



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

%

Judgment Reserved on: 17.10.2025

Judgment delivered on: 23.12.2025

Judgment uploaded on: *As per Digital Signature~*

+ **W.P.(C) 10556/2025 & CM APPL. 43739/2025 (stay)**

ZSCALER INC

.... PETITIONER

versus

DEPUTY COMMISSIONER OF INCOME TAX,
CIRCLE 3(1)(1), NEW DELHI

.... RESPONDENT

Advocates who appeared in this case

For the Petitioner : Mr. Kamal Sawhney, Mr. Arun Bhadauria
and Mr. Puru Medhira, Advocates.

For the Respondent : Mr. Sunil Agarwal, SSC, Mr. Viplav
Acharya, JSC, Ms. Priya Sarkar, JSC with
Mr. Anugrah Dwivedi and Mr. Utkarsh
Tiwari, Advocates

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

HON'BLE MR. JUSTICE VINOD KUMAR

JUDGMENT

V. KAMESWAR RAO, J.

1. This petition has been filed seeking to set aside a certificate issued under Section 197 of the Income Tax Act, 1961 (the Act) dated 06.05.2025 along with an order dated 07.05.2025 read with continuation order dated 16.05.2025, dismissing the petitioner's application for issuance of 'Nil



Withholding Certificate’ for prospective payments amounting to Rs.13,19,12,77,703/-.

2. The petitioner is a company incorporated under the laws of the United State of America (USA) and a non-resident entity, in the business of providing software-based IT solutions and resells its software along with ancillary services to clients in (End-User)India.

3. The respondent is the Deputy Commissioner of Income Tax (DCIT) who has issued the certificate dated 06.05.2025 and passed the order dated 07.05.2025 read with continuation order dated 16.05.2025 under Section 197 of the Act.

ISSUE INVOLVED:

4. The petitioner stated that it filed an application for ‘*Nil Withholding Certificate*’ before the Assessing Officer (AO), Circle International Tax 3(1)(1) DEL, who rejected the application vide the impugned order dated 07.05.2025 by relying upon the assessment orders of preceding years i.e. Assessment Years (AYs) 2021-22 and 2022-23.

5. The issue agitated before this Court is that the assessment orders for AYs 2021-22 and 2022-23 have been set aside by the Income Tax Appellate Tribunal, Delhi Bench D, New Delhi (ITAT) by order dated 18.06.2025. As such the impugned orders/certificate are liable to be set aside, as the assessment orders for AY 2021-22 and AY 2022-23 is the sole basis for the AO to reject the application of the petitioner for ‘*Nil Withholding Certificate*’.



FACTUAL CONTEXT:

6. The petitioner is providing software/solution/products to its clients /customers in India for the last several years. Prior to AY 2021-22, the petitioner has been paying income tax on its receipts from software solution / services in India as ‘Royalty’ under Article 12 of the India-USA Double Taxation Avoidance Agreement (DTAA).

7. Pursuant to the decision of the Supreme Court in ***Engineering Analysis Centre of Excellence (P.) Ltd. v. Commissioner of Income-tax, [2021] 125 taxmann.com 42 (SC)*** which differentiated the transfer of right to use a copy-righted software and the transfer of right to use a copy of a copy-righted software and that, transfer of copy of a copy-righted software such (resale/EULA software) is not eligible to be taxed as ‘Royalty’, the petitioner changed its tax position on income from software solutions/services. Thereafter, for the AY 2021-22 and 2022-23, the petitioner claimed a refund of Tax Deducted at Source (TDS) that was deposited as royalty income in its return of income. Consequently, a scrutiny assessment was initiated and a final assessment order was passed under Section 143(3) read with Section 144(C) (13) of the Act wherein, the respondent held that the petitioner has a Dependent Agent Permanent Establishment (DAPE) in India through its Indian subsidiary.

8. Thereafter, the petitioner filed an application dated 28.03.2025 for the FY 2025-26 (AY 2026-27) with regard to 24 transactions that the petitioner proposes to enter under Section 197 of the Act for ‘*Nil Withholding Certificate*’, seeking income from software services / solutions, as software sold under agreement does not come under the definition of



‘Royalty’ in view of the findings of the Supreme Court in *Engineering Analysis Centre of Excellence (supra)*.

9. According to the petitioner, at the time of filing of the application under Section 197 of the Act, the assessment orders for both AY 2021-22 and AY 2022-23 were appealed before the ITAT and a stay for both the years was operational. In the meanwhile, on 06.05.2025, the respondent, without seeking any further queries or questions from the petitioner, issued the impugned certificate directing that, for 24 transactions, the withholding tax/TDS be deducted at 8.75%. On 07.05.2025, the respondent issued a detailed order wherein it held that the petitioner has a DAPE being Zscaler Softech India Pvt Limited (ZSIPL) in India and its entire revenue from software services/solutions from Indian clients would be taxed as business income in India, in view of the assessment orders of the preceding AYs. On this basis, the entire income from software solutions was attributed to Permanent Establishment at an arbitrary rate of 25% (net attribution).

10. On 16.05.2025, the respondent in continuation to the speaking order dated 07.05.2025 issued another order, wherein, the attribution rate of 25% was affirmed. The relevant extract of both the orders are as follows:

Order dated 07.05.2025.

“3. It must be appreciated that the proceedings u/s 197 are provisional in nature and the scope of enquiry is limited. The true nature of the income is scrutinized during the final assessment proceedings in the case of the assessee in details. In this respect, assessment orders passed in Applicant’s case for preceding years has established that M/s Zscaler Softech India Pvt. Ltd., the Indian subsidiary of the Assessee company which provides sales/marketing support to Assessee company for securing of orders for selling/licensing of Zscaler Software products to Indian distributors, creates a dependent agent PE for Assessee company in



view of Article 5(6)(c) of India-USA DTAA. Consequently, the receipts of M/s Zscaler Inc. has been taxed as business income in India by applying the tax rate of 40%, profit attributable to PE being 25% taking the effective rate tax @ 10% on gross revenue in the assessment proceedings.

4. For the year under consideration, the tax rate applicable to foreign company is 35% plus surcharge and cess as applicable. Therefore, the effective tax rate works out at 8.75, computed by applying tax rate at 35% on the 25% of attributable profits.”

Continuation order: Dated 16.05.2025.

“This in continuation to the speaking order passed in case of M/s Zscaler Inc (PAN: AAACZ4350P) DIN No: ITBA/COM/F/17/2025-26/1076080086(1). Kindly read Para 4 in the said order now as below:

4. Consequently, the receipts of M/s Zscaler Inc. have been taxed as business income by applying tax rate of 40% on profit margin of 25% on net basis.

For the year under consideration, the tax rate applicable to foreign company is 35% plus surcharge and cess as applicable. Therefore, the effective tax rate works out at 8.75, computed by applying tax rate at 35% on profit margin of 25% on net basis.”

11. The ITAT vide a common order dated 18.05.2025, for AYs 2021-22 and 2022-23 in paragraphs 19 & 20, held as under:-

“19. We are of the considered view that the burden to prove, that assessee has a PE in India lies initially on the Revenue as held by the Hon’ble apex Court in Assistant Director of Income-tax-1, New Delhi vs. E-Funds IT Solution Inc. [2017] 399 ITR 34 (SC). As discussed above there was no discussion of Id.Tax authorities on basis of any material available in the form of two agreements, we have discussed to show that anyelement of agency was there in the respective rights and obligations of two parties. Evidence such as email record, travel itinerary etc. would not have mattered much. Further, the reliance placed on the judgment of Daikin Industries Ltd. vs. ACIT, [2018] 65 ITR(T) 693 (Delhi - Trib.) is differentiated by Id.Sr. Counel submitting in the said case, the Indian entity involved was finalizing products sold by it in the capacity of a distributor as well by the non-resident entity therein, which is not the case herein. In any case, the above principles have been distinguished by this Tribunal in the case of Siemens Mobile Communications SPA vs. DCIT, [2020] 182 ITD 479 (Delhi -



Trib.). Secondly, the reliance placed on the judgment of *Rolls Royce Singapore (P.) Ltd. vs. ADIT*, [2012] 347 ITR 192 (Delhi), is also misplaced inasmuch as, in that case the Tribunal had given a factual finding that there existed DAPE and the Hon'ble High Court after concluding that the Tribunal had arrived on wrong conclusion, remanded the matter back to reconsider the issue. In the present case, it has been sufficiently demonstrated above that *Zscaler India* does not constitute DAPE of the Appellant and is only providing marketing support services to the Appellant.

20. Consequently we are inclined to sustain the ground no 4. The remaining grounds are general or consequential, so need no separate adjudication. The appeals are allowed.”

CASE OF THE PETITIONER :

12. Mr. Kamal Sawhney, learned counsel for the petitioner submitted that, at the time of issuing the impugned certificate and orders, the appeals for both AY 2021-22 and AY 2022-23 were pending consideration, and the entire basis for passing impugned order under Section 197 of the Act was the final assessment orders of the above AYs. The respondent/AO did not see it fit to keep the order on hold or pass the order basis the *prima facie* case established by petitioner in the stay orders.

13. On 18.06.2025, the ITAT in *Zscaler Inc. v. DCIT, ITA No. 3376/DEL/2023* and *ITA No. 982/DEL/2025*, set aside the final assessment orders for AY 2021-22 and AY 2022-23 by stating that there exists no DAPE with regard to the petitioner and its Indian subsidiary, i.e., ZSIPL. The ITAT while allowing the petitioner's appeal for AYs 2021-22 and AY 2022-23 held that business income was not taxable in India in the absence of a Permanent Establishment in India and indirectly accepted the petitioner's contention that income from software services was not Royalty. Therefore, for the present year in concern, since income from software services cannot be taxed either as business income or as Royalty, the '*Nil Withholding*



Certificate’ should be granted to the petitioner on the ground of consistency.

14. Mr. Sawhney stated that the Revenue at the time of passing of the impugned order did not undertake any preliminary fact-finding exercise as to the existence of petitioner having a DAPE in India and rather completely relied on the assessment order passed in the applicant’s case for ‘preceding years’ to conclude the existence of a DAPE. As the entire thrust of the Revenue’s allegation of existence of DAPE was the assessment orders of AY 2021-22 and AY 2022-23, and the ITAT has categorically held that, no DAPE of petitioner exists in India, the impugned order cannot be sustained and the impugned certificate is required to be modified.

15. By relying upon the judgment of the Supreme Court in ***Engineering Analysis Centre of Excellence (supra)***, he contended that an application for ‘Nil Withholding Certificate’ was applied for on the ground that the income from software services will not come under ‘royalty’ taxable under Section 195 of the Act. In that case, the Revenue authorities relied upon the assessment orders/DRP direction for a preceding AY and denied the certificate to the petitioner. The assessment order has been set aside by the ITAT, and this Court in W.P.(C) No.14695/2022 has set aside the certificate issued under Section 197 of the Act dated 03.08.2022 and communication / order dated 17.08.2022. Therefore, the same is applicable in the facts of the present case where the respondent has solely relied upon assessment orders passed in petitioner’s preceding AY. Since the question of DAPE was never raised by the AO prior to AY 2021-22, and both assessments for AY 2021-22 and AY 2022-23 are the only orders relied upon by the AO, the finding of the ITAT on the non-existence of DAPE completely nullifies the *prima*



facie case established by the AO, and as such, the impugned order has no legs to stand.

16. He stated that this Court in ***SFDC Ireland Ltd. v. Commissioner of Income-tax., WP (C) No.12847/2024***, *vide* order dated 17.02.2025, has settled the position of law with regard to Section 197 of the Act and the AO was only required to take a *prima facie* view on the taxability and final assessment need not be passed. Insofar as the question of having a *prima facie* view on the existence of DAPE is concerned, this Court has made it clear that the existence of Permanent Establishment is a fact-finding exercise that has to be done for each AY and that even for Section 197 orders, a *prima facie* view on the question of “habitually concludes contracts as agent” must be answered. In this regard, he has also relied upon the decision of the Supreme Court in ***DIT v. E-Funds IT Solution [2017] 399 ITR 34 (SC)***, and stated that, the AO in the present case, has failed to show *prima facie* how the petitioner and its ‘Indian subsidiary’ were negotiating, concluding, assisting each other in conclusion of contracts with its customers in India for the AY in question. The AO has merely relied upon the assessment order for AY 2021-22 and AY 2022-23 to conclude the existence of DAPE.

17. By relying upon the decision of this Court in ***Progress Rail Locomotive Inc v. DCIT., [2024] 466 ITR 76 (Delhi)***, he stated that the test of DAPE, i.e., authority to conclude a contract and habitually conclude contracts, has to be satisfied as a matter of fact and the AO without producing any evidence and relying upon the preceding AYs has held that the ZSIPL is an Indian subsidiary of the petitioner and has the authority to



conclude the contract on behalf of the petitioner.

18. According to Mr. Sawhney, the respondent has only resorted to taxation of software-based IT solutions (resale software services) as business income of the DAPE. It is an undisputed fact that the petitioner, prior to AY 2021-22 had been paying income tax at 10% on its income from software services as income from ‘Royalty’ under the treaty, before the decision of the Supreme Court in *Engineering Analysis Centre of Excellence (supra)*.

19. He stated that, taking the inter-co agreement into consideration, the ITAT held that the Revenue had resorted to treating Indian subsidiaries as DAPE only after the decision of *Engineering Analysis Centre of Excellence (supra)*. For the present case, on a completely similar factual scenario – as no business income arises in India, and as income from software services is not ‘Royalty’, the *Nil Withholding Certificate* should be allowed on the ground of consistency. In the absence of change in circumstances, the rule of consistency ought to be unexceptionally followed and in the present case, the principle of consistency is of two folds; firstly, the receipt of sale of software is not taxable as royalty; secondly, receipts from sale of software cannot be taxed as business income in India as no DAPE exists.

20. He further stated that entire attribution is done on the basis of Section 115A of the Act which is provision to tax royalty and the ITAT in paragraph 11 its order has held that the Revenue has changed its stand from taxing the software receipt as royalty to business income (income from PE) only after the decision of the Supreme Court in of *Engineering Analysis Centre of*



Excellence (supra).

21. He contended that, it is admitted that the receipts in question are not royalty, and a provision concerning tax rate of royalty cannot be taken as a basis for attribution. The AO has not undertaken any exercise to derive the attribution rate based on activities performed by the alleged Permanent Establishment which is *sine-qua-non* for AY 2021-22 whereas for AY 2022-23 the AO has attributed profits at 2.5% and even the profit margin of 25% calculated is completely arbitrary as the same is without any basis or reasoning. The entire attribution is done relying on the assessment orders in AY 2021-22 and AY 2022-23, which is arbitrary.

22. According to him, the AO after realising the computation mistake, in the subsequent AY 2022-23 has taken a profit margin of 6.25% and later computed tax at 2.5% of the total revenue. In this regard, the petitioner has relied upon the decision in ***GE Energy Parts Inc. v. CIT., [2019] 411 ITR 243 (Delhi)*** and has produced the following table to demonstrate the incorrect attribution:-

S.No.	Remarks	Attribution in GE	Attribution made by AO in this case.
1.	Profits margin arising from the Indian revenue	10% Since actual data on global profits was not available, a presumptive computation of profit was undertaken basis similar provisions of Section 44BB and 44BBB which presume 10% of gross	Arbitrary margin of 25% without any Basis



		revenue to be profit.	
2.	<i>Profit attributable to the PE in India</i>	<i>25% Initially a rate of 35% was taken basis the order in Rolls Royce Plc, but ITAT later revised it to 25% keeping in mind the business activity performed</i>	<i>Not computed at all which as per law ought to be computed based on activities carried out by the PE in India.</i>
3.	<i>Net profits attributable to PE for tax</i>	<i>2.5% of sales in India 25% of 10 % of India revenues</i>	<i>25% of sales in India</i>
4.	<i>Final taxability</i>	<i>1% of Indian sale (40% of 2.5)</i>	<i>8.75% of Indian sale</i>

23. Mr. Sawhney, submitted that, it is settled position that no tax can be withheld under Section 195 of the Act unless the payment in question is taxable in India, and the petitioner herein being a resident company of USA, the remittance in question is not taxable in India. The reason for rejection of *Nil Withholding Certificate* by the respondent was on the basis that the petitioner has a PE in India and the remittance receipt by the petitioner is liable as tax as 'business profit arising out of the said PE'. He also stated that the respondent has solely relied upon the assessment orders of the preceding AYs, i.e., AY 2021-22 and AY 2022-23 to substantiate the contention that the petitioner has PE in India through its Indian subsidiary without bringing the facts in the present year, different from that of the preceding AYs, which is erroneous.

24. He submitted that, since the assessment orders of the preceding AYs have been set aside by the ITAT, the entire question of existence of DAPE in India stands covered in favour of the petitioner, as the ITAT after taking



the “**Reseller Agreement**” and the “**Service Agreement**” between the petitioner and its Indian subsidiary into consideration, has held that the contracts are on principal to principal basis, Indian subsidiary is neither an agent nor does it habitually conclude the contracts on behalf of the petitioner or maintain stock of goods on behalf of the petitioner.

25. Mr Sawhney has also submitted that the Revenue cannot modify or improve their case by adding additional reasons that were not part of the impugned order. As the argument of the Revenue before the ITAT was that the petitioner failed to provide the underlying agreement, the actions of the Revenue would amount to supplanting the reasons to impugned order. He has relied on the judgment in ***Shreyansh Retail Private Limited v. DCIT, 2023: DHC: 8085-DB***, to contend that the order under Section 197 of the Act, the respondent cannot be improved by supplanting reasons.

26. Relying upon the judgment of this Court in ***SFDC Ireland Ltd. (supra)***, he submitted that, a *prima facie* case of existence of DAPE cannot be made out by the AO in the Section 197 order given that proceedings under Section 197 of the Act are tentative and not final. He has also submitted that, even if the Revenue files an appeal against the ITAT order, the same would not change the fact that the respondent/AO continues to be bound by the decision of ITAT by virtue of the principles of judicial discipline and the impugned order falls afoul of the ITAT order upholding the non-existence of DAPE in favour of petitioner.

27. Mr. Sawhney contested the submission made by the Revenue that, irrespective of the existence of a PE/business income in India, all



remittances made to non-residents are liable to withholding taxes under Section 195 of the Act and Explanation 2 to Section 195 of the Act, (inserted vide Finance Act 2012), by stating that firstly, under the scheme of the Act, no deduction may be required if the total income of the non-resident is not taxable India which was affirmed by the Supreme Court in ***Engineering Analysis Centre of Excellence (supra)*** following ***GE India Technology Centre (P) Ltd. v. CIT, (2010) 10 SCC 29***, which held that, unless the total income is chargeable to tax under the Act, no withholding under Section 195 of the Act could be made; secondly, on the interpretation of Explanation 2 to Section 195 of the Act (inserted vide Finance Act 2012) a full bench of this Court in ***Commissioner of Income-tax v. Mitsubishi Corporation India (P.) Ltd., [2024] 463 ITR 335 (Delhi)*** (majority opinion) held that the obligation to deduct TDS under Section 195 of the Act only arises once the sum in question is chargeable to tax and Explanation 2 has no relevance to this settled position in law.

28. Mr. Sawhney has vehemently contested the argument of the Revenue that it has incorrectly relied upon Form 13 Column 4- 'nature of payment' which states 'other income' to say the petitioner's claimed remittance as 'other income' and hence there exists a liability to pay taxes under the residuary clause of DTAA. Further, he stated that the Revenue is incorrect in producing Form 15E (form 15E is filed under Section 195(2) for lower deduction) to show that the petitioner had an option to fill in 'business income' but rather chose to fill in 'other income'. A screenshot of the IT Portal which shows options in 'nature of payment' available in Section 195 (Form 13) on which, Mr Sawhney has relied on, is reproduced as under:-



Section Code	194C	194LBA(a)	194LBA(b)	194LBA(c)	194LBB	194LBC
Select nature of payment						
Fee for technical Service where the agreement is made after the 31st day of March, 1976						
Fee for technical Service where the agreement is made 29th day of February, 1964 but before the 1st day of April, 1976						
Interest Payment						
long term capital gains referred to in section 112A						
long term capital gains referred in section 112E or sub clause (iii) of clause (c) of sub-section (1) of section 112						
Royalty						
Royalty (not being royalty of the nature referred to in sub-item (b)(ii)(G) where the agreement is made after the 31st day of March, 1976						
Royalty (not being royalty of the nature referred to in sub-item (b)(ii)(G) where the agreement is made after the 31st day of March, 1961 but before the 1st day of April, 1976						
Short Term Capital Gain						
Other Income						
Tax deducted at source						
						amount of Req

29. He has submitted that, without prejudice to the claim of nil deduction, at the worst, petitioner may be allowed to receive the payment upon deduction at the rate which the DRP/AO themselves allowed in the preceding AY on the presumption that Permanent Establishment exists and which the respondent has relied upon in the impugned order as well. He has produced a table to show that the approach adopted in AY 2022-23 by the DRP/ AO and the rate of deduction of this year, if the same is followed:

S.No.	Final Assessment order in AY 2022-23 following the DRP Directions (pg.99 of wp)	If Final Assessment Order in AY 2022-23 is followed in this year as AO himself has relied upon the said assessment order in the Impugned Order	Attribution adopted in the Impugned Order (pg.72 of wp)
1.	Profits arising from the Indian revenue was taken 25%	Profits arising from the Indian revenue was taken 25%	Profits arising from the Indian revenue was taken 25%
2.	Income attributable to the PE in India was taken @ 25% (Because even as per DRP, Petitioner would	Income attributable to the PE in India shall be taken @ 25%	Not computed at all which even as per the final assessment order for AY 2022-23 ought to have



	<i>not have the entire income in India only out of the activities of Zscaler India, so 25% of the entire profit was attributed to the activities of Zscaler India).</i>		<i>been done.</i>
3.	<i>Final taxability therefore was= 40% (tax rate applicable to the AY) * 25% (profit margin) * 25% (income attributed to PE)= 2.5% of Indian sale</i>	<i>Final taxability therefore shall be= 35% (tax rate applicable to the AY) * 25% (profit margin) * 25% (income attributed to PE) = 2.18% of Indian sale</i>	<i>35% (tax rate applicable to the AY) * 25% (profit margin) = 8.75% of Indian sale</i>

He stated that the correct formula for income attribution to the Permanent Establishment as per settled law and even adopted in the final assessment order for AY 2022-23 is (tax rate applicable to the AY) * (profit margin) * (income attributed to PE). Therefore, without prejudice, in the interim, at least withholding tax should be allowed following the approach adopted in the final assessment order dated AY 2022-23, i.e., at 2.5% of Indian sales.

30. Mr. Sawhney has submitted that the respondent issued a *Lower Deduction Certificate* under Section 197 of the Act for the AYs 2023-24 and 2024-25, withholding ten percent TDS treating the total receipts of Rs. 4,18,41,68,013/- as FTS as per the Act and DTAA to be received by the applicant for in FY 2022-23 and Rs. 9,32,24,18,063/- as business income, to be received by the applicant for the FY 2023-24; and stated that such



certificate is provisional in nature and subject to final assessment.

CASE OF THE RESPONDENT/REVENUE:

31. Mr. Sunil Agarwal, learned Senior Standing Counsel for the respondent/Revenue would submit that the impugned order has been passed for FY 2025-26 and the same has already come to an end i.e. the order has run out of its life. He also submitted that the withholding orders by its very nature are provisional and tentative, subjected to the final assessment order. In support of his submission, he has relied upon the cases in ***Transmission Corpn. of AP Ltd v. CIT, (1999) 239 ITR 587*** and ***National Petroleum Construction Company v. DCIT, [2020] 421 ITR 24 (Del)***. He also submitted that the provisions of TDS especially in case of non-residents are to protect the interest of the Revenue in the event tax liability comes into existence subsequently so that and the Revenue is not left remediless.

32. He submitted that the petitioner has not submitted the following relevant documents during the course of proceedings before the AO;

- a. Agreement between the petitioner and its economically dependent subsidiary ZSIPL.
- b. Agreement between the petitioner and end-users in India.
- c. Agreement, if any, establishing linkage between the petitioner, end-user and ZSIPL.

33. According to him a detailed examination of agreements cannot be carried out within the limited time-period available to certificates issued under Section 197 of the Act and that exercise can be completed only during scrutiny assessment proceedings. He submitted that the issue of Permanent



Establishment is to be decided on a year to year basis, as it is an exercise in determination of facts. He also submitted that, the ITAT order for earlier AYs do not become a *res judicata* or *estoppel* for other AYs, more so when each AY is fact specific.

34. It is his submission that the petitioner has a subsidiary in India; namely ZSIPL, which is economically wholly dependent on the petitioner. Therefore, the subsidiary constitutes a Permanent Establishment of the petitioner in India in terms of Article 5.5 of India-USA DTAA and this disqualifies the status “agent of independent status” unless the payment to the agent is established on Arms-Length basis. It is also his submission that, whether the payment to economically dependent subsidiary is on Arms-Length basis or not, cannot be established during proceedings under Section 197 of the Act, that exercise can be carried out only during subsequent proceeding by referring the matter to the Transfer Pricing Officer (TPO).

35. Mr. Agarwal stated that the exercise of Arm-Length Pricing would be carried out during AY 2026-27 i.e., after return of income is filed by the petitioner and the burden of proof of Arms-Length Price lies on the petitioner in terms of Section 92D read with 92C(3) of the Act. He stated that the assessment of the petitioner for AY 2021-22 was completed vide order dated 31.12.2022 under Section 144C(1) read with Section 143(3) of the Act by treating the ZSIPL as Permanent Establishment of the petitioner and the AO has taken this consistent position while issuing the order under Section 197 of the Act. The AO has duly noted the fact that the payment of Equalisation Levy (EL) by the petitioner and as per the proviso applicable to EL, EL is not applicable where non-resident has a Permanent Establishment



in India.

36. He submitted that the principles of law under Section 197 of the Act are settled and the orders are provisional and tentative in nature. The order passed does not prejudice the rights/ liabilities of either the assessee or the Revenue. According to him, the decision taken in Section 197 orders does not bind the AO in scrutiny assessment proceedings. The AO is free to depart from the position, that, if the petitioner proves on its facts that its income is not taxable in India, the petitioner will be so held at that stage, no precedent is required for that proposition. He also submitted that there are 3 components of a precedent (i) Findings of fact (ii) Principle of law developed for deciding the *lis*. (iii) Conclusion by applying (ii) to (i). In paragraph 14 of the order of the ITAT, there is a finding of fact recorded that the Indian subsidiary i.e., ZSIPL has been paid on Arms Length Price basis, that position is yet to be arrived at for AY 2026-27. The ITAT has considered Article 5.4 of DTAA, but Article 5.5 has also to be satisfied. Assuming the AO committed some error in prior AYs, there is no law which prevents the AO to correct the course in a subsequent AY. The petitioner cannot claim perpetuation of error by the AO as a vested right. In support of this, he has relied upon the judgment of the Supreme Court in ***Joshi Technology Inc v. Union of India, (2015) 7 SCC 728***.

37. Mr. Agarwal contested the submission made by the petitioner that the facts of the case of the instant AY 2026-27 [FY 2025-26] are identical/similar to AY 2021-22 & AY 2022-23 decided by ITAT, hence petitioner is entitled to *Nil* Withholding Certificate under Section 197 of the Act. He submitted that the jurisdiction to conduct this exercise rests with



AO, and not with this Court in writ jurisdiction. In support of this submission, he has relied upon the following judgments in ***Union of India v. TELCO, (1997) 8 SCC 730, Chhatrasinhji Kesarisinhji Thakore v. CIT, (1966) 59 ITR 562, and National Petroleum Construction Company (supra).***

38. He submitted that the burden of proof is upon petitioner, not upon the AO and the judgments relied upon for ‘Royalty’ is not applicable to the facts of petitioner’s case. For exempting business income, it has to be proved as a fact that no PE exists in the source State during the AY 2026-27, which eventuality is yet to arrive. Assuming in future, it is found as a fact that, no PE existed during relevant AY income is not taxable, even in that event TDS that is to be deducted at this stage, will be refunded along with interest.

39. He also contended that, it is a well settled position in Taxation Law that the burden of proof for exemption from taxability lies upon the assessee and the petitioner’s claim is that the impugned income is from business and taxable under the Act, but gets exempted from tax in the source State-India under the DTAA allegedly as no PE exists. The petitioner being a multinational corporation cannot be heard to say that, it was not aware of correct position in law as to the burden of proof.

40. According to him, despite absolute withholding of relevant documents and manner of conducting business in India by the petitioner before AO; he has placed before this Court “Sample Agreement” as found annexed to a Writ Petition being ***WP (C) No. 11305/2023*** filed by the petitioner for an



earlier year namely AY 2024-25 [FY 2023-24]. He has also relied upon the documents, which according to him, leads to following factual pattern;

- i. That, the petitioner being resident of USA is carrying on systematic, organised business activity in India, 4 players are involved; the petitioner -resident of USA, Reseller Partner-resident of India, Indian-subsidary a wholly economically dependent subsidiary, Indian End-User. The Indian reseller's remuneration paid by the petitioner is directly linked to the volume of sales made to Indian End-users by the Indian reseller. On the basis of volume of sales made by the Indian reseller to Indian End-Users, the petitioner grades Indian Resellers in 3 categories namely; Summit Partner Level, Ascent Partner Level and Foundation Partner Level.
- ii. That, the Indian Reseller has authority to display on its website inventory of all services offered by the petitioner and available for paid subscription by Indian-End Users. The Indian reseller determines the sale price to the Indian End User. Price quoted by Indian reseller to the Indian End- User is bound to be subsequently confirmed/ratified by the petitioner.
- iii. That, after the Indian reseller thus determines/finalises the Indian End-User, Indian Reseller drives the Indian End-User to the Petitioner to sign a EUSA online through a "Click Through" command. Upon online "Click Through", command, formal contract is signed between the petitioner and Indian End-User.



- iv. That, the said business model satisfies the test of Indian Reseller being the Permanent Establishment of petitioner in India under Article 5.4 (b) of India-USA DTAA.
- v. That, the petitioner sends its personnel for providing training to the Indian Reseller, depending upon the grade of the Indian reseller. This activity, subject to availability of full facts after FY 2025-26 is over, is likely to constitute Service Permanent Establishment of petitioner in India under Article 5.2 (l) of India-USA DTAA.
- vi. That, Indian Subsidiary does market research in India to discover preferences/likes/dislikes of Indian End-Users to provide inputs to the petitioner so that it can mould/modify/improve its service offerings to Indian End-Users.
- vii. That, the Indian dependent Subsidiary finds out suitable Indian resellers and thereafter recommends the names of such short-listed Indian Resellers to the petitioner. On this basis, the petitioner signs the agreement with Indian Reseller, who in turn finds out maximum number of Indian End-Users and drives them back to petitioner to sign "*Click Through EUSA*", thus completing the seem less, composite, integrated, systematic cycle described in this section.
- viii. That, the petitioner has not even denied the correctness of this business model, let alone controvert it or disprove it by any acceptable piece of relevant evidence. All this is without prejudice to the impact of subsequent prospective amendments to S.9(1)(i) / Explanation-1(a) / Explanation-2 / Explanation-2A /



Explanation-3A of IT Act, which are aligned with DTAA and which have not been even noticed by ITAT in the order relied upon. These amendments incorporate the principle of “Significant Economic Presence” of non-resident sellers of good/services to India based End-Users. In support of his submission, he has relied upon the following judgments in ***Hyatt International Southwest Asia Ltd v. DIT, (2025) 478 ITR 238 (SC)*** and ***Pride Foramer SA, France v. CIT, 2025 WSC 1247***.

41. He submitted that, without admitting, even if full credence is given to the petitioner’s application under Section 197 of the Act, the said remittances of Rs 1300 crore plus from India are taxable in India on “*accrual basis*” under Article 23.3 of the India-USA DTAA. [India-UK DTAA also has similar article. India-Ireland DTAA does not have this Article.] The petitioner does not rely upon the India-USA DTAA, which is against the petitioner, rather petitioner relies upon India- Ireland DTAA, which is not applicable to the case, but beneficial to the petitioner, which is a clear case of placing wrong facts before the Court. He has relied upon the judgment of this Court in ***John Mathey Public Co Ltd v. CIT International Taxation (2024) 465 ITR 649 (Del)***.

42. He submitted that the petitioner has proffered the agreement between petitioner and Indian subsidiary and reseller before the ITAT for earlier AYs, but no such agreement for current FY 2025- 26 has been submitted before AO. Therefore, the petitioner cannot be heard to say that no such agreement for current FY exists, because the petitioner has disclosed that it is entitled to receive a precise amount of Rs 13,19,12,77,703/- from Indian



end-users during FY 2025- 26.

43. Mr. Agarwal submitted that without prejudice to the respondent's principal argument that the said order of the ITAT is absolutely irrelevant for the current AY 2026-27 [FY 2025-26], the order of the ITAT dated 18.06.2025 is *ex-facie* perverse, inter alia, for the following reasons;

- i. The ITAT has noted only few clauses, that too in a garbled and selective manner and has come to conclusions not supported even by the clauses noticed and extracted.
- ii. In the agreement between the petitioner-Indian Subsidiary, both parties are claimed as independent P to P. ZSIPL has appointed the petitioner as ZSIPL's "Attorney-in-Fact" irrevocably. However, the petitioner has granted limited license to Indian Subsidiary, this is the sign of unequal bargaining power of the Indian Subsidiary, an unconscionable contract, where the petitioner has made the Indian Subsidiary to sign on the dotted line, which is not a normal feature of contracts signed with uncontrolled independent parties. Such terms annihilate the petitioner's claim of a P to P relationship.
- iii. It is settled position in Transfer Pricing that, presence of clauses in controlled party agreements, which clauses are not found in uncontrolled party agreements, may require re-adjustment of pricing by the TPO/AO, hence, petitioner's contentions cannot be accepted at face value.
- iv. ZSIPL is compensated on Cost-Plus Basis with the petitioner having access to ZSIPL's books of accounts. This is not the



hallmark of a real P to P relationship. Cost-Plus basis rules out the compensation attributable to Risk element in FAR analysis [FAR analysis of Transfer Pricing=Functions performed + Assets used + Risks assumed], which must be paid to ZSIPL.

- v. In the Petitioner-Indian Reseller Agreement, the conclusions recorded by the ITAT are in ignorance/ inconsistent with business model and taxability under Article 5.5 of India-USA DTAA is yet to be satisfied for which current FY 2025-26 must come to an end. No finding can be recorded before the FY comes to an end.
- vi. He has relied upon the following judgments in support of the above:
 - i. ***CIT v. EKL Appliances Ltd (2012) 345 ITR 241 (Del)***
 - ii. ***DIT v. Morgan Stanley & Co, Inc (2007) 7 SCC 1.***

44. He submitted that, the judgment in the case of ***Engineering Analysis Centre for Excellence (supra)*** is factually distinguishable and the precise issue before Supreme Court was, whether consideration received by a non-resident from sale of shrink-wrapped/ off-the-shelf software converted into tangible goods/sold to Indian End-Users-was royalty. In this case it is of rendering services to Indian End-Users through the intermediaries of Indian Re-Sellers and on economically dependent Indian Subsidiary. Even the Constitution of India defines sale of goods and rendering of services differently. He submitted that Article 366(12) is for goods and Article 366(26A) is for services, the two are mutually exclusive. His contention is that this judgment does not advance the case of petitioner, rather it annihilates it.



45. He submitted the statutory test for Section 197 certificate is ‘*if the AO is satisfied*’ that the total income of the recipient justifies the deduction of income-tax at any lower rate or no deduction of income-tax, the AO on application made by a non-resident recipient, shall issue such certificate as may be appropriate. For the meaning of the phrase “*if the AO is satisfied*”, a perusal of Section 237 of the Act as compared to Section 240 of the Act brings out the distinction in two situations:-

- i. Where the burden of proof is on the assessee to place on record necessary documents to get requisite result.
- ii. Where there is no burden of proof on the assessee, but the burden is on AO to issue refund suo motto, without any application to be made by the assessee before AO.

46. According to him, in ***SR Bommai v. Union of India, (1994) 3 SCC 1***, where the word “satisfied” fell for interpretation in the context of Article 356 of the Constitution of India, article uses the same expression “*if the.....is satisfied*”, meaning;-

- i. “Total Income” is defined in Section 2(45) to mean income referred in Section 5 and computed in the manner provided by the Act.
- ii. In contrast, the statutory test for issuance of certificate under Section 195 is- if the remittance from India to the non-resident is “chargeable to tax”.
- iii. There is a world of difference between “chargeable sum” and “Total Income”. Chargeable sum refers to gross sum, in which



taxable sum may be a small fraction embedded in gross sum. In contrast, Total Income requires full accounts to show gross receipts and details of expenses incurred in India and outside India to be deducted from gross receipts to arrive at the figure of Total Income.

47. He submitted that at minimum, the petitioner was required to submit to AO; estimated Profit & Loss Account of petitioner as drawn for USA for the current FY 2025-26 and actual P/L account for prior FYs to prove percentage of profitability comprised in Rs 1300 crore, plus remittances from Indian End-Users. On that figure, the AO would arrive at total income and total tax as per the Act. The figure of tax as applied to gross remittance of Rs 1300 crore will provide the percentage at which AO could issue lower TDS certificate. Relevant documents were not placed by the petitioner before this Court or before the AO. He also submitted that the benefit of the DTAA, if any, can be granted only at the final assessment stage, not at the TDS stage. In support of this, he has relied upon **PILCOM v. CIT, (2020) 19 SCC 409**

48. He submitted that the least that is expected of the petitioner is to submit to the AO (a) Relevant Agreements in exclusive possession of the petitioner (b) Estimated P/L account for the current FY and for prior FYs for enabling the AO to have a fair/reasonable estimate of the petitioner's profitability embedded in outward remittances amounting to Rs 1319 Crore. Then, the AO would examine the documents so submitted and issue an appropriate order under Section 197 of the Act as justified by the material placed on record.



49. In a similar situation, the Indian payer himself had deducted TDS at 42% while making remittance to the non-resident recipient in the absence of any information regarding profit percentage of the non-resident recipient. The propriety /appropriateness of TDS effected by resident-payer has never been challenged by the non-resident recipient. The non-resident recipient is currently contesting its taxability in India on merits and praying for refund of TDS before this Court. The judgment in ***Teva Pharmaceutical Industries Ltd v. ACIT, WP(C) No 4065/2022***, pending before this Court, highlights the importance of facts to be placed before AO.

50. Mr. Agarwal submitted that, the AO in the petitioner's case has been very reasonable and despite absolute dearth of evidence on profitability of non-resident recipient, the AO, *suo-moto*, has allowed Rs 75/- as expenditure to each Rs 100/- of outward remittance, thereby arriving at Rs 25/- as Net profit of the petitioner. After applying 35% tax rate applicable to Total Income of foreign company, the TDS Rate arrived is at 8.75%. Accordingly, the impugned certificate has been issued at 8.75%. i.e., 35% of Rs 25=8.75%. The rate at 8.75% TDS cannot be branded as arbitrary under any circumstances. He also stated that, it is important to note that most DTAA's allow 10% TDS on gross remittance on Interest, Dividends, Royalty, Fee for Technical Services, calculated as per Section 144 of the Act.

51. Mr. Agarwal contended that the statement of the petitioner in its written submission at paragraph 6 that, "*it was never the case of petitioner that no Permanent Establishment exists*", even at this belated stage, at least establishes that the petitioner does not deny the possibility of existence of



Permanent Establishment in current AY 2026-27. He submitted that the petitioner blows hot and cold in the same breath, wherein paragraph 15 of the petitioner's submissions; the petitioner denies the existence of PE. In any case, the jurisdiction to decide existence of Permanent Establishment is vested with AO, not with the petitioner. So, these prevarications have no value. In support of this submission, he has relied on the judgment of this Court in ***DIT v. GE Packaged Power Inc, (2015) 373 ITR 65 (Del)***

52. According to him, in Ground "G", the petitioner relies upon the judgment of the Supreme Court in ***E-Funds IT Solution (supra)***, wherein, the Court records a finding of fact that the assessee therein did not render any service to its customers in India. On this basis, Service Permanent Establishment was held to be not constituted. In contra-distinction, in petitioner's case, admittedly, the non-resident petitioner signs contracts with End-Users based in India, End-Users pay subscription fee to the petitioner. So, they are the petitioner's customers. This judgment annihilates the petitioner's case.

53. Mr. Agarwal vehemently contested the submissions of the petitioner that respondents cannot add reasons not found in the impugned order and stated that, this argument is baseless for the following reasons:

- (i) This kind of argument is generally made by assesses in re-opening cases under Section 148, where finality of earlier order is sought to be disturbed. It does not apply to Section 197 orders which by very nature are provisional and tentative. Such orders do not prejudice the rights/liabilities either of the assessee or the



Revenue. All options of the assessee and the Revenue remain unprejudiced in subsequent assessment proceedings.

- (ii) Without prejudice, even in Section 148 proceedings, the test is; if there is material on record, but the order passed is cryptic or the authority does not pass a detailed order, the Court can look into the record and if it is found that the material on record justifies the impugned order, the order is to be sustained. Even the concerned authority can be directed to submit on affidavit what reasons prompted the authority to take action and the Court takes into account that affidavit to sustain the impugned order. In support of this submission he has relied upon the following judgments in ***Calcutta Discount Co. Ltd v ITO, AIR 1961 SC 372 (Constitution Bench judgment of the Supreme Court); ITO v Biju Patnaik, 1991 Supp (1) SCC 161/(1991) 188 ITR 247 (SC); and Amarchand Sobhachand v. CIT, (1971) 1 SCC 458/(1971) 82 ITR 591 (SC).***;
- (iii) The petitioner's argument is founded upon a misinterpretation of the judgment of the Supreme Court in ***MS Gill v. Chief Election Commissioner, [1978] 1 SCC 405***, which has been subsequently distinguished and explained by the Bombay High Court in ***Vodafone India Services P Ltd v. Union of India, (2013) 359 ITR 133 (Bom)***, wherein the Court dismissed assessee's writ petition founded upon ***MS Gill (supra)***, and held that the argument forms the basis of dismissing writ petition and relegating the petitioner to statutory authorities, where additional



evidence/additional grounds can be filed before the original/appellate authority as per statutory Rules.

- (iv) It is important to note that ***MS Gill (supra)*** was decided in the context of the Representation of the People Act, 1951, not under the Income Tax Act, 1961. It is well-settled that the Income Tax Act is a self-contained Code, which has to be applied as per its own provisions without relying upon provisions of other statutes, unless provisions of other statutes are incorporated by reference or incorporation [in terms of S. 8 of the General Clauses Act] into the Income Tax Act as held in ***Rao Bahadur Ravulu Subba Rao v. CIT, AIR 1956 SC 604.***

54. According to him, the petitioner controverts Statutory Form for Section 197 versus Section 195 of the Act; the petitioner has withheld information, and has made unsubstantiated arguments.

55. He seeks dismissal of the petition.

ANALYSIS AND CONCLUSION:

56. Having heard the learned counsel for the parties and perused the record, the short issue which arises for consideration is whether the respondent/Revenue is justified in issuing the impugned certificate dated 06.05.2025 and order dated 07.05.2025 read with continuation order dated 16.05.2025.

57. In the impugned certificate/order, the AO has worked out the tax rate at 8.75% by applying tax rate at profit margin of 25% on net basis. Mr.



Sawhney has contended that the only ground on which the AO has certified the rate at 8.75% is that in the assessment orders passed in the case of the assessee for the preceding years, it has been established that ZSIPL, the Indian subsidiary of the assessee company, which provides sales marketing support to the assessee company for securing orders for selling/licensing Zscaler software products to Indian distributors is the DAPE of the assessee in view of Article 5(6)(c) of the India-USA DTAA. However the same is not sustainable as the said conclusion of the AO in the assessment orders under Section 143(3) read with Section 144(c)(13) of the Act for the AYs 2021-22 and 2022-23 has been set aside by the ITAT in ITA No. 3376/Del/2023 and ITA No. 928/Del/2025 respectively, by holding that ZSIPL does not constitute a PE of the assessee in India and is only providing marketing support services and as such the very foundation for imposing the tax rate ceases to exist.

58. He has also submitted that as per his knowledge, no appeal has been filed by the respondent/Revenue to challenge the order of the ITAT before this Court.

59. Mr. Agarwal has made various submissions justifying the rate and also contending that ZSIPL constitutes a DAPE in India. He also stated that the appellant/Revenue is in the process of filing an appeal challenging the order of the ITAT.

60. It is his submission that in the case of this nature, as the interest of the Revenue is paramount, in the event tax liability comes into existence subsequently, the Revenue should not be left remediless. Hence, his plea is



that this Court should not interfere with the impugned certificate/order. His submission is also that the impugned order has been passed for the FY 2025-26 and the same has already come to an end and the order has run out of its life. In any case, it is his submission that withholding orders by its very nature are provisional and tentative, subject to the final assessment order.

61. It is true that the purpose for fixing a rate especially in the case of non-residents is to protect the interest of the Revenue so as to ensure that in the eventuality tax liability comes into existence subsequently, the Revenue is not left remediless to tax such a non-resident. But the fact remains that the only basis on which the petitioner/assessee can be taxed, is if it is proved that it has a DAPE in India. Though the AO in the previous AYs 2021-22 and 2022-23 did conclude that the petitioner has a DAPE in India through ZSIPL, the said conclusion has been set aside by the ITAT.

62. The submission of Mr. Agarwal that the Revenue is in the process of filing an appeal against the order of the ITAT, is of little help to the Revenue, as the law in this regard has been quite well settled by the Supreme Court in the case of ***Union of India v. Kamlakshi Finance Corporation Ltd, (1991) 55 ELT 433 SC***, wherein it was held that the order of higher appellate authorities should be followed unreservedly and the mere fact that the decision is not acceptable to the Revenue cannot be a ground for not following the decision of the higher authority. Nothing has been placed before us to show that the order of the ITAT has been set aside.

63. We are conscious of the fact that when the order was passed by the AO, he had before him the valid assessment orders stating that ZSIPL is a



dependent PE of the petitioner/assessee. However, as of now, such conclusion does not exist, and the very basis for the AO to issue the impugned certificate/order has fallen.

64. In the order impugned before us, the AO has referred to the assessment orders of the ‘preceding years’. As submitted by Mr. Sawhney, the assessment orders of AYs 2021-22 and 2022-23 have been set aside by the ITAT. The assessment orders, if any, for AYs 2023-24 and 2024-25, are not before us, though the orders for these years under Section 197 of the Act have been annexed by the petitioner, which have been challenged before this Court in WP(C) 14695/2022 and WP(C) 11305/2023 respectively. In WP(C) 14695/2022, this Court set aside the order under Section 197 on the basis of the judgment in the case of ***Engineering Analysis Centre for Excellence (supra)*** and remanded the matter back to the AO for fresh consideration. In WP(C) 11305/2023, the challenge to the order under Section 197 of the Act in respect of AY 2024-25 has been withdrawn by the petitioner.

65. At the cost of repetition, we note that the basis for passing the impugned order i.e. the ZSIPL constituted a DAPE in India as per the previous assessment orders (*at least insofar as AYs 2021-22 and 2022-23 are concerned*) no longer holds good. That being said, Mr. Agarwal for the Revenue has submitted that the AO while passing the order impugned did not have the relevant documents before it, including the agreement between the assessee and ZSIPL for FY 2025-26, which remain in the exclusive possession of the assessee. As such, the AO was constrained to rely only upon the assessment orders of the preceding years to pass the order under



Section 197 of the Act.

66. It is a settled proposition of law that in taxation, each assessment year has to be seen on the basis of the facts applicable to that particular year. The order of the ITAT for AYs 2021-22 and 2022-23 holding that the assessee does not have a DAPE in India conclusively settles the issue whether the receipts of the assessee is taxable in India during those AYs. Nothing has been brought before us to ascertain whether assessments were carried out for AYs 2023-24 and 2024-25, and if carried out, what is the conclusion of the AO with respect to the same, for us to examine whether the same would have any bearing on the order passed under Section 197 of the Act impugned herein. Conversely, if such assessments have not been carried out, then it follows, there is no finding of PE against the petitioner. Having said that, we have already noted that the challenge to the certificate under Section 197 of the Act for AY 2024-25 has been withdrawn.

67. In these facts, we are of the view that appropriate shall it be for the AO to re-consider the issue of certificate under Section 197 for the AY 2025-26 by examining the issue afresh, in the facts of the present assessment year.

68. We may state at this juncture that the learned counsel for the parties have relied upon a host of judgments in support of their submissions. In view of our above analysis, these judgments need not be discussed for deciding the petition.

69. As such, the impugned certificate dated 06.05.2025 and order dated 07.05.2025 read with continuation order dated 16.05.2025 are set aside.



70. The AO shall consider the application of the petitioner/assessee under Section 197 of the Act *de novo*, bearing in mind our observations, and without being influenced by the filing of any appeals by the Revenue against the order of the ITAT dated 18.06.2025. The petitioner shall place on record the necessary documents as required by the AO, for the purpose of deciding the application. The AO shall grant an opportunity of hearing to the petitioner/assessee, by informing the date and time of such hearing to the representative of the petitioner and pass an order within three weeks from today as an outer limit.

71. The petition is disposed of, along with the pending application.

V. KAMESWAR RAO, J

VINOD KUMAR, J

DECEMBER 23, 2025

rt