

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'D', NEW DELHI**

Before Sh. C. N. Prasad, Judicial Member

Dr. B. R. R. Kumar, Accountant Member

ITA No. 2010/Del/2023 : Asstt. Year : 2020-21

Saxo Bank A/S, C/o Walker Chandiook & Co. LLP, 2 nd Floor, Plot No. 19A, Sector-16A, Noida, Uttar Pradesh-201301	Vs	ACIT, International Taxation, Gurgaon-122001
(APPELLANT)		(RESPONDENT)
PAN No. AAWCS6369P		

Assessee by : Sh. Ajay Vohra, Sr. Adv.

Revenue by : Sh. Vizay B. Vasanta, CIT DR

Date of Hearing: 01.02.2024

Date of Pronouncement: 16.04.2024

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeal has been filed by the assessee against the order dated 22.05.2023 passed by the AO u/s 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961.

2. Following grounds have been raised by the assessee:

"1. That on the facts and circumstances of the case and in law, the Learned Assessing Officer ('Ld. AO') has erred by considering the amount of INR 7,41,25,499 received by the Appellant from its group entity, SGIPL, being reimbursement of software license expenses as its income chargeable to tax in India by holding that such receipts qualify as Royalty for use of equipment without appreciating that reimbursement per se does not constitute taxable income.

2. That on the facts and circumstances of the case and in law, the Learned Assessing Officer ('Ld. AO') has erred by disregarding the principles laid down by Hon'ble Supreme Court in case of M/s Engineering Analysis Centre of Excellence Private Limited vs. CIT [2021] 125 taxmann.com 42 (SC) on taxability of standard shrink wrapped software, which squarely applies to the facts of the Appellant's case. The Ld. AO erred in holding

that the SC decision is not applicable to the facts of Appellant as the transaction is one for use of industrial, commercial or scientific equipment and not for use of standard software as dealt in the SC decision.

3. That, on facts and in the circumstances of the case and in law, the Ld. AO has erred in passing the final assessment order with a pre-determined mindset quoting unsubstantiated, imaginary and farfetched facts to conclude that the Appellant maintained IT infrastructure and was providing third party standard software through Enterprise applications and Enterprise Servers by allowing access to such IT infrastructure. The Ld. AO failed to appreciate that the software under question are standard offerings of third-party vendors and IT infrastructure, if any is maintained only by such third-party vendor and not by Appellant.

4. That, the Ld. AO has erred in facts and in law by disregarding the directions of the Hon'ble DRP to consider and factually verify the assessee's submission dated 03.04.2023 and to pass speaking & reasoned order within the ambit of law and judicial precedents. The Ld. AO failed to appreciate and was grossly negligent in concluding that the documents shared via submission dated 03.04.2023 were already available with the Ld. AO while passing draft assessment order for the captioned year.

5. The Ld. AO has erred in facts and in law by not recording any observation regarding the examination of relevant facts and documents as directed by the Hon'ble DRP while concluding that the Appellant maintains IT infrastructure or servers for provision of third-party software."

3. The assessee is a tax resident of Denmark. The assessee company filed return of income on 29.05.2021 declaring NIL income.

4. The assessee, Saxo Bank A/S is Fin-tech specialist that provides its partners and clients platform, tools and knowledge to make an impact through investment strategies. It is a global multi-asset facilitator and delivers capital market access, products and services through multi asset platform to traders, investors and SAS (wholesale). During the year under consideration, the assessee entered into a global agreement with Microsoft for procuring various shrink wrapped software

user licenses such as Microsoft Visual Studios, Dynamic 365, remote desktop, office 365 etc. for entities within the Saxo Group. The assessee received payments against the above licenses from its AE, M/s Saxo Group India Private Limited (SGIPL) on which tax was withheld u/s 195 of the Act. The assessee claimed that receipts from, its AE, SGIPL was exempt which the revenue treated as taxable.

5. The assessee alongwith its group concerns require various licensed software for carrying out their business. Since the whole group needs same/similar software, the assessee group has procured the software centrally. Also, the group administers its Global IT policy through the assessee. During the assessment proceedings, the assessee was requested to provide details of software provided to its Indian AE and also provide copies of invoices raised by Microsoft. The Assessing Officer held that the assessee was procuring various softwares for the whole group and mainlining an IT Infrastructure and recovered charges on usage basis from group concerns. The AO held that Saxo Group is engaged in providing various platforms for investment in capital markets and operates all over the world.

6. The Assessing Officer held that the assessee was allowing access to its IT Infrastructure and charges received against the same were chargeable to tax as royalty.

7. The assessee contended that the receipts are not chargeable to tax for the following reasons:

- (i) That the assessee only purchases software for its own captive use and for group concerns and it does not maintain any IT infrastructure.
- (ii) That the assessee cross charges the cost of software to group concerns.
- (iii) Decision of Hon'ble Supreme Court in the case of M/s Engineering Analysis Centre of Excellence Private Limited vs. CIT [2021] 125 taxmann.com 42 (SC) is applicable to the facts of the case and receipts are not chargeable to tax.

8. In the case of the assessee, central procurement IT department carries out the following functions in the process of procurement of licenses and allocating them to various group concerns:

- (i) Negotiate with Microsoft/other vendors for purchase of licenses.
- (ii) Signs enterprise licensing agreements.
- (iii) Ensures distribution of licenses to various group concerns.
- (iv) Computes and allocates cost to various group concerns on actual usage basis.
- (v) Implement and monitor group IT Policy.
- (vi) Acts as point of contact for any issues related to third party software.

9. It is seen that the assessee procures the following licensed software:

- Office365: Office 365 comprises of traditional Microsoft Office desktop applications, Microsoft application services, and some new productivity services, all of which are enabled as consumable services over Microsoft's Azure cloud platform. Examples include Outlook, Teams, OneNote etc. which are used in day to day operations;
- Windows Remote Desktop: This is a Microsoft application used to connect a PC with a remote device to have access to the data in that device on the PC connected;
- Visual Studio: This is a Microsoft application over cloud used to develop computer programs for windows, websites, web services, web applications etc. by accessing Microsoft's software development platforms;
- Microsoft Project: This is a project management software, developed and sold by Microsoft. It is designed to assist a project manager in developing a schedule, assigning resources to tasks, tracking progress, managing the budget, and analyzing workloads;
- Dynamics CRM: This is a set of software solutions which helps in improving interactions and business with customers.

10. A perusal of the above reveals that the software are used by the group for carrying out its business. It is seen that same/similar software are used by the whole group concerns. It

is also seen that the above software are hosted through Enterprise applications and Enterprise Servers which provide the group to collaborate with one another.

11. The software/programs are hosted on Enterprise Servers which are computer servers that includes programs required to collectively serve the requirements of an enterprise instead of an individual user, unit or specific application. Such servers cater to needs of the whole group and are managed by the assessee centrally. Such servers provide consolidated connections a choice of broadcast, TCP/IP or multicast, as well as user-defined tools for conflation and hibernation, resulting in improved network and desktop performance. The assessee's central team i.e. Information Technology Department and Chief Information Officer handles the issue of procurement of licenses by signing Enterprise Licensing Agreements.

12. An enterprise license agreement (ELA) is a contract between a customer and a vendor that allows purchase of a software product for a company at a discounted, fixed rate for a certain time period. Enterprise license agreements benefit the customer in a variety of ways. It provides a common IT platform deployed across an organization and ensures that users always have access to the latest software version. The software purchased by the assessee form a part of its IT infrastructure as discussed above and they form an integral part of IT systems owned/leased by the assessee. The assessee maintains a global IT Infrastructure which consists of owned, leased, supported and hosted IT systems, hardware devices, internet and intranet systems etc. It is not the case that the assessee makes

purchases on the request of its AEs. As per ELA, affiliates of the assessee can access the licensed software. The assessee has filed copy of intercompany services agreement which provides use of or right to use of IT infrastructure to its AEs.

13. The assessee hosts the software/program through enterprise applications and Enterprise servers for the benefit of whole group which optimizes the resources as discussed above. Therefore, the Assessing Officer held that it is a clear case of **making available** IT infrastructure and AEs are charged on actual usage basis.

14. The assessee argued that its case is covered by the decision of Hon'ble Supreme Court in the case of M/s Engineering Analysis Centre of Excellence Private Limited vs. CIT.

15. The Assessing Officer held that the current case is regarding taxation of equipment royalty. The Assessing Officer held that the assessee receives from its group concerns is charges for allowing use of its IT Infrastructure which consists of various third party software, owned/leased/supported platforms including hardware systems, hence, the receipts are taxable as royalty as per explanation 2(iva) to section 9(1)(vi) of the Act

16. The Id. DRP considered the following facts.

- The assessee does not carry on any business operations in India during the year.

- Neither the assessee undertook any business activities in India, nor it is in receipt of any income from any third party in India.
- During AY 2020-21, it had procured various licenses from 'Microsoft Denmark ApS' in shrink-wrap form without any specific customization for its captive use and for use by its group entities. SGIPL is also a group entity of assessee incorporated in India and such Microsoft Licenses were provided to its employees.
- In most cases the software licenced from Microsoft are installed in the laptops/ desktops of the end users and does not require any IT Infrastructure / server to be maintained by the assessee.
- Certain software which are accessible over the cloud (like Office 365), the IT Infrastructure, if any is owned and maintained by Microsoft as the service provider and not by the assessee.
- In both these cases the assessee only contracts with Microsoft for the software licences and cross charges the cost of the licence to SGIPL based on actual users.
- The assessee never submitted these facts, and the AO also did not bring any evidence on record to support this statement. As stated above, the assessee has not maintained any IT infrastructure or servers for providing software licenses to SGIPL. Thus, these facts are incorrect and mere guesswork of the AO.

- The cost-to-cost reimbursement does not have any income element and thus, cannot be brought to tax. Further, mapping the cost with IT infrastructure is not applicable in the instant case in absence of any IT infrastructure maintained by the assessee for the said purpose.
- When a new employee / user joins the organization viz. SGIPL, a request is made for various softwares required by the employee and licensed from Microsoft.
- The software provided by the assessee to SGIPL mostly does not require any IT Infrastructure / server as the same are installed in the hardware (laptops/ desktops) of the end users i.e., employees of SGIPL.
- the software used by SGIPL and the amount for which is cross charged by assessee, does not pertain to any use or right to use of any copyright as neither the assessee nor SGIPL can sub-license, transfer, reverse engineer, modify or reproduce the software / user license. SGIPL acknowledges that the Microsoft Software has been granted to assessee by Microsoft Denmark ApS under an object code-only, non-exclusive, non-sublicensable, non-transferable, revocable license to access and use the object code version of the proprietary software, solely for assessee and its group/associate companies' internal business purposes.

17. On going through above averments, the Id. DRP held as under:

"4.1.3.....An opportunity of being heard was afforded to the assessee before the Panel on 27.03.2023. During the hearing, the Authorized Representative of the assessee by referring the paper-book including page no. 9 of the paper-book submitted inter-alia that the servers were not maintained by the assessee and the cloud infrastructure was made and provided by the Microsoft company. The AR further submitted that this case was covered by the Supreme Court judgment in case of M/s Engineering Analysis Centre of Excellence Private Limited vs. CIT and had referred to page no. 26 of the paper-book. However, the AR was asked to file a copy of the agreement made between the holding company and the Microsoft regarding providing the software to the group entities.

4.1.3.1 The assessee vide letter dated 03.04.2023, has filed the documents being Microsoft Business and Services Agreement, corresponding Signature Form, Product Selection Form and Customer Price Sheet between the assessee and Microsoft as Annexure A. The assessee has submitted that the assessee is not required to maintain IT infrastructure of any kind for using the licenses procured from Microsoft. Further, all the requisite facilities are managed and handled by Microsoft and its affiliates. Thus, the question of equipment royalty does not arise in the instant case.

4.1.3.2 The Panel takes note of the assessee's submission made at page no. 9 of the paper-book that the assessee never submitted these facts, and the Ld. AO also did not bring any evidence on record to support this statement. The Panel further take a note of AO's the draft order and is of the view that the AO has not actually recorded his observations regarding the examination of the relevant facts and documents for arriving at the conclusion regarding the assessee has

not maintained any IT infrastructure or servers for providing software licenses to SGIPL. Considering the above, the Panel is of the view that the AO should consider and factually verify the assessee's submission dated 03.04.2023 made before the Panel by passing a speaking and reasoned order within the ambit of law and judicial precedents. The Panel hastens to clarify that the AO shall not conduct any fresh inquiry in this regard; the verification shall be made based on documents/submissions available on the assessment records. The assessee's objections made at 2 and 3 in this regard, are hereby rejected and disposed off accordingly."

18. We have gone through the facts and in agreement with the fact that the software used by SGIPL and the amount for which is cross charged by assessee, does not pertain to any use or right to use of any copyright as neither the assessee nor SGIPL can sub-license, transfer, reverse engineer, modify or reproduce the software / user license. SGIPL acknowledges that the Microsoft Software has been granted to assessee by Microsoft Denmark ApS under an object code-only, non-exclusive, non-sublicensable, non-transferable, revocable license to access and use the object code version of the proprietary software, solely for assessee and its group/associate companies' internal business purposes.

19. Reliance is being placed on the judgments of EY Global Services Ltd. Vs. ACIT 133 taxmann.com 157 (Del) and Engineering Analysis Centre of Excellence Pvt. Ltd. Vs. CIT 125 taxmann.com 42 (SC). The conclusion drawn from the above said judgments is as under:

"(i) Copyright is an exclusive right, which is negative in nature, being a right to restrict others from doing certain acts.

(ii) Copyright is an intangible, incorporeal right, in the nature of a privilege, which is quite independent of any material substance. Ownership of copyright in a work is different from the ownership of the physical material in which the copyrighted work may happen to be embodied. An obvious example is the purchaser of a book or a CD/DVD, who becomes the owner of the physical article, but does not become the owner of the copyright inherent in the work, such copyright remaining exclusively with the owner.

(iii) Parting with copyright entails parting with the right to do any of the acts mentioned in section 14 of the Copyright Act. The transfer of the material substance does not, of itself, serve to transfer the copyright therein. The transfer of the ownership of the physical substance, in which copyright subsists, gives the purchaser the right to do with it whatever he pleases, except the right to reproduce the same and issue it to the public, unless such copies are already in circulation, and the other acts mentioned in section 14 of the Copyright Act.

(iv) A licence from a copyright owner, conferring no proprietary interest on the licensee, does not entail parting with any copyright, and is different from a licence issued under section 30 of the Copyright Act, which is a licence which grants the licensee an interest in the rights mentioned in section 14(a) and 14 (b) of the Copyright Act. Where the core of a transaction is to authorize the end- user to have access to and make use of the "licensed" computer software product over which the licensee has no exclusive rights, no copyright is parted with and consequently, no infringement takes place, as is recognized by section 52(1)(aa) of the Copyright Act. It makes no difference whether the end-user is enabled to use computer software that is customized to its specifications or otherwise.

(v) A non-exclusive, non-transferable licence, merely enabling the use of a copyrighted product, is in the nature of restrictive conditions which are ancillary to such use, and cannot be construed as a licence to enjoy all or any of the enumerated rights mentioned in section 14 of the Copyright Act, or create any interest in any such rights so as to attract section 30 of the Copyright Act.

(vi) The right to reproduce and the right to use computer software are distinct and separate rights, as has been recognized in SBI v. Collector of Customs, (2000) 1 SCC 727 (see paragraph 21), the former amounting to parting with copyright and the latter, in the context of non-exclusive EULAs, not being so."

20. A reading of the above judgment would clearly show that for the payment received by the assessee to be taxed as "royalty", it is essential to show a transfer of copyright in the software to do any of the acts mentioned in section 14 of the Copyright Act, 1957. A licence conferring no proprietary interest on the licensee, does not entail parting with the copyright. Where the core of a transaction is to authorize the end-user to have access to and make use of the licenced software over which the licensee has no exclusive rights, no copyright is parted with and therefore, the payment received cannot be termed as "royalty". The software used by SGIPL and the amount for which is cross charged by assessee, does not pertain to any use or right to use of any copyright as neither the assessee nor SGIPL can sub-license, transfer, reverse engineer, modify or reproduce the software / user license. SGIPL acknowledges that the Microsoft Software has been granted to assessee by Microsoft Denmark ApS under an object code-only, non-exclusive, non-sublicensable, non-transferable, revocable

license to access and use the object code version of the proprietary software, solely for assessee and its group/associate companies' internal business purposes.

21. In view of the factual position and judicial pronouncement, we hold that no liability arises on the assessee. The mere fact that tax has been deducted doesn't automatically make the receipt taxable as "royalty".

22. In the result, the appeal of the assessee is allowed.
Order Pronounced in the Open Court on 16/04/2024.

Sd/-

(C. N. Prasad)
Judicial Member

Dated: 16/04/2024

Subodh Kumar, Sr. PS

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-

(Dr. B. R. R. Kumar)
Accountant Member

ASSISTANT REGISTRAR