

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

**BEFORE SH. N. K. BILLAIYA, ACCOUNTANT MEMBER  
AND  
MS. SUCHITRA KAMBLE, JUDICIAL MEMBER**

ITA No.6640/DEL/2013  
Assessment Year: 2008-09

<b>Pernod Ricard India Pvt. Ltd., Building No.8A, 4<sup>th</sup> Floor, DLF Cyber City, DLF Phase-II, Gurgaon -122002 PAN AAACS4781P</b>	<b>Vs</b>	<b>ITO (TDS), Ward – 3(2) New Delhi</b>
<b>(APPELLANT)</b>		<b>(RESPONDENT)</b>

Appellant by	Sh.Deepak Chopra, Advocate Smt. Rashi Khanna, Advocate Sh. Yojit Pareek, Advocate
Respondent by	Smt. Naina Soin Kapir, Sr. DR

Date of hearing:	03/01/2019
Date of Pronouncement:	08/01/2019

**ORDER**

**PER N. K. BILLAIYA, AM:**

This appeal by the assessee is preferred against the order of the CIT (A)- XXIX, New Delhi dated 11.09.2013 pertaining to A. Y. 2008-09.

2. The quarrel relates the payments made by the assessee to non-resident on which no tax was deducted at source and the

Assessing Officer was of the firm belief that the payments made to non-resident were subject to withholding tax in India.

3. The payments made to non residents can be summarised as under :-

(a) Reimbursement of expense in the nature of training expenses, meeting expenses, relocation expenses and accommodation expenses.

(b) Reimbursement of expenses in the nature of consultancy expenses, legal expenses, seminar expenses; and

(c) Payments in the nature of reimbursement of software and license renewal.

4. The Assessing Officer came to the conclusion that such payments made by the assessee attracted withholding tax provisions and as such the assessee was required to deduct tax at source on such payments rendering the assessee as “assessee in default” section 201 (1) of the Act. By treating the assessee as assessee in default the Assessing Officer levied a tax demand u/s 201 (1) and interest u/s 201(1A) of the Act.

5. Aggrieved, the assessee agitated the matter before the CIT(A)

but without any success.

6. Before us the counsel for the assessee vehemently stated that all the payments made to non-resident were reimbursement of travel expenses, research expenses and seminar, training and conference expenses. It is the say of the counsel that all the reimbursement are duly supported by the invoices alongwith certificate of the Chartered Accountant accordingly reliance was placed on the decision of Hon'ble High Court of Bombay in the case of Krupp Udhe GmbH 354 ITR 173. Reliance was also placed on the decision of the Hon'ble High Court of Delhi in the case of Industrial Engineering Projects Private Limited 202 ITR 1014.

7. Per contra the DR strongly supported the findings of the lower authorities.

8. We have given a thoughtful consideration to the orders of the authorities below. The quarrel can be understood from the following charts:-

<i>Name of (the recipient</i>	<b>Nature of payment</b>	<b>Amount</b>	<i>Date</i>
Category <b>1</b> - <i>Taxability' of reimbursements in the nature of meeting, travel, consultancy, research, legal and seminar expenses</i>			
<i>Pernod Ricard, France</i>	<i>Reimbursement of meeting expenses</i>	<i>EUR 8,953</i>	<i>July 17, 2007</i>
<i>Jean-Manuel Jacquinot, France</i>	<i>Reimbursement of travel expenses</i>	<i>EUR 1796</i>	<i>April <b>17,2007</b></i>
<i>Jean-Manuel Jacquinot, France</i>	<i>Consultancy charges</i>	<i>EUR 5570 {Tax already deducted and deposited]</i>	<i>May 23, 2007</i>
<i>Pernod Ricard, France</i>	<i>Reimbursement of consultancy</i>	<i>EUR 4751</i>	<i>June 25, 2007</i>
<i>Pernod Ricard, France</i>	<i>Reimbursement of research expenses</i>	<i>EUR 8730</i>	<i>June <b>28</b>, 2007</i>
<i>Pernod Ricard, France</i>	<i>Reimbursement of legal expenses</i>	<i>EUR 6000</i>	<i>July 17, 2007</i>
<i>Pernod Ricard, France</i>	<i>Reimbursement of seminar expenses</i>	<i>EUR 10,200</i>	<i>July <b>17</b>,2007</i>
<i>Pernod Ricard. France</i>	<i>Reimbursement of seminar expenses</i>	<i>EUR 2946</i>	<i>July 17,2007</i>
<i>Pernod Ricard, France</i>	<i>Reimbursement of seminar expenses</i>	<i>EUR 2846</i>	<i>October 15, 2007</i>
<i>Pernod Ricard, France</i>	<i>Reimbursement of seminar expenses</i>	<i>EUR. 6003</i>	<i>October 15, 2007</i>
<i>Jean-Manuel Jacquinot, France</i>	<i>Reimbursement of travel expenses</i>	<i>EUR 1196</i>	<i>November 15, 2007</i>
<i>Pernod Ricard, France</i>	<i>Reimbursement of seminar expenses</i>	<i>EUR 3196</i>	<i>December 17, 2007</i>
<i>Pernod Ricard, France</i>	<i>Reimbursement of seminar expenses</i>	<i>EUR 4528</i>	<i>December 13, 2007</i>
<i>Jean-Manuel jacquinot, France</i>	<i>Consultancy charges</i>	<i>EUR 2888 [Tax already deducted and deposited]</i>	<i>January 28, 2008</i>
<i>Jean-Manuel Jacquinot, France</i>	<i>Reimbursement of travel expenses/</i>	<i>EUR <b>937</b></i>	<i>January 28, 2008</i>

<i>Name of the recipient</i>	<i>Nature of payment</i>	<i>Amount</i>	<i>Date</i>
<i>Category 2 - Taxability' of reimbursements in the nature of software license and renewal payments</i>			
<i>Pernod Ricard, France</i>	<i>Reimbursement of software and license renewal expenses</i>	<i>EUR 4,050</i>	<i>June 14, 2007</i>
<i>Pernod Ricard, France</i>	<i>Reimbursement of software and license renewal expenses</i>	<i>EUR 16,200</i>	<i>June 26, 2007</i>
<i>Integralis SAS</i>	<i>Reimbursement of software and license renewal expenses</i>	<i>EUR 2,103</i>	<i>June 26, 2007</i>
<i>integralis SAS</i>	<i>Reimbursement of software and license renewal expenses</i>	<i>EUR 5,678</i>	<i>June 26, 2007</i>
<i>Integralis SAS</i>	<i>Reimbursement of software and license renewal expenses</i>	<i>EUR 5,702</i>	<i>October 16, 2007</i>
<i>Swedley Place Ltd. UK</i>	<i>Design Development charges</i>	<i>GBP 12,500 (Tax already deducted and deposited of GBP 1,822)</i>	<i>January 10, 2008</i>
<i>Pernod Ricard, France</i>	<i>Reimbursement of software and license renewal expenses</i>	<i>EUR 27,000</i>	<i>January 30, 2008</i>
<i>Integralis SAS</i>	<i>Reimbursement of software and license renewal expenses</i>	<i>EUR 4,284</i>	<i>February 22, 2008</i>

9. It is a settled principal of law that any payment made to non-resident become subject to withholding tax u/s 195 of the Act only when it is chargeable to tax in India. As per the copy of the agreement placed at pages 1 to 6 of the paper book it was agreed by the assessee to reimburse travelling expense and other incidental expenses on actual basis. The invoices raised by Jean Manuel Jackquinet which is at page 7 clearly show that the same is for travelled expenses / visa charges/ car parking

charges and diesel reimbursements which is further supported by a certificate by Chartered Accountant placed at page 8 and 9 of the paper book.

10. The Hon'ble High Court of Bombay in the case of Krupp Udhe GMBH (supra) had the occasion to consider a similar issue and the relevant observations of the Hon'ble High Court read as under :-

*4 'The assessee had entered into a contract with M/s. EID Parry (India) Ltd. (EID Parry) for the supply of a compressor for an ammonia storage tank. The compressor was found to be in a damaged condition. The assessee deputed two technicians from Germany to the establishment of EID Parry in India. EID Parry remitted an amount of DM 202,433,37 comprising (i) inspection fees in the amount of DM 170,701.37 for technicians ; and (ii) reimbursement of expenses for air tickets for travel between Germany and India in the amount of DM 11,732. The Commissioner of Income-tax, on the question of reimbursement of expenses, followed the decision of the Andhra Pradesh High Court in the case of Elkem Technology v. Dy. CIT 120011 250 ITR 164/117 Taxman 382 and of the Kerala High Court in the case of Cochin Refineries Ltd. v. CIT [ 1996] 222 ITR-354. and held that the decision of the Assessing Officer to treat the reimbursement of expenses as part of taxable income was correct.*

*5. In appeal the Tribunal dealt with the issue as regards-the payment of fees received by the assessee and of the reimbursement of expenses separately. In so far as the receipt of fees was concerned, the Tribunal noted that the assessee had deputed its technicians for inspection of the equipment. Inspection could not be done unless the personnel deputed had technical knowledge in respect of the equipment to be inspected. Consequently the fees received by the assessee were held to amount to fees for technical services. In so far as the issue of reimbursement is concerned, the Tribunal held that though there was a conflict between the judgment of the Kerala*

High Court, which was relied upon by the Commissioner of Income – tax (Appeals) and the judgment of the Calcutta High Court in the case of *CIT v. Dunlop Rubber Co, Ltd.* [1983] 142 ITR 493 / [1982] 10 Taxman 179, it would follow a view which was favourable to the assessee, consistent with the judgment in *CIT v. Vegetable Products Ltd.* [1973] 88 ITR 192 (SC).

6. The question as to whether a reimbursement for expenses would form part of the taxable income is not *res integra* in so far as this court is concerned. In *CIT v. Siemens Aktiorigesellschaft* 120091 310 ITR 320/177 Taxman 81. a Division Bench of this court held that it was in agreement with the view taken by the Calcutta High Court in *Dunlop Rubber Co. Ltd.* case (*supra*) and by the Delhi High Court in *CIT v. Industrial Engineering Projects (P.) Ltd.* 119931 202 ITR 1014 (Delhi). The observations of this court in *Siemens Aktiongesellschaft* (*supra*) are as follows (page 340):

"That leaves us with the last contention as to whether the amounts by way of reimbursement are liable to tax. To answer that issue, we may gainfully refer to the judgment of a Division Bench of the Delhi High Court in *CIT v. Industrial Engineering Projects (P.) Ltd.* [1993] 202 ITR 1014 (Delhi). The learned Division Bench of the Delhi High Court was pleased to hold that reimbursement of expenses can, under no circumstances, be regarded as a revenue receipt and in the present case the Tribunal had found that the assessee received no sums in excess of expenses incurred. A similar issue had also come up for consideration before the Division Bench of the Calcutta High Court in *CIT v. Dunlop Rubber Co. Ltd.* [1983] 142 ITR 493 (Cal). The learned Division Bench was answering the following question:

'Whether, on the facts and in the circumstances of the case, the amounts received by the assessee (English company) from M/s. Dunlop Rubber Co. (India) Ltd. (Indian company) as per the agreement dated January 29, 1957, constituted income assessable to tax?'

On considering the issue the learned Bench noted that the Tribunal was of the view that what was recouped by the English company was part of the expenses incurred by it. The learned court upheld the said finding. The learned Bench was pleased to hold that sharing of expenses of the research utilised by the subsidiaries as well as the head office organisation would not be income which would be assessable to tax. A similar view was taken in *CIT v. stewarts and Lloyds of India Ltd.* 119871 165 ITR 416 (Cal)."

7. Consequently, in view of the judgment in *Siemens*, the first and second issue would not raise any substantial question of law since they are covered against the Revenue.

11. While delivering the aforesaid judgment Hon'ble High Court of Bombay has also considered the decision by the Hon'ble High Court of Delhi in the case of Industrial Engineering Projects Private Limited (supra).

12. Since, facts on record alongwith the relevant documentary evidence clearly show that the payments are just reimbursements made by the assessee which do not contain any profit element the same cannot be treated as FTS as nothing has been made available to the assessee. Respectfully following the decision of Hon'ble High Court of Bombay and Delhi (supra) we have no hesitation in holding that the payments made by the assessee in respect of travel expenses, research expenses, seminar, training and conference expenses are nothing but reimbursements of expenses without any profit element and therefore the assessee is not liable for withholding tax u/s 195 of the Act. Ground No.4 to 7 taken together is allowed.

13. The next quarrel is in respect of reimbursement of software and licenses renewal. The Assessing Officer has treated the payments as royalty. Drawing support from the Indian Copy right

Act 1957 the Assessing Officer was of the firm belief that the payment for the certain software is royalty. The Assessing Officer observed that as per provision of section 9 the payment made for import of software are royalty payment. The Assessing Officer further observed that the payments are for the use of copy right itself and not for the use of copy righted article. The Assessing Officer accordingly treated the income from software licenses in the nature of royalty.

14. The CIT(A) confirmed the findings of the Assessing Officer.

15. Before us the counsel for the assessee reiterated what has been stated before the lower authorities.

16. We have carefully perused the orders of the authorities below and have also considered the relevant invoices brought on record in the paper book filed. On perusal of the invoices supported by the certificate from a Chartered Accountant show that amount paid are either annual maintenance charges or for the use of software or for software maintenance or the payments were made for antivirus software, anti spam software etc. The invoices clearly show that the payments have been made for the

use of copy righted article. The Hon'ble High Court of Delhi in the case of Infracsoft Limited 264 CTR 329 has held that amount received by the assessee a non-resident company for granting license to use its copyrighted software for licensee own business purpose only could not be brought to tax as royalty under article 12 (3) OF India USDTA. The relevant findings of the Hon'ble Delhi High Court read as under :-

87. *The license granted by the Assessee is limited to those necessary to enable the licensee to operate the program. The rights transferred are specific to the nature of computer programs. Copying the program onto the computer's hard drive or random access memory or making an archival copy is an essential step in utilizing the program. Therefore, rights in relation to these acts of copying, where they do no more than enable the effective operation of the program by the user, should be disregarded in analyzing the character of the transaction for tax purposes. Payments in these types of transactions would be dealt with as business income in accordance with Article 7.*

88. *There is a clear distinction between royalty paid on transfer of copyright rights and consideration for transfer of copyrighted articles. Right to use a copyrighted article or product copy so made shall include Infracsoft's copyright and other proprietary notices. All copies of the Software are the exclusive property of Infracsoft. The Software includes a licence authorisation device, which restricts the use of the Software. The software is to be used only for Licensee's own business as defined within the Infracsoft Licence Schedule. Without the consent of the Assessee the software cannot be loaned, rented, sold, sub-licensed or transferred to any third party or used by any parent, subsidiary or affiliated entity of Licensee or used for the operation of a service bureau or for data processing. The Licensee is further restricted from making copies, decompile, disassemble or reverse-engineer the Software without Infracsoft's written consent. The Software contains a mechanism which Infracsoft may activate to deny the Licensee use of the Software in the event that the Licensee is in breach of payment terms or any other provisions of this Agreement. All copyrights and intellectual property rights in and to the Software, and copies made by Licensee, are owned by or duly licensed to Infracsoft.*

89. *The Licensing Agreement shows that the license is non-exclusive, non-transferable and the software has to be used in accordance with the agreement. Only one copy of the software is being supplied for each site. The licensee is permitted to make only one copy of the software and associated support information and that also for backup purposes. It is also stipulated that the copy so made shall include Infrasoftware's copyright and other proprietary notices. All copies of the Software are the exclusive property of Infrasoftware. The Software includes a licence authorisation device, which restricts the use of the Software. The software is to be used only for Licensee's own business as defined within the Infrasoftware Licence Schedule. Without the consent of the Assessee the software cannot be loaned, rented, sold, sub-licensed or transferred to any third party or used by any parent, subsidiary or affiliated entity of Licensee or used for the operation of a service bureau or for data processing. The Licensee is further restricted from making copies, decompile, disassemble or reverse-engineer the Software without Infrasoftware's written consent. The Software contains a mechanism which Infrasoftware may activate to deny the Licensee use of the Software in the event that the Licensee is in breach of payment terms or any other provisions of this Agreement. All copyrights and intellectual property rights in and to the Software, and copies made by Licensee, are owned by or duly licensed to Infrasoftware.*

90. *In order to qualify as royalty payment, it is necessary to establish that there is transfer of all or any rights (including the granting of any licence) in respect of copyright of a literary, artistic or scientific work. In order to treat the consideration paid by the Licensee as royalty, it is to be established that the licensee, by making such payment, obtains all or any of the copyright rights of such literary work. Distinction has to be made between the acquisition of a "copyright right" and a "copyrighted article". Copyright is distinct from the material object, copyrighted. Copyright is an intangible incorporeal right in the nature of a privilege, quite independent of any material substance, such as a manuscript. Just because one has the copyrighted article, it does not follow that one has also the copyright in it. It does not amount to transfer of all or any right including licence in respect of copyright. Copyright or even right to use copyright is distinguishable from sale consideration paid for "copyrighted" article. This sale consideration is for purchase of goods and is not royalty.*

17. Respectfully following the Hon'ble High Court of Delhi (supra) we hold that the payments for software and license

renewal is not royalty ground No. 8 to 10 taken together are allowed.

18. Ground No.11, 12 and 13 become otiose.

19. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 08.01.2019.

**Sd/-**  
**(SUCHITRA KAMBLE)**  
**JUDICIAL MEMBER**

\*NEHA\*

Date:-08 .01.2019

Copy forwarded to:

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

**Sd/-**  
**(N. K. BILLAIYA)**  
**ACCOUNTANT MEMBER**

ASSISTANT REGISTRAR  
ITAT NEW DELHI

Date of dictation	07.01.2019
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for Pronouncement	
Date on which the fair order comes back to the Sr. PS/ PS	
Date on which the final order is uploaded on the website of ITAT	08.01.2019
Date on which the file goes to the Bench Clerk	
Date on which file goes to the Head Clerk.	
The date on which file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	