Technology [GE (India) Technology Centre (P) Ltd. v. CIT, (2010) 10 SCC 29].
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> 36. It will be seen that Section 194-E of the Income Tax Act belongs to a set of various provisions which deal with TDS, *without* any reference to chargeability of tax under the Income

[4] [2021] 432 IRT 471

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> Tax Act by the non-resident assessee concerned. This section is similar to Sections 193 and 194 of the Income Tax Act by which deductions have to be made without any reference to the chargeability of a sum received by a non-resident assessee under the Income Tax Act. On the other hand, as has been noted in *GE Technology [GE (India) Technology Centre (P) Ltd. v. CIT*, (2010) 10 SCC 29], at the heart of Section 195 of the Income Tax Act is the fact that deductions can only be made if the non-resident assessee is liable to pay tax under the provisions of the Income Tax Act in the first place.
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> xxxx xxxx xxxx
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> 66. What is made clear by the judgment in *GE Technology [GE (India) Technology Centre (P) Ltd. v. CIT*, (2010) 10 SCC 29] is the fact that the "person" spoken of in Section 195(1) of the Income Tax Act is liable to make the necessary deductions only if the non-resident is liable to pay tax as an assessee under the Income Tax Act, and not otherwise. This judgment also clarifies, after referring to CBDT Circular No. 728 dated 30-10-1995, that the tax deduct or must take into consideration the effect of the DTAA provisions. The crucial link, therefore, is that a deduction is to be made only if tax is payable by the non-resident assessee, which is underscored by this judgment, stating that the charging and machinery provisions contained in Sections 9 and 195 of the Income Tax Act are interlinked."
>
> [emphasis added]

29. The Supreme Court also noted the following observations made in regard to the scope of Section 195 of the Act in the earlier decision in ***Vodafone International Holdings BV v. Union of India***[5]:

> "171. Section 195 casts an obligation on the payer to deduct tax at source ("TAS", for short) from payments made to non-residents which payments are chargeable to tax. Such payment(s) must have an element of income embedded in it which is chargeable to tax in India. If the sum paid or credited by the payer is not chargeable to tax then no obligation to

[5] (2012) 6 SCC 613

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deduct the tax would arise. Shareholding in companies incorporated outside India (CGP) is property located outside India. Where such shares become subject-matter of offshore transfer between two non-residents, there is no liability for capital gains tax. In such a case, question of deduction of TAS would not arise.

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

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

[emphasis added]

30. The liability to deduct tax at source is contingent upon whether the payments represent the income of the recipient, which is chargeable to tax under the Act. Clearly, if the payments are not chargeable to tax, the requirement of deduction of tax at source under Section 195 of the Act – which is a part of the machinery provision for collection of tax – is inapplicable. It is, thus, relevant to examine the taxability of the payments in the hands of the payee for the purposes of ascertaining

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whether tax is required to be deducted at source under Section 195 of the Act.

31. In the facts of the present case, the petitioner asserts that its receipts from SFDC India are not chargeable to tax under the Act as it is a tax resident of Ireland and does not have a PE in India. It also claims that the resale agreement with SFDC India is on a principal-to-principal basis where SFDC India is appointed on a non-exclusive basis, as a reseller of the SFDC Products. In the aforesaid context, it would be relevant to refer to the Reseller Agreement, which is stated to be effective from 01.02.2023. The relevant extract of the Reseller Agreement is set out below:

> "RECITALS
>
> A. Vendor and Reseller are part of a network of affiliated companies.
>
> Vendor is in the business of marketing and selling SFDC Products in both Europe, Middle East, and Africa ("EMEA") and Asia Pacific ("APAC") regions, providing consulting services and support to customers and desires to sell SFDC Products to the Reseller for onward sale to customers in the Territory.
>
> Reseller is engaged in the business of inter alia marketing and sales support services and desires to serve as a third-party reseller of SFDC Products for sale to customers in the Territory.
>
> B. Vendor does not desire to sell the SFDC Products directly to customers in the Territory.
>
> C. Vendor therefore wishes to appoint Reseller as its non-exclusive reseller of the SFDC Products in the Territory.

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

The parties now agree as follows:

Section 1 – Definitions

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

1.1 "Additional Resellers" shall mean and include a Person appointed as a non-exclusive sub-reseller by the Reseller of SFDC Products in the Territory.

xxxx xxxx xxxx

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

xxxx xxxx xxxx

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

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

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made available to Reseller and used by Reseller for internal business purposes including any related documentation. The use by Reseller of SFDC Products for Reseller's Internal Use shall be exclusively governed by the SFDC Products for Reseller's Internal Use Agreement, a copy of which is attached hereto as Exhibit B.

xxxx xxxx xxxx

Section 2 - Appointment of Reseller

2.1 Appointment. Subject to the terms and conditions set forth in this Agreement, Vendor hereby appoints Reseller as its non-exclusive reseller of the SFDC Products in the Territory, and Reseller hereby accepts such appointment. Further, Reseller shall have the right to appoint one or more Additional Resellers within the Territory, and to enter into Partner Contracts with partners in the Territory. Nothing in this Agreement shall be construed to limit Vendor's right to appoint one or more Additional Resellers within the Territory.

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

2.3 Reseller's Appointment of Sub-contractors. Reseller shall have the right to appoint sub-contractors (other than its employees) to provide marketing, resale, and sales support services (including post-sale support services) for the SFDC Products to customers in the Territory, subject to the policies established by Vendor from time to time. Reseller shall

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require sub-contractors appointed by Reseller pursuant to this Section 2.3 to agree in writing to adhere to the same obligations as Vendor has imposed on Reseller under this Agreement for the purpose of protecting Vendor's Confidential Information and Intellectual Property Rights.

Section 3 - Obligations of Reseller

xxxx xxxx xxxx

3.3 Personnel and Facilities. Reseller shall occupy and maintain facilities adequate to market and resell the SFDC Products in the Territory and to provide after sale support services to its customers in the Territory. Reseller shall retain and have at its disposal at all times an adequate staff of trained and qualified personnel to perform its obligations under this Agreement.

3.4 Representations and Warranties. Reseller shall not make representations or warranties with respect to the SFDC Products greater in scope or duration than those generally made by Vendor in the Territory, except where required by local law, and in any event shall not make or purport to make any representation or warranty, or enter into any obligation on Vendor's behalf. Vendor shall indemnify and hold Reseller harmless against any damages and losses resulting from (a) the non-conformance of the SFDC Products with Vendor's standard contract terms, (b) such other warranty as Reseller may be unable to disclaim as a matter of local law, and (c) other claims howsoever arising out of Reseller's exercise of its rights and performance of its obligations under this Agreement, other than those caused by Reseller's gross negligence.

Section 4 - Obligations of Vendor

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

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

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

Section 5 - Pricing and Payment Terms

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

xxxx xxxx xxxx

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

Section 8 - Indemnification

Vendor or its designee shall indemnify, defend, and hold Reseller harmless against any and all claims, suits, actions, demands, proceedings, losses, damages, liabilities, costs, and expenses, including, without limitation, interest and reasonable attorneys' fees, arising out of, relating to, or resulting from a claim that Reseller's use, marketing, or sale

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of any SFDC Product in the Territory infringes the patent, copyright, trademark, trade secret, or other proprietary right of any other Person and shall pay any costs and damages finally awarded against Reseller in any such action which are attributable to any such claim. Vendor's indemnification obligation is subject to the conditions that (a) Reseller notifies Vendor of any such claim, and (b) Vendor (or its designee) has the ability to control the defense and any settlement negotiations. Should any SFDC Product become, or in Vendor's opinion be likely to become, the subject of any infringement claim, Vendor may instruct and require Reseller to refrain from further marketing such SFDC Product or to take such other steps as may be appropriate to limit Vendor's liability exposure."

32. Exhibit A and Exhibit B forms an integral part of the Reseller Agreement. Exhibit A is reproduced below:

"Exhibit A

Purchase Price and Shortfall Payment

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

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

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

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(2.75%) of Indian Territory Revenue, or a rate agreed to by the Parties.

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

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

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

6. Costs. For purposes of this Exhibit A, Reseller's "Costs" shall be an amount equal to Reseller's ordinary and necessary costs, as calculated in accordance with Indian GAAP, including, without limitation, employee salaries, travel expenses, professional fees, rent, depreciation, stock option expenses, non-recoverable goods and services taxes ("GST"), third party costs incurred by Reseller in its operation of the SFDC Business in the Territory, compensation or reimbursements paid to an Affiliate, and any other costs agreed to by the Parties; but excluding interest, penalties, income taxes, goodwill, one-time charges, other non-operating expenses, and any costs incurred by Reseller for which it is compensated or reimbursed by an

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> Affiliate. For the avoidance of doubt, Costs shall not include the Purchase Price set forth herein.
>
> 7. GST. The payments payable hereunder by Reseller is exclusive of any GST, which shall be invoiced as applicable.
>
> 8. Foreign Exchange Gains or Losses. The Parties agree to make appropriate adjustments to the payments determined under this Exhibit A so that Reseller neither derives any gain nor incurs any loss attributable to foreign exchange rate fluctuations in connection with this Agreement."

33. It is apparent from the plain reading of the above sections of the Reseller Agreement that the role of SFDC India is to resell the SFDC Products and ancillary services. All intellectual property rights (IPR) in the SFDC Product vest with the petitioner and SFDC India does not acquire any IPR rights in the SFDC products.

34. Section 2.2 of the Reseller Agreement explains the relationship between the petitioner and SFDC India. Apparently, the same is that of a seller and a distributor. Section 2.2 of the Reseller Agreement expressly provides that the transactions would be undertaken on a principal-to-principal basis and that the parties shall in the performance of the obligations remain independent contractors. Neither party has a power to bind the other to any contract or the performance of any other obligation, or represent to any third party that it has any right to enter into any binding obligation on behalf of the other party.

35. The aforesaid section (Section 2.2 of the Reseller Agreement) is relevant to determine whether SDFC India acts as a dependent agent of the petitioner. Unless there is sufficient material to indicate otherwise,

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the provisions of Section 2.2 of the Reseller Agreement would, *prima facie*, be determinative of the relationship between SFDC India and the petitioner.

36. In the prior assessment year (AY 2024-25), the AO had proceeded on the basis that the payments made by SFDC India to the petitioner would be covered under fees for technical services under Article 12 of the India-Ireland DTAA. However, the petitioner had contested the same and had filed a writ petition before this court[6]. This court had examined the terms of the Reseller Agreement and had rejected the said approach as the terms of the Reseller Agreement did not indicate that SFDC India renders any technical service or that the payments for SFDC Products could constitute fees for technical service. We consider it apposite to reproduce the following extract from the said decision:

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> "40. As we read the terms of the Reseller Agreement, its stipulations do not appear to contemplate any technology transfer to SFDC India. The Indian entity appears to have been designated merely to act as the Reseller which would engage with and onboard customers within the territory for use of SFDC products. As is evident from the definition of SFDC Products, it speaks of customer relationship management offerings, applications, platforms, products and offerings exclusively for resale in the territory. The obligation of SFDC Ireland as per Section 4 of the Reseller Agreement was to provide SFDC products as notified from time to time. The price for those products was to be as per the stipulations contained in Exhibit A. The aforesaid clauses merely speak of

[6] SDFC Ireland Limited v. Commissioner of Income Tax and Anr.: Neutral Citation No. 2024:DHC:1910-DB

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the Reseller being accorded the right to sell SFDC products as distinct from what would constitute technical service.

xxxx xxxx xxxx

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

[emphasis added]

37. However, in ***SFDC Ireland Limited v. Commissioner of Income Tax & Another***[1], this court also noticed that the AO had not examined various streams and heads of revenue of SFDC India and earnings from customization or individualization of the SFDC suite of products. Accordingly, this court remitted the matter for consideration of the AO. The relevant extract of the said decision articulating the reasons for remitting the matter to the AO is set out below:

"48. We also bear in mind the indubitable fact that in order to fall within the ambit of FTS, it was incumbent upon the respondents to establish an indelible link between the payment received by SFDC Ireland and the same constituting "consideration" for providing technical services. Presently and on the state of the record as it exists today, the respondents do not appear to have evaluated the claim for withholding tax as raised on the touchstone of whether the remittances made to SFDC Ireland was for customized technical services. The

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impugned order does not proceed on the basis of any material or evidence which may have indicated that the moneys remitted to the assessee could be said to constitute consideration for technical services. Support, training and assistance provided by the assessee was asserted to be free of charge. According to SFDC Ireland, no remuneration is charged or received for providing technical assistance and training. It is also unclear from the record whether SFDC Products for Resellers Internal Use and which were restricted to training of customers and employees on the use of SFDC Products as also for managing customer accounts are charged for. The aforenoted conclusions thus clearly merit the impugned order being quashed and set aside with a liberty being reserved to the respondent to examine the issue in light of the above.

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

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

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> bearing in mind the observations entered hereinabove especially those highlighted in paras 48 and 49."

38. Concededly, the AO had, thereafter, examined the aspect whether remittance of 2.75% would include supply of customized technical services and had found in the negative. Accordingly, the AO had issued a certificate under Section 197(1) of the Act for no deduction of TDS in respect of the remittances made by SFDC India to the petitioner on account of supply of the SFDC Products.

39. Notwithstanding the aforesaid precedent in respect of the earlier assessment year, the AO has declined giving a Nil Deduction Certificate in the current assessment year. The AO has not accepted the petitioner's request for issuance of a certificate for Nil rate of withholding tax not on the ground of the payments made would be taxable under the Act as fees for technical services or royalty but on the ground that SFDC India's role in India was more than a mere reseller. The AO had reasoned that SFDC India was empowered to enter into contracts with customers and was also involved in price determination process. According to the AO, this was indicative of dependency of SFDC India on the petitioner.

40. There appears to be no cavil that the amounts remitted by SFDC India in respect of sale of the SFDC Products constitutes business profits, which is covered under Article 7 of the India-Ireland DTAA. There is nothing in the impugned order, which suggests that the AO was of the view that the petitioner's income from receipts pertaining to sale of the SDFC Products, from SDFC India is chargeable to tax as Royalty

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or Fees for Technical Services. The AO had merely made observations to the effect that (i) the petitioner's contention cannot be accepted as the petitioner company had no assessment/scrutiny history in the given circle; and (ii) issuance of nil withholding tax certificate would literally amount to accepting facts of the case without suitable enquiry. The contents of the impugned order suggests that the AO had accepted that the petitioner's income was in the nature of Business Profits and had suggested an element of dependency of SDFC India on the petitioner. Thus, though not specifically stated, the AO had suggested that there was an issue regarding the petitioner having a PE in India. It is, thus, relevant to refer to Article 7 of the India-Ireland DTAA, which refers to the taxability of business profits.

41. Article 7 of the India-Ireland DTAA is set out below:

> "Article 7: *Business profits* - 1. The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may also be taxed in the other State but only so much of them as is attributable to that permanent establishment.
>
> 2. Subject to the provisions of paragraph 3, where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment.

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> 3. In the determination of the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the permanent establishment, whether in the State in which the permanent establishment is situated or elsewhere. Executive and general administrative expenses shall be allowed as deductions in accordance with the taxation laws of that State. Nothing in this paragraph shall, however, authorise a deduction for expenses which would not be deductible if the permanent establishment were a separate enterprise.
>
> 4. No profits shall be attributed to a permanent establishment by reason of the mere purchase by that permanent establishment of goods or merchandise for the enterprise.
>
> 5. For the purposes of the preceding paragraphs, the profits to be attributed to the permanent establishment shall be determined by the same method year by year unless there is good and sufficient reason to the contrary.
>
> 6. Where profits include items of income which are dealt with separately in other Articles of this Convention, then the provisions of those Articles shall not be affected by the provisions of this Article."

42. In view of the above, there is no dispute that the profits of petitioner would be taxable only in its resident state, that is, Republic of Ireland unless it is found that the petitioner carries on business in India through a PE. It was also contended by Mr Aggarwal that the petitioner has a PE in India in the form of SFDC India. However, it is material to note that the AO has not rendered any such *prima facie* finding. The impugned order does not hold that the petitioner has a PE in India in form of SFDC India.

43. It is relevant to refer to Article 5 of the India-Ireland DTAA, which defines the expression "Permanent Establishment" (PE) for the

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purposes of the India-Ireland DTAA. Article 5 of the India-Ireland DTAA, reads as under:

> "ARTICLE 5: *Permanent Establishment* - 1. For the purposes of this Convention, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.
>
> 2. The term "permanent establishment" includes especially:
>
> (a) a place of management;
>
> (b) a branch;
>
> (c) an office;
>
> (d) a factory;
>
> (e) a workshop;
>
> (f) a mine, an oil or gas well, a quarry or any other place of extraction or exploration of natural resources;
>
> (g) an installation or structure used for the exploration or exploitation of natural resources;
>
> (h) a sales outlet;
>
> (i) a warehouse in relation to a person providing storage facilities for others; and
>
> (j) a farm, plantation or other place where agricultural, forestry, plantation or related activities are carried on.
>
> 3. A building site or construction or assembly project or supervisory activities in connection there with constitute a permanent establishment only if such site, project or activity last more than six months.
>
> 4. An enterprise shall be deemed to have a permanent establishment in a Contracting State and to carryon business through that permanent establishment if it provides services or facilities in connection with, or supplies plant and machinery on hire used for or to be used in, the prospecting for, or extraction or exploitation of mineral oils in that State.

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5. Notwithstanding the previous provisions of this Article, the term "permanent establishment" shall be deemed not to include:

(a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;

(b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;

(c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;

(d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information for the enterprise;

(e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character;

(f) the maintenance of a fixed place of business solely for any combination of activities mentioned in sub-paragraphs (a) to (e), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.

6. Notwithstanding the provisions of paragraphs 1 and 2, where a person - other than an agent of an independent status to whom paragraph 8 applies - is acting in a Contracting State on behalf of an enterprise of the other Contracting State, that enterprise shall be deemed to have a permanent establishment in the first-mentioned Contracting State in respect of any activities which that person undertakes for the enterprise, if such a person:

(a) has and habitually exercises in that State an authority to conclude contracts in the name of the enterprise, unless the activities of such person are limited to those mentioned in paragraph 5 which, if exercised through a fixed place of business, would not make this fixed place of business a

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permanent establishment under the provisions of that paragraph; or

(b) has no such authority, but habitually maintains in the first-mentioned State a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the enterprise; or

(c) habitually secures orders in the first-mentioned State, wholly or almost wholly for the enterprise itself or for the enterprise and other enterprises controlling, controlled by, or subject to the same control as that enterprise.

7. Notwithstanding the preceding provisions of this Article, an insurance enterprise of a Contracting State shall, except in regard to re-insurance, be deemed to have a permanent establishment in the other Contracting State if it collects premiums in the territory of that other State or insures risks situated therein through a person other than an agent of an independent status to whom paragraph 8 applies.

8. An enterprise shall not be deemed to have a permanent establishment in a Contracting State merely because it carries on business in that State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business. However, if the activities of such an agent are carried out wholly or almost wholly for the enterprise and the conditions made or imposed between them in their commercial and financial relations differ from those which would have been made or imposed if this had not been the case, that agent shall not be considered to be an agent of an independent status for the purpose of this paragraph.

9. The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other."

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[emphasis added]

44. It is also relevant to refer to the paragraphs of the OECD and UN Model Conventions which correspond to paragraph 6 of Article 5 of the India-Ireland DTAA. The same are set out below:

> "**<u>Article 5</u>**
>
> 5. Notwithstanding the provisions of paragraphs 1 and 2 but subject to the provisions of paragraph 6, where a person is acting in a Contracting State on behalf of an enterprise and in doing so, habitually concludes contracts, or habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise, and these contracts are
>
> a) in the name of the enterprise, or
>
> b) for the transfer of the ownership of, or for the granting of the right to use, property owned by that enterprise or that the enterprise has the right to use, or
>
> c) for the provision of services by that enterprise,
>
> that enterprise shall be deemed to have a permanent establishment in that State in respect of any activities which that person undertakes for the enterprise, unless the activities of such person are limited to those mentioned in paragraph 4 which, if exercised through a fixed place of business (other than a fixed place of business to which paragraph 4.1 would apply), would not make this fixed place of business a permanent establishment under the provisions of that paragraph."
>
> **<u>UN MC</u>**
>
> "5. Notwithstanding the provisions of paragraphs 1 and 2 but subject to the provisions of *paragraph* 7, where a person is acting in a Contracting State on behalf of an enterprise, that enterprise shall be deemed to have a permanent establishment in that State in respect of any

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activities which that person undertakes for the enterprise, *if such a person:*

a) habitually concludes contracts, or habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise, and these contracts are

i) in the name of the enterprise, or

ii) for the transfer of the ownership of, or for the granting of the right to use, property owned by that enterprise or that the enterprise has the right to use, or

iii) for the provision of services by that enterprise, unless the activities of such person are limited to those mentioned in paragraph 4 which, if exercised through a fixed place of business (other than a fixed place of business to which paragraph 4.1 would apply), would not make this fixed place of business a permanent establishment under the provisions of that paragraph; or

b) the person does not habitually conclude contracts nor plays the principal role leading to the conclusion of such contracts, but habitually maintains in the first-mentioned State a stock of goods or merchandise from which that person regularly delivers goods or merchandise on behalf of the enterprise."

45. We also consider it apposite to refer to the following passage from the text Klaus Vogel on Double Taxation Conventions[7], in the context of OECD Model Conventions, which sets out the rationale of including a dependent agent in a contracting state as a PE of an enterprise in the other contracting state:

[7] Pg. 357, Volume 1, Fifth Edition Edited by Ekkehart Reimer and Alexander Rust.

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"83. [**Dependent agents, *i.e.* persons**] Persons whose activities may create a permanent establishment for the enterprise are i.e. persons, whether or not employees of the enterprise, who act on behalf of the enterprise and are not doing so in the course of carrying on a business as an independent agent falling under paragraph 6. Such persons may be either individuals or companies and need not be residents of, nor have a place of business in, the State in which they act for the enterprise. It would not have been in the interest of international economic relations to provide that any person undertaking activities on behalf of the enterprise would lead to a permanent establishment for the enterprise. Such treatment is to be limited to persons who in view of or the nature of their activity involve the enterprise to a particular extent in business activities in the State concerned. Therefore, paragraph 5 proceeds on the basis that only persons habitually concluding contracts that are in the name of the enterprise or that are to be performed by the enterprise, or habitually playing the principal role leading to the conclusion of such contracts which are routinely concluded without material modification by the enterprise, can lead to a permanent establishment for the enterprise. In such a case the person's actions on behalf of the enterprise, since they result in the conclusion of such contracts and go beyond mere promotion or advertising, are sufficient to conclude that the enterprise participates in a business activity in the State concerned. The use of the term 'permanent establishment' in this context presupposes, of course, that the conclusion of contracts by that person, or as a direct result of the actions of that person, takes place repeatedly and not merely in isolated cases."

46. India-Ireland DTAA is not identical to OECD or UN Model Conventions. More importantly, India's stand regarding interpretation of a PE is also different in some aspects. However, it is relevant to bear the aforesaid rationale as articulated in Klaus Vogel's text in mind in examining whether, *prima facie*, the petitioner has a PE in India in the form of SDFC India.

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47. Plain reading of paragraph 6 of Article 5 of the India-Ireland DTAA indicates that the following conditions are to be satisfied:

(a) The agent habitually acts on behalf of the enterprise.

(b) He habitually exercises authority to conclude contracts in the name of the enterprise.

(c) He has no ostensible authority to conclude contract but habitually maintains a state of stock of goods or merchandise and delivers the same on behalf of the enterprise.

(d) Habitually secures orders wholly or almost wholly for the enterprise (or other enterprises, which are controlling or controlled by the enterprise).

48. Even if the aforesaid conditions are satisfied, an enterprise will not be deemed to have a PE in India if the agent has an independent status and is covered under paragraph 8 of Article 5 of the India-Ireland DTAA. That is, he is a broker, general commission agent or any other agent of independent status and acts in the normal course of its business. Paragraph 6 of Article 5 of the India-Ireland DTAA also does not cover persons, which are mentioned in paragraph 5 of Article 5 of the India-Ireland DTAA.

49. In ***Formula One World Championship Ltd.* v. *CIT***[8], this court had observed as under:

[8] 2016 SCC Online Del 6144

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> "69. Article 5(5) has certain preconditions if an entity has to be treated as dependent agent. The agent must have the authority to conclude contracts, which bind the represented enterprise, and it must habitually exercise such authority. If these positive preconditions are met, then only an enterprise shall be deemed to have a PE in that State in respect of any activities, which that person undertakes for the enterprise. The contention that because the three entities were subsidiaries of FOWC, they acted on its behalf and thus become dependent agents is insubstantial. The mere circumstance that the three subsidiaries had a connection with FOWC was not enough; what is to be shown is that the contracts they entered into and the businesses they were engaged in, was for and on behalf of FOWC. Each of the three agreements independently entered into by them with Jaypee contains no pointers to this fact."

50. In the present case, there is no *prima facie* finding by the AO that SFDC India habitually exercises authority to conclude contracts in the name of the petitioner. There is also no finding that SDFC India without authority habitually maintains a state of stock of goods or merchandise and regularly delivers the same on behalf of the petitioner or habitually secures orders.

51. As apparent from above, it is not necessary for the AO to finally determine the tax chargeable. However, it was essential for the AO to form an opinion regarding the taxability of the income on a *prima facie* basis before rejecting the assessee's application under Section 197(1) of the Act.

52. As noted above, the impugned order proceeded on the basis that the petitioner had empowered SFDC India to enter into contracts with customer on its behalf within the territory of India. The AO had also noted that although the petitioner had appointed SFDC India as a non-

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exclusive reseller, the petitioner had not appointed any other entity as the reseller of its products. But SFDC India had appointed sub-resellers.

53. Additionally, the AO had found that SFDC India had a role to play in the process of determining the price of the SFDC Products.

54. Both the aforesaid contentions are stoutly disputed by the petitioner. The petitioner denies that it has empowered SFDC India to enter into any contract on its behalf. The Reseller Agreement, which governs the relationship between the petitioner and SFDC India, explains the relationship between the parties and expressly provides that neither party would have the power to bind the other party to any contract or the performance of any other obligation. Neither party can represent to a third party that it has the right to enter into any binding obligation on behalf of the other party. Given the unambiguous terms of the Reseller Agreement, the conclusion that SFDC India is empowered to bind the petitioner or enter into contracts on its behalf cannot, absent any other definitive material establishing to the contrary, be sustained.

55. The contention that SFDC India has a role in price determination of the SFDC Products also appears to be without sufficient foundation. The petitioner emphasises that SFDC Products are standardized products and SFDC India does not determine the said prices. The AO had reasoned that the involvement of SFDC India in price determination points towards the dependency of SFDC India over the petitioner. This observation is also unsustainable as even if SFDC India is involved in

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providing any inputs for determination of pricing, the same would not render SFDC India as a dependent PE.

56. Mr Aggarwal, learned counsel for the Revenue had sought to sustain the impugned order mainly on the remuneration model and Section 8 of the Reseller Agreement, whereby the petitioner has agreed to indemnify SFDC India. He had submitted that the revenue model in fact takes into account operating cost and all other cost of SFDC India and ensures SFDC India, a fixed revenue of 2.75%. The price at which the SDFC Products are invoiced to SDFC India is based on a revenue model, which ensures a mark-up of 2.75% of the operating cost. It is material to note that Section 5.1 of the Reseller Agreement also records that the parties would "*periodically review the Purchase Price (and, as the case may be, the Shortfall Payments) and to make adjustments as deemed appropriate to maintain arm's-length compensation*". However, we are unable to accept that, absent any other features, the revenue model providing for a margin of 2.75% on operating costs to SDFC India indicates that SDFC India is the petitioner's PE in the form of a dependent agent and consequently, the petitioner's business income is chargeable to tax under the Act.

57. Undisputedly, SFDC India is an affiliate of the petitioner, its transaction would be benchmarked on arm's length basis.

58. Mr Aggarwal had also referred to Section 8 of the Reseller Agreement. Section 8 of the Reseller Agreement is an indemnification clause, whereby the petitioner had agreed to indemnify SFDC India

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against all claims, suits, actions, demands, proceedings, losses, damages, liabilities, costs and expenses that arises from an allegation that the sale of SFDC Products in India infringes any patent, copyright, trademark, trade secret, or other proprietary rights of any other person. Plainly, SFDC India is a re-seller of products and is not required bear the liability on account of infringement of any intellectual property rights attributable to sale of SFDC Products in India. This is because all the intangible rights such as copyright, patent, trademarks in respect of SFDC Products vests with the petitioner and SFDC India cannot claim any such rights. This is expressly recorded in the Reseller Agreement. It would, thus, obviously follow that SFDC India – as any reseller – is entitled to indemnity against any action brought about by a person claiming infringement of its rights on account of sale of SFDC products. This principle would also apply to product liability and in terms of Section 3.4 of the Reseller Agreement, the petitioner has also agreed to indemnify SDFC India against claims relating to product liability or in respect of obligations under the Reseller Agreement. However, the petitioner does not indemnify SDFC India against any claims resulting from gross negligence or which are not related to performance of its obligations under the Reseller Agreement.

59. In the present case, we do not find that there is any material or a finding, which would justify denial of the petitioner's application on the ground that its income is chargeable to tax in India.

60. We are unable to sustain the impugned order as in the given facts, there is little indication at least at this stage, that amounts paid by SFDC

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India to the petitioner as consideration for sale of SFDC Products are chargeable to tax under the Act. It is also important to note that the AO has not returned any findings, which indicate to the contrary. There is no express finding on a *prima facie* basis that the petitioner has a PE in India. And, the impugned order does not disclose sufficient grounds, which would substantiate this assumption.

61. In view of the above, we set aside the impugned order and direct the AO to issue the certificate under Section 197(1) of the Act for nil withholding tax, bearing in mind the observations made in this order.

62. We, however, clarify that the observations made in the present order are confined to the question of issuance of a certificate under Section 197(1) of the Act. This order will not preclude the AO from examining and framing an assessment in accordance with law, uninfluenced by this order.

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63. The petition is allowed in the aforesaid terms. The pending application is also disposed of.

VIBHU BAKHRU, J

TUSHAR RAO GEDELA, J

FEBRUARY 17, 2025

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