IN THE INCOME-TAX APPELLATE TRIBUNAL "I" BENCH MUMBAI

BEFORE SHRI R.C. SHARMA, ACCOUNTANT MEMBER AND
SHRI PAWAN SINGH, JUDICIAL MEMBER AND

ITA No. 3968/Mum/2017 (Assessment Year 2012-13)

M/s SAVVIS Communications, LLC (Formerly known as SAVVIS Communication Corporation), 2333 Ponce De Leon Blvd., Suite 900, Coral Gables, Florida-33134. **PAN: AANCS2551E**	Vs.	DCIT (International Taxation), Circle-4(2)(1), 1st Floor, R.No. 119, Scindia House, Ballard Estate, NM Road, Mumbai-400038.
Appellant		Respondent

Appellant by : Shri Dhanesh Bafna (AR)

Respondent by : Shri Nishant Samaiya (DR)

Date of Hearing : 28.02.2018

Date of Pronouncement : 15.03.2019

ORDER UNDER SECTION 254(1)OF INCOME TAX ACT

PER PAWAN SINGH, JUDICIAL MEMBER;

1. This appeal by assessee under section 253 of Income-tax Act ('Act') is directed against the order of ld. Commissioner of Income-tax (Appeals)-58, Mumbai [hereinafter referred as ld. CIT(A)] dated 15.03.2017 for Assessment Year 2012-13. The assessee has raised the following grounds of appeal:

> 1. That the order passed by the learned Deputy Commissioner of Income-tax, ('learned Assessing Officer' or 'learned AO') under section 144 read with section 143(3) read with section 144C(3) of the Income-tax Act, 1961 ('Act') and the order passed by the learned Commissioner of Income-tax (Appeals) [learned CIT(A)] under section 250 of the Act, to the extent prejudicial to the Appellant, is bad in law and contrary to the facts and circumstances of the case.

2. a. That on the facts and in the circumstances of the case, the learned CITCA) has erred in upholding the action of the learned AO in bringing to tax the sum of Rs 26,189,848 received by the Appellant from customers for managed hosting services as income chargeable to income tax in India.

2. b. That on the facts and in the circumstances of the case, the learned CIT(A) has erred in upholding the action of the learned AO in treating the impugned amount received by the Appellant as 'Royalty' and / or 'Fees for Included Services' under section 9(1)(vi) / (vii) of the Act and under Article 12 (3) / (4) of the India-USA Double Taxation Avoidance Agreement ('DTAA') .

2. c. That on the facts and circumstances of the case, the learned CIT(A) has erred in holding that the income earned by the Appellant from customers for providing managed hosting services constituted consideration for use or right to use equipment.

2. d That on the facts and circumstances of the case, the learned CIT(A) erred in incorrectly alleging that the Appellant does not use its facilities to render service but such facilities are provided to the clients themselves, without any material on record.

3. That on the facts and circumstances of the case, the learned CIT(A) erred in upholding the order of the learned AO disregarding the binding order passed by the Hon'ble ITAT (in ITA No. 7340/Mum/2012) for the Appellant's own case for Assessment Year 2009-10.

2. Brief facts of the case are that the assessee is a tax resident of USA engaged in the business of providing managed hosting services. The assessee filed its return of income for assessment year 2012-13 on 01.07.2013 declaring total income at NIL. During the relevant FY the assessee has earned income of Rs. 2.61 Crore from provision of managed hosting services to customers in India namely Malyala Manorma Company and Cyber Media India Online Ltd. of Rs. 2.41 Crore and Rs. 20.86 Lakhs respectively. The assessee claimed that the consideration for

its managed hosting services is neither in the nature of fees for included service nor in the nature of royalty within the meaning of Article-12 of India-USA Double Taxation Avoidance Agreement (India-USA Tax Treaty). The assessee further claimed that the receipts are not taxable in India under Article-7 of India-USA Tax Treaty in absence of permanent establishment (PE) in India. Therefore, the consideration is not chargeable to tax in India as per the provision of India-USA Tax Treaty. The contention of assessee was not accepted by the Assessing Officer. The Assessing Officer issued show-cause vide order-sheet entry dated 06.01.2015 as to why the managed hosting services should not be treated as taxable royalty income as per the provision of section 9(1)(vi) read with Explanation (2)(iva) and Article-12(3)(b) of India-USA Tax Treaty. The assessee filed its reply dated 20.01.2015. In the replies furnished before the assessing Officer, the assessee contended that under the term of agreements the assessee engaged in providing managed hosting services in accordance with the term and condition providing such services. The assessee deploys industry standard hardware and software platforms at its Data Centre in the USA for necessity for operating their customers application. The assessee received payment for providing managed hosting services with all back up, maintenance, security and uninterrupted services and not for use of any equipment. The core transaction under the agreement is to provide access to the

data/application being hosted by the assessee, placed by the customer and the assessee does not develop the contents. It is the customer data which is hosted on the assessee server. The customer accesses its own data and does not access the assessee's database. The customer cannot assign or commercially exploit the use of managed hosting services to third party without assessee's permission. The assessee does not grant any rights/license and shall retain title to all rights in intellectual property in providing such services to its customers. The use of software is incidental in providing managed hosting services. The assessee received consideration for the rendition of services and there is no deployment of any process involved or does it involved transfer of any right or license in respect of any copy right. The consideration is not attributable to use any copyright or patent or trade mark or no how but is merely for providing certain set of services. The reply of assessee was not accepted. The Assessing Officer while passing the assessment order under section 143(3) r.w.s. 144C(3) held that the consideration received by the assessee for managed hosting services is for the use of or right to use equipment, therefore, the same is covered by the provision of section 9(1)(vi) as well as under Article-12 of India-USA Tax Treaty and chargeable to tax in India. On appeal before the ld. CIT(A), the action of Assessing Officer was upheld in taxing the consideration as royalty in India under Article-12 as well as under section 9(1)(vi) of the Income-

tax Act. Therefore, further aggrieved by the order of ld CIT(A), the assessee has filed the present appeal before us.

3. We have heard the submission of ld. Authorized Representative (AR) of the assessee and ld. Departmental Representative (DR) for the Revenue and perused the material available on record. At the outset of hearing, the ld. AR of the assessee submits that the ground of appeal is covered by the decision of Tribunal in assessee's own case for A.Y. 2009-10 in ITA No. 7340/M/2012 wherein it was held that the consideration received by assessee for providing managed hosting services is not for the use of or right to use of scientific equipment by the customer and the same is not taxable as royalty. The ld. AR further submits that again for A.Y. 2010-11 and 2011-12, the decision of Tribunal for A.Y. 2009-10 was followed. Therefore, the issue is squarely covered in favour of assessee.

4. On the other hand, the ld. DR for the revenue supported the order of lower authorities. The ld. DR submits that the assessee-company provides IT Solutions like managed hosting, cloud computing, collocation, Network connectivity and IT consulting supported by assessee's global data centre. The assessee delivers IT Infrastructures as services by combining cloud technology, a global network 50 data centre in North America, Europe and Asia automatic management and provisioning system and a best practices operation model. The ld. CIT(A) while passing the impugned order, the actual nature of services

rendered by assessee and its clients. From the order of ld. CIT(A), it is clear that while passing the order for earlier years the relevant parts of the agreement were not brought to the notice of Tribunal, which clearly demonstrate that it is not for the assessee which is providing services using its own equipment but equipment itself are being provided in the premises of customer, which, in term, remain at beck and call of the user. The assessee not only uses its highly sophisticated equipment to render services but such right to use is given to the client, who directly uses the equipments capabilities. Once, the web hosting rights are given to the clients, the clients have direct access to these facilities. The ld. DR further submits that the bench has based its observation on wrong set of facts contained in the order of ld. CIT(A). The ld. DR for the revenue further refers various clauses of service agreement recorded by ld. CIT(A) in para-6.2 of its order and would submit that the assessee is offering comprehensive package of software and hardware system which remain at the beck and call of the client. The assessee is in possession of various equipment and associated technology, software and high speed access, which together, result in replacement of client's infrastructure with the infrastructure provided by the assessee. The ld. DR explained that when these facilities grouped together, for which the assessee also undertake security and management responsibility, which is known as hosting services. This includes server, cloud space, internet access,

security procedure etc. and desired software for use of client. The maintenance of these equipments is carried out by assessee so as to ensure data security as well as for operational purpose. The entire set up at the contracted level of bandwidth or cloud space is in possession of the client with the assessee having obligation to facilitate the clients use. While providing infrastructure as a service there cannot be any suppression between the software and hardware. Both are integrated together and offered as a whole. The client needs the cloud space at all the times as well as data availability of the software at beck and call. The clients is not bothered about the location of data center or rack space, therefore, the claim of assessee that it render certain hosting services for use of equipment is incidental is not acceptable.

5. In the rejoinder submission, the ld. AR of the assessee submits that the copy of service agreement for the provision for managed hosting services was furnished by the assessee before the ld. CIT(A) as well as in Tribunal in A.Y. 2009-10. The ld. AR of the assessee furnished the copy of order of ld. CIT(A) dated 13.09.2012 for A.Y. 2009-10 and invited our attention that while adjudicating the issue for the said year, ld. CIT(A) in said year reproduced the relevant clause of the service agreement in para-4 of the order. The ld. AR further submits that service agreement was available on the record of appellate authority while adjudicating the appeal for A.Y. 2009-10. The Tribunal for A.Y. 2009-

10 after considering the nature of services detailed in the service agreement held that the equipments are not used by assessee for provisions of service to the clients. Therefore, the ld. AR submits that the submission of ld. DR that the clauses of services agreement was not considered or not brought in the notice of Tribunal is absolutely misplaced. The ld. AR submits that the consideration received by assessee for managed hosting services was from the same/common parties under the same agreement during A.Y. 2009-1`0, 2010-11, 2011-12 and the year under consideration i.e. 2012-13. The ld. AR further invited our attention for the order passed by ld. CIT(A) for A.Y. 2010-11 and would submits that the order was passed by same ld. CIT(A), wherein the similar reason as mentioned in the order of current year i.e. A.Y. 2012-13, he held the consideration to be in the nature of royalty income. However, the Tribunal in appeal for A.Y. 2010-11 followed the decision for A.Y. 2009-10 and decided the issue in favour of assessee. The ld. AR would submits that there being no change in the facts that the consideration received for managed hosting services and the same cannot be taxed as royalty either under the Income-tax Act or under India-USA Tax Treaty.

6. We have considered the rival submissions of the parties and gone through the orders of the lower authorities. We have also deliberated on the decision of Tribunal in assessee's own case for A.Y. 2009-10 in ITA

No. 7340/M/2012 dated 31st March 2016 and the decision for A.Y. 2010-11 & 2011-12 in ITA No. 5670 & 5671/M/2016 dated 13.08.2018. We have noted that the assessee has raised identical grounds of appeal in A.Y. 201-11 & 2011-12 except variation of figure. The Tribunal in appeal for A.Y. 201-11 & 2011-12 followed the decision of A.Y. 2009-10 and passed the following order:

> "7. We have heard both the counsel and perused the records. It transpires that the issue was decided in assessee's own case for assessment year 2009-10 by the Tribunal in ITA No. 7340/Mum/2012 vide order dated 31.03.2016. The Tribunal has held as under:
>
> > *6. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.*
> >
> > *7. We have noted that while the CIT(A) has given relief in the light of the provisions of the Indo US tax treaty as also the provisions of the Act, but limited grievance raised before us is with respect to the provisions of the Act. The issue so raised is purely academic in the sense that even if the grievance of the Assessing Officer is upheld, the findings on the treaty aspect will remain intact, and as the provisions of the Act come into play only when these provisions are more beneficial vis-a-vis the treaty provisions, the relief under the treaty provisions will continue to hold the field. The success of the Assessing Officer, even if he was actually entitled to the same on merits, would have been rather hollow.*
> >
> > *8. That, however, is not the only reason why the appeal must fail.*
> >
> > *9. We have noted that the very basis of the impugned addition is Assessing Officer's finding that the receipts in question were on account of use of scientific equipment, and, for that reason, giving rise to an income taxable under section 9(l)(vi] of the Act as also article 13[1](b) of the Indo US tax treaty. This finding, however, proceeds on the fallacy that when a scientific equipment is used by the assessee for rendering a service, the receipt will be construed as a receipt for use of scientific equipment. Undoubtedly, when the assessee receives an income on account of allowing a customer to use a scientific equipment, it does become taxable for the reason of its being characterized as such, but the use of a scientific equipment by the assessee, in the course of giving a service to the customer, is something very distinct from allowing the customer to use a scientific equipment. The true test is in finding out the answer to the fundamental question- is it the consideration for rendition of services, even though involving the use of*

scientific equipment, or is it the consideration for use of equipment simplicitor by the assessee? In the case of former, the consideration is not taxable, in the case of the latter, the consideration is taxable. In the case of Kotak Mahindra Primus Ltd Vs DDIT [(2007) 11 SOT 578 (Bom)], a coordinate bench, dealing with a situation in which the mainframe computer and the specialized software was used for rendering data processing services to an Indian entity, held so and observed that, "No part of this payment can be said to be for the use of specialized software on which data is processed or for the use of mainframe computer because the Indian company does not have any independent right to use the computer or even physical access to the mainframe computer, so as to use the mainframe computer or the specialized software." A payment cannot be said to be consideration for use of scientific equipment when person making the payment does not have an independent right to use such an equipment and physical access to it. In the present case also, what the assessee is providing is essentially web hosting service, though with the help of sophisticated scientific equipment, in the virtual world. The scientific equipment used by the assessee enable rendition of such a service, and such a use, which is not even by the Indian entity, is not an end in itself. In this view of the matter, even though the services rendered by the assessee to the Indian entities may involve use of certain scientific equipment, the receipts by the assessee cannot be treated as "consideration for the use of, or right to use of, scientific equipment" which is a sine qua non for taxability under section 9(l)(vi) read with Explanation 2 (iva) thereto.

10. In view of the above discussions, as also bearing in mind entirety of the case, we approve the conclusions arrived at by the learned C1T[A) and decline to interfere in the matter.

8. Since the facts are identical and it is not the case that the Hon'ble jurisdictional High Court has reversed this decision, we follow the same. Hence, we set aside the order of the authorities below and decide the issue in favour of the assessee."

7. Considering the decision of co-ordinate bench for A.Y. 2009-10, which was followed in A.Y. 2010-11 & 2011-12 and the assessee has derived its income/consideration received for managed hosting services from the same service agreement with the same parties in all years. Therefore, in our view, there is no variation in the facts for the year under consideration. The submission of ld. DR for the revenue that while deciding the appeal for A.Y. 2009-10 the Tribunal has not considered the

various clauses of service agreement to determine the exact nature of services is not acceptable. We have seen from the order of ld CIT(A) for AY 209-10, that the ld. CIT(A) has elaborately discussed the various clause of the service agreement in para-4 of its order, which was upheld by the Tribunal. It is not the case of revenue that for the year under consideration the assessee rendered its services under different module. Therefore, respectfully following the decision of co-ordinate bench, the grounds of appeal raised by assessee is covered in favour of assessee and against the revenue. No contrary decision of jurisdictional High Court on the similar issue is brought to our notice. Thus, the grounds of appeal raised by assessee are allowed.

8. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 15/03/2019.

Sd/-	**Sd/-**
R.C. SHARMA	**PAWAN SINGH**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai, Date: 15.03.2019
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Copy of the Order forwarded to :

1. Assessee
2. Respondent
3. The concerned CIT(A)
4. The concerned CIT
5. DR "I" Bench, ITAT, Mumbai
6. Guard File

BY ORDER,

Dy./Asst. Registrar
ITAT, Mumbai