

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : C : NEW DELHI

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
SHRI KULDIP SINGH, JUDICIAL MEMBER

ITA No.2486/Del/2016
Assessment Year: 2010-11

ONGC as representative assessee of
International Human Resources Dev.
Corporation,
DGM-Head Corp. Tax, OnGC Ltd.,
Room No.244, Old Secretariat
Building,
Tel Bhawan,
Dehradun.

Vs Deputy Director of Income-
tax, International Taxation,
Circle-2, Aayakar Bhawan,
13A, Subhash Road,
Dehradun.

PAN: AAACO1598A

(Appellant)

(Respondent)

Assessee by	:	Shri Mohd. Farid, CA
Revenue by	:	Shri Amit Katoch, Sr. DR
Date of Hearing	:	16.01.2019
Date of Pronouncement	:	22.01.2019

ORDER

PER R.K. PANDA, AM:

This appeal filed by the assessee is directed against the order dated 29th
February, 2016 of the CIT(A)-2, Noida, relating to assessment year 2010-11.

2. Facts of the case, in brief, are that the assessee filed its return of income on 13th September, 2010 showing nil income in its capacity as the representative assessee of M/s International Human Resources Development Corporation, USA. The Assessing Officer, during the course of assessment proceedings, observed that the assessee has earned revenue on account of contract dated 25th September, 2009 for procurement of IPIMS e-Learning License and for Joint Development Project i.e., Exploration Action Learning Plans (EALP). He observed that the assessee has received payments/revenues amounting to Rs.52,06,380/- in respect of provision of the following services:-

“During the relevant previous year, payments were made by ONGC to International Human Resources Development Corporation, USA (hereinafter ‘non-resident’) under one tax protected contract dated 25.09.2009 for procurement of International Petroleum Industry Multimedia System (IPIMS) e-Learning License and for development of Exploration Action Learning Plans (EALP). IPIMS Database Management Software is a software developed by the non-resident and delivered to ONGC for installation on central servers PC and/or hard drives, which is used to manage access to and administration of IPIMS content. Action Learning Module is an action learning unit devoted to a specific learning topic, designed and published so that the content may be learned on a e-learning basis “as needed” at the desktop.”

3. He noted that the assessee has not offered any revenue to tax in India in the return filed under the claim that the payment for sale of software through licence to ONGC is not received by assessee in India and is, therefore, exempt from tax. It was submitted that the assessee did not have any PE in India. However, the Assessing Officer did not accept the claim of the assessee and held that the receipts of the non-resident were taxable as royalty on gross basis as per the rate mentioned in section

115A of the Act within the meaning of section 9(1)(vi) of the Act. Accordingly, the Assessing Officer determined the total income of the assessee at Rs.58,20,930/-.

4. Before the CIT(A), it was argued that the receipts of the non-resident are not taxable in India. Through an additional ground of appeal, the assessee also, without prejudice to the main plea taken in the appeal proceedings that the receipts were not taxable in India, submitted that the receipts of the assessee could be taxable u/s 44B of the Act in view of the decision of the Hon'ble Supreme Court in the light of the decision of the Hon'ble Supreme Court reported in 376 ITR 306. However, the Id.CIT(A) was also not satisfied with the arguments advanced by the assessee and held that the receipts of International Human Resources Development Corporation, USA are taxable as royalty. He also rejected the alternative contention of the assessee that the receipts are taxable u/s 44B of the Act.

5. Aggrieved with such order of the CIT(A), the assessee is in appeal before the Tribunal by raising the following grounds:-

1. "The Ld. Commissioner of Income Tax (Appeals)-2, Noida, has erred in law and in the facts and circumstances of the case in holding that the receipts of International Human Resources Development Corporation, USA, are taxable as "royalty" and in rejecting the appellant's contention that the same were not taxable in India as per the India-USA Double Taxation Avoidance Agreement.

2. Without prejudice to the preceding ground, the Ld. Commissioner of Income Tax (Appeals)-2, Noida, has erred in law and in the facts and circumstances of the case in rejecting the alternative contention of appellant that the receipts of International Human Resources Development Corporation, USA, are taxable u/s. 44BB of the Income-tax Act, 1961.

3. The appellant craves permission to add, alter and/or amend any

ground(s) of appeal before or at the time of hearing.”

6. The ld. counsel for the assessee, at the outset, filed a copy of the order of the Tribunal in assessee's own case for assessment year 2005-06 and 2006-07 vide ITA No.1811 & 3047/Del/2010, Order dated 18th May, 2018 and submitted that the identical issue had been considered by the Tribunal and it has been held that the payments made by ONGC for use of IPIMS e-Learning License is in the nature of business receipts and, thus, exempt under Article 7 of DTAA. The ld. counsel further made a statement at the bar that no return has been filed by the assessee for assessment year 2007-08, 2008-09 and 2009-10. He accordingly submitted that this being a covered matter in favour of the assessee, the grounds raised by the assessee should be dismissed.

7. The ld. DR, on the other hand, heavily relied on the order of the Assessing Officer and CIT(A).

8. We have considered the rival arguments and perused the orders of the authorities below. We find the assessee was a tax resident of the USA during the year under consideration. ONGC filed the return of income as representative assessee of the non-resident for the year under consideration claiming that the receipts of the non-residents were not taxable in India. Accordingly, the assessee did not offer any income to tax in the return of income filed for the year. We find the Assessing Officer held that the receipts of the non-residents were taxable as royalty on gross basis as per

the rate mentioned in 115A of the IT Act within the meaning of Section 9(1)(vi) of the Act. The relevant observation of the Assessing Officer reads as under:-

“During the relevant previous year, payments were made by ONGC to International Human Resources Development Corporation, USA (hereinafter "non-resident") under one tax protected contract dated 25.09.2009 for procurement to International Petroleum Industry Multimedia System (IPIMS) e-Learning License and for development of Exploration Action Learning Plans (EALP). IPIMS Database Management Software is a software developed by the non-resident and delivered to ONGC for installation on central services PC and/or hard drives, which is used to manage access to and administration of IPIMS content. Action Learning Module is an action learning unit devoted to a specific learning topic, designed and published so that the content may be learned on a e-learning basis “as needed” at the desktop. The assessee has not offered any revenues to tax in India in the return filed under the claim that the payment for sale of software through license to ONGC is not received by assessee in India and is therefore, exempt from tax. Assessee has also stated that it did not have Permanent Establishment (PE) in India. The claim of the assessee is not found to be correct and acceptable. Looking at the nature of the activities which involves procurement of license to use the IPIMS systems by ONGC in India which is a data base management software developed by IHRDC for ONGC, to be installed on ONGCs computers, is clearly in the nature of software supply and software development (alongwith grant of license to use) is in the nature of Royalty payment by ONGC.”

9. We find, in appeal the Id.CIT(A) not only upheld the action of the Assessing Officer, but also rejected the alternative claim of the assessee that receipts could be taxable u/s 44B of the IT Act. We find identical issue had come up before the Tribunal in assessee’s own case in the preceding assessment years 2005-06 and 2006-07. We find the Tribunal vide ITA No. vide ITA No.1811 & 3047/Del/2010, Order dated 18th May, 2018, has decided the issue in favour of the assessee by observing as under:-

“11. We have heard the rival contentions and have perused the material placed before us. The short issue in this case is required to be examined as to whether assessee’s claim is correct in view of the licence agreement and the definition of the royalty as provided under the DTAA, payment of annual licence fee cannot be treated as royalty and should be treated as the business receipts of the assessee

company, which is exempt under the DTAA. For the sake of clarity, definition of royalty as provided under the DTAA between India and U. S. A., which speaks that the royalties as used in the Article 12 means :-

- (a) Payments of any kind received as consideration for the use of, or the right to use any copyright of a literary, artistic or scientific work, including cinematograph films or work on film, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience including gains derived from the alienation of any such right or property which are contingent on the productivity, use or disposition thereof ; and
- (b) payments of any kind received as consideration for the use of, or the right to use, any industrial, commercial or scientific equipment, other than payments derived by an enterprise described in paragraph 1 of article 8 (Shipping and Air Transport) from activities described in paragraph 2(c) or 3 of article 8.

Transaction between the assessee company and the ONGC is to be tested on the basis of this definition.

12. Now coming to the agreement between the assessee company and the ONGC, as per the recitals of the agreement i.e. the assessee company has represented that it publishes virtual knowledge, learning and communication system contained in the IPIMS and Action Learning models thereof, for the international energy sector and continues to make additions, modifications and extensions to such system on an annual basis.

13. As per the definition clause 1.4 of the agreement, IPIMS Content is that multimedia subject matter classified as Background Knowledge, Practical Knowledge, Background Learning and Communication as described from time in IHRDC brochures and publications. This content includes any upgrades, substitutions, replacements, enhancements and modifications thereof, which are delivered to ONGC during the term of this Agreement and any extension thereof. The scope of IPIMS content for the energy sector that is the subject of this license is provided in Schedule B.

14. Clause 3.2 of the term of agreement envisages IPIMS system becomes and remains inaccessible to ONGC during the license period due to bugs, errors, inconsistencies, etc. in software, hardware, failure or other problems with material/software supplied for installation at ONGC sites and/or IHRDC server at Boston, or the access gets blocked for any reason under the direct control of IHRDC, the same shall be notified by ONGC to IHRDC through telephone and/or e-mail/fax. If the access is not restored within seventy two (72) hours of intimation to IHRDC by ONGC, the license period will automatically be extended pro-rata for the period of non-availability of the system to ONGC.

15. As per Clause 4.4, no title or ownership of IPIMS System is transferred to ONGC by way of this Agreement.

16. As per Clause 3.1, the term of agreement shall remain for a period of one year, which is extendable upon mutual agreement by the parties.

17. As per Clause 16.1, unless authorized by IHRDC, ONGC agrees not to copy, in any form, or otherwise add to, delete and/or modify the IPIMS System, nor allow non-employees, excluding third party personnel to whom ONGC outsources its services and who perform on ONGC premises, to view, use or otherwise obtain access to said system.

18. From the above stated clauses of the agreement, it is evident that ONGC acquires only copy of copyrighted article, whereas the copyright remains with the owners. We are in agreement with the contention of the Ld. Counsel for the assessee that the transaction would not fall within the definition of 'Royalty' as used in Article 12(3) of the Indo-US DTAA. Since the definition speaks of use of copyright, it does not speak use of copyrighted article. If the copy right is transferred in favour of the assessee, in that event, the payments made by ONGC would have certainly fallen in the category of payment for royalty. Having considered the material on record and submission of the parties, we are of the view that the issue is squarely covered in favour of the assessee by the decision of the Hon'ble High Court of Delhi in the case of DIT vs. Infrasoftware Limited, (2014) 220 TAXMAN 273 (Del), wherein the Hon'ble Court has ruled as under :-

87. 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 copy right 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, copy righted. 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.

88. 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.

89. 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 with the owner retaining his copyright, is not the same thing as transferring or assigning rights in relation to the copyright. The enjoyment of some or all the rights which the copyright owner has, is necessary to invoke the royalty definition. Viewed from this angle, a non-exclusive and non-transferable licence enabling the use of a copyrighted product cannot be construed as an authority to enjoy any or all the enumerated rights ingrained in Article 12 of DTAA. Where the purpose of the licence or the transaction is only to restrict use of the copyrighted product for internal business purpose, it would not be legally correct to state that the copyright itself or right to, use copyright has been transferred to any extent. The parting of intellectual property rights inherent in an attached to the software produce in favour of the licensee/customer is what is contemplated by the Treaty. Merely authorizing or enabling a customer to have the benefit of data or instructions contained therein without any further right to deal with them independently does not, amount to transfer of rights in relation to copyright or conferment of the right of using the copyright. The transfer of rights in or over copyright or the conferment of the right of use of copyright implies that the transferee who divests himself of the rights he possesses pro tanto.

90. The license granted to the licensee permitting him to download the computer programme and storing it in the computer for his own use is only incidental to the facility extended to the licensee to make use of the copyrighted product for his internal business purpose. The said process is necessary to make the programme functional and to have access to it and is qualitatively different from the right contemplated by the said paragraph because it is only integral to the use of copyrighted product. Apart from such incidental facility, the licensee has no right to deal with the product just as the owner would be in a position to do.

91. There is no transfer of any right in respect of copyright by the assessee and it is a case of mere transfer of a copyrighted article. The payment is for a copyrighted article and represents the purchase price of an article and cannot be considered as royalty either under the Income-tax Act or under the DTAA.

92. The licensees are not allowed to exploit the computer software commercially, they have acquired under licence agreement, only the copyrighted software which by itself is an article and they have not acquired

any copyright in the software and associated support information for backup purpose with a condition that such copyright shall include Infracsoft copyright and all copies of the software shall be exclusive properties of Infracsoft. Licensee was allowed to use the software only for its own business as specifically identified and was not permitted to loan/rent/sale/sub-licence or transfer the copy of software to any third party without the consent of Infracsoft.

93. The licensee has been prohibited from copying, decompiling, de-assembling, or reverse engineering the software without the written consent of Infracsoft. The licence agreement between the assessee company and its customers stipulates that all copyrights and intellectual property rights in the software and copies made by the licensee were owned by Infracsoft and only Infracsoft has the power to grant licence rights for use of the software. The licence agreement stipulates that upon termination of the agreement for any reason, the licensee shall return the software including supporting information and licence authorization device to Infracsoft.

94. The incorporeal right to the software i.e. copyrighter mains with the owner and the same was not transferred by the assessee. The right to use a copyright in a programme is totally different from the right to use a programme embedded in a cassette or a CD which may be a software and the payment made for the same cannot be said to be received as consideration for the use of or right to use of any copyright to bring it within the definition of royalty as given in the DTAA. What the licensee has acquired is only a copy of the copyright article whereas the copyright remains with the owner and the Licensees have acquired a computer programme for being used in their business and no right is granted to them to utilize the copyright of a computer programme and thus the payment for the same is not in the nature of royalty.”

19. The Ld. Departmental Representative tried to distinguish the facts of the present case. However, the Id. Senior Counsel reverted the same by a plausible explanation. Thus, we have no hesitation to hold that the payments made by the ONGC for use of IPIMS system is in the nature of business receipts and, thus, is exempt under Article 7 of DTAA.”

10. Since the facts of the impugned assessment year are identical to the facts of the case decided by the Tribunal in assessee’s own case for assessment year 2005-06 and 2006-07, therefore, in absence of any distinguishable feature brought to our notice by the Id. DR, we hold the payments made by ONGC to the International Human

Resources Development Corporation, USA for procurement of International Petroleum Industry Multimedia System (IPIMS) is in the nature of business receipts and, thus, exempt under Article 7 of DTAA. The ground of appeal No.1 by the assessee is accordingly allowed. Since the assessee succeeds on ground of appeal No.1, the ground of appeal No.2 being academic in nature is not being adjudicated.

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

The decision was pronounced in the open court on 22.01.2019.

Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER

Sd/-
(R.K. PANDA)
ACCOUNTANT MEMFBER

Dated: 22nd January, 2019

dk

Copy forwarded to

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asstt. Registrar, ITAT, New Delhi