INCOME TAX APPELLATE TRIBUNAL

DELHI BENCH "D": NEW DELHI

BEFORE

SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER
AND
MS. ASTHA CHANDRA, JUDICIAL MEMBER

ITA No. 7749/Del/2019
Assessment Years 2015-16

ACIT 3(1)(2) (International Taxation) New Delhi.	Vs.	Symantec Asia Pacific Pte. Ltd., 8, Marine Boulevard, Marina Financial Centre, Singapore PAN AAOCS1828F
(Appellant)		**(Respondent)**

ITA No.8282/Del/2019
Assessment Year 2015-16

NortonLifeLock Singapore Pte Ltd. (earlier known as Symantec Asia Pacific Pte. Ltd.), One Raffles Place Mall,#02-01, Room 308, Singapore 048616	Vs.	DCIT Circle-3(1)(2) Int. Tax., New Delhi
(Appellant)		**(Respondent)**

Assessee by:	Shri Nageshwar Rao, Advocate, Ms. Deepika Agarwal, Advocate
Department by :	Shri Sanjay Kumar, Sr. DR
Date of Hearing	26.05.2022
Date of pronouncement	.08.2022

O R D E R

PER ASTHA CHANDRA

These cross appeals by the Revenue and the assessee arise out of order dated 12.07.2019 of the Ld. Commissioner of Income Tax (Appeals)-43, New Delhi **("CIT(A)")** pertaining to the assessment year **("AY")** 2015-16.

2. The Revenue has taken the following grounds :-

"1) Whether on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in holding that the consideration received by the assessee on account of providing Norton security is off the shelf product for individual use for supply of an article, therefore cannot be treated as Royalty, when the same is also part of sale of software which is covered under the definition of Royally u/s 9(l)(vi) of the IT Act and DTAA between India and Singapore. Moreover, the case of M/s Infrasoft Limited referred by the assessee during the appeal is pending for adjudication before Hon'ble Supreme Court."

3. The assessee has taken the following grounds:-

*"**Ground 1 - Consideration from sale of software licenses of Rs. 2,79,11,40,041 taxed as royalty***

In the facts and circumstances of the case and in law, the learned AO and the Hon'ble CIT(A) erred in assessing the receipt on sale of software licenses as consideration for use of 'process' and/or 'for information concerning industrial, commercial or scientific experience' and as a result erred in treating the said consideration taxable as 'Royalty' in accordance with the provisions of the clause (ii) of the Explanation 2 to section 9(l)(vi) of the Income Tax Act, 1961 and Article 12 of the DTAA between India and Singapore.

The CIT(A) ought to have appreciated that

- *Software sold by the Appellant provides a facility by using which, the purchasers can keep their computer systems secure and it is different from the word 'process' used in the clause (ii) of the Explanation 2 to section 9(l)(vi) of the Income Tax Act, 1961 and in the Article 12(3) of the India -Singapore DTAA.*

- *the Appellant has sold the software product in object code form and has not passed on any right to use any process or information concerning industrial, commercial and scientific experience.*

- *the phrases 'process' and/or 'information concerning industrial, commercial or scientific experience' used ip the clause (ii) of the Explanation 2 to section 9(l)(vi) of the Income Tax Act, 1961 and in the Article 12(3) of the India-Singapore DTAA and as interpreted by the Courts means 'know-how' and the Appellant has not imparted or has granted any exclusive right to use any 'know-how' or source code or logic or algorithm of the software to the purchaser."*

4. The assessee is non-resident foreign company formed under the laws of Singapore which does not have any presence in India either by way of a permanent establishment **("PE")** or fixed base as defined under Article 5 of

the Double Tax Avoidance Agreement entered between India and Singapore **("DTAA")**.

4.1 The assessee filed its return of income for AY 2015-16 on 28.09.2015 declaring income at Rs. Nil and claiming refund of Rs. 27,51,82,430/- on account of TDS deducted. The Ld. Assessing Officer **("AO")** noticed that during the relevant financial year the assessee had received amount of Rs. 2,79,11,40,041/- on account of sale of licensed standard software, maintenance and support services to its end user customers in India. The assesee sold application software like Symantec Antivirus Software to the end-users for their self use either directly or indirectly through authorized distributors resellers or service provider in India and not for making copies of its product/software and sell to others thereby making profit by way of exploiting the IPRs which are with the assessee. Further, the software maintenance/support services are provided online through live chat with a technical support agent and by remote computer access.

4.2 After examining the details filed like Distributor Agreement, General and Administrative Service Agreement, License Agreement etc. the Ld. AO required the assessee to show cause as to why additions/disallowances made in earlier years be not made in this year also vide order sheet entry dated 20.09.2017 to which the assessee filed its submissions vide letter dated 01.11.2017. The Ld. AO passed draft assessment order on 10.11.2017 which was received by the assessee on 14.11.2017. Since the assessee neither filed its objection before Hon'ble DRP nor submitted its acceptance to the variations made to the returned income, the Ld. AO completed the assessment on 18.01.2018 under section 143(3) r.w. section 144(C)(3)(b) of the Income Tax Act, 1961 **(the "Act")** holding that the receipt of Rs. 2,79,11,40,041/- claimed as sale of software is nothing but royalty with respect to the use of the computer software by the end users together with or without technical support taxable under section 9(1)(vi) of the Act as well as DTAA and is, therefore, brought to tax as 'royalty' taxable @ 10% under the India-Singapore DTAA which is more beneficial to the assessee.

5. Aggrieved, the assessee filed appeal before the Ld. CIT(A) who recorded the finding in his concluding para 5.8 of his order as under:-

> *"5.8 In view of the aforesaid finding it is seen that the receipts for providing business security intelligence applications to the clients is clearly classifiable as royalty. Receipts from supports, services which are incidental and ancillary to the consideration for royalty are taxable as fee for technical services though no separate invoicing for the same has been made; Therefore it is held that income of the Appellant of Rs, 252,09,26,368 from provision of its security solutions and related .support services to Indian diems is taxable in India as Royalty or Fees for Technical Services (FTS) under Article-12 of the India-Singapore Tax Treaty,"*

6. The Revenue as also the assessee, being aggrieved by the aforesaid finding of the Ld.CIT(A) are before the Tribunal. The grievance of the Revenue is that the Ld. CIT(A) erred in holding that the consideration received by the assessee on account of providing Norton Security is off-the-shelf product for individual use for supply of an article, therefore, cannot be treated as royalty whereas the assessee's grievance is that the Ld. AO erred in assessing the receipt on sale of software licenses as consideration for use of 'process' and/or 'for information concerning industrial, commercial or scientific experience' and as a result erred in treating the said consideration taxable as 'royalty' in accordance with the provisions of the clause (ii) of Explanation 2 to section 9(1)(vi) of the Act and Article 12 of the DTAA between India and Singapore.

7. It is the case of the Revenue that the consideration received by the assessee for providing Norton Security is also part of sale of software which is covered under the definition of royalty under section 9(1)(vi) of the Act and India-Singapore DTAA. Moreover, the case of M/s. Infrasoft Ltd. is still sub-judice before the Hon'ble Supreme Court.

7.1 On the other hand, the case of the assessee is that software sold by the assessee provides a facility by using which, the purchaser can keep their computer system secure and it is different from the word 'process' used in clause (ii) of the Explanation 2 to section 9(1)(vi) of the Act and in the Article 12(3) of India-Singapore DTAA. The Ld. AR further submitted that the

assessee sold the software product in object code form and did not pass on any right to use any process or information concerning industrial commercial and scientific experience. The assessee has not imparted or granted any exclusive right to use any 'know-how' or source code or logic or algorithm of the software to the purchaser.

7.2 The Ld. AR submitted that the issue under consideration is now squarely covered by the decision of the Hon'ble Supreme Court in Engineering Analysis Centre of Excellence (P) Ltd. vs. CIT (2021) 432 ITR 471 (SC). The Ld. AR pointed out that identical issue came up for consideration before the Tribunal in assessee's own case for AY 2013-14 and 2014-15 and the Tribunal decided in favour of the assessee.

7.3 The Ld. AR further submitted that in AY 2018-19 the Ld. AO vide his order dated 29.03.2022 (copy at page 139-140 of Paper Book) assessed the income of the assessee at Nil. The assessment for AY 2019-20 has also been completed by the Ld. AO on 29.09.2021 (copy at page 142-156 of Paper Book) accepting the income returned by the assessee at Nil relying on the decisions (supra) of the Tribunal and the decisions of the Hon'ble Supreme Court in Engineering Analysis Centre of Excellence (P) Ltd. vs. CIT (2021) 432 ITR 471 (SC).

8. We have considered the rival submissions and perused the orders of Ld. AO/CIT(A) as also the material on records. It is observed that the issue whether the consideration from sale of software license received by the assessee is 'royalty' or not in terms of section 9(1)(vi) of the Act and/or Article 12(3) of the India-Singapore DTAA has been dealt with by the Tribunal in assessee's own case for AY 2013-14 in ITA No. 1000/Del/2017 and the Tribunal in its order dated 31.08.2020 referred to its order dated 06.07.2020 in Nagravision S.A. vs. ACIT in ITA No. 9130/Del/2019 and the order of the Pune Bench of the Tribunal in the case of the sister concern of the assessee i.e. Symantec Corporation. The Tribunal in its order (supra) recorded its findings in para 14 as under:-

"14. The issue raised in the present appeal is similar to the issue raised in the decision of Hon'ble High Court in Infrasoft Ltd. (supra) and sister concern of the assessee in Symantec Corporation (supra) and also in the case of the Nagravision S.A. (supra). The Hon'ble High Court of Delhi in DIT vs Nokia Networks OY [2013] 358 ITR 259 (Delhi) had held that Explanation 4 was added to section 9(1)(vi) of the Act by the Finance Act, 2012 with retrospective effect from 01.06.1976 to provide that all consideration for use of software shall be assessable as "Royalty". However, the definition in the DTAA has been left unchanged. It is an admitted fact that though Explanation 5 has been inserted in section 9(1)(vi) of the Act but no amendment has been made to the definition under the DTAA and since the provisions of the DTAA are beneficial to the assessee, then the said provisions would be applied. Thus, we hold that the amended definition of Royalty under the domestic law even if amended with retrospective effect cannot be extended to the definition of "Royalty" under the DTAA since the term "Royalty" under the DTAA has not been amended. As the provision of DTAA over-ride the provision of Income Tax Act, 1961 and being more beneficial shall apply and since the definition of "Royalty" has not been amended in the DTAA, receipts by the assessee on sale of copyright Article was not taxable in the hands of the assessee. Before parting, we may also point out that there is no merit in the plea of the Ld. DR for the Revenue that whether the copyrighted Article was processed or not. We reiterate that as per the provisions of DTAA has not been amended and the same being more beneficial, the same are to be applied and the consideration received by the assessee on sale of copyrighted license is not taxable in the hands of the assessee. Ground of appeal No.1 raised by the assessee is thus allowed. "

9. The same issue has been considered in assessee's own case for AY 2014-15 by the Tribunal in its order dated 15.04.2021 in ITA No. 3013/Del/2017 and the Tribunal in para 7 of its order observed that the issue stands settled by the Hon'ble Apex Court in the case of Engineering Analysis Centre of Excellence (P) Ltd. vs. CIT since reported in (2021) 432 ITR 471 (SC) wherein the Tribunal quoted para 168,169 and 170 of the decision (supra) of the Hon'ble Supreme Court:

"168. Given the definition of royalties contained in article 12 of the DTAAs 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.

170. 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."

10. The appeal filed by the Revenue against the order dated 31.08.2020 for AY 2013-14 passed by the Tribunal stands dismissed by the Hon'ble Delhi High Court vide order dated 04.04.2022 in ITA No. 74/2022 (copy at page 97 of Paper Book). Likewise, the appeal of the Revenue against ITAT's order dated 15.04.2021 for AY 2014-15 has been dismissed by the Hon'ble Delhi High Court vide order dated 10.05.2022 in ITA No. 147/2022 (copy at page 240 of Paper Book).

11. It is an admitted position that the facts and circumstances of the assessee's case in AY 2015-16 remain the same as in immediately preceding years and the Revenue has accepted Nil income returned by the assessee in AY 2018-19 and 2019-20 following the decision of the Hon'ble Supreme Court in Engineering Analysis Centre of Excellence (P) Ltd. (supra). Hence, the dispute between the Revenue and the assesee no longer survives. In this view of the matter, we do not find any substance in the appeal of the Revenue as the decision of Hon'ble Delhi High Court in DIT vs. Infrasoft Ltd. (2014) 220 Taxman.273 (Delhi) has been approved by the Hon'ble Supreme Court in para 118 of its decision in Engineering Analysis Centre of Excellence (P) Ltd. (supra). Therefore, we reject the appeal of the Revenue and allow the appeal of the assessee.

12. In the result, the appeal of the Revenue is dismissed and appeal of the assessee is allowed.

Order pronounced in the open court on 3rd August, 2022.

sd/-	**sd/-**
(SHAMIM YAHYA)	**(ASTHA CHANDRA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 03/08/2022

Veena

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1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

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Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	
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Date on which the file goes to the Bench Clerk	
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