IN THE INCOME TAX APPELLATE TRIBUN AL DELHI BENCH "D": NEW DELHI

BEFORE SHRI C.M. GARG, JUDICIAL MEMBER

AND

SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER

ITA No. 1975/DEL/2020
[Assessment Year; 2017-18]

Net App. B.V. Room No. 615, 6th Floor, E-2 Block, Civic Centre, Minto Road, New Delhi-110002 PAN- AADCN2178C	Vs	DCIT, Circle-2(2)(2), International Taxation, New Delhi.
Appellant		**Respondent**

Appellant by	:	Sh. Nageshwar Rao. Adv.
Respondent by	:	Ms. Naina Soil Kapil, CIT-DR
Date of hearing	:	23.06.2022
Date of pronouncement	:	11.07.2022

ORDER

PER C.M. GARG. JM:

This appeal has been filed by the assessee against the order of the DCIT, Circle-2(2)(2), New Delhi u/s 143(3) read with Section 144C(13) of the Income-tax Act, 1961 (in short "the Act"). During arguments before us the learned counsel for the assessee submitted that the assessee wants to only press ground nos. 3 & 4, which read as follows:

"3. The learned AO/Hon'ble DRP has erred, in law and on facts, by holding that the income from the sale of software amounting to INR 73,90,97,440 is 'Royalty'/ 'Fees for Technical Services ' as per Article 12 of the Double Taxation Avoidance Agreement between India and Netherlands ('Treaty') and consequently, liable to tax in India.

4. The learned AO/Hon'ble DRP has erred, in law and on facts, by holding that the income from the sale of subscriptions amounting to INR 30,78,07,318 is 'Royalty'/ Fees for Technical Services' as per Article 12 of the Treaty and consequently, liable to tax in India.

2. We have heard arguments of both sides and perused the relevant material placed on the record of the Tribunal including paper book submitted by the assessee consisting of five annexures.

3. The learned counsel for the assessee submitted that this case pertains to the assessment year 2017-18 and the identical issue has been decided in favour of the assessee in assessee's own case in ITA No.6270/Del/2018, order dated 08.04.2022 by the 'D' Bench of ITAT, Delhi as ground No. 1 and 2 for AY 2014-15.

4. The ld. CIT, DR supported the order of the AO and CIT(A). However, in all fairness, the ld.CIT, DR did not controvert that in the similar and identical facts and circumstances the grounds No.1 and 2 of the assessee for AY 2014-15, which are similar to grounds No. 3 and 4 of the present appeal for AY 2017-18 have been decided in favour of the assessee by the Tribunal order dated 08.04.2022 (supra).

5. On careful consideration of the above submissions, we are of the view that

the Tribunal in assessee's own case for AY 2014-15, order dated 08.04.2022, while adjudicating grounds No. 1 and 2 in favour of the assessee observed as follows:-

> *"8. We have heard the rival submissions and perused the material available on record. The issue in the present ground is with respect to the taxability of receipts towards software and subscription. The AO had held the receipt to be royalty and taxed it @10% on the gross basis as per Article 12 in India-Netherland treaty. We find that AO in the order has noted the facts of the case in the year under consideration to be identical to that of earlier years. We find that identical issue arose in assessee's own case in A.Y. 2013-14 before the Co-ordinate Bench of Tribunal. The Co-ordinate Bench of Tribunal in ITA No.1882/Del/2017 order dated 20.09.2021 had decided the issue in favour of the assessee by observing as under:*
>
> > *"6.0 Ground Nos.3 & 4 are directed against the treatment of software and sale of subscription receipts as the royalty income under Article 12(3) of the India-Netherlands DTAA. The Assessing Officer, vide para 12 of the impugned final assessment order, has considered the subscription revenue of Rs.16,43,90,916/- in the nature of royalty and made addition to the extent of Rs.14,99,39,032/- in terms of Article 7 read with Article 12 of the DTAA. The Ld. AR submitted that the Assessing Officer has considered the addition on the basis of the view taken in the assessment order for Assessment Year 2008-09 and 2010-11. It was further submitted by the Ld. AR that identical issue had come up for consideration before this Tribunal in Assessment Years 2008-09 and 2010-11 wherein the issue was restored to the file of the Assessing Officer with the direction to verify whether the facts of the case were identical to those as decided by the Hon'ble Delhi High Court in the case of Infrasoft Ltd. reported in 264 CTR 329 (Delhi). It was accordingly submitted that this issue also may be similarly restored as per the order of the Co-ordinate Bench in Assessment Year 2008-09 and 2010-11.*
> >
> > *7.0 Per contra, the Ld. CIT-DR relied upon the assessment order.*
> >
> > *8.0 Having heard the rival submissions and after having perused the final assessment order, we fully agree with the contentions of the Ld. AR*

that the addition of software income is wholly based on the assessment order passed for Assessment Year 2008-09. This assessment order was the subject matter of appeal before the Co-ordinate Bench in ITA No. 4871/Del/2013, wherein after noting the parity of facts between the case of the assessee and facts involved in the case decided by the Hon'ble Delhi High Court in the case of Infrasoft Ltd. (supra), the matter was restored to the Assessing Officer for verification. The relevant observations of this Tribunal are being reproduced herein under:

> *"48. Ground No. 3 and 4 of the appeal of the assessee are against the order of the Ld. assessing officer in holding that income from sale of software and income from sale of subscriptions is royalty income under article 12 (3) of the treaty and consequently liable to tax in India. Ld. Assessing Officer has discussed the whole gamut of the taxation of the software taxable as royalty in paragraph No. 6 of his order. Before us, Ld. Authorized Representative submitted that now the issue is squarely covered in favour of the assessee in view of the decision of the Hon'ble Delhi High Court in case of Director of income tax versus Infrasoft Ltd 264 CTR 329 (Delhi).He also submitted a chart during the course of hearing that compares the software considered by Hon'ble Delhi High Court and the features of the software licensing agreement in the present case. He has demonstrated that the issue involved is similar stating various aspects of software licensing agreement as under:*

Soft Limited	*Assessee*
• *Clause 2(a) of the Infrasoft License Agreement:* *"(a) Infrasoft grants License a non-exclusive, non-transferable license to use the software in accordance with this agreement and the Infrasoft License Schedule."* • *Clause 2(d) of the infrasoft License Agreement:* *"(d) Licensee may make one copy of the software and associated support information for backup purposes, provided that the*	• *Clause 1 of Software License:* *"Supplier grants to Buyer a nonexclusive license to use the accompanying software in machine- readable form ("Software"), together with the accompanying documentation."* • *Clause 2 of End User Software License:* *"NetApp shall retain title to the Software and the accompanying documentation and all*

copy shall include Infrasoft's copyright and other proprietary notices. All copies of the Software shall be the exclusive property of Infrasoft." • *Clause 2(h) of Infrasoft license agreement* *"(h) Licensee may not copy, decompile. disassemble or reverse-engineer the Software without infrasoft's written consent. The Licensee's rights shall not be restricted by this Clause 2(h) to the extent that local law grants Licensee a right to do so for the purpose of achieving interoperability with other software and in addition thereto Infrasoft undertakes to make information relating to interoperability available to Licensee subject to such reasonable conditions as Infrasoft may from time to time impose including a reasonable fee for doing so. To ensure Licensee receives toe appropriate information, Licensee must first give Infrasoft sufficient details of its objectives and the other software concerned. Requests for the appropriate information should be directed to the Vice president Technical of Infrasaft"* • *Clause 2(f) of the Infrasoft License Agreement is quoted as below:* *"(f) The Software shall be used only for Licensee's own business as defined within the Infrasoft License Schedule and shat? not, without prior written consent from Infrasoft;* *(i) be loaned, rented, sold,*	*copies and any derivative works thereof. Customer shall not make any copies of the Software except as reasonably required for backup purposes."* • *Clause 2 of Software License:* *"Buyer must not make any copies of the Software except as reasonably necessary for backups. Neither Buyer nor any third party may: (a) reverse engineer or try to reconstruct or discover any source code or underlying ideas used in the Software; or (b) remove or conceal any product identification or proprietary notices contained in or on toe Software or products; or (c) except as allowed in Suppliers user documentation, modify or create a derivative work of any part of the Software.* *Buyer must not publish or provide any results of benchmark tests run on the Software to a third party without Suppliers prior written consent.* *The Software is Supplier's confidential property and is protected by copyrights and by one or more U.S. patents issued or pending. Buyer must take adequate steps to protect the Software from unauthorized use or disclosure."* • *Clause 2 of*

transferred to any third party *(ii) used by any parent, subsidiary or affiliated entity of Licensee* *(iii) Used for the operation of a service bureau or for data processing.*	*End User Software License :* *"Customer shall not, nor shall Customer allow any third party to: (i) decompile, disassemble, decrypt, extract, or otherwise reverse engineer or attempt to reconstruct or discover any source code or underlying ideas, algorithms, or file formats of or of any components used in the Software by any means whatever; or (ii) remove or conceal any product identification., copyright, patent or other notices contained in or on the Software or accompanying documents; or (iii) modify the Software, incorporate it into or with another Software, or create a derivative work of any part of the Software. Customer must not publish or provide any results of benchmark tests run on the Software to a third party without NatApp's prior written consent.* • *Clause 7 of End User Software License:* *"THIS LICENSE IS PERSONAL TO CUSTOMER.. CUSTOMER SHALL NOT ASSIGN, SUBUCENSE OR TRANSFER THE LICENSE OR AGREEMENT WITHOUT NET APRS PRIOR WRITTEN APPROVAL; ANY ATTEMPT TO DO SO SHALL BE VOID."*

49. The revenue is also not seriously disputed before us that the issue is not covered by the decision of the Hon'ble Delhi High Court. However the issue needs to be verified by the Ld. assessing officer whether the licensing agreement involved in the present appeal is similar to the issue decided by the Hon'ble Delhi High Court. Therefore we set aside ground3 and 4 of the appeal of the assessee back to the file of the Ld. assessing officer to decide the issue afresh considering the decision of the Hon'ble Delhi High Court. In the result ground No. 3 and 4 of the appeal of the assessee allowed with above direction."

8.1 It is also pertinent to note that the issue of software royalty was recently adjudicated by the Hon'ble Apex Court in the case of Engineering Analysis Center of Excellence Pvt. Ltd. vs. CIT (2021) 432 ITR 471 (SC). The Hon'ble Apex Court, in its detailed judgment, has analyzed various aspects of the issue taking into consideration end user license, Copy Right Act, and provisions contained in DTAA and the Income Tax Act and has laid down the parameters to test whether the receipt from sale of software would tantamount to royalty or not. Therefore, in view of the above, the Assessing Officer is directed to carry out the necessary exercise in accordance with the directions issued by the Co-ordinate Bench in Assessment Year 2008-09 duly keeping in mind the ratio laid down by the Hon'ble Apex Court in the case of Engineering Analysis Center of Excellence Pvt. Ltd. vs. CIT (supra) and adjudicate the issue accordingly after giving due and proper opportunity to the assessee to present its case. Thus, ground Nos. 3 & 4 are allowed for statistical purposes."

9. We further find that consequent to the direction of the Tribunal, AO passed order on 19.03.2022 u/s 254 r.w.s 143(3) of the Act for A.Y. 2013-14 and the AO has accepted the income declared by the assessee and no addition was made. Since the facts of the case in the year under consideration are identical to that of earlier years, we following the decision of Tribunal for A.Y 2013-14 and for similar reasons are of the view that no addition is required to be made. ***Thus the grounds of assessee are allowed."***

6. Undisputedly, grounds No.1 and 2 for AY 2014-15 are similar to grounds No. 3 and 4 for AY 2017-18. Therefore, we hold that the issue is covered in favour

of the assessee by the order dated 08.04.2022 (supra). Respectfully following the same, grounds No.3 and 4 of the assessee are allowed.

7. Ld. Representatives of both the sides have also agreed that grounds No.5 and 6 are consequential and, thus, restored to the file of the AO for consideration at the time of passing appeal effect order.

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

Order pronounced in the open court on 11th July, 2022.

Sd/-	Sd/-
(PRADIP KUMAR KEDIA) ACCOUNTANT MEMBER	(C.M. GARG) JUDICIAL MEMBER

Dated: 11th July, 2022.

dk

Copy forwarded to :

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asstt. Registrar, ITAT, New Delhi