

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

Before Sh. Amit Shukla, Judicial Member

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

ITA No. 391/Del/2017 : Asstt. Year : 2013-14

ITA No. 6668/Del/2016 : Asstt. Year : 2012-13

DCIT (International Taxation), Circle-3(1)(1), New Delhi	Vs	Qliktech International AB, C/o BMR & Associates LLP, 22 nd Floor, Building 5, Tower-A, DLF Phase-III, DLF Cyber City, Gurgaon-122002
(APPELLANT)		(RESPONDENT)
PAN No. AAACQ2234R		

Assessee by : Sh. Vishal Kalra, Adv.

Revenue by : Sh. N. K. Bansal, Sr. DR

Date of Hearing: 29.08.2019

Date of Pronouncement: 17.10.2019

ORDER

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

The present appeals have been filed by the revenue against the orders of the Id. CIT(A)-43, New Delhi dated 17.10.2016 and 24.11.2016.

2. Since, the issues involved in both the appeals are common, they were heard together and are being disposed off by common order.

3. In ITA No. 391/Del/2017, following grounds have been raised by the revenue:

"(i) Whether on the facts and in circumstances of the case, the Id. CIT (A) has erred in holding that receipts of the assessee from sale of software are not taxable as Royalty ignoring the fact that by selling software

the assessee has transferred the right to use of software.

(ii) Whether on the facts and in circumstances of the case, the Id. CIT (A) has erred in holding that receipts of the assessee from sale of software are not taxable as Royalty even when explanation 4 to section 9(1)(vi) of the Act clearly states that consideration in respect of transfer of all or any right for use or right to use a computer software (including granting of a license) irrespective of the medium through which such right is transferred is taxable as Royalty.

(iii) Whether on the facts and in circumstances of the case, the Id. CIT (A) has erred in holding that receipts of the assessee from sale of software are not taxable as Royalty relying upon the decision of Hon'ble Delhi High Court in the case of DIT Vs M/s Infracsoft (264 CTR 329) even when the department has not accepted the said order and has filed an SLP before the Apex Court.

(iv) Whether on the facts and in circumstances of the case, the Id. CIT (A) has erred in holding that the effect of amendment in section 9(1)(vi) brought about by the Finance Act 2012 cannot be read into a treaty relying upon the decision of Hon'ble Delhi High Court in the case of DIT Vs M/s Nokia Networks (358 ITR 259) even when the department has not accepted the said order and has filed an SLP before the Apex Court."

4. Brief facts of the case are that the assessee, is a company incorporated in Sweden and engaged in the business of sale of software products and rendering Information Technology ("IT") services. The business of the assessee included software materialization, marketing and support of the software material 'QlikView', for which it enjoys all intellectual property rights, such as patent, trademark and copyrights. The assessee has developed the said software in house. The assessee and the

resellers had agreed, as per the agreement entered, that the Reseller will promote and resell QlikTech products to the end users within the prescribed territory in accordance with the terms and conditions set forth in the agreement. The expression "end user" is defined in the agreement as "a third party licensed to use the QlikTech products pursuant to the Software End User License Agreement". The assessee entered into agreements with independent third party resellers / distributors as well as its subsidiary in India, QlikTech India Private Limited, for sale of software to them for the purpose of onward sales to end customers as per the distribution agreement. The assessee has received payments from India only through the sale of aforesaid software products. It is a fact on record that the Indian customers have withheld taxes from consideration for sale of software. The assessee had filed its Return of Income on November 29, 2014 declaring total income of INR Nil and claiming a refund of INR 62,22,957 on account of Tax Deducted at Source ("TDS") by the Indian customers. The Assessing Officer passed a draft assessment order under section 143(3) read with section 144C of the Act, determining the entire receipts, amounting to INR 6,22,12,740, from sale of software products, taxable as 'royalty' under Article 12 of the India - Sweden Double Taxation Avoidance Agreement ("DTAA or Tax Treaty") and under section 9(i)(vi) of the Act. Ultimately, the AO passed final assessment order under section 143(3) read with section 144C(3) of the Act on April 29, 2016, computing tax on gross receipts amounting to INR 62,21,274 at the rate of 10 percent as per the DTAA.

5. Aggrieved by the assessment order, the assessee preferred an appeal with the CIT(A) which held that the right to use, granted through licensing of software, does not fall within the meaning of 'royalty' as provided for in the domestic law or the DTAA. It was further held that what has been transferred by the assessee is neither the copyright in the software nor the use of the copyright in the software, but the right to use copyrighted material or article which is clearly distinct from the rights in the copyright.

6. In this background the points to be adjudicated would be

- a) Whether the receipts from sale of software be treated as royalty or not.
- b) Whether the effect of amendment in Section 9(1)(vi) brought about by the Finance Act, 2012 can be read into the treaty or not.

7. We have heard the arguments of both the parties and perused the material on record.

8. We find from the judgment of the Jurisdictional High Court, in the case of DCIT Vs Infrasoftware Ltd. 264 CTR 329 has elaborately explained as to what constitutes licensing agreement, its exclusivity, non-transferability, as to what constitutes a copyright and how the amounts paid for transfer of copyright and amounts paid for royalty defer in connection with the Article 7 and Article 12 of the DTAA. The judgments also dealt with the licenses, copyrights, loan rent sale, sub-license, transfer of copy of software as well as royalties. The judgments also considered the decision of the Hon'ble

Karnataka High Court in the case of Samsung Electronics Co. Ltd. with regard to copyright and royalty. The operative portion of the said judgment of the Hon'ble High Court of Delhi is as under:

"85. The Licensing Agreement shows that the license is non-exclusive, non-transferable and the software has to be uses 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 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, sublicensed 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.

86. The Licensing Agreement shows that the license is non-exclusive, non-transferable and the software has to be uses 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 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, sublicensed 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.

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 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.

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 of 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 and attached to the software product 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/licensee should acquire rights either in entirety or partially co-extensive with the owner/ transferor 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 copy righted software which by itself is an article and they have not acquired any copyright in the software. In the case of the Assessee company, the licensee to whom the Assessee company has sold/licensed the software were allowed to make only one copy of the software and associated support information for backup purposes with a condition that such copyright shall include Infracore copyright and all copies of the software shall be exclusive properties of Infracore. 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. copyright remains 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.

95. We have not examined the effect of the subsequent amendment to section 9 (1)(vi) of the Act and also whether the amount received for use of software would be royalty in terms thereof for the reason that the Assessee is covered by the DTAA, the provisions of which are more beneficial.

96. *The amount received by the Assessee under the licence agreement for allowing the use of the software is not royalty under the DTAA.*

97. *What is transferred is neither the copyright in the software nor the use of the copyright in the software, but what is transferred is the right to use the copyrighted material or article which is clearly distinct from the rights in a copyright. The right that is transferred is not a right to use the copyright but is only limited to the right to use the copyrighted material and the same does not give rise to any royalty income and would be business income.*

98. *We are not in agreement with the decision of the Andhra Pradesh High Court in the case of SAMSUNG ELECTRONICS CO. LTD (SUPRA) that right to make a copy of the software and storing the same in the hard disk of the designated computer and taking backup copy would amount to copyright work under section 14(1) of the Copyright Act and the payment made for the grant of the licence for the said purpose would constitute royalty. The license granted to the licensee permitting him to download the computer programme and storing it in the computer for his own use was only incidental to the facility extended to the licensee to make use of the copyrighted product for his internal business purpose. The said process was necessary to make the programme functional and to have access to it and is qualitatively different from the right contemplated by the said provision because it is only integral to the use of copyrighted product. The right to make a backup copy purely as a temporary protection against loss, destruction or damage has been held by the Delhi High Court in DIT v. M/s Nokia Networks OY (Supra) as not amounting to acquiring a copyright in the software.*

99. *In view of the above we accordingly hold that what has been transferred is not copyright or the right to use copyright but a limited right to use the copyrighted material and does not give rise to any royalty income."*

9. Since, the matter stands settled by the order of the Hon'ble High Court, we hereby uphold the Id. CIT (A) observation that the right to use granted through licensing of a software does not fall within the meaning of "Royalty" as provided for in the domestic law or the DTAA. Any consideration for the same is not taxable as Royalty under section 9(1)(vi) or the relevant DTAA. Thus what has been transferred by the appellant is neither the copyright in the software nor the use of the copyright in the software, but what is transferred is the right to use the copyrighted material or article which is clearly distinct from the rights in a copyright. The right that is transferred is not a right to use the copyright but is only limited, to the right to use the copyrighted material and the same does not give rise to any royalty income.

10. Regarding the applicability of amendment in Section 9(1)(vi) brought out by Finance Act, 2012, we find that this issue of applicability has been examined in the case of DIT Vs New Skies Satellite BV by the Hon'ble Delhi High Court in ITA 473/2012. The Hon'ble Court observed that the only manner in which change in position of the provisions of the treaty can be relevant only if such change is incorporated into the agreement itself and not otherwise. A change in executive position cannot bring about a unilateral legislative amendment into a treaty concluded between two sovereign states. It is fallacious to assume that any change made to domestic law to rectify a situation of mistaken interpretation can spontaneously further their case in an international treaty. Therefore, mere amendment to Section 9(1)(vi) cannot result in a change. It is imperative that such amendment is brought about in the

agreement as well. The Hon'ble High Court's observation is relevant to the instant case with regard to the amendment to the Act even though the judgment was given in the case of determination of royalty of payment of transponder fee, it adequately dealt with the issue of Section 9(1)(vi). The relevant extract of the said order read as under:

"74. Even when we look into the matter from the standpoint of Double Taxation Avoidance Agreement (DTAA), the case of the appellant gets boost. The Organization of Economic Cooperation and Development (OECD) has framed a model of Double Taxation Avoidance Agreement (DTAA) entered into by India are based. Article 12 of the said model DTAA contains a definition of royalty which is in all material respects virtually the same as the definition of royalty contained in clause (iii) of Explanation 2 to Section 9(1) (vi) of the Act. This fact is also not in dispute."

77. The Tribunal has discarded the aforesaid commentary of OECD as well as Klaus Vogel only on the ground that it is not safe to rely upon the same. However, what is ignored is that when the technical terms used in the DTAA are the same which appear in Section 9(1)(vi), for better understanding all these very terms, OECD commentary can always be relied upon. The Apex Court has emphasized so in number of judgments clearly holding that the well-settled internationally accepted meaning and interpretation placed on identical or similar terms employed in various DTAA's should be followed by the Courts in India when it comes to construing similar terms occurring in the Indian Income Tax Act....."

59. On a final note, India's change in position to the OECD Commentary cannot be a fact that influences the interpretation of the words defining royalty as they stand today. The only manner in which such change in position can be relevant is if such change is incorporated into the agreement itself and not otherwise. A change in executive position cannot bring about a unilateral legislative amendment into a treaty concluded between two sovereign states. It is fallacious to assume that any change made to domestic law to rectify a situation of mistaken interpretation can spontaneously further their

case in an international treaty. Therefore, mere amendment to Section 9(1)(vi) cannot result in a change. It is imperative that such amendment is brought about in the agreement as well. Any attempt short of this, even if it is evidence of the State's discomfort at letting data broadcast revenues slip by, will be insufficient to persuade this Court to hold that such amendments are applicable to the DTAAAs."

11. From the above judgment, it can be concluded that the amendment in the DTAA unilaterally cannot be enforced, hence, the provisions of Section 9(1)(vi) are not applicable to the instant case. The contention of the Assessing Officer cannot be upheld.

12. In the result, both the appeals of the revenue are dismissed.

Order Pronounced in the Open Court on 17/10/2019.

Sd/-

(Amit Shukla)
Judicial Member

Dated: 17/10/2019

Subodh

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