INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D": NEW DELHI

BEFORE SHRIR. K. PANDA, ACCOUNTANT MEMBER
AND
SHRI N. K. CHOUDHRY, JUDICIAL MEMBER

ITA No. 3209 & 3210/Del/2018
(Assessment Year: 2010-11)

DCIT, Circle-2(1), International Taxation, New Delhi (Appellant)	Vs.	HP Services (Singapore) Pvt. Ltd, 450, Alexandra Road, Singapore PAN: AABCE1256C (Respondent)

Revenue by :	Shri Anand Kumar Kedia, CIT DR
Assessee by:	Shri Satyen Sethi, Adv
Date of Hearing	23/02/2022
Date of pronouncement	31/03/2022

O R D E R

PER N.K. CHOUDHRY, J. M.:

1. These appeals have been preferred by the revenue against the orders dated 28.02.2018 impugned herein passed under section 250(6) of the Income Tax Act 1961 (in short 'the ACT') by the ld. Commissioner of Income Tax (Appeals)–44, New Delhi { in short "Ld. Commissioner"} for the assessment years 2009-10 and 2010-11.

2. As the issue and facts involved in the appeals under consideration are same, therefore we are deciding the same by this composite order and for brevity shall quote facts and issues of ITA No. 3209.

3. Brief facts of the case are that the Assessee Companybeing in-corporated under the laws of Singaporeis engaged in the business of supply of computer products and rendering support services related to the computer services and information technology. The Assessee has provided sale of off the shelf software and provision for connectivity/lease line internet with security feature etc. during the year under consideration from outside India.

3.1 The Assessee had filed its return of income electronically on dated 30.09.2009 by disclosing an income of Rs. 617,543,077/-. The case of the Assessee was selected for scrutiny and the AO issued the notice dated 03.08.2011 u/s 143(2) of the Act, which was replied by the Assessee by filing information and documents in the assessment proceedings and therefore, on the basis of information and documents furnished, the AO passed the order u/s 144C/143(3) of the Act on dated 02.05.2013 by making additions of Rs. 1,14,09,24,658/- on account of income from sale of off the shelf software and of Rs. 15,01,19,737/- on account of income from connectivity/lease line.

4. Aggrieved by the said additions made by the AO, the Assessee preferred first appeal before the Ld. Commissioner who vide impugned order deleted the said additions.

5. The Revenue department being aggrieved by impugned order, preferred the instant appeal and raised the following grounds of appeal:-

"*1. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) was justified in holding that the consideration received by the Assessee from various entities on account of sale/ supply of software is not royalty within the meaning of Article 12(3) of the India-Singapore- DTAA.*

2. Whether the Ld. CIT(A) has erred in not considering the effect of Article 3(2) of the DTAA in terms of which, any term not defined in the DTAA is deemed to have the same meaning, which it has under the domestic law and therefore, the clarification provided in Explanation 4 to section 9(1)(vi) of the Act vide Finance Act, 2012 can be used for interpreting the terms used in Article 12(3) of the DTAA.

3. The Appellant craves to add, amend, modify or alter any grounds of appeal at the time or before the hearing of the appeal."

6. For brevity we will decide this appeal ground-wise.

7. Ground No. 1 is challenge to the deletion of addition made by the AO qua consideration received by the Assessee from various entities on account of sale/supply of software, by treating as 'royalty' within the meaning of Article 12(3) of the India-Singapore-DTAA.

7.1 The Revenue department has claimed that the Assessee being a company based at Singapore providing professional services, software and network equipment etc. and during the year under consideration, has provided the said services to the companies in India like Mphasis Ltd and Gems Techno Solutions (India) Pvt. Ltd etc. and therefore, the issue was cropped up as to whether payment received for sale of softwareby the Assessee from the said companies, is to be treated as 'royalty' as per the Act and DTAA. The

AO held the consideration received on sale of software as 'royalty' in nature and therefore, rightly added the said consideration received as addition in the income of the Assessee. However, the Ld. Commissioner held contrary while following the principle of consistency and relying upon the judgments passed by the jurisdictional High Court in the case of M Tech India Pvt. Ltd in ITA No. 890/2015, CIT Vs. Alcatel Lucent Canada 2015 372 ITR 0476, DIT Vs. Ericsson Radio Systems AB 2011 ITA 507/ 2007 and DIT Vs. Infrasoft Ltd 2013 ITA 103/2009 and consequently deleted the said addition.

7.2 It was further claimed that the Hon'ble Apex Court in the case of Engineering Analysis Center of Excellence Pvt Ltd 432 ITR 471 made the analysis of various judgments passed by Hon'ble Apex Court and High Courts as well and observed that the right to reproduce and right to use computer software are distinct and separate rights, as has been recognized in State Bank of India Vs. Collector of Customs (2001) 1 SCC 727, the former amounting to parting with copyright and latter in the context of non-exclusive EULAs, not being so.

7.3 As in the instant case, the customers of the Assessee have been given right to reproduce the software and therefore, payment to the Assessee would constitute the 'royalty'. The customers of the Assessee are not only getting the right to make photo copies but also getting authority to make multiple copies and to make payment on copy basis and therefore, the judgment of the Hon'ble Apex Court supports the case of the revenue.

7.4 It was further contended by the ld.DR that the Assessee is not a reseller of computer software but it has given the customer a right to make copies and therefore the Assessee acted as 'principal' or as an 'agent' of the software manufacturer. Therefore, payment made

by the customers from India to the Assessee constitutes 'royalty' and thus the determination by the Ld. Commissioner is contrary to the facts and law settled by the Hon'ble Apex Court.

8. On the contrary, the ld. AR refuted the claim of the revenue department and contended that the Assessee purchases software license from Microsoft, the cost of which invoiced on the number of users activated on a monthly basis. In other words each UAF allows one user to connect to the server software. Once the UAF has been allocated to "a user", it cannot be used by "another user". Similarly, ender-user license agreement (EULA) was considered by the Hon'ble Apex Court in Engineering Analysis Centre of Excellence Pvt. Ltd case (supra) wherein, it was observed as under:

> *"You may install and use one copy of the software product on a single computer, including a workstation, terminal, or other digital electronic device (Computer). You may permit a maximum of five computers to connect to the single computer running the software product solely to access the internet using the internet connection sharing feature of the software product……*
>
> *…..however, you must acquire and run a license for each separate computer on or from which the software product is installed, used……."*
>
> *"When it comes to an end-user who is directly sold the computer programme, such end-user can only use it by installing it in the computer hardware owned by the end-user and cannot in any manner reproduce the same for sale or transfer, contrary to the terms imposed by the EULA.*
>
> *In all these cases, the "license" that is granted vide the EULA is not a licence in terms of section 30 of the Copyright Act, which transfers an interest in all or any of the rights contained in sections 14(a) and 14(b) of the Copyright Act, but is a "license" which imposes restrictions or conditions for the use of computer software. Thus, it cannot be said that any of the EULAs that we are concerned with are referable to section 30 of the Copyright Act….."*

8.1 The ld. AR further argued that as per terms of the agreement with the Microsoft the Assessee had no right to reproduce or make any change in the off the shelf software therefore, the question of passing the right to its customers does not arise and the said fact is not being disputed by the ld. AO and stands affirmed by the Ld. Commissioner.

9. Heard the parties and perused the material available on record. We have considered the rival claim of the parties. The claim of the revenue more or less is that transaction of sale of computer software to its customers implicit involved making of multiple copies of the software clearly indicates 'transfer of copyright' and therefore the consideration received qua said transactions amounts to "royalty" as per the Act and DTAA.

9.1 The Assessee on the contrary claimed that the Assessee purchasing the software from '**Microsoft company'** and as per terms of the agreement with 'Microsoft' having no right to reproduce or to make any change in 'off the shelf software' and therefore, the question of passing a right by the Assessee to its customers does not arise.

9.2 We observe, recently the Hon'ble Apex Court in para no 173 of its judgment in the case of Engineering Analysis Centre of Excellence Pvt. Ltd (supra), clearly held 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.

9.3. The jurisdictional Hon'ble High Court recently in the case of CIT (International Taxation) Vs. GRACEMAC CORPORATION {ITA No. 32/2022 decided on 07.03.2022} *wherein, the Assessee was also holding the licensing of software products of '**Microsoft company'** in the*

*Territory of India and selling to its customers in India,*dealt with the identical issue as involved in the instant cases and while relying upon dictum laid down in Engineering Analysis Centre of Excellence Pvt. Ltd. case, accepted the proposition that licensing of software products of 'Microsoft' in the territory of India by the Respondent (Assessee) is not taxable in India as 'Royalty' under Section 9(1)(vi) of the Act read with Article 12 of the Indo US DTAA, by concluding as under:-

> *"2.* ***Learned counsel for the appellant-Revenue submits that ITAT has erred in holding that licensing of software products of Microsoft in the Territory of India by the Respondent was not taxable in India as Royalty under Section 9(1)(vi) of the Act read with Article 12 of the Indo US DTAA.****{highlighted by us}*
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> *3. He states that the Tribunal has failed to appreciate that the distribution model in the case of the respondent assessee involved making of multiple copies of the software clearly indicating transfer of copyright.*
>
> *4. Having heard learned counsel for the appellant, this Court finds that the issue raised in the present appeals is no longer res integra as the Supreme Court in Engineering Analysis Centre of Excellence Private Limited vs. Commissioner of Income Tax and Anr., (2021) SCC OnLine SC 159 has held as under:-*
>
> > *"...4. The appeals before us may be grouped into four categories:*
> >
> > *i) The first category deals with cases in which computer software is purchased directly by an end-user, resident in India, from a foreign, non-resident supplier or manufacturer.*
> >
> > *ii) The second category of cases deals with resident Indian companies that act as distributors or resellers,*

by purchasing computer software from foreign, non-resident suppliers or manufacturers and then reselling the same to resident Indian end-users.

iii) The third category concerns cases wherein the distributor happens to be a foreign, non-resident vendor, who, after purchasing software from a foreign, non-resident seller, resells the same to resident Indian distributors or end-users. iv) The fourth category includes cases wherein computer software is affixed onto hardware and is sold as an integrated unit/equipment by foreign, non-resident suppliers to resident Indian distributors or end-users.

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97. The AAR then reasoned that the fact that a licence had been granted would be sufficient to conclude that there was a transfer of copyright, and that there was no justification for the use of the doctrine of noscitur a sociis to confine the transfer by way of a licence to only include a licence which transferred rights in respect of copyright, by referring to explanation 2 to section 9(1)(vi) of the Income Tax Act. It then held:

> *"Considerable arguments are raised on the so-called distinction between a copyright and copyrighted articles. What is a copyrighted article? It is nothing but an article which incorporates the copyright of the owner, the assignee, the exclusive licensee or the licencee. So, when a copyrighted article is permitted or licensed to be used for a fee, the permission involves not only the physical or electronic manifestation of a programme, but also the use of or the right to use the copyright embedded therein. That apart, the Copyright Act or the Income-tax Act or the DTAC does not use the expression 'copyrighted article', which could have been used if the intention was as claimed by the applicant. In the circumstances, the distinction sought to be made appears to be illusory."*

98. This ruling of the AAR flies in the face of certain principles. When, under a non-exclusive licence, an end-user gets the right to use computer software in the form of a CD, the end-user only receives a right to use the software and nothing more. The end-user does not get any of the rights that the owner continues to retain under section 14(b) of the Copyright Act read with sub-section (a)(i)-(vii) thereof. Thus, the conclusion that when computer software is licensed for use under an EULA, what is also licensed is the right to use the copyright embedded therein, is wholly incorrect. The licence for the use of a product under an EULA cannot be construed as the licence spoken of in section 30 of the Copyright Act, as such EULA only imposes restrictive conditions upon the end-user and does not part with any interest relatable to any rights mentioned in sections 14(a) and 14(b) of the Copyright Act.

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101. Also, any ruling on the more expansive language contained in the explanations to section 9(1)(vi) of the Income Tax Act would have to be ignored if it is wider and less beneficial to the assessee than the definition contained in the DTAA, as per section 90(2) of the Income Tax Act read with explanation 4 thereof, and Article 3(2) of the DTAA. Further, the expression "copyright" has to be understood in the context of the statute which deals with it, it being accepted that municipal laws which apply in the Contracting States must be applied unless there is any repugnancy to the terms of the DTAA. For all these reasons, the determination of the AAR in Citrix Systems (AAR) (supra) does not state the law correctly and is thus set aside.

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173. 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.

174. 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."

5. Further, this Court on similar facts has allowed writ petitions filed by the similarly placed assessee in EY Global Services Limited vs. Assistant Commissioner of Income Tax &Anr, W.P.(C) 11957/2016 and EYGBS (India) Private Limited vs. Joint Commissioner of Income Tax & Ors., W.P.(C) 12003/2016. The relevant portion of the said judgment is reproduced hereinbelow:-

"…13. A reading of the above judgment would clearly show that for the payment received by EYGSL (UK) from EYGBS (India) to be taxed as 'royalty', it is essential to show a transfer of copyright in the software to do any of the acts mentioned in Section 14 of the Copyright Act, 1957. A licence conferring no proprietary interest on the licencee, does not entail parting with the copyright. Where the core of a transaction is to authorise the end-user to have access to and make use of the licenced software over which the licencee has no exclusive rights, no copyright is parted with and therefore, the payment received cannot be termed as 'royalty'.

14. In the present case, the EYGBS (India), in terms of the Service Agreement and the MOU, merely receives the right to use the software procured by the EYGSL (UK) from third-party vendors. The consideration paid for the use of the same therefore, cannot be termed as 'royalty' as held by the Supreme Court in Engineering Analysis Centre (supra). In determining the same, the

rights acquired by the EYGSL (UK) from the third-party software vendors are not relevant. What is relevant is the Agreement between the EYGSL (UK) and the EYGBS (India). As the same does not create any right to transfer the copyright in the software, the same would not fall within the ambit of the term 'royalty' as held by the Supreme Court in Engineering Analysis Centre (supra).

15. We may also note that the learned AAR in its Impugned Order has relied upon its earlier view in Citrix Systems Asia Pacific Pty Ltd., In Re., (2012) 343 ITR 1 (AAR), which has been expressly stated to be bad law in Engineering Analysis Centre (supra).

16. The submission of the learned counsel for the Revenue that the judgment of the Supreme Court in Engineering Analysis Centre (supra) cannot be applied because it confines itself only to the four categories mentioned in paragraph 4, also cannot be accepted. Though the Supreme Court was on facts considering the four categories of cases that arose in the appeals before it, it has laid down the law for general application. The law, as laid down by the Supreme Court, when applied to facts of the present case, squarely covers the same in favour of the petitioners.

17. The submission made by the learned counsel for the revenue relying upon the amendment to Section 9(1)(vi) of the Income Tax Act, 1961 has also been specifically considered and rejected by the Supreme Court.

18. In view of the above, the Impugned Rulings dated 10.08.2016 passed by the learned AAR are set aside and it is held that the payment received by EYGSL (UK) for providing access to computer software to its member firms of EY Network located in India, that is, EYGBS (India), does not amount to 'royalty' liable to be taxed in India under the provisions of the Income Tax Act, 1961 and the India-UK DTAA."

6. ***Since, the issue of law raised in the present appeals has been conclusively decided in the favour of the assessee by the Supreme Court, no substantial question of law arises for consideration***

in the present appeals. It is also pertinent to mention that the appellant had admitted before the ITAT that the dispute in question had been decided in favour of the assessee by the Tribunal in earlier years. Accordingly, the present appeals are dismissed. *{highlighted by us}*

7. At this stage, learned counsel for the appellant states that there are other connected appeals pending before this Court. Registry is directed to list the connected appeals being ITA Nos.203/2017, 267/2017, 940/2019, 942/2019, 943/2019, 419/2019, 432/2019 and 611/2019 on 23rd March, 2022."

9.3 Theidentical issue as involved in the instant Ground, has already been elaborately discussed and decided, by the Hon'ble Apex court in the case of EngineeringAnalysis Centre of Excellence Pvt. Ltd (supra), and decision of the same has been followed by the jurisdictional High Court in the cases referred above, thus we do not haveany hesitation to dismiss the Ground No. 1 raised by the revenue department, resultantly the same is dismissed.

10. Coming to **Ground No. 2** which relates to the interpretation of the terms used in Article 12(3) of DTAA as per clarification provided in Explanation 4 to section 9(1)(vi) Finance Act 2012 whereby, as per effect of Article 3(2) of the DTAA, any term not defined in DTAA is deemed to have the same meaning as having under the domestic law. The ld. DR did not raise this ground specifically and conceded to have already been decided in favor of the Assessee by the Hon'ble Courts. Consequently ground No. 2 stands dismissed.

11. Ground No. 3 is formal in nature and hence, do not require independent adjudication.

12. In the result both appeals of the revenue department stands dismissed.

Order pronounced in the open court on 31/03/2022.

-Sd/-	-Sd/-
(**R. K. PANDA**)	(**N.K. CHOUDHRY**)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Dated: 31/03/2022
A K Keot

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1. Applicant
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