

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "D", NEW DELHI**

**Before Sh. R. K. Panda, Accountant Member  
&**

**Sh. Anubhav Sharma, Judicial Member**

**ITA No. 4996/Del/2018 : Asstt. Year : 2015-16**

Attachmate Corporation, Block 1, 705, 5 <sup>th</sup> Avenue, South Seattle, Washington-98104  Or M/s King & Partridge, Advs. No. 48, Lavelle Road, Bangalore, Karnataka-560001	Vs	DCIT, International Taxation, Circle-1(1)(1) New Delhi
<b>(APPELLANT)</b>		<b>(RESPONDENT)</b>
<b>PAN No. AALCA1395C</b>		

**Assessee by : Smt. Sumisha Murgai, CA  
Revenue by : Mrs. Anupama Anand, CIT DR**

**Date of Hearing: 28.03.2022**

**Date of Pronouncement: 31.03.2022**

**ORDER**

**Per R. K. Panda, Accountant Member:**

This appeal filed by the assessee is directed against the order passed by the AO u/s 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 relating to A.Y. 2015-16.

2. Facts of the case, in brief, are that the assessee is a company incorporated in the United States of America (USA) and is engaged in the business of developing, manufacturing and distribution of software products. The assessee has entered into International Distributor/Reseller Agreements with distributors in India for supplying software products and for providing ancillary support services. It filed its return of income

on 30.09.2015 declaring Nil income. The case was selected for scrutiny and a statutory notice u/s 143(2) of the Income Tax Act, 1961 was issued and served on the assessee. In response to the same, the AR of the assessee appeared from time to time and filed the requisite information/ details. During the course of assessment proceedings, the AO noted that the assessee has received an amount of USD 828170 which is from supply of software products to the end customers in India. He noticed that assessee has not offered this amount to tax in its return of income. He, therefore, asked the assessee to explain nature of its revenue received in India and how the same is not taxable in India. The assessee contended that in view of the provisions of India-USA DTAA assessee's income from- sale of software is not taxable in India. The assessee placed reliance on various judgments in support of its claim. Assessee also discussed various provisions of the Income Tax Act, 1961, India-US DTAA and relevant provisions of Copyright Act, 1957 etc. to reinforce its arguments and claims.

3. However, the AO was not satisfied with the arguments advanced by the assessee. Rejecting the various explanations given by the assessee and following the order for the preceding assessment year where it has been held that payment received from the Indian distributors/resellers towards sale of software license is "Royalty", the AO held that the revenue received by the assessee from sale of software amounting to Rs.4,53,68,924/- is to be treated as income from "Royalty" to be taxed @ 15% as per Article 12 of India-USA DTAA.

4. The assessee approached the Id. DRP. However, the Id. DRP, following its order for A.Y. 2014-15 upheld the action of the AO by observing as under:

*"xii. The Panel has considered the Draft assessment order, submissions of the assessee, the remand report and A's reply to the Remand Report, alongwith the order of the DRP for AY 2014-15. It is seen that the A' has now submitted the bifurcation of revenue from the sale of software license and the support services, which was not done during the assessment proceedings. The Panel therefore directs as under:  
report.*

*a. that the sale of software license be assessed as 'Royalty' as has been done by the AO in the draft assessment order which is upheld.*

*b. that the revenue from Maintenance and Technical Support Services (MTSS) be assessed as FTS as has been done in AY 2014-15, and accepted in the remand report.*

*c. the total of the two amounts may be taken INR 5,14,52,500/- (Instead of INR 4,53,68,694/- which was taken in the draft assessment order). This is the equivalent of USD 8,28,170/- and the bifurcation is now submitted by the A' which should be the amount taken by the AO in the final order."*

5. The AO in the final assessment order accordingly made addition of Rs.4,53,68,924/- as income from "Royalty". Similarly, he also made addition of Rs.60,83,576/- as income from FIS.

6. Aggrieved with such order of the AO/DRP, the assessee filed appeal before the Tribunal by raising the following grounds:

*"1. That the order of the Learned the Deputy Commissioner of Income Tax, Circle-1 (1)(1), New Delhi ("the learned Assessing Officer" or "the learned AO") passed pursuant to the direction of the learned Dispute Resolution Panel ('the learned Panel' or 'the learned DRP') is bad in law and liable to be quashed.*

*2. The learned AO/DRP erred in holding that the payments received by the Appellant on sale of software to Indian resellers/distributors is in the nature of 'royalty' chargeable to tax under Section 9(1)(vi) of the Income-tax Act, 1961 ('the Act' for short) and under Article 12 of the India-USA Double Taxation Avoidance Agreement ('the DTAA' for short).*

*3. That the learned AO/DRP overlooked the difference between the transfer of right to use a copyrighted article as against the transfer of copyright itself and that in the case of the Appellant, it is the former that has taken place.*

*4. That the learned AO/DRP erred in not appreciating that the consideration received by the Appellant for sale of software to Indian resellers/distributors does not constitute payments in respect of a secret process.*

*5. That the learned AO/DRP failed to appreciate that since the payment received by the Appellant from its customers was not to be measured with reference to the productivity or use of the software, it could not be construed as 'royalty'.*

*6. That the learned AO/DRP erred in not following decisions delivered by the jurisdictional High Court and this Hon'ble Tribunal, and the Authority for Advance Rulings on the issue arising in the Appellant's case.*

*7. That the learned AO/DRP erred in classifying the consideration received by the Appellant towards maintenance and technical support services/ancillary support services as fees for technical/ included services under Article 12 of the DTAA.*

*8. That, without prejudice, the learned AO erred in treating an amount of Rs. 60,83,576/- as income from fees for included services as against Rs. 1,15,60,553/-*

*which was the amount received by the Appellant towards provision of ancillary services and in treating an amount of Rs. 4,53,68,924/- as income from royalty as against Rs. 3,98,91,947/- which was the amount received towards sale of software licenses.*

9. *That the learned AO erred in levying interest under Section 234B of the Act. The DRP erred in upholding the same.*

10. *That the learned AO erred in initiating penalty proceedings under Section 271(1 )(c) of the Act.*

11. *That the impugned order passed by the learned AO is otherwise unsustainable in law and on facts and is thus liable to be set aside by this Hon'ble Tribunal.*

*Each of the foregoing grounds is without prejudice to the other and the Appellant craves leave to add to, amend or delete all or any of the above grounds of appeal either before or at the time of hearing."*

7. Ground Nos. 1 & 11 being general in nature is dismissed.

8. So far as ground Nos. 2 to 8 are concerned, the same relate to the order of the AO/DRP in holding that the payments received by the assessee on sale of software to Indian resellers/distributors is in the nature of "Royalty" chargeable to tax u/s 9(1)(vi) of the I.T. Act and Article 12 of the India-USA DTAA.

9. After hearing both the sides, we find identical issue had come up before the Tribunal in assessee's own case in the immediately preceding assessment year. We find the Tribunal vide ITA No. 6064/Del/2017 order dated 17.02.2022 for A.Y. 2014-15 has decided the issue and held that consideration received by the assessee cannot be brought to tax as per India-

USA DTAA. The relevant observation of the Tribunal from para 2 to 16 reads as under:

*"2. The sum and substance of the grievance of the assessee is that the Assessing Officer/DRP erred in holding that the payments received by the assessee on sale of software to India resellers/distributors is in the nature of 'Royalty' chargeable to tax u/s 9(1)(vi) of the Act and under Article 12 of the India - USA Double Taxation Avoidance Agreement [DTAA].*

*3. Representatives were heard at length. Case records carefully perused.*

*4. Briefly stated, the facts of the case are that the appellant is engaged in the business of developing, manufacturing and distribution of software products and has entered into international distributor/reseller agreements in India for supplying software products and maintenance support services to the end customers in India.*

*5. During the year under consideration, the assessee has received the following income from Indian distributors/resellers:*

<i>i) Receipts from sale of software products</i>	<i>Rs. 4,86,91,372/-</i>
<i>ii) Receipts from provision ancillary support services</i>	<i>Rs. 1,12,06,404/-</i>

*6. Return was filed on 29.09.2014 declaring NIL income. The aforementioned receipts were considered as not taxable in India as the same does not constitute royalty/fees for technical services [FTS] under India - USA DTAA.*

*7. Return was selected for scrutiny assessment and accordingly, statutory notices were issued and served upon the assessee. The Assessing Officer was of the firm belief that income from sale of software licensing to Indian distributions/resellers is taxable as 'Royalty' under Article 12 of the India - USA DTAA and so also the income from ancillary services.*

*8. Objections were raised before the DRP and the DRP, vide order dated 28.06.2017 upheld the additions*

*proposed by the Assessing Officer. Accordingly, final assessment order was framed.*

*9. Article 12 of the India - USA DTAA deals with "Taxability of Royalty Payment", the relevant extract of which is reproduced as under:*

*"3. The term "royalties" as used in this Article means:*

*(a) payments of any kind received as a consideration for the use of, or the right to use, any copyright of a literary, artistic or scientific work, including cinematograph film or work on film, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trademark, design or model, plan, secret formula or process, or information concerning industrial, commercial or scientific experience, including gains derived from the alienation of any such right or property which are contingent on the productivity, use, or disposition thereof; and*

*(b) payments of any kind received as consideration for the use of, or the right to use, any industrial, commercial, or scientific equipment, other than payments derived by an enterprise described in paragraph 1 of Article 8 (Shipping and Air Transport) from activities described in paragraph 2(c) or 3 of Article 8."*

*10. A perusal of the above shows that the term 'Royalty' means payment received, inter alia, for use or right to use, any copy right or a literary, artistic, or scientific work, patent, trademark, design, model, plan, secret formula or process. A perusal of the agreement with the Indian distributors/resellers shows that the resellers/distributors have a non-exclusive, non-transferrable right to sell/ re-sell the assessee's products and Maintenance Technical MTSS services ("MTSS") to customers within the specified territory. Reseller/Distributor cannot make copies of the products for resale and cannot alter the product package that it receives from the assessee in any way. All the rights, including all intellectual property rights in the products, updates and other localizations or translations are owned by the*

*assessee and no ownership rights have been transferred to Reseller/Distributor.*

*11. It is further provided that the Reseller/ Distributor cannot make any representation or warranties to resellers or customers on assessee's behalf and trade with products that are not made by the assessee. It is also provided that the Reseller/ Distributor cannot reproduce the software products or modify and create any derivative work and copies of assessee's product. The Reseller/Distributor can use the trademark of the assessee only for the specific purpose of indicating to the public that they are authorized by the assessee, but they will indicate that the assessee is sole owner of trademark and on termination will immediately cease all use of assessee's trademark.*

*12. A careful perusal of the agreement entered into by the assessee with the resellers in India and keeping in mind the aforementioned specific clauses, in our considered opinion, it is clear that such agreements are entered into solely for the sale of software products and not in any way entail transfer of patent, copy right or any other intellectual property right.*

*13. On the above factual matrix, in our consider opinion, the quarrel is squarely covered in favour of the assessee and against the Revenue by the decision of the Hon'ble Supreme Court in a land mark judgment in the case of Engineering Analysis Center of Excellence Pvt. Ltd. [2021] 432 ITR 471 has laid down the following:*

*"Given the definition of royalties contained in article 12 of the DTAA's 168 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 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 s. manufacturers/suppliers, as consideration for the resale/use of the computer software through EULAs/distribution agreements, is not the pay of royalty for the use of copyright in the computer software, and that same does not give rise to any income taxable in India, as a result of 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 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 rule the AAR in **Citrix Systems** (AAR) (supra) is set aside. The appeals from impugned judgments of the High Court of Delhi are dismissed."*

14. *The factual matrix involved in the case in hand, read with the ratio laid down by the Hon'ble Supreme Court [supra], we are of the considered view that no right in copy right is being transferred and accordingly, consideration received by the assessee cannot be brought to tax as per India – USA DTAA.*

15. *Incidentally, in Assessment Years 2018-19 and 2019-20, the Revenue has accepted the stand of the assessee. Considering the facts of the case in totality, in light of the decision of the Hon'ble Supreme Court [supra], we direct the Assessing Officer to delete the impugned addition.*

16. *In the result, the appeal of the assessee in ITA No. 6064/Del/2017 is allowed."*

10. Since, the facts of the instant case are identical to the facts of the case decided by the Tribunal in assessee's own case for the immediately preceding assessment year, therefore, respectfully following the decision of the Tribunal and in absence of any contrary material brought to our notice by the

Id. CIT DR, we hold that the payment received by the assessee on sale of software to India resellers/distributors is not in the nature of "Royalty" chargeable to tax u/s 9(1)(vi) of the I.T. Act and under Article 12 of the India-USA DTAA. The ground nos. 2 to 8 of the assessee are accordingly allowed.

11. Ground No. 9 relating to levy of interest u/s 234B of the I.T. Act being mandatory and consequential in nature is dismissed.

12. Ground No. 10 relating to penalty u/s 271(1)(c) is premature at this juncture and therefore is dismissed.

13. In the result, the appeal filed by the assessee is partly allowed.

Order Pronounced in the Open Court on 31/03/2022.

Sd/-

**(Anubhav Sharma)**  
**Judicial Member**

Sd/-

**(R. K. Panda)**  
**Accountant Member**

**Dated: 31/03/2022**

\*Subodh Kumar, Sr. PS\*

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

**ASSISTANT REGISTRAR**