IN THE INCOME TAX APPELLATE TRIBUNAL
[DELHI BENCH : "D" NEW DELHI]

BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER
AND
SHRI YOGESH KUMAR U.S., JUDICIAL MEMBER

I.T.A. No. 557/DEL/2021 (A.Y 2016-17)

NetApp B. V., C/o. Ms. Sonu Lakhotia, Ernst & Young LLP, 4th Floor, A–Wing, Divyasree Chambers, #11, O' Shaughnessy Road, Langford Gardens, Bengaluru, Karnataka –560 025. **PAN No. AADCN2178C** **(APPELLANT)**	Vs.	DCIT, Circle : 2 (2) (2), International Tax, New Delhi. **(RESPONDENT)**

Assessee by :	**Shri Nageshwar Rao, Advocate; &** **Deepika Agarwal, Adv.;**
Department by:	**Ms. Sapna Bhatia,** **[CIT] – D. R.;**

Date of Hearing	**10.08.2022**
Date of Pronouncement	**25.08.2022**

ORDER

PER YOGESH KUMAR U.S., JM

This appeal filed by the assessee is directed against the order dated 25/03/2021 of the Deputy Director of Income Tax, New Delhi u/s 143(3)/144C(13) of the Income Tax Act pursuant to the direction of Dispute Resolution Panel (DRP)-2, New Delhi order dated 15.09.2020 for Assessment Year 2016-17.

2. The assessee has raised the following grounds of appeal:-

"1. The impugned order and directions of the Hon'ble DRP are based on incorrect appreciation of facts and wrong interpretation of law and therefore, are bad in law and on facts.

2. The learned AO/Hon'ble DRP has erred in making adjustments aggregating to INR 101,09,78,380 to the returned income of the Appellant and thereby, has erred in law and on facts in assessing the total income of the Appellant at INR 105,45,10,270.

3. The learned AO/Hon'ble DRP has erred, in law and on facts, by holding that the receipts from the sale of software amounting to USD 68,18,853 is 'Royalty' / 'Fees for Technical Services' as per Article 12 of the Double Taxation Avoidance Agreement entered into between India and Netherlands ('the 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 receipts from the sale of subscriptions amounting to USD 43,06,416 is 'Royalty' / 'Fees for Technical Services' as per Article 12 of the Treaty and consequently, liable to tax in India.

5. The learned AO/Hon'ble DRP has erred, in law and on facts, by not following the decisions of the Hon'ble Delhi Tribunal, subsequently upheld by the Hon'ble Delhi High Court on similar matters arising in the Appellant's own case for AY 2008-09, AY 2010-11 and AY 2012-13 wherein, the Hon'ble Court has upheld the position that the receipts from sale of software and subscriptions are not 'Royalty' as per Article 12 of the Treaty.

6. The learned AO has erred, in law and on facts, by not following the binding decision of the Hon'ble Supreme Court rendered on 2 March 2021 on similar matters arising in the Appellant's own case

for AY 2008-09 and AY 2012-13 wherein, the Hon'ble Supreme Court has held that the receipts in the nature of software/subscriptions (without transferring copyright in the software per se) are not taxable in India, while passing the Order on 25 March 2021 on which date the said favourable decision of the Hon'ble Supreme Court was available on record.

7. Without prejudice to the grounds mentioned above, the learned AO has erred, in law and on facts, in taxing the receipts aggregating to INR 101,09,78,30 appearing in Form No. 26AS for the year under consideration, without assigning any reason, in spite of the amounts of software (USD 68,18,853) and subscription (USD43,06,416) being made available during the course of assessment proceedings, though in USD.

8. Without prejudice to the grounds mentioned above, the learned AO has erred, in law and on facts, by not following the specific directions issued by the Hon'ble DRP wherein the Hon'ble DRP has directed the learned AO to apply the correct foreign exchange rate for conversion of software receipts of USD 68,18,853 and subscription receipts of USD 43,06,416.

9. Without prejudice to the grounds mentioned above, the learned AO has erred, in law and on facts, by not following the directions given by Hon'ble DRP while passing the final Assessment Order in as much as in not applying the applicable conversion rate to the USD amounts pertaining to Software and Subscription as directed by the Hon'ble DRP in its directions dated 15 September 2020 and thereby, taxing the receipts of INR 101,09,78,30. Thus, the final Assessment Order passed by the learned AO is not in compliance with the

provisions of Section 1440(10) of the Act and therefore, the final Assessment Order passed by the learned AO is liable to be quashed.

10. The learned AO has erred, in law and on facts, by computing the tax payable on interest income of INR 4,35,31,890 at the rate of 10%, without appreciating that the said income is taxable under the provisions of Section 115A(1)(a)(iiaa) read with Section 194LC of the Act at the rate of 5.253% (including surcharge @2% and Education Cess @ 3%).

11. The learned AO has erred in leying interest ofINR 3,41,118 under Section234A of the Act and that of INR 11,37,060 under Section 234Bof the Act.

12. The learned AO has erred, in law and on facts, in initiating penalty proceedings under Section 271(1)(c) of the Act.

The Appellant submits that each of the above grounds is independent and without prejudice to one another. "

3. The Ld. Counsel for the assessee submitted that Ground No. 1 & 2 are general in nature. Ground No. 3 to 9 are covered in assessee's own case for AY 2014-15 in ITA No. 6270/Del/2018 vide order dated 08/04/2022. Further submitted that, the Ground No. 10 is in respect of buying the tax payable on interest income @10% without considering the said income is taxable under the provisions of 115 A(1) (a)(iiaa) read with Section 1904LC of the Act @ 5.253 %.

4. On the other hand, the Ld. DR not disputed the contentions of the Ld. AR and also not produced any contrary judgments relied by the assessee but submitted that he is relying on the order of the Lower Authorities.

5. We have heard the parties, perused the material on record and gave our thoughtful consideration. Ground No. 3 to 6 are in respect of holding the receipt from sale of software amounting to Rs. USD 68,18,853/- as royalty/fees for technical service as per Article 12 of the Double Taxation Avoidance Agreement entered between India and Neitherland. The said issue has already been dealt and decided in assessee's own case for the Assessment Year 2014-15 in favour of the assessee in ITA No. 6270/Del/2018 vide order dated 08/04/2022 and following manners:-

> *"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 8 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 9 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: 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) license censee may make one copy of the software and associated support information for backup purposes, provided that the 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 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	• 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 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 provideany 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

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, 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.	the Software from unauthorized use or disclosure. Clause 2 End User Software License: Customer shall not, nor shall Customer allow any third party to: (i) decompile, disamble, 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 (Hi) 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: LICENSE IS PERSONAL TO CUSTOMER.. CUSTOMER SHALL NOT ASSIGN, SUBUCENSE OR TRANSFER. THE LICENSE OR AGREEMETN IWTHOUT NET APRS PRIOR WIRTTEN APPROVAL; ANY ATATEMPT TODO SO OSHALL 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 ground 3 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."

By respectfully following the decision of the Coordinate Bench in assessee's own case (supra), for Assessment Year 2014-15 and for the similar reasons, we are of the view that no addition is required to be made for the year under consideration. Thus, the Assessee's Ground No. 3 to 6 are allowed.

6. In view of deciding the Assessee's Grounds of Appeal 3 to 6, Ground No. 7 to 9 have become academic in nature which requires no adjudication.

7. The Assessee's Grounds of Appeal No. 10 is regarding taxing the interest income of Rs. 4,35,31,890/- @10% as against the current tax date of 5.23%. The Ld. Counsel for the assessee prayed for remanding the issue to the file of Ld. A.O. for proper verification. The Ld. DR had no objection for the same. Therefore, we deem it fit to restore the issue involved in Ground No. 10 to the file of A.O for carry out necessary verification and thereafter to bring it to the tax in accordance with law. Needless to say, that the A.O shall provide adequate opportunity of hearing to the assessee. The assessee is also directed to promptly furnish all the required details called for by the A.O. Thus, the Ground No. 10 of the assessee is allowed for statistical purpose.

8. In the result, the Appeal of the assessee is allowed for statistical purpose.

Order pronounced in the open court on : **25/08/2022.**

Sd/-	**Sd/-**
(SHAMIM YAHYA)	**(YOGESH KUMAR U.S.)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated : 25/08/2022

**R.N* Sr PS*

Copy forwarded to :

1. Appellant
2. Respondent
3. CIT
4. CIT (Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI.