

**IN THE INCOME TAX APPELLATE TRIBUNAL  
“I” BENCH, MUMBAI**

**BEFORE SHRI AMIT SHUKLA, JM, &  
SHRI AMARJIT SINGH, AM**

आयकरअपीलसं./ I.T.A. No. 1317/Mum/2020  
(निर्धारणवर्ष / Assessment Year: 2016-17)

DCIT Cir – 15(3)(2), R. No. 451, 4 <sup>th</sup> Floor, Aayakar Bhavan, M. K. Road, Mumbai- 400 020	<b>बनाम/ Vs.</b>	M/s Smartconnect Tehcnologies Pvt. Ltd. A-702, Harbour View, Sector-19, Nerul, Navi Mumbai-400 706
स्थायीलेखासं ./जीआइआरसं ./PAN No. AAOCS87763B		
(अपीलार्थी/ <b>Appellant</b> )	:	(प्रत्यर्थी / <b>Respondent</b> )

अपीलार्थीकीओरसे/ <b>Appellant by</b>	:	Shri Milind Chavan, Ld. DR
प्रत्यर्थीकीओरसे/ <b>Respondent by</b>	:	Shri Rajesh S. Shah, Ld. AR
सुनवाईकीतारीख/ <b>Date of Hearing</b>	:	12.05.2022
घोषणाकीतारीख / <b>Date of Pronouncement</b>	:	19.05.2022

आदेश / O R D E R

**Per Amit Shukla, Judicial Member:**

The aforesaid appeal has been filed by the revenue against the impugned order dated 11.12.2019 passed by Ld. CIT(A)-24, Mumbai for the quantum appeal of assessment passed u/s 143(3)

for AY 2016-17. The revenue has taken the following grounds of appeal:-

*i) "On the facts and in the circumstances of the case in law, the Ld. CIT(A) has erred in allowing the ground of appeal of the assessee company when the payment made by the assessee to its AE for the purchase of the application software named Genesys for reselling is treated as royalty within the meaning of section 9(1) (vi) of the Income-tax Act, 1961, on which no tax is deducted at source by the assessee company."*

*ii) "On the facts and in the circumstances of the case in law, the Ld. CIT(A) has erred in holding that the payments made are not covered u/s 40(a)(i) of the Income-tax Act, 1961, when assessee-company had made payments for purchase of software licenses and the delivery of which has been by downloading of software by the assessee-company."*

*iii) "On the facts and in the circumstances of the case in law, the Id. CIT(A) has erred in not considering the clarificatory Explanation-4, 5 & 6 inserted in Finance Act, 2012 with retrospective effect from 01.06.1976, while examining whether the payment for software constitutes Royalty under the Income-tax Act. "*

*iv) "On the facts and in the circumstances of the case in law, the Ld. CIT(A) has erred in treating the software as shrink*

*wrap software or off the shelf software, whereas the software is downloaded by the assessee and license is purchased and sold by the assessee to number of customers."*

*v) "On the facts and in the circumstances of the case in law, the Ld. CIT(A) has erred in treating the software as shrink wrap software or off the shelf software whereas the software is hosted on the software cloud of Genesys Co. of USA, and cloud software is used by the end user in India as per the choice of set of modules purchased for use by any unique customers.."*

*vi) "The Ld. CIT(A) has erred in law and facts in holding para 5.2.8 that " Thus, in order to treat the consideration paid by the cellular operator as royalty, it is to be established that the cellular operator, by making such payment, obtains all or any of the copyright rights of such literary work. In the present case, this has not been established." Whereas retrospectively introduced Explanation 4 to section 9(i)(vi) makes it very clear that transfer of copyright is not mandatory and transfer of right for use or right to use including granting of license is covered under the definition of the term " transfer of all or any right in respect of any right, property or information."*

*vii) "On the facts and in the circumstances of the case in law, the Ld. CIT(A) has erred in not treating the payment as*

*Royalty. In a similar case of remote access of Computer system (cloud computing) in Re: P. No. 30 of 1999 (2381 ITR 296) the payment is held as Royalty taxable in India by the Authority of Advance Ruling.*

*viii) "On the facts and in the circumstances of the case in law, the Ld. CIT(A) has erred in holding that expenditure claimed by the appellant company cannot be held as Royalty and further erred in holding that provisions of section 40(a)(ia) of the Income-tax Act, 1961 are not applicable to the assessee."*

*2. "The appellant prays that the order of the Ld.CIT(A) on the above grounds be set aside and that of the Assessing officer be restored."*

*3. "The applicant craves leave to add, amend or alter any grounds or add new ground, which may be necessary."*

2. The sole issue raised in the grounds of appeal is treating the purchase of software 'GENESYS' and for reselling it customer in India which has been treated as 'royalty' within the meaning of section 9(1)(vi) of the Act.

3. The facts in brief are that, assessee is a private limited company engaged in the business of information technology and BPO. The AO noted that assessee has made payment of Rs.

5,96,334,615/- for purchase of software known as 'GENESYS' from M/s Smartconnect Consulting Pte Ltd. He further noted that assessee had not deducted tax at source on the said payment.

4. Before the AO as well as Ld. CIT (A), assessee submitted that it had purchased /imported Application Software known as "Genesys" which was "Off the Shelf" software. Assessee had also enclosed invoice copies in respect of the same. It was further submitted that the said software was by Genesys, a leading technology provider for contact-centre operations, headquartered in USA. Genesys operated through its partners in various markets. It was further submitted that assessee was the leading VAR for Genesys in India for over 7 years. As part of their partnering engagement, assessee procured License from Genesys and resold the same to their clients in India for their various technology rollouts in contact-centre operations. Genesys was sold without any modification to their customers. Smart Connect was only involved in implementation of the platform for operation. The software was "Off the Shelf" software. It was a downloadable software and as such no form for delivery either from Genesys or to its customers.

5. Ld. AO observed that Assessee Company was buying from Smartconnect Consulting Pte., its application software named "Genesys". The same was sold by the assessee company to various clients in India for their various technology rollouts in contract-centre operations. It was stated that in the IT industry, this model of using cloud computing software was known as "Software as a service" model (Genesys Model). The AO's contention was that the assessee acted as a middleman; it took right to use the Application & Other Services of Genesys and solicited them to retail customers in India. He observed that the section 9(1)(vi) clearly states that any use or right to use a patent, invention, model, design, secret formula, process, trademark and similar intangibles are to be characterized as royalty. He has opined that the transfer of rights in any copyright, literary, artistic or scientific work is to be considered as royalty. Ld. AO concluded that the payments made to Smartconnect Consulting Pte. of Rs.5,96,34,615/- for application software is in the nature of 'royalty' and the assessee company was under statutory obligation to deduct TDS on the said amount. As the assessee company failed to comply with the said provisions, he has invoked the provisions of section 40(a)(ia) of the Act and made

disallowance of Rs. 5,96,34,615/- and added to the total income of the assessee.

6. Ld. CIT(A) after relying on various judgments which has been discussed from pages 16-20, accepted the contention of assessee that the said payment cannot be held as 'royalty' and therefore, assessee was not liable to deduct TDS and provision of section 40(a)(ia) of the Act is not applicable. The relevant findings of Ld. CIT (A) read as under:-

*5.2.8 In order to qualify as royalty payment, within the meaning of Section 9(1) (vi) and particularly clause (v) of Exptenation-11 thereto, it is necessary to establish that there is transfer of all or any rights (including the granting of any license) in respect of copy right of a literary, artistic or scientific work. Section 2(o) of the Copyright Act makes it clear that a computer programme is to be regarded as a 'literary work'. Thus, in order to treat the consideration paid by the cellular operator as royalty, it is to be established that the cellular operator, by making such payment, obtains all or any of the copyright rights of such literary work. In the presence case, this has not been established.*

*5.2.9. I have considered all the submissions and arguments put forth by the Ld AR. In light of the above legal position and the facts of the case, I am of the considerate view that the*

*expenditure claimed by the appellant company cannot be held as royalty and the provisions of section 40(a)(ia) of the Act are not applicable to the appellant and hence, the appellant company was not required to deduct TDS under section 195 of the Act. The disallowance so made by the Ld. AO is not sustained so as to stand in test of appeal and hence the addition is not warranted. The AO is therefore directed to delete the addition. Accordingly, this ground is allowed.*

7. We have heard the rival submissions and also perused the relevant findings given in the impugned order. The controversy in this appeal is that the payment made by the assessee company for procuring license software from Singapore entity and then reselling the same to the clients in India without any modification to the users/ customers in India can be reckoned as 'royalty'. It is undisputed fact that the payment has been made to non-resident entity at Singapore and therefore, the scope and ambit of 'Royalty' has to be seen qua the definition given in Article 12 of India Singapore DTAA.

8. Before the AO and Ld. CIT (A), the assessee had explained the nature of software and its uses and stated the following uses of the software and clients to whom software sold:-

**Uses of the software:-**

- *Genesys is a contact centre technology platform. It empowers clients/business to do Omni channel communication with their customers.*
- *It allows to make inbound (IVR), outbound (blaster), Email, Chat, Social media, Co-browse, SMS, Video, Chabot, Automation etc.*
- *Unified reporting and viewing capabilities for agents which help in superior customer experience.*
- *It's, stable and compatible platform to integrate with client application.*
- *It gives real time dashboards & historical reports, which helps in better decision making.*
- *Multiple levels of routing and configuration can be done in the platform for better ROI.*

**Clients to whom software sold:-**

- *Aditya Infotec Ltd.*
- *Home Credit India Finance Pvt. Ltd.*
- *Concentrix Services India Pvt. Ltd.*
- *Religare Securities Ltd.*
- *Tata Sky Ltd*
- *Tata Consultancy Services Ltd.*
- *Reliance Jio*
- *Minacs Private Limited*
- *Sensiple Limited*
- *Polaris Consulting and services.*

9. Thus, the assessee imports software from M/s Smartconnect PTE, Singapore and sells the software to its clients in India and is also responsible for set up and commissioning of the software for its clients without any modification or customization. It is either sold 'Off the Shelf' or in the form of downloadable software. It has been further stated that the 'Genesys' software is electronically downloadable and ready to install software which can be easily determined in client environment, for as-is use for business. It was also provided on CD/DVD form. The software is not custom made and no modification or changes are permitted to be carried out by the Assessee Company. Thus, the assessee procured license from Genesys (Singapore), and sell without any modification. In other words assessee is merely reseller of the software.

10. Thus, on the facts as culled out from the impugned appellate order, we find that the software in question is shrink wrapped /off the shelf software and the products provided are standard products already developed and made available to other customers. The user only acquires a license to use a copy of the software for its business purpose. The right to make multiple copies of the software is limited

only for the purpose of the user's own operations. It is not permitted to resell the software products and components or commercially exploit the same. The license is essentially granted for the user's own use and it has not been granted any rights in the underlying copyright. The owner exclusively owns all the Intellectual Property Rights (IPR) in and to the software. It merely grants to the user a 'copyrighted article' and not the 'copyright in the article'. Hence, the user does not use or have any right to use the copyright in the software products.

11. Thus, on these facts, the payment made to Foreign Entity does not fall within the scope and ambit of royalty within Article 12 of India Singapore DTAA. Now this issue stand settled by the judgment of Hon'ble Apex Court on deciding the issue of software royalty which were classified into 4 categories viz:-

***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.**

12. The assessee's case falls in the second category. The Hon'ble Apex Court after considering the definition given in Article 12 dealing with royalty, provisions of Indian Copyright Act and catena of other judgments concluded as under:-

*168. Given the definition of royalties contained in Article 12 of the DTAA's 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.*

*169. 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.*

13. Thus, the aforesaid decision of the Ld. CIT(A) is in conformity with the principle laid down by the Hon'ble Apex Court, therefore the order of Ld. CIT(A) is confirmed.

14. In the result, the appeal filed by the revenue stands **dismissed.**

*Orders pronounced in the open court on 19.05.2022*

Sd/-  
(Amarjit Singh)

Accountant Member

Sd/-  
(Amit Shukla)

Judicial Member

मुंबई Mumbai;दिनांक Dated : 19.05.2022

Sr.PS. Dhananjay

**आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

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उप/सहायकपंजीकार (Dy./ Asstt.Registrar)  
आयकरअपीलीयअधिकरण, मुंबई/ **ITAT, Mumbai**