

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI 'I' BENCH, MUMBAI**

**[Coram: Pramod Kumar (Vice President)
And Ravish Sood (Judicial Member)]**

ITA No. 7300/Mum/2016
Assessment year: 2014-15

Reliance Corporate IT Park Ltd. **Appellant**
*Building No.4,5 TTC Industrial Area,
Thane-Belapur Road, Ghansoli,
Navi Mumbai 400701
[PAN: AABCD7169H]*

Vs

Deputy Commissioner of Income Tax **Respondent**
**(IT) 4(1)(1), Room No. 1712,
17th Floor, Air India Building,
Nariman Point, Mumbai 400021**

Appearances by

Dr. Sunil Moti Lal *for the appellant*
Avaneesh Tiwari *for the respondent*

Date of concluding the hearing: September 19, 2019
Date of pronouncement : December 10, 2019

ORDER

Per Pramod Kumar, VP:

1. By way of this appeal, the assessee appellant has challenged correctness of learned CIT(A), order dated 2nd August 2016, in the matter of ascertainment of tax withholding liability under section 195 of the Income Tax Act 1961, during the period relevant to the assessment year 2014-15.

2. Grievances raised in the appeal are as follows:

Ground No. 1: On the facts and circumstances of the case and in law, the learned Commissioner of Income-tax (Appeals) ['CIT(A)'] has erred in holding that the consideration paid by the Appellant to Exida Asia Pacific Pte. Limited represents Royalty as per Income-tax Act, 1961 ('Act') as well as the India-Singapore Double Taxation Avoidance Agreement ('DTAA').

Ground No. 2: On the facts and circumstances of the case and in law, the learned CIT(A) has erred in holding that the Appellant is liable to withhold tax under section 195 of the Act at the rate specified in the DTAA or Act, whichever is beneficial.

3. To adjudicate on the above grievances, only a few material facts need to be taken note of the assessee before us is a domestic company engaged in the business of providing support services. During the relevant previous year, the assessee has made payment of us Rs. 1,58,062/- to Exida Asia Pacific Pte. Ltd., Singapore for licence fees C25 concurrent licences for 'exSILentia version 3 ultimate bundle'. While the assessee deducted tax at source @10%, while making the remittance, the assessee preferred an appeal under section 248 against the TDS liability, claiming that no tax is deductible from licence fee paid for software. Learned CIT(A) rejected the contentions of the assessee, and, in the operative portion of the order, observed, inter alia, as follows:-

6. The submission made by the appellant has been examined. It is seen that the appellant has made a payment to M/s Exida for obtaining a license to use exSilentia 3.0 Software by the appellant. The claim of the appellant is that the software is an off-the-self software capable of being used independently and hence, what has been granted by Exidia is a copy of the copyrighted article and not a right to use the copyright. It has claimed that purchase of copyrighted article ought to be taken as sale of a product not liable to be treated as being in the nature of royalty and hence, not liable to tax in India. For this, it has extensively relied on

the OECD guidelines, the Australian Tax Office Guidance, the American IRS guidelines and various judicial pronouncements.

6.1 The purchase invoice of the software has been examined. It represents consideration paid by the appellant for Software License Fees for 25 concurrent ultimate licenses. The purchase accordingly relates to 'exSILentia Version 3 Ultimate bundle' sold by Exida Asia Pacific Pte Ltd. This is server license which allows the appellant Two basic issues arise for consideration which will be relevant for determination of its nature -

i. Whether the purchased software represents sale of a copyrighted article and hence not liable to be treated as royalty under India Singapore DTAA; or

ii. Whether even if the purchase represents sale of copyrighted article, it is required to be treated as royalty as concluded by the AO in his order.

Clearly, if the character of the license is such that the purchase does not represent sale of copyrighted article, there would not be any need to discuss the various issues raised by the appellant with respect to the character of copyrighted article as against right to a copyright.

6.2 The appellant has purchased a server license for a soft ware to 'exSILentia Version 3 Ultimate bundle". The character of the software has been analyzed based on information given on the website of the company to determine the character of the software. As per the Software License Agreement, "The software is owned by exida and is protect eel by copyright laws and international copyright treaties, as well as other intellectual property laws and treaties. THE SOFTWARE IS LICENSED. NOT SOLD."

Exsilentia is an integrated safety lifecycle engineering tool offered by Exida Asia Pacific Pte Ltd. Singapore, predominantly used for equipment design and safety integrity level (SIL) verification. The exsilentia version 3 software is sold in various formats - it is available as a single independent unit (windows based) or it can be accessed through the infra-network of the purchaser through Citrix® platform or can be accessed online. The 'Ultimate' version of the software comprises of a right to use safety related databases of the seller being in the nature of Exida Safety Equipment Reliability Handbook Viewer and a Proprietary Equipment Reliability Database

in addition to SERH. These databases are specific to the online/intranet version with Citrix® platform.

6.4 Hence, while the plain standalone version of exsilia software is in the nature of an independent software, the enterprise version is not so. There is a critical difference between the two as significant proprietary databases are allowed to be accessed by the enterprise Versions. Clearly the license fee paid by the purchaser not only relate to the cost of software but also for use or right to use such proprietary information.

6.5 Keeping in view the overall nature of the software license acquired by the appellant, it is noticed that this does not represent off-the-self or shrink wrapped software but software access alongwith database access which enables the appellant to conduct Safety Integrity Level Verification (SILver) by using these databases and handbooks. These accesses change the character of the software acquired by the appellant and it no longer merely remains a standalone independent software product sale as claimed by the appellant. It is no longer sale of a copyrighted article but payment for the use of databases and suitable scientific manipulating (design/analysis) tools provided alongwith. The India Singapore DTAA defines Royalty to be;

Article 12(3) the term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use:

- (a) any copyright of a literary, artistic or scientific work, including cinematograph film or films, or tapes used for 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 front the alienation of any such right, property or information;*
- (b) any industrial, commercial or scientific equipment, other than payments derived by an enterprise from activities described in paragraph 4(b) or 4(c) of Article 8.*

6.6 In light of the specific facts of this case, the dispute with respect to whether the license represents right to a copyrighted article or a right to use the copyright itself does not arise. The payment represents a payment for "use or right to use any copyright of a design or model information concerning

industrial, commercial or scientific experience. It is clear that this is not a case of sale of software per se. In light of these facts, there is hardly any need to into the dispute of 'copyright vs copyrighted article' although I find no reason or justification for the reliance placed by the appellant on the Statues of US, Australia and OECD rather than the DTAA and the Indian Income Tax Act.

4. Aggrieved, assessee is in appeal before us.

5. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of applicably legal position.

6. We find that the basic reasoning adopted by the learned CIT(A), for holding that the payment for software licence is royalty, is the access to "significant proprietary database" being allowed to the assessed by the software in question. However, we find that assessee to database, in the context of materially similar DTAA provision, has been held to be outside the ambit of 'royalty'. While holding so, the coordinate bench, in the case of ITO vs Cadila Healthcare Ltd. [(2017) 162 ITR 575 (Ahd)] has observed as follows:-

17. We find that as the treaty provision unambiguously requires, it is only when the use is of the copyright that the taxability can be triggered in the source country. In the present case, the payment is for the use of copyrighted material rather than for the use of copyright. The distinction between the copyright and copyrighted article has been very well pointed out by the decisions of Hon'ble Delhi High Court in the case of DIT Vs Nokia Networks OY [(2013) 358 ITR 259 (Del)]. In this case all that the assessee gets right is to access the copyrighted material and there is no dispute about. As a matter of fact, the AO rightly noted that 'royalty' has been defined as "payment of any kind received as a consideration for the use of, or right to use of, any copyright of literary, artistic or scientific work" and that the expression "literary work", under section 2(o)

of the Copyright Act, includes 'literary database' but then he fell in error of reasoning inasmuch as the payment was not for use of copyright of literary database but only for access to the literary database under limited non exclusive and non transferable licence. Even during the course of hearing before us, learned Departmental Representative could not demonstrate as to how there was use of copyright. In our considered view, it was simply a case of copyrighted material and therefore the impugned payments cannot be treated as royalty payments. This view is also supported by Hon'ble Bombay High Court's judgment in the case of DIT Vs Sun and Breadstreet Information Services India Pvt. Ltd [(2011) 318 ITR 95 (Bom)].

7. When database access by itself does not result in taxation as royalty, such database access being coupled with software licence cannot bring the software hence consideration within the scope of royalty. Nothing, therefore, turns on the reasoning adopted by the learned CIT(A).

8. As per the taxation of payment for licencing of software, we find that the issue is covered in favour of the assessee by a coordinate bench decision in the case of ADIT vs TII Team Telecom International Ltd. [12 ITR (Tri) 688 (Mum)] whereas, dealing with materially similar issue, has observed as follows:-

14. It is an admitted position that the assessee did not have any permanent establishment in India, in terms of the provisions of Article 5 of the tax treaty, and, accordingly, the assessee cannot be held liable to be taxed in respect of business profits, under Article 7, on supply of software in question. The case of the revenue really rests on taxability under Article 12 which provides as follows:

"Royalties.-(1) Royalties arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

(2) However, such royalties may also be taxed in the Contracting State in which they arise, and according to the laws of that State, but if the recipient is the beneficial owner of the royalties, the tax so charged shall not exceed 10 per cent of the gross amount of the royalties.

(3) The term royalties as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience.

(4) The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the royalties, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties arise, through a permanent establishment situated therein, or perform in that other State independent personal services from a fixed base situated therein, and the right or property in respect of which the royalties are paid is effectively connected with such permanent establishment or fixed base. In such case, the provisions of Article 7 or Article 15, as the case may be, shall apply.

(5) Royalties shall be deemed to arise in a Contracting State when the payer is that State itself, a political sub-division, a local authority or a resident of that State. Where, however, the person paying the royalties, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the liability to pay the royalties was incurred, and such royalties are borne by such permanent establishment or fixed base, then such royalties shall be deemed to arise in the State in which the permanent establishment or fixed base is situated.

(6) Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the royalties, having regard to the use, right or information for which they are paid, exceeds the amount which would

have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Convention."

15. In terms of the provisions of Article 12(3) of the Indo Israel tax treaty, royalty is defined, for the purposes of this tax treaty, as "payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience". The question then arises whether a payment for computer software cannot be a payment for use of or right to use of 'a copyright of literary, artistic or scientific work, including cinema photographic film', and, while examining this question, it is important to bear in mind the fact that there is a specific mention about the use "of" copyright. The only other clause in which payment for software could possibly fall is "consideration for use of, or right to use of, a "process". Let us examine these two aspects of the definition of 'royalty' under the India Israel tax treaty.

16. As regards the question whether the payment for software could be treated as payment for "use of, or the right to use, any copyright of literary, artistic or scientific work", we find that this issue directly came up for consideration of a Special Bench of this Tribunal in the case of Motorola Inc. (supra). That was a case in which the Special Bench had an occasion to decide whether payment for software amounts to 'royalty', for the purposes of India Sweden tax treaty which incidentally is the same as in Indo Israel tax treaty and which also defines royalty as "payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience". The Special Bench, after a very erudite discussion on various facets of the issue before them, concluded that "we hold that the software supplied was a copyrighted article and not a copyright right, and

the payment received by the assessee in respect of the software cannot, therefore, be considered as royalty either under the IT Act or the DTAA". Right now we are only concerned with the provisions of the tax treaty, and we have noticed that the provisions of tax treaty as before the Special Bench are exactly the same as before us in this case. The issue, therefore, as to whether payment for supply of software can be viewed as a payment for copyright or not is no longer res integra. The Special Bench has decided this issue in favour of the assessee, and the views so expressed by the Special Bench, being from a higher forum than this division bench, are binding on us. In any case, as the provisions of Article 12(3) specifically provide, what is liable to be treated as royalty is payment for "use of, or the right to use, any copyright of literary, artistic or scientific work", and the connotations of "use of copyright" of a work are distinct from the use of a copyrighted article. The meaning of "use of copyright of a work" cannot be treated as extending to "use of a copyrighted work" as well, as it would amount to doing clear violence to the words employed by the treaty. Copyright is one thing, and copyrighted article is quite another thing. To give a simple example, when a person is using a music compact disc, that person is using the copyrighted article, i.e. the product itself, and not the copyright in that product. As held by the Special Bench, in Motorola Inc. case (supra), the four rights which, if acquired by the transferee, constitute him the owner of a copyright right, and these rights are :

(i)	The right to make copies of the computer programme for purposes of distribution to the public by sale or other transfer of ownership, or by rental, lease, or lending.
ii)	The right to prepare derivative computer programmes based upon the copyrighted computer programme
iii)	The right to make a public performance of the computer programme.
iv)	The right to publicly display the computer programme."

17. It is not even revenue's case that any of these rights have been transferred by the assessee, on the

facts of this case, and, for this reason, the payment for software cannot be treated as payment for use of copyright in the software. As we hold so, we may mention that in the case of Gracemac Corpn. (supra), a contrary view has been taken but that conclusion is arrived at in the light of the provisions of clause (v) in Explanation 2 to section 9(1)(vi) which also covers consideration for "transfer of all or any rights (including the granting of a licence) in respect of any copyright, literary, artistic or scientific work" - a provision which is clearly larger in scope than the provision of Article 12(3) of the Indo Israel tax treaty. The word "of" between 'copyright' and 'literary, artistic or scientific work' is also missing in the statutory provision. The treaty provision that we are dealing with are thus certainly not in pari materia with this statutory provision, and, by the virtue of section 90(2) of the Act, the provisions of India Israel tax treaty clearly override this statutory provision. In GracemacCorpn. case (supra), the coordinate bench was of the view that the provisions of the applicable tax treaty and the Income-tax Act are "identical" - a position which does not prevail in the situation before us. We, therefore, see no reasons to be guided by Gracemac Corpn. case (supra). The next issue that we need to consider is whether a payment for software can be said to be a payment for "process" as a computer program is a nothing but a set of instruction lying in the passive state and this execution of instructions is 'a process' or 'a series of processes'. No doubt, in terms of the provisions of section 2(ffc) of the Indian Copyright Act, 1957, a computer program, i.e., software, has been defined as "a set of instructions expressed in words, codes, schemes or in any other form, including a machine readable medium, capable of causing a computer to perform a particular task or achieve a particular result", but the moot question is as to what is that a customer pays for when he buys, or to put it in technical terms 'obtains licence to use' the software - for the process of executing the instructions in the software, or for the results achieved on account of use of the software. To draw an analogy, it is akin to a situation in which a person hires a vehicle, and the question could be as to what does he pay for - for the use of the technical know-how on the basis of which vehicle operates, or for the use of a product which carries passengers or goods from one place to another. The answer is obvious. When you pay for use of vehicle, you actually pay for a product which carries the passengers or goods from one place to another and not the

technical know-how on the basis of which such a product operates. Same is the case with the software, when someone pays for the software, he actually pays for a product which gives certain results, and not the process of execution of instructions embedded therein. As a matter of fact, under standard terms and conditions for sale of software, the buyer of software is not even allowed to tinker with the process on the basis of which such software runs or to even work around the technical limitations of the software. In *Asia Satellite Telecommunications Ltd. v. Dy. CIT* [2003] 78 TTJ 489, 85 ITD 478 (Delhi), a coordinate bench of this Tribunal did take the view that when an assessee pays for transponder hire, he actually pays for the a process inasmuch as transponder amplifies and shifts the frequency of each signal, and, therefore, payment for use of transponder is in fact a payment for process liable to be treated as 'royalty' within meanings of that expression under Explanation 2 to section 9 (1)(vi) of the Income-tax Act. However, when this decision came up for scrutiny of Hon'ble Delhi High Court, in the case reported as *Asia Satellite Telecommunications Co. Ltd. v. CIT* [2011] 332 ITR 340/ 197 Taxman 263. Their Lordships, after a very erudite and detailed discussion, concluded that "we are unable to subscribe to the view taken by the Tribunal in the impugned judgment on the interpretation of section 9(1)(vi) of the Act". It cannot, therefore, be open to us to approve the stand of the revenue to the effect that the payment for software is de facto a payment for process. That is a hyper technical approach totally divorced from the ground business realities. It is also important to bear in mind the fact that the expression 'process' appears immediately after, and in the company of, expressions "any patent, trade mark, design or model, plan, secret formula or process". We find that these expressions are used together in the treaty and as it is well settled, as noted by Maxwell in *Interpretation of Statutes* and while elaborating on the principle of *noscitur a sociis*, that when two or more words which are susceptible to analogous meaning are used together they are deemed to be used in their cognate sense. They take, as it were, their colours from each other, the meaning of more general being restricted to a sense analogous to that of less general. This principle of interpretation of statutes, in our considered view, holds equally good for interpretation of a treaty provision. Explaining this principle in more general terms, a very distinguished former colleague of ours Hon'ble Shri M.K. Chaturvedi, had, in an article 'Interpretation of Taxing

Statutes' (AIFTP Journal: Vol. 4 No. 7, July, 2002, at p. 7), put it in his inimitable words as follows :

"Law is not a brooding omnipotence in the sky. It is a pragmatic tool of the social order. The tenets of law being enacted on the basis of pragmatism. Similarly, the rules relating to interpretation are also based on common-sense approach. Suppose a man tells his wife to go out and buy bread, milk or anything else she needs, he will not normally be understood to include in the terms "anything else she needs" a new car or an item of jewellery. The dictum of ejusdem generis refers to similar situation. It means of the same kind, class or nature. The rule is that when general words follow particular and specific words of the same nature, the general words must be confined to the things of same kind as specified. Noscitur a sociis is a broader version of the maxim ejusdem generis. A man may be known by the company he keeps and a word may be interpreted with reference to the accompanying words. Words derive colour from the surrounding words."

18. Viewed in this perspective, and taking note of lowest common factors in all the items covered by definition of the expression 'royalty' in Article 12(3), the 'process' has to be in the nature of know-how and not a product. In this view of the matter, and in view of Hon'ble Delhi High Court's declining to uphold the coordinate bench's decision in the case of Asia Satellite Telecommunication Co. Ltd. (supra), we are of the considered view that the payment for software, by no stretch of logic, can be treated as a payment for "a process" liable to be taxed as royalty. This is precisely what was held by a coordinate bench of this Tribunal in the case of Sonata Information Technology Ltd. (supra), though for different reasons.

9. Respectfully following the above views, we hold that the payment for licence fee of software is not taxable in nature. No contrary decision, which is binding in nature, has been cited before us.

10. In view of the above discussions, as also hearing in mind entirety of the case, we uphold the plea of the assessee and hold that no tax was deductible from remittance in question.

11. In the result, the appeal is allowed. Pronounced in the open court today on the 10th of December, 2019

Sd/-
Ravish Sood
(Judicial Member)

Sd/-
Pramod Kumar
(Vice President)

Mumbai, dated the 10th of December, 2019

Nishant Verma Sr.PS

Copies to: (1) The appellant (2) The respondent
(3) CIT (4) CIT(A)
(5) DR (6) Guard File

By order

Assistant Registrar
Income Tax Appellate Tribunal
Mumbai benches, Mumbai