IN THE INCOME TAX APPELLATE TRIBUNAL
"I" Bench, Mumbai
Before Shri Shamim Yahya (AM) & Shri Pavan Kumar Gadale (JM)

I.T.A. Nos. 6064, 6065, 6066 and 6067/Mum/2019
(Assessment Years : 2009-10 to 2012-13)

Shell India Markets Private Limited [Successor of Shell Technology India Pvt.Ltd.] Trent House, First Floor, G Block, Plot NO.C-60, Bandra Kurla Complex, Bandra East Mumbai-400 051 PAN : AAICS1404P	Vs.	ITO(TDS) Large Tax Payer Unit World Trade Centre, 29th Floor, cuffe Parade Mumbai-400 005
(Appellant)		(Respondent)

Assessee by	Shri Madhur Agrawal
Department by	Shri Vijay Kumar G.Suramanyam
Date of Hearing	30.06.2021
Date of Pronouncement	24 .09.2021

O R D E R

Per Shamim Yahya (AM) :-

These are Assessee's appeals directed against respective orders of learned CIT(A) for respective assessment years.

2. Since the issues are common and connected and the appeals were heard together, these have been consolidated and disposed off together for the sake of convenience.

3. Since, grounds are identical, we are referring to grounds from ITA No. 6064/Mum/2019 for AY 2009-10. The grounds of appeal are read as under:-

Ground No. 1: License fee for use of HR software treated as royalty under the Act / Article 12 of the India-Netherlands tax treaty

1.1 On the facts and in the circumstances of the case, the learned CIT(A) has erred on the facts and in law and erred in confirming the action of the Income Tax Officer (TDS), LTU, Mumbai('TDS Officer') in holding that the payments made by the Appellant to Shell International BV ('SIBV') towards license fee for use of HR software (pursuant to Service Order 2) constitutes 'royalty' under section 9(l)(vi) of the Act and Article 12 of India-Netherlands tax treaty.

1.2 On the facts and in the circumstances of the case, the learned CIT(A) failed to appreciate that the payment made by the Appellant was for the "use of copyrighted article' as compared to 'use of copyright' and accordingly, such payments cannot be considered as 'royalty'.

Ground No. 2: Payments towards Ongoing support services treated as royalty under the Act / Article 12 of the India-Netherlands tax treaty

2.1 On the facts and in the circumstances of the case, the learned CIT(A) has erred on the facts and in law and erred in confirming the action of the TDS Officer in holding that the payments made towards Ongoing support services (pursuant to Service Order 2) towards updation and maintenance of the common HR platform constitutes 'royalty' under section 9(l)(vi) of the Act as well as Article 12 of the India-Netherlands tax treaty and thus liable to withholding tax in India;

2.2 On the facts and in the circumstances of the case, the learned CIT(A) failed to appreciate that the payments were neither for any copyright nor any copyrighted article but in the nature of routine support services and hence the same did not constitute 'royalty'.

Ground No. 3: Levy of interest under section 201 (A) of the Act

3.1 On the facts and in the circumstances of the case, the learned CIT(A) in the order dated 30 July 2019 has erred in concluding that the Appellant has filed separate appeal against the rectification order passed by the AO.

3.2 On the facts and in the circumstances of the case, the learned CIT(A) erred in not adjudicating ground relating to error made by the TDS Officer in computing interest under section 201(1A) of the Act.

Each of the above grounds are independent and without prejudice to the other grounds of appeal preferred by the Appellant.

4. Brief facts of the case are that AO in this case initiated proceedings u/s. 201 r.w.s. 195 of I.T.Act, 1961 vide notice dt. 11.10.2012 and the assessee was requested to produce further details pertaining to F.Y. 2008-09 to 2011-12 alongwith supporting documents in respect of the payments made to M/s. Shell International B.V. (SIBV) under the (1) Terms of agreement of the Service Order 1 for availing the HR helpdesk support services and ongoing support services, being cost re-charge & (2) Terms of agreement of the Service Order 2 for license to use the HR software developed by SIBV.

5. Against the same assessee made following submissions:-

> "In the said submissions, it is stated that assessee is in business of providing information technology enabled services in relation to scientific and technical consultancy services. SIBV is a company incorporated in and tax resident of Netherlands. It is engaged in the business of providing services globally to Shell group entities. It has neither has any control or management in India nor a business presence in India through a Permanent Establishment. Thus, as per provisions of Sec. 6(3) of the Act, SIBV is a non-resident assessee for the purposes of the Act. Assessee Company has entered into (1) Service Order 1 for Human Resource (HR) help desk support services/and (2) Service Order 2 for Shell People On-going basic charges with SIBV."

6. The AO accepted the submissions for Service Order 1. However for Service Order 2, he rejected the assessee's plea. AO concluded as under:-

> " In the light of the above discussion, assessee's claim that it has acquired mere user right in copyrighted article and thus the payments in question are not to be considered as royalty, is not tenable. As there is transfer of copyright right between the assessee and the SIBV, the payments made by the assessee to the SJBV for use of license fall under the purview of 9(l)(vi) of the Income Tax Act, as royalty payment, and hence chargeable to tax in India.
> The Hon'ble High Court of Karnataka in the case of CIT Vs Samsung Electronics Ltd. & Others (ITA No. 2808 of 2006 & Others) decided the similar issue and held that payment for payment to non-resident for software is 'royalty'.

Further through Finance Bill, 2012, the explanation 48s 5 are inserted with retrospective effect from 01/06/1976 to clause [vi] to sub-section (1) of Section 9 of the Act, which are as follows:

> Explanation 4.—*For the removal of doubts, it is hereby clarified that the transfer of all or any rights in respect of any right, property or information includes and has always included transfer of all or arty right far use or right to use a computer software (including granting of a licence} irrespective of the medium through which such right is transferred.*
> Explanation 5.—for *the removal of doubts, it is hereby clarified that the royalty includes* and *has always included consideration in respect of any right, property or information, whether or not—*
> *(a.) the possession or control of such right, property or information is with the payer;*
> *(b) such right, property or information is used directly by the payer;*
> *(c) the location of such right, property or information is in India.*

It makes it clear that the payment for the use of software amounts to royalty. The assessee claimed that these amendments cannot be applied to acceptable, these amendments are only clarificatory in nature and cannot be said to enlarging the scope of the royalty.

Conclusion:

> From the above discussion, it has been proved that the payment made by the *assesses* to SIBV, as listed above, during the F.Y.s 2008-09 to 20} 1-12 for the Shell People ongoing basic charges (Service Order-2), constitute Royalty, both under Sec 9(1) (vi)'of the Income Tax Act, 1961, and under the Double Taxation Avoidance Agreement between India and Netherlands, and is chargeable to tax in India. Sec. 195 of the Income Tax Act, 1961, casts an obligation on the person making payment of the sums chargeable to tax to a foreign company to deduct tax at the time of making such payment, or at the time of crediting the amount, whichever is earlier. But no tax had been deducted by the assessee thereon either at the time of crediting or subsequently. As the assessee has failed to discharge its obligation to deduct tax at source as stipulated u/s. 195 of the Income Tax Act, 1961, as per the provisions of Sec.201(l) of the Income Tax Act, 1961, for the Asst. Years 20O9-10 to 2012-13, I am holding the assessee as assessee in default in respect of tax not deducted at source in respect of royalty payable to the SIBV listed above. It is liable to pay to tax deductible in this regard along with the interest u/s. 201(1A).”

7. Upon assessee's appeal Ld.CIT(A) confirmed the AO's action. Against the above order assessee is in appeal before us.

8. We have heard both the parties and perused the record. Ld. Counsel of the assessee submitted that issue is squarely covered by the decision of the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Private Limited v. CIT 125 taxmann.com 42.

9. Per contra Ld. DR submitted that the above Hon'ble Supreme Court decision may be applicable only up to AY 2009-10 to 2011-12. However, for AY 2012-13, the Hon'ble Supreme Court decision is not applicable. The Ld. DR has summarized his submissions as under:-

> "The appeals of the assesse arise from a consolidated order u/s 201(1} & 201(1A) rws 195 of the I T Act 1961 dated 28th March 2013.
>
> The AO has held the payments made in pursuance to Service Order 2 to M/s Shell International B V, a Netherlands company, as Royalty. These payments fall into two categories
>
> (a) license fee for use of HR software developed and maintained by Shell International BV
> (b) fee for ongoing support services related to the HR software.
>
> The AO concluded that the payments under Service Order 2 on the basis of Explanation 4 to section 9(l)(vi) of the Act. The AO has taken support of the fact that the license granted is a license within the meaning of section 30 of Copyright Act, The AO has also placed reliance on the decision of Hon. Karnataka High Court in the Case of CIT v Samsung Electronics Ltd & others (ITA No 2808 of 2006 & others)
>
> The Id.CIT(A) confirmed the order of the AO for all the four assessment years.
>
> Case of the revenue :Taxation under the I T Act, 1961: The assessment year is AY 2012-13 and therefore the provisions of Explanation 4 (Inserted by Finance Act 2012 wref 1/6/1976) to Section 9(l)(vi) are definitely applicable. The provisions of Explanation 4 are reproduced below for ready reference :

Explanation 4 - For the removal of doubts, it is hereby clarified that the transfer of all or any rights in respect of any right, *property or information includes and has always included 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, [emphasis supplied].*

Thus, the payments made for the license for use of HR Software are, therefore, squarely covered by the provisions of Explanation 4 to section 9(l)(vi) of the Act, and are in the nature of Royalty. The payments for ongoing support services related to HR Software are also in the nature of Royalty considering that the said support services are in connection with the provision of HR Software in terms of Clause (vi) of Explanation 2 to Section 9(l)(vi) of the Act.

Taxation under the India Netherlands DTAA : Article 12 of India Netherlands DTAA governs the taxation of Royalties arising in these two countries. For the sake of ready reference, the same is reproduced below :

[ARTICLE 12
ROYALTIES AND FEES FOR TECHNICAL SERVICES

1.Royalties and fees for technical services 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 and fees for technical services may also be taxed in the Contracting State in which they arise and according to the laws of that State, but if I he recipient is the beneficial owner of the royalties, or fees for technical services, the tax so charged shall not exceed 10 per cent of the gross amount of the royalties or the fees for technical services.]
3. The competent authorities of the States shall by mutual agreement settle the mode of application of paragraph 2.
[4. 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]
5. For purposes of this Article, "fees far technical services" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services:

(a) are ancillary and subsidiary to the application or *enjoyment of the right, property or information for which a payment described in paragraph 4 of this Article is received; or*
(b) make available technical knowledge, experience, skiti, know-how or processes, or consist of the development and transfer of a technical plan or technical design.
[6. .....
It is humbly submitted that paragraph 2 of Article 12 of India Netherlands DTAA permits the taxation of Royalty in the contracting state (ie. India) and according to the laws of the State (ie. India). Thus, your honours may kindly notice that Paragraph 2 vests

the Tax authorities with the jurisdiction to tax Royalty under the domestic laws ie. Income Tax Act 1961.

Then the question arises as to which domestic law is to applied ie. The domestic law as it stood at the time the DTAA is signed or the domestic law as it stands when the transaction occurs. The former is the Static approach while the latter is Dynamic Approach. If the Static Approach is adopted then the very purpose of the DTAA permitting the taxation as per Domestic Law gets defeated and becomes redundant.

The Hon. Bombay High Court in the case of Siemens **AG 310 ITR 320 (Bombay)** has, in para **22** of its judgment has disapproved the Static Approach and stated

"22. .....While considering the DTAA the expression "law in force" would not only include a tax
already covered by the treaty but would also include any other tax as taxes of a substantially similar character subsequent to the date of the agreement as set out in article l(2). Considering the express language of article 1(2) it is not possible to accept the broad proposition urged on behalf of the assessee that the law would be the law as was applicable or as defined when the DTAA was entered into. ....."
It is humbly submitted your honours, that this decision has not been overturned by Hon. Supreme Court.

The Hon. Delhi High Court in the case of New Skies Satellite BV [2016] 68 taxmann.com 8 (Delhi) in para 50 of its order has also taken note of the decision of Hon Bombay High court in the case of Siemens AG [supra] but refrained from disapproving the Ambulatory approach. The Hon Delhi High Court held as under :

50. There are therefore two sets of circumstances. First, where there exists no definition of a word in issue within the DTAA itself, regard is to be had to the laws in force in the jurisdiction of the State called upon to interpret the word. The Bombay High Court seems to accept the ambulatory approach in such a situation, thus allowing for successive amendments into the realm of "laws in force". We express no opinion in this regard since it is not in issue before this Court. .....

In this regard, it is humbly submitted, that the decision of Hon. Jurisdictional High Court is binding on all the authorities below.

Earlier Orders in the case of the assesse :

The assessee had submitted the order of Hon. Mumbai Tribunal in ITA No 926 & 927/Bang/2022 dated 8.1.2018. Your honor, it is humbly submitted that this order pertains to AY 2009-10 and
2010-11 and not to post amended periods whereas the present appeal is for AY 2012-13.

Decision of Hon. Supreme Court in the case of Engineering Analysis Centre of Excellence (P) Ltd [2021] 125 taxmann.com 42 (SC)].

Your honors may kindly see that the Hon. Apex Court has held that the payments in pursuance to

"168.....distribution agreements/End User License Agreements ***in the facts of these cases*** *do*

not create any interest or right in such distributors/end-users, which would amount to the use of or right to use any copyright. The provisions contained in the Income Tax Act (section 9(1)(vi) alongwith explanations 2 and 4 thereof), which deal with royalty, not being more beneficial to the assesses, have no application in the facts of these cases.

169 Our answer to the question posed before us, is that the amounts paid by resident Indian end-users/distributors to nonresident computer software manufacturers/suppliers, as consideration for the resale/use of the computer software through EULAs/distribution agreements, is not the payment of royalty for the use of copyright in the computer software and that the same does not give rise to any income taxable in India, as a result of which the persons referred to in Section 195 of the Income Tax Act were not liable to deduct any TDS under section 195 of the Income Tax Act. The answer to this question will apply to all four categories of cases enumerated by us in paragraph 4 of this judgment."

It is humbly submitted, that this decision is to be seen in the context in which it was delivered especially as the operative part of the decision refers to the 'facts of the these cases'

It is humbly submitted that all the appeals in the said judgment of Hon. Supreme Court relate to assessment years prior to AY 2012-13 and the question under consideration was to the applicability of the provisions of Explanation 2 and 4 to section 9(l)(vi) of the Act. It was in this context, it was held that these provisions are not clarificatory. Therefore, it is implied that these provisions would not be applicable to assessment years prior to AY 2012-13.

Summing up :

Your honors, it is humbly submitted that the present appeal relates to AY 2012-13 and paragraph 2 of Article 12 of India Netherlands DTAA vests the tax authorities the power to tax Royalties arising in India in accordance with domestic law. Adopting the ambulatory approach, as approved by the Hon. Jurisdictional Bombay High Court in the case of Siemens AG 310 ITR 320 (Bom), For AY 2012-13, provisions of Explanation 4 to section 9(1)(vi) are squarely applicable.

Further, the submission of the Id AR that in the case of the assessee that there are decisions of Mumbai Tribunal relating to post amendment period, is incorrect considering the fact that the decision as per Paper book relate to AY 2009-10 and 2010-11. The decision of Hon. Supreme court in the case Engineering Analysis Centre of Excellence (P) Ltd [2021] 125 Taxmann.com 42(SC) is in the specific context of whether the payments would be Royalty in the pre amended period in view of the

retrospective amendment of insertion of Explanation 4 to Section 9(l)(vi) of the Act and in this regard, it cannot be said that the said decision would be applicable for the post amendment period.

It is humbly submitted, that the written submissions may be taken on record and may kindly be considered in the order for appeal for AY 2012-13."

10. In the rejoinder, Ld. Counsel of the assessee submitted that the decision pointed out by the Ld. DR is not at all applicable that the same has been duly considered by the Tribunal in the other cases and the same is found to be not at all tenable. The Ld. Counsel's submissions in this regard are summarized as under:-

" The issue in appeal relates to remittances made by Shell India Markets India Private Limited ('SIMPL' or 'the Appellant') to Shell International BV ('SIBV') towards HR Shell People Support (license fees and support services for HR software) where the Ld. TDS officer has held that remittances are in the nature of Royalty as per the Act as well as under the Double Taxation Avoidance Agreement ('DTAA') the Ld. TDS Officer has inter alia relied on the decision of Hon'ble Karnataka High Court in case **of CIT** v **Samsung Electronics Ltd & others** (ITA No. 2808 of 2005 & others).

The Appellant submitted that the said issue is covered by the recent Hon'ble Supreme Court's(SC) decision m the case **of Engineering Analysis Centre of Excellence (P.) Ltd.** v CIT [2021] 125 taxmann.com 42 (SC) wherein it is held that license fees is not 'Royalty' in nature and. hence, not taxable as per DTAA. The Appellant also submitted that the issue is also concluded by the **ITA"Ps order dated 8 January 2018 in SIM PL's own case** wherein it is held that access / user rights of software is not 'Royalty' in nature.

Ld. Department Representative (DR) agreed that Assessment Years (AYs) 2009-10 to 2011 -12 are covered by the Hon'ble SC decision but submitted that in view of the amendment made by Finance Act, 2012 in Section 9(l)(vi) of the Income-tax Act, 1961 ('the Act'), AY 2012-13 needs to be decided differently.

Ld. DR, on 5 July 2021 filed the written submissions before the Hon'ble Members placing reliance on the decision of Hon'ble Bombay High Court in the **case of CIT v. Siemens Aktiongesellschaft** [2009| **310ITR 320 (Bom)** submitted that Ambulatory Approach be applied while interpreting the DTAA between India and the other Contracting State.

In response to the submissions of the DR. the Appellant would like to provide its rejoinder and the same is as under:

At the outset, it is submitted that the **Hon'ble SC** in case ***of Engineering Analysis Centre of Excellence*** *(P.)* ***Ltd*** *(supra)* has considered the decision of the Hon'ble Bombay High Court in case *of Siemens AG (supra)* quoted by the DR. The SC before coming to its conclusion in case of *Engineering Analysis Centre of Excellence (P.) Ltd(Supra)* has also considered Explanation 4 to Section 9(l)(vi)of the Act as well as Explanation 4 of Section 90 of the Action its decision. The Amendment in the Act is retrospective and with effect from 1 April 1976 and, therefore, the decision of the Apex Court will apply even for assessment year 2012-13.

The Appellant further submits that the decision of *Siemens AG (supra)* is not relevant in the present case. The term 'royalty' was not defined in the DTAA - the old German treaty, and, hence, reliance was placed on Article 3(2) for interpreting the term 'royalty'. However, where a term is specifically defined in the DTAA, one needs to refer to the meaning ascribed to such term as per the DTAA and not as per the Act. In case of India-Netherlands DTAA. the term royalty is defined in the DTAA and the same is required to be referred without making reference to its definition under the Act.

Reliance is also placed on the decision of the **Hon'ble Delhi High Court** in the case of New Skies **Satellite BV,** wherein the court has held that unless the DTAA is amended jointly by both the parties, amendments made by the Finance Act, 2012 would not affect the meaning of the term 'royalties' as mentioned in Article 12 of India-Thai land tax treaty and India-Netherlands tax treaty.

The Hon'ble Mumbai Bench of the Tribunal in the case **of Reliance Jio Infocomm Ltd** dealt **with** the issue of importing the meaning of a term which is not defined in a tax treaty from the domestic law by virtue of Article 3(2) of the India-Singapore tax treaty. The Tribunal observed that when the expression 'royalty' is a defined expression under the applicable tax treaty, there cannot be any occasion to invoke Article 3(2) for further dissecting the issue and explore the domestic law meaning of each expression used in this definition for coming at the conclusions about connotations of 'royalty'. Therefore, Article 3(2) cannot be invoked to import domestic law meaning, even partly, when the treaty term has received a definition under the tax treaty. The Hon'ble Tribunal observed that the definition of expression 'process' under the Act is not a standalone definition which can be imported in the tax treaty by virtue of Article 3(2) of the tax treaty. The expression 'process' is not a treaty term per *se,* or a reference point, used in the treaty, rather it is an expression or word used in defining the treaty term 'royalty'. The expression 'process'[1] is used in the treaty in that limited context and

> it does not have an independent existence. Accordingly, the Hon'ble Tribunal held that payment for provision of bandwidth services to a non-resident company cannot be classified as royalty under the tax treaty.
>
> Apart from the above, similar proposition has also been upheld in various other decisions[3], wherein it has been held that amendments in the Act will not have any effect if there has been no corresponding amendment / change in the relevant lax treaty.
>
> *Without prejudice* to the above, the question of referring to Article 12(2), as has been done by the Revenue, does not arise since Article 12(1) is itself not applicable to Appellant's case as the payment is not in the nature of royalty under the treaty. Accordingly, the question of referring to Article 12(2) of the DTAA does not arise.
>
> In view of the above, it is submitted that the payments made towards HR Shell People Support Services does not amount to royalty as per the provisions of India-Netherlands DTAA even after the insertion of Explanation 4 to Section 9 (1)(vi) of the Act. In the Appellant's case, the Appellant being eligible to claim the treaty benefit *i.e.* the more beneficial provision, provisions contained in the DTAA would apply - which has also not been disputed by the Ld. DR."

11. Upon careful consideration, we find that assessee's plea that issue is squarely covered in favour of the assessee by the decision of Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Private Limited v. CIT (supra) is acceptable. The Hon'ble Supreme Court has elaborately examined the issue and has decided the issue in favour of the assessee. The Hon'ble Supreme Court has set aside the decision of Hon'ble Karnataka High Court in the case of Samsung Electronics Company Ltd. (supra), which has been relied upon by the AO. We may gainfully refer to the concluding portion of Hon'ble Apex Court order in that case as under:-

> "Given the definition of royalties contained in Article 12 of the DTAAs mentioned in paragraph 41 of this judgment, it is clear that there is no obligation on the persons mentioned in section 195 of the Income Tax Act to deduct tax at source, as the distribution agreements/EULAs in the facts of these cases do not create any interest or right in such distributors/end-users, which would amount to the use of or right to use any copyright. The provisions contained in the Income Tax Act (section 9(1)(vi), along with

explanations 2 and 4 thereof, which deal with royalty, not being more beneficial to the assessees, have no application in the facts of these cases.

Our answer to the question posed before us, is that the amounts paid by resident Indian end-users/distributors to non-resident computer software manufacturers/suppliers, as consideration for the resale/use of the computer software through EULAs/distribution agreements, is not the payment of royalty for the use of copyright in the computer software, and that the same does not give rise to any income taxable in India, as a result of which the persons referred to in section 195 of the Income Tax Act were not liable to deduct any TDS under section 195 of the Income Tax Act. The answer to this question will apply to all four categories of cases enumerated by us in paragraph 4 of this judgment.

The appeals from the impugned judgments of the High Court of Karnataka are allowed, and the aforesaid judgments are set aside. The ruling of the AAR in Citrix Systems (AAR) (supra) is set aside. The appeals from the impugned judgments of the High Court of Delhi are dismissed."

12. Respectfully following the aforesaid precedent from Hon'ble Supreme Court, we set aside the orders from authorities below, decide the issue in favour of the assessee.

13. In the result, these appeals by the assessee are allowed.

Pronounced in the open court on 24 /09/2021

Sd/-	Sd/-
(PAVAN KUMAR GADALE)	(SHAMIM YAHYA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai; Dated : 24 /09/2021
Thirumalesh, Sr.PS
Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

BY ORDER,

//True Copy//

(Assistant Registrar)
ITAT, Mumbai