IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH: 'D' NEW DELHI

BEFORE SHRI G.S. PANNU, HON'BLE PRESIDENT
AND
SHRI SAKTIJIT DEY, JUDICAL MEMBER

ITA No.2686/Del/2018
Assessment Year: 2014-15

Microstrategy Singapore Pte. Ltd., Mumbai, 1102,11th Floor, B-Wing, Regus Peninsula Business Park, S B Road, Lower Parel, Mumbai	**Vs.**	ACIT (International Taxation), Circle-2(2)(1), New Delhi
PAN :AAHCM4798D		
(Appellant)		**(Respondent)**

Appellant by	Sh. Rajan Vora, CA
Respondent by	Sh. Sanjay Kumar, Sr. DR

Date of hearing	27.04.2022
Date of pronouncement	29.04.2022

ORDER

PER SAKTIJIT DEY, JM:

The captioned appeal by the assessee arises out of the order dated 31.01.2018 of learned Commissioner of Income Tax (Appeals)-43, New Delhi, pertaining to assessment year 2014-15.

2. The grounds raised by the assessee are as under:

Based on the facts and in the circumstances of the case and in law, the Appellant respectfully craves leave to prefer an appeal against the order passed by the learned Commissioner of Income-tax (Appeals) - 43

['Learned CIT(A)'], under Section 250 of the Income-tax Act, 1961 ('Act'), on the following grounds:

On the facts and circumstances of the case and in law, the learned CIT(A) has:

General ground

1. erred in upholding the total income of the Appellant at Rs 2,59,12,200 as against the returned income of Rs 9,17,792.

Taxability of sale of software products

2. erred in upholding that the income earned by the Appellant from sale of software products of Rs 1,30,74,292 is taxable in India as 'royalty' under Section 9(1)(vi) of the Act and under Article 12 of the India-Singapore Tax Treaty.

Taxability of provision of software related support services

3. erred in upholding that income earned by the Appellant from provision of software related support services ofRs 1,19,20,121 is taxable in India as 'Fees for Technical Services' under Section 9(l)(vii) of the Act and under Article 12 of India-Singapore Tax Treaty.
4. erred in upholding that income earned by the Appellant from provision of software related support services of Rs 1.19220.121 is taxable in India as 'royalty' under Section 9(l)(vi) of the Act and under Article 12 of India-Singapore Tax Treaty.

Levy of education cess

5. erred in levying education cess amounting to Rs 77,737 without appreciating the fact that the tax rate under Article 12 of the India-Singapore Tax Treaty is inclusive of education cess.

Other grounds

6. erred in charging interest under section 234B of the Act amounting to Rs.20,196.

7. erred in initiating penalty proceedings under section 271(1)(c) of the Act.

Each of the above grounds of appeal is without prejudice to the independent of one another.

3. Ground no. 1 being a general ground does not require specific adjudication.

4. The core issue arising in the appeal is raised in ground nos. 2, 3 and 4 and concerns taxability of amount received by the assessee from sale of software and provision of software related support services as royalty and Fees for Technical Services (FTS) both under the provisions of Income-tax Act, 1961 as well as under India – Singapore Double Taxation Avoidance Agreement (DTAA).

5. Briefly the facts relevant for the purpose of deciding the issue are, the assessee is a non-resident company incorporated in Singapore and is a tax resident of that country. The assesse is a wholly owned subsidiary of Microstrategy Inc., a US based company. The core activity of the assessee is distribution and maintenance of software to customers in the Asian market. Additionally, the assessee also offers consultancy, system integration and education services to its customers for sale of software products and provision of services. The assessee has entered into agreement with Indian distributors, partners (resellers) for sale of software products as well as related maintenance support services. The maintenance support services

include upgradation of software version, addressing critical defect correction and resolving queries over telephone. During the year under consideration, the assessee has sold software products and rendered maintenance services to Indian customers against which it has received a consideration of Rs.2,59,12,204/-. An amount of Rs.26,09,576/- was withheld at source by the Indian customers towards tax. As could be seen, out of the aforesaid amount received, an amount of Rs. 9,17,792/- relating to training/education related services was offered to tax in India while filing the return of income for the impugned assessment year. Whereas, the balance amount of Rs.2,44,94,412/- was not offered to tax on the plea that it is neither royalty nor FTS. Hence, in absence of a PE, the amount, being in the nature of business income, is not taxable.

6. The Assessing Officer, however, did not accept the claim of the assessee. Relying upon certain judicial precedents, including, the decision of Hon'ble Karnataka High court in case of CIT Vs. Samsung Electronic Pvt. Ltd. he held that the amount received by the assessee towards sale of software products and provision of software related maintenance services is in the nature of royalty, both under section 9(1)(vi) of the Act as well under Article 12(3) of

the India – Singapore DTAA. Further, he held that the amount received by the assessee towards provision of software related maintenance services, as otherwise, is also in the nature of FTS both under Section 9(1)(vii) as well as Article 12(4)(b) of the India – Singapore Tax Treaty. Accordingly, he added back the amount of Rs.2,59,12,204/- to the income of the assessee while completing the assessment.

7. The aforesaid decision of the Assessing Officer was also upheld by learned Commissioner (Appeals) while deciding assessee's appeal.

8. Learned counsel for the assessee submitted, the amount received on sale of software and provision of software related maintenance services cannot be treated as royalty under Article 12(3) of the India – Singapore Tax Treaty, as, what the assessee has sold is a copyrighted article and not copyright.

9. Drawing our attention to the sample copy of reseller agreement with the Indian distributors placed in the paper-book as well as sample copy of invoices raised, he submitted, the assessee and its holding company exclusively own intellectual property rights in and on the software. He submitted, the assessee merely grants the Indian distributors/resellers the right

to distribute a copyrighted article and not the copyright. Therefore, the Indian distributors/resellers do not use or have right to use the copyright in the software product. He submitted, there is nothing on record to suggest that the assessee has transferred its right over the copyright to the Indian distributors. He submitted, the definition of royalty under Article 12(3) is narrower than section 9(1)(vi) of the Act. He submitted, since reciprocal amendment in conformity with the provisions contained in the Act has not been made in Article 12(3), the definition of royalty as given in the domestic law cannot be imported to the Treaty provisions. He submitted, going by the definition of royalty under Article 12(3) of the Treaty, only in case of transfer of copyright the amount received can be treated as royalty. Whereas, if the amount received is in respect of sale of copyrighted article simplicitor, it cannot be regarded as royalty under Article 12(3).

10. He submitted, the ratio laid down in case of CIT Vs. Samsung Electronics Pvt. Ltd. (supra) relied upon by the departmental authorities is no longer good law in view of the decision of the Hon'ble Supreme Court in case of Engineering Analysis Centre of Excellence (P) Ltd. Vs. CIT, [2021] 125

taxmann.com 42 (SC). He submitted, the ratio laid down by the Hon'ble Supreme Court in the aforesaid decision would squarely apply to assessee's case as the facts are, more or less, identical. To buttress his contention, learned counsel for the assessee furnished before us a chart showing the comparative analysis of the facts in assesee's case and in case of Engineering Analysis Centre of Excellence (P.) Ltd.(supra). For better appreciation, the comparative analysis is reproduced hereunder:

Sl. No.	***Microstrategy Singapore***	***Engineering Analysis Centre of Excellence (P.) Ltd.***
1.	***Parties involved:***	
	• *MSTR Singapore is a wholly owned subsidiary of MSTR US and is responsible for distribution and maintenance (upgrading, defect correction and hotline) of MSTR software for customers in Asian markets. It also offers consulting, system integration and education services to its customers.* • *MSTR Singapore enters into agreements with Indian distributors/ partners on principal to principal basis.*	*The appeals has been grouped into four categories, out of which the below two are relevant:* • *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.* • *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.*

2.	***Relevant extracts from Agreement:***	
	MICROSTRATEGY END USER LICENSE AGREEMENT: *"4. RIGHTS AND RESTRICTIONS* *4.1 Subject to Licensee's compliance with this Agreement MicroStrategy grants Licensee a nonexclusive, non-transferable license, without the right to grant sublicenses, (a) to install and use the Products according to this Agreement solely for Licensee's internal business use, for the DSI specified on the Order in the Territory, and (b) to make one copy, for Non-Production Use in the Territory solely as an offline archival backup, of each Product. The right of use is granted only for the Products ordered, even if such Products are delivered on media containing other Products.* *4.2 Licensee shall not, directly or indirectly:* *(a) copy, display, distribute, or otherwise use the Products or the metadata created by the Products in any manner or for any purpose not expressly authorized by this Agreement.* *(b) create derivative works of or otherwise adapt, modify, or translate the Products or the metadata created by the Products,* *(c) rent, lend or transfer a Product or a Product license to an Affiliate of Licensee.* *(d) reverse engineer, reverse compile, or disassemble the Products or the metadata created by the Products or otherwise obtain or derive the source code of the Products.*	***Category 1:*** *"1. GRANT OF LICENCE. Samsung grants you a limited non-exclusive licence to install, use, access, display and run one copy of the Samsung Software on a single Samsung Mobile Device, local hard disk(s) or other permanent storage media of one computer and you may not make Samsung Software available over a network where it could be used by multiple computers at the same time. You may make one copy of the Samsung Software in machine readable form for backup purposes only; provided that the backup copy must include all copyright or other proprietary notices contained on the original.* *…..* *2. RESERVATION OF RIGHTS AND OWNERSHIP. Samsung reserves all rights not expressly granted to you in this EULA. The Software is protected by copyright and other intellectual property laws and treaties. Samsung or its suppliers own the title, copyright and other intellectual property rights in the Samsung Software. The Samsung Software is licenced, not sold.* *3. LIMITATIONS ON END USER RIGHTS. You shall*

	(e) rent, lease, or lend the Products or a Product license, purport to sell or resell the Products, purport to grant any license or sublicense in the Products, use the Products or the metadata created by the Products for outsourcing, or provide any persons with access to the Products or the metadata created by the Products through a service bureau, timesharing, or ASP arrangement, or *(f) use any Product or other Confidential Information to create any computer program or user documentation that is substantially similar to any Product.* *4.3 Licensee acquires no ownership rights in or title to the Products. The Products are licensed and not sold. Micro Strategy and its licensors retain all ownership rights in and title to the Products. Licensee shall not at any time during or after the term of this Agreement assert or claim any interest in, or assert or do anything that may adversely affect MicroStrategy's ownership of, or the validity of, the intellectual property and proprietary rights of MicroStrategy in or relating to the Products.*	*not, and shall not enable or permit others to, copy, reverse engineer, decompile, disassemble, or otherwise attempt to discover the source code or algorithms of, the Software (except and only to the extent that such activity is expressly permitted by applicable law notwithstanding this limitation), or modify, or disable any features of, the Software, or create derivative works based on the Software. You may not rent, lease, lend, sublicense or provide commercial hosting services with the Software. You may not transfer this EULA or the rights to the Samsung Software granted herein to any third party unless it is in connection with the sale of the mobile device which the Samsung Software accompanied. In such event, the transfer must include all of the Samsung Software (including all component parts, the media and printed materials, any upgrades, this EULA) and you may not retain any copies of the Samsung Software. The transfer may not be an indirect transfer, such as a consignment. Prior to the transfer, the end user receiving the Samsung Software must agree to all the EULA terms. Where Samsung Mobile Device is being used by your employee or other person using the Samsung Mobile*

		Device as part of your undertaking ("Your Staff'), that member of your Staff is licenced to use the Samsung Software as if it were you and must comply with these terms on the same basis. Any failure to comply with these terms by your Staff shall be deemed [to be a] failure to comply with these terms by you."
	RESELLER AGREEMENT *"1.1 Subject to receipt by MicroStrategy of all fees owed by Reseller, MicroStrategy grants Reseller a non-exclusive, non-transferable license, during the Term, to:* *(a) distribute Products to any Approved Opportunity in the Territory according to the terms and conditions of this Agreement;* *(b) market and demonstrate the Products to any Approved Opportunity in the Territory according to the terms and conditions of this Agreement. Reseller shall delete any demonstration copies of the Products upon completion of any demonstration at an Approved Opportunity site;* *(c) distribute copies of the Products to any Approved Opportunity in the Territory solely for Evaluation, according to the terms and conditions of this Agreement and the applicable clickwrap license agreement included with the Products, and....."* *"1.4 Reseller shall not directly or indirectly:*	***Category 2:*** *"Other Responsibilities* *You agree:* *.....* *2. that your rights under this Agreement are not property rights and therefore, you can not transfer them to anyone else or encumber them in any way. For example, you can not sell your approval to market our Programs or your rights to use Trademarks;* *3. Not to assign or otherwise transfer this Agreement, your rights under it, or any of its approvals or delegate any duties, other than to a Related Company, unless expressly permitted to do so under this Agreement."* *....* *"7. Patents, Copyrights and Intellectual Property Rights. You agree that you do not and shall not own any right, title or interest in and to any and all patents, copyrights and intellectual property rights.*

	(a) copy, display, distribute, or otherwise use the Products or the metadata created by the Products, in any manner or for any purpose not expressly authorized by the Agreement *(b) reverse engineer, decompile, translate or disassemble the Products or the metadata created by the Products* *(c) rent, lend or transfer a Product or a Product license to an Affiliate or Resseler* *(d) use the Products or the metadata created by the Products for outsourcing, or provide any access to the Products through a service bureau, time-sharing or ASP agreement* *(e) Market or demonstrate any pre-release Software("Beta") in the Territory.* *1.5 Reseller and End Users acquire no ownership rights in or title to the Products. The Products are licensed and not sold. No use of the terms "sell" or "resell" in or in connection with this Agreement shall be deemed to imply otherwise. MicroStrategy and its licensors retain all ownership rights in and title to the Products."*	*You shall not alter, deface, remove, cover, mutilate, or add to, in any manner whatsoever, any patent notice, copyright notice, trademark, service mark, trade name, serial number, model number, brand name or legend that we may attach or affix to the Programs.* *"2. License Grant* *The Program is owned by IBM or an IBM supplier, and is copyrighted and licensed, not sold.... Assimil Limited grants Licensee a nonexclusive license to* *(1) use the Program up to the Authorized Use specified in the PoE* *(2)....* *(3) a)....* *b)....* *e) Licensee does not:* *(i) use, copy, modify, or distribute the Program except as expressly permitted in this agreement;* *(ii) reverse assemble, reverse compile, otherwise translate, or reverse engineer the program, except as expressly permitted by law without the possibility of contractual waiver;* *(iii) use any of the Program's components, files, modules, audio-visual content, or related licensed materials separately from that program; or* *(iv) sublicense, rent, or lease the Program;"*

2.	***End-user licence agreements and distribution agreements:***	
	• *Indian distributors/ partners do not use or have any right to use the copyright in the software products and MSTR Singapore merely grants a right to distribute the software in India.* • *It is mentioned in the EULA and reseller agreement that no further right to sublicense or transfer, nor is there any right to reverse-engineer, modify, reproduce in any manner otherwise than permitted by the licence to the end-user.*	• *What is granted to the distributor is only a non-exclusive, non-transferable licence to resell computer software, it being expressly stipulated that no copyright in the computer programme is transferred either to the distributor or to the ultimate end-user.* • *Similarly, no further right to sub-license or transfer, nor is there any right to reverse-engineer, modify, reproduce in any manner otherwise than permitted by the licence to the end-user.*

11. Thus, he submitted, the issue is squarely covered in favourte of the assessee by virtue of the aforesaid decision of the Hon'ble Supreme Court.

12. As regards treatment of software related maintenance services as FTS, learned counsel for the assessee submitted, while providing such services, the assessee has not made available any technical knowledge, skill, knowhow or experience which would enable the party to use it independently without requiring the aid and assistance of the assessee. He submitted, the provision of Article 12(4) of India – Singapore Treaty are identical to Article 12(4) of India – USA Treaty. He submitted, in the Memorandum of

Understanding to the Indian – USA Tax Treaty, it has been explained that Article 12(4), includes only certain technical and consultancy services. He submitted, technical services, in this context, have been interpreted as service requiring expertise to a particular technology; consultancy services have been interpreted to mean advisory services. He submitted, while explaining Article 12(4)(b) in the Memorandum of Understanding to the Indian – USA Tax Treaty, it has been said that only those services, which make available experience, skills, know-how or processes or consist of the development or transfer of the technical plan or technical design qualify as included services or technical services. He submitted, Memorandum of Understanding explaining the provision of section 12(4) of India – USA Tax Treaty can also be used as a guide to interpret Article 12(4) of India – Singapore DTAA. Thus, he submitted, when the Revenue has failed to demonstrate that the 'make available' condition has been satisfied, the amount received cannot be treated as FTS in terms with Article 12(4)(b) of the Treaty. In support of his contention, he relied upon the following decisions:

- *DIT vs Guy Carpenter (346 ITR 504) (Delhi HC)*
- *Interteck Services [307 ITR 418]. The decision has been followed in the case of M/s Invensys Systems Inc [AAR No 796 of 2009].*

- *Anapharma Inc [305 ITR 405]. The decision has been followed in the case of M/s BharatiAxa General Insurance Co Ltd [AAR No 845 of 2009*
- *CIT v. De Beers India Minerals (P.) Ltd. (346 ITR 467) (Karnataka HC)*
- *Raymond Ltd vs DCIT (Mumbai Tribunal) (86 ITD 791)*
- *Boston Consulting Group (Mumbai Tribunal) (280 ITR 1)*
- *DDIT v Preroy AG (Mumbai Tribunal) (309 SOT 187)*
- *Mark & Spencer Reliance India Pvt. Ltd. (38 taxmann 190) (Mumbai Tribunal)*
- *Anapharm Inc (305 ITR 394) (AAR)*
- *ITO vs Nokia India Pvt. Ltd.(Delhi Tribunal) (44 CCH 314)*
- *Intertek Testing Services India Pvt Ltd (307 ITR 418) (AAR)*
- *Hughes Systique India (P) Ltd. vs DCIT (50 Taxmann.com 25) (Delhi Tribunal)*
- *ACIT v Viceroy Hotels Ltd (60 DTR 1) (Hyderabad Tribunal)*

13. Insofar as the taxability of the amount received by the assessee as royalty is concerned, learned Departmental Representative fairly submitted that the issue now stands covered in favour of the assessee in view of the ratio laid down by the Hon'ble Supreme Court in case of Engineering Analysis Centre of Excellence (P.) Ltd. (supra). However, insofar as the issue of taxability of the amount as FTS, learned Departmental Representative submitted, while providing such services the assessee has made available technical knowledge, skill, knowhow etc. to the distributors/resellers to enable them to use such technical knowledge, skills, know-how etc. Therefore, the consideration received for provision of such services has to be treated as FTS.

14. We have considered rival submissions and perused the materials on record. Undisputedly, during the year under consideration, the assessee had sold certain software products to customers in India and has also provided software related maintenance services. The first issue which arises for consideration is, whether the amount received by the assessee towards sale of software products and software related maintenance services can be treated as royalty under Article 12(3) of India – Singapore Tax Treaty. In case, it does not come within the ambit of royalty as defined under the Treaty, there is no need to go into the provisions of the Act. On a perusal of the assessment order it is noticed that the Assessing Officer has not factually examined the nature of transaction between the assessee and the Indian Customers. The Assessing Officer relying upon certain judicial precedents has straightway assumed that the assessee has sold a copyright. However, neither the sample agreement nor any other material available on record demonstrate that the assessee has transferred/sold the use or right to use a copyright and not copyrighted article.

15. On the contrary, the facts on record clearly demonstrate that what the assessee has sold is copyrighted article and not the

copyright. It is also observed, while treating the payment received by the assessee as royalty, the departmental authorities have been greatly influenced by the decision of the Hon'ble Karnataka High Court in case of Samsung Electronics Pvt. Ltd. (supra). However, the issue is no more *res integra* in view of the decision of Hon'ble Supreme court in case of Engineering Analysis Centre of Excellence (P.) Ltd. (supra). Since, the factual matrix clearly reveals that the assessee has sold a copyrighted article and not the copyright, the ratio laid down by the Hon'ble Apex Court in the decision referred to above would squarely apply. Accordingly, we hold that the amount received by the assessee from sale of software and provision of software related services cannot be treated as royalty under Article 12(3) of the India – Singapore DTAA.

16. Insofar as the issue of treating the amount received towards provisions of software related services as FTS, we have noticed that the Assessing Officer has not brought any cogent material on record to demonstrate that while providing the software related maintenance service, the assessee has made available any technical knowledge, knowhow, skill etc. so as to enable the recipient of such service to use it independently in exclusion of

the assessee. Therefore, in our considered opinion, the conditions of Article 12(4)(b) of the Treaty are not satisfied. That being the factual position emerged on record, the amount received cannot be treated as FTS. Therefore, the addition made is deleted.

17. Accordingly, ground nos. 2, 3 and 4 are allowed.

18. In ground no. 5, the assessee has challenged the levy of education cess on the ground that as per the definition of tax under Article 2, being in the nature of surcharge, would be included in the tax rates prescribed in the Treaty. For such, proposition, he relied on the following decisions:

- *Soregam SA v DDIT (101 taxmann.com 94) (Delhi Tribunal) (referpage no. 370 to 382 of Legal Paperbook)*
- *DIC Asia Pacific Pte Ltd v Assistant Director of Income Tax (18 ITR(T) 358) (Kolkata Tribunal) (refer page no. 383 to 386 of Legal Paperbook)*
- *R.A.K. Ceramics, UAE v DCIT(IT) (176ITD 294)(Hyderabad Tribunal)*
- *Sunil V Motiani v Income Tax Officer (International Taxation) (59 SOT 37) (Mumbai Tribunal)*

19. Learned Departmental Representative submitted, the issue may be resorted back to the Assessing Officer for re-examination.

20. Having considered rival submissions, we are of the view that the issue has become, more or less, academic, since, we have deleted the additions made by the Assessing Officer. However, the Assessing Officer is directed to compute the tax liability strictly in terms with the Treaty provisions, keeping in view the ratio laid

down in the decisions, referred to above. Ground nos. 6 and 7, being inconsequential, do not require adjudication.

21. In the result, the appeal is allowed, as indicated above.

Order pronounced in the open court on 29th April, 2022

Sd/-	***Sd/-***
(G.S. PANNU)	**(SAKTIJIT DEY)**
PRESIDENT	**JUDICIAL MEMBER**

Dated: 29th April, 2022.
RK/-
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi