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

BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER AND
SHRI YOGESH KUMAR US, JUDICIAL MEMBER

ITA No.7111/DEL/2019
[Assessment Year: 2010-11]

Verint System Limited, 2nd Floor, Tower-A, Building No.8, DLF Cyber City, Phase-II, Gurgaon,-122002	Vs	DCIT, Circle-3(1)(1), International Taxation, Room No.416, E-2 Block, Civic Centre, Minto Road, New Delhi-110002
PAN-AADCV2314E		
Assessee		Revenue

Assessee by	Sh. Dinesh Bafna, CA & Ms. Chandni Shah, CA,
Revenue by	Ms. Sapna Bhatia, CIT-DR

Date of Hearing	**10.08.2022**
Date of Pronouncement	**23.08.2022**

ORDER

PER SHAMIM YAHYA, AM,

This appeal by the assessee is directed against the order of the Assessing Officer, New Delhi, dated 02.07.2019 pertaining to Assessment Year 2010-11.

2. The grounds of appeal reads as under:-

> *"1 Based on facts and circumstances of the case and in law, the Learned Assessing officer (Ld. AO)/Dispute Resolution Panel ('DRP') has_ erred in holding that amount of Rs.46,80,538 received by the Appellant from Wipro Limited on account of sale of software/license charges is taxable as royalty under Article 12(3) of India-Israel Double Taxation Avoidance Agreement ('DTAA') and as per section 9(l)(vi) of the Act.*

2 That Ld. AO has erred in not appreciating the fact that non-exclusive, non-transferable and terminable license has been granted by Appellant to Wipro.

3 That Ld. AO failed to appreciate that sale of such 'off shelf software by the Appellant is merely a sale of copyrighted article and has not resulted in transfer of any right in relation to a 'copyright' embedded in the said software and therefore, payments received by the Appellant do not constitute 'royalty'.

4 That Ld. AO/DRP erred in disregarding the facts that the definition of 'royalty' as per the DTAA is restricted, since it treats only consideration for 'use of or the right to use' any 'copyright of literary, artistic or scientific work as royalty and does not include those cases where there is only use of a 'copyrighted article'.

5 That the Ld. AO/DRP erred in disregarding the decisions rendered by the jurisdictional Delhi High Court in DIT v. Infrasoft Ltd [2013] 39 taxmann.com 88, which have clearly held that there is a clear distinction between royalty paid on transfer of 'copyright' and consideration for transfer of 'copyrighted article.

6. Without prejudice to above, the Ld. AO/DRP has erred in considering receipts of INR 46,80,538 taxable as royalty both as per Act and DTAA, and still taxing these receipts at the higher rate of 15% instead of 10% as per India — Israel DTAA.

7 Based on the facts and circumstances of the case and in law, Ld. AO/DRP has erred in granting tax credit of INR 7,02,081 only as against tax credit of Rs. 1,91,63,956 claimed in the return of income for AY 2010-11.

8 Based on the facts and circumstances of the case and in law, the Ld. AO/DRP has erred in proposing charging interest under section 234A of the Act.

9 Based on the facts and circumstances of the case and in law, the Ld. AO/DRP has erred in levying interest under section 234B and 234C of the Act, ignoring the fact that same are not applicable in Appellant's case."

Apropos Ground No. 1 to 5

3. Brief facts of the case are that the assessee received the consideration on account of software sale in India. The same has been

treated as business income, but not liable to tax in absence of Permanent Establishment ('PE') in India invoking Article 12 read with Article 7 of the 'India-Israel Double Taxation Avoidance Agreement' by the assessee. The AO treated the same as taxable as royalty under Article 12(3) of the India-Israel DTAA and as per section 9(1)(vi) of the Act. Upon assessee objections, the Ld DRP gave following observation:-

> *"3.3 Term 'Royalty' has been defined in Article 12(3) of the India Israel tax treaty as:*
>
> > *"The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience."*
>
> *3.4 A software programme is a preset process which executes functions to achieve desired outcome/result through series of mathematical computations and generates output in the requisite format. Tire process does not lie outside the software programme in the hardware rather it is embedded and encrusted within the software programme itself. Tire user requirement is accordingly to obtain the coded instructions in whatever medium. Computer program is a process made available by owner/creator and the payment for license to use such computer programs is for use of such process. The AO concluded the transaction to be within scope of the term Royalty as in Clause (iii) of Explanation 2 to section 9(l)(vi) of the Act and also within the meaning of royalty as defined under Article 12 of DTAA between India-Israel Treaty. The AO has proposed to tax it accordingly as Royalty taxable @ 10% under the India-Israel DTAA (beneficial to the assessee).*
>
> *3.5 Royalty definition in Indian Income tax Act, 1961 was amended in section to include such transactions also. The AO validly treated it as 'Royalty' in view of the amended definition of Royalty per section 9 (l)(vi) of the Act read with explanations (explanation 2 in particular). The assessee has challenged this contention by referring to the definition of Royalty in the relevant DTAA. The assessee has also submitted the judgment by Hon'ble Delhi High Court in Director of Income Tax vs. Infrasoft Limited (264*

CTR 329) on similar issues where relief has been granted to the assessee. It has been reported that the department is in appeal before Hon'ble Supreme Court (CC No 19034/2014) against the above referred judgment of Hon'ble Delhi High Court. It has to be borne in mind that the panel is an extension of the assessment process and the AO is now bound by the directions of DRP. Accordingly, the matter needs to be kept alive in view of its pendency before the Apex Court. Tire panel accordingly upholds addition by the AO in this matter. Ground of objections No. 1 to 3 are, therefore, rejected."

4. Against this order, the assessee in appeal before us.

5. We have heard both the parties and perused the records. Ld. Counsel for the assessee submitted that this issue is squarely covered by the decision of the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Private Limited vs CIT 432 ITR 471 (SC).

6. Per contra, Ld. DR would not dispute this proposition.

7. Accordingly, we hold that this issue is covered in favour of the assessee by the decision of the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Private Limited (supra) and also by the decision of the Hon'ble Delhi High Court in the case of DIT vs Intrasoft Ltd. 264 ITR 329 (Del.). Accordingly, ground nos.1 to 5 are allowed.

8. Ground no.6 has not been pressed. Hence, the same is dismissed as not pressed.

9. As regards, ground no.7, we direct the AO to examine afresh and grant appropriate tax credit as per law.

10. Grounds of appeal no.8 and 9 are consequential in nature, therefore, need not be adjudicated.

11. In the result, the appeal of the assessee is partly allowed for statistical purposes.

Order pronounced in the open court on 23/08/2022.

Sd/-	**Sd/-**
[YOGESH KUMAR US] **JUDICIAL MEMBER**	**[SHAMIM YAHYA]** **ACCOUNTANT MEMBER**

Delhi; 23.08.2022.
Shekhar,
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi