

**IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH : BANGALORE**

**BEFORE SHRI. CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER**

IT(IT)A No. 2529/Bang/2019
Assessment Year : 2016-17

M/s. EduNxt Global SDN BHD, C/o. Manipal Global Education Services Pvt. Ltd., 14, Old Airport Road, Bangalore – 560 008. PAN: AADCE6923A	Vs.	The Assistant Commissioner of Income Tax, International Taxation Circle 1(1), Bangalore.
APPELLANT		RESPONDENT

Assessee by	:	Shri Padamchand Khincha, CA
Revenue by	:	Smt. Vandana Sagar, CIT-DR

Date of Hearing	:	30-06-2022
Date of Pronouncement	:	30-08-2022

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present appeal filed by the assessee arises out of final assessment order dated 18.10.2019 passed by the Ld.ACIT(IT), Circle -1(1), Bangalore u/s. 143(3) r.w.s. 144C(13) for Assessment Year 2016-17 on following grounds of appeal.

“1. General Ground

1.1 The order passed by the learned assessing officer ("AO") and the directions of Hon'ble DRP to the extent prejudicial to the appellant is bad in law and liable to be quashed.

2. Grounds relating to treatment of income from distance education under provisions of Income Tax Act, 1961.

2.1 *The learned AO and the Hon'ble DRP erred in making addition of Rs. 3,59,11,128 and assessing the same as total income of the appellant.*

2.2 *The Hon'ble DRP has erred in confirming the action of the learned AO in passing the assessment order under section 143(3) read with section 144(C) of the Act.*

2.3 *The Hon'ble DRP and the learned AO have erred in holding that the income earned by the appellant is in nature of royalty under section 9(1)(vi) of the Income Tax Act, 1961.*

2.4 *The learned AO has failed to appreciate that the payment made by a resident company to the appellant cannot be treated as royalty, as the students are only provided with the course material and the Indian company did not obtain the use or right to use the copyright or literary work.*

2.5 *The learned AO has erred in not appreciating the fact that the services provided by the appellant do not allow the Indian Company to enjoy any patent, trademark or copyright. Therefore, receipt from such services cannot be considered as royalty under section 9(1)(vi) of the Act.*

2.6 *The learned AO has erred in not appreciating that as the payer was not under an obligation to deduct tax at source and the income earned by appellant was also not chargeable to tax in India.*

3 *Grounds relating to treatment of income from distance education under provisions of DTAA.*

3.1 *The learned AO has erred in holding that the payment received by the appellant was in the nature of Royalty as per Article 12 of the DTAA entered into between India and Malaysia.*

3.2 *The learned AO has erred in not appreciating that the income of the appellant constitutes business profits under article 7 of the DTAA, and in the absence of a Permanent Establishment in India. the business profits is not chargeable to tax in India under the Treaty.*

4. *Ground relating to TDS Credit*

4.1 *The learned AO has erred in giving TDS Credit of Rs.36,15,113/- as against an amount of Rs.40,70,116/- claimed in the return of income.*

5. Prayer

5.1 In view of the above and other grounds to be added at the time of hearing, the appellant prays that the assessment order passed under section 143(3) r.w.s 144C be quashed or in the alternative the aforesaid grounds including relief as prayed for in these grounds be allowed. The appellant prays accordingly.”

2. Brief facts of the case are as under:

The assessee is a non resident company incorporated in Malaysia. It is engaged in the business of provision of distant education courses to individuals for various post-graduation courses. During the FY 2015-16, the assessee provided services to certain Indian companies like Aditya Birla Management Corporation Pvt. Ltd.(“ABMC”), Tech Mahindra Ltd., L&T Infotech Ltd. etc. in the form of distance education in MBA to various employees of these Indian companies.

2.1 It was submitted by the assessee that, the course is driven on the concept of self-study, i.e., the students would be provided with the course material (in the form of text-books) and the students were expected to study the same on their own. It was submitted that the students were also provided with e-books and lecture videos recorded by the faculty, and at the end of the course, the students would be tested through an online examination. It was submitted that subsequently, a certificate would be provided to such students based on their results. The Ld.AO observed that for the provision of these services, the assessee received a total amount of Rs. 3.59 Crores from such Indian Companies during the FY relevant to Assessment Year under consideration. The Ld.AO also noted that while making

the said payment to the assessee, Indian Companies have deducted tax of Rs.40,70,116/- at source.

2.2 The Ld.AO observed that the assessee while filing its ROI for AY 2016-17, declared, 'NIL' income and claimed the entire TDS amount of Rs. 40,70,116/- as refund. The Ld.AO called upon the assessee for information u/s 142(1) of the Act seeking reasons for filing 'NIL' return & claiming the said refund. The assessee in response submitted that since it is a Resident of Malaysia, it is eligible for the benefits of the India-Malaysia DTAA and it also doesn't have any PE in India, hence the amount of Rs. 3.59 Crores is not taxable in India.

2.3 The Ld.AO noted that the assessee during the course of assessment proceeding for AY 2013-14 (being the earlier AY) had submitted that, there does not exist any formal agreement with the Client Companies for the provision of the abovementioned services. Accordingly, a Notice u/s 133(6) of the Act, was issued to ABMC, being one of the Indian Companies, seeking details of any formal agreement on the basis of which it had remitted the service fee amounts to the assessee in that FY. In reply, ABMC mentioned that there was no such agreement and it had remitted the amounts to the assessee "as per the terms of agreement". On being further asked to clarify about the self-contradictory statements on existence of any agreement, no reply was received from ABMC during that FY.

2.4 During the course of assessment proceedings for the year under consideration, the assessee was again asked to submit the formal agreement that it had with the Indian companies if any.

This time, the assessee submitted copies of sample agreements with some of the Indian Companies.

The Ld.AO after going through one of the sample agreement submitted as the Master Service Agreement with ABMC, analysed in detail, the scope of work, mentioned in the agreement. The Ld.AO noted that “EduNxt has made available the GlobalNxt Platform to ABMC participants of the program”.

(para 3.3). The platform comprises of a customized program designed for the employees of ABMC by the faculties and the GlobalNxt platform (owned by the assessee) is where the program is hosted. The Ld.AO thus was of the opinion that, the service fee payment by ABMC to the assessee is in the nature of royalty as per the definition contained in the Act. The Ld.AO held that, as per section 5(2), the total income of the previous year earned by the assessee who is a non-resident includes all income from whatsoever sources that is derived which is:

- Received or deemed to be received in India or
- Accrues or arises or is deemed to accrue or arise to him in India during such year.

2.5 The Ld.AO was of the view that, as per the agreement between assessee and ABMC, ABMC was able to get access to the education software and corresponding services. He was thus of the opinion that, the use of education software thus amounting to royalty, if not as FTS, on a conventional basis corroborating the education services thus rendered comprising use of webinars, vodcasts, online courses, webcasts, discussion boards, ebooks, technical discussions with faculty, consultancy regarding engagement and participation, periodic assessments,

examinations, corrections, scoring, valuations, suggestions and feedback & awarding of degree.

2.6 The Ld.AO, thereafter, referring to various decisions, more particularly the decision of *Hon'ble Karnataka High Court* rendered in the case of *Samsung Electronics Ltd.* reported in 345 *ITR 494*, was of the opinion that payment received by assessee is in the nature of 'royalty'. The Ld.AO also referred to the directions of DRP dated 09/09/2017 in support of the view. The Ld.AO thus assessed the income in the hands of the assessee at Rs.3,59,11,128/-.

On receipt of the DRP directions, assessee filed objections before the DRP.

3. The DRP after considering the submissions of the assessee, observed and held as under:

2.1.3 Having considered the submissions, we note at the outset, that the assessee could not furnish any documentation as to the terms governing the use of Edunxt Platform (Learning Management System), though called for. Only the invoice raised by the assessee was submitted, which do not contain any terms of use of the software provided and delivered to the employees of ABMC. It is rather difficult to accept the contention that the assessee had not entered into any agreement either in writing or e-form as to the terms of use of the said software provided to the ABMC and its employees. The issue of taxability is addressed in this factual frame work.

2.1.4 We note that in the light of the Explanatory Memorandum to the Finance Bill 2012 (referred at para 4.1.2 of the Draft order) and the retrospective amendment made to section 9(1)(vi) of the IT Act explaining the scope and definition of royalty, the impugned payment made for use of software would attract tax liability in India. As rightly argued, it should also been seen whether the said amount would fall within the purview of "Royalty" as defined in the DTAA between India and Malaysia. Article 12(3) of the DTAA with Malaysia reads:-

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 or films or tapes used for television or radio broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for the use of, or the right to use, industrial, commercial or scientific equipment, or for information (know-how) concerning industrial, commercial or scientific experience.



2.1.5 A plain reading of the above provisions of the treaty would indicate that any payment made for the use or right to use any copy right would fall within the purview of this article. The Scope of 'royalty' under DTAA was discussed by the Hon'ble Karnataka High Court in the case of Synopsis International Old Ltd., as under:

In the DTAA for the term 'royalty' means payments of any kind received as a consideration for the use of the right to use any copyright of literary, artistic or scientific work whereas in the Income-tax Act, royalty means consideration for the transfer of all or any rights including the granting of a license. Therefore, under the DTAA to constitute royalty there need not be any transfer of or any rights in respect of any copyright. It is sufficient if consideration is received for use of or the right to use any copyright. Therefore, if the definition of royalty in the DTAA is taken into consideration it is not necessary there should be a transfer of any exclusive right. A mere right to use or the use of a copyright falls within the mischief of Explanation (2) to clause (v) of sub-section (1) of section 9 and is liable to tax.

2.1.6 Edunxt through its Edunxt platform (Learning Management System) provides access to ABMC and its employees to its course content and for such usage the impugned payments were made; such course content held in the form of computer database would fall within the scope of 'literary work' under Article 12(3) of the DTAA. Thus, in terms of the DTAA consideration paid for use or right to use of the Literary work in the form of course content, tutorials, webinar through the software would constitute 'Royalty' under the DTAA with Malaysia. Accordingly, we are inclined to uphold the action of the AO.

4. On receipt of the DRP directions, the Ld.AO passed the final assessment order by making the addition in the hands of the assessee as proposed by the Ld.AO in the draft assessment order.

Aggrieved by the order of Ld.AO, the non-resident assessee is in appeal before this *Tribunal*.

4.1 The Ld.AR submitted that the subscription fee received by the assessee from Indian customer for providing access to the database is not in the nature of royalty, either under the Act or under the India-Malaysia DTAA. He submitted that the

subscription fees received by the assessee are in the nature of business income. However, in the absence of a PE in India, the amount received is not taxable as per the provisions of India-Malaysia DTAA.

4.2 Ld.AR submitted that, the assessee being a tax resident of Malaysia has to be governed under the India-Malaysia DTAA. He submitted, the definition of royalty under Article-12 of the India-Malaysia is narrower than the definition of royalty under the Act. He submitted, while providing access to the online database the assessee does not provide the customer any right to use the copyright in the database. It is submitted, the assessee does not transfer any ownership right to the subscriber such as right to copy the database for reproduction and sale, right to grant license to any person who wishes to use the database.

4.3 He submitted, by providing access to the database, the assessee does not impart any information relating to underlying experience, skill, etc., which is required for evolving the database. It was also submitted that assessee do not share its experience, technique, or methodology employed in evolving the database with the subscriber. It does not provide any right to the subscriber to use any industrial, commercial or scientific equipment. Thus, he submitted, the subscription fee received by the assessee for providing publicly available information cannot be treated as royalty. He placed reliance on the following decisions:

- *DIT(IT) v Dun & Bradstreet Information Services India (P.) Ltd [2012] 338 ITR 95 (Bombay)*
- *Dun & Bradstreet Espana. S.A., In re [005] 272 ITR 99 (AAR)*

- *Elsevier Information Systems GmbH v DCIT(IT) [2019] 106 taxmann.com 401 (Mumbai - Trib.)*
- *American Chemical Society v DCIT(IT) [2019] 106 taxmann.com 253 (Mumbai - Trib.)*
- *ITO(IT) v Cadila Healthcare Ltd [2017] 77 taxmann.com 309 (Ahmedabad - Trib.)*
- *The Regents of the University of California UCLA Anderson School of Management Executive Education, USA (AAR No. 1656 of 2014)*
- *Hughes Escort Communications Ltd. v DCIT [2012] 21 taxmann.com 171 (Delhi)*

4.4 On the contrary, the Ld.CIT.DR strongly relied on the observations of the Ld.AO and the DRP submitted that the data provided by the assessee through the database are customized data catering to the specific need of the customer. Therefore, the fee received by the assessee is in the nature of royalty as the assessee has transferred the right to use the copyright to the customer in India. He submitted, the decisions relied upon by the Ld.AR are not applicable to the facts of the present case.

The Ld.CIT.DR has filed certain additional evidence gathered by her from assessee's website, and from public domain being the student handbook issued by the assessee and the copyright works of one of the consultant faculty have been annexed.

4.5 The Ld.DR also referred to agreement between assessee and Manipal Global Education Services Pvt. Ltd. that was engaged as a service provider to provide for marketing, business development and accounting services including student enrolment, student back office support services, collection of fees and remitting into and bursar activities. (collectively referred to as "Support Services") upon mutually agreed terms and conditions and other support activities that was carried out as per the agreement dated 05/08/2013. She also referred to page 256 of the paper book, wherein certain faculties were appointed by assessee in India, who delivered the courses through online modes to the students across nations, of the companies with whom assessee had an agreement.

4.6 The Ld.DR submitted that though in the said letter, it is mentioned that these consultants are not employees of the assessee, however this aspect needs to be verified. Referring to pages 192 to 325 of paper book, the Ld.DR submitted that all these documents were filed before the DRP and the Ld.AO did not get opportunity to verify the same. He thus prayed for the issue to be remanded to the Ld.AO for fresh consideration.

4.7 She submitted that these documents are relevant and has made a request under Rule 29 of the ITAT Rules for the same to be admitted. The Ld.CIT.DR referred to following decision to support of her argument that the issues may be remanded to the Ld.AO for proper verification.

- *Decision of Hon'ble Supreme Court in case of Hukumchand Mills Ltd. vs. CIT reported in 1967 SCR(1) 463*
- *Decision of Hon'ble Mumbai Tribunal in case of Linklaters LLP vs. ITO in ITA Nos. 4896 & 5085/Mum/2003 by order dated 16/07/2010*
- *Decision of Hon'ble Mumbai Tribunal in case of Volkswagen Finance Pvt. Ltd. vs. ITO in ITA No. 2195/Mum/2017 by order dated 19/03/2020.*

4.8 The Ld.DR relied on the decision of *Coordinate Bench of this Tribunal* in assessee's own case for A.Y. 2014-15 wherein similar issue has been remanded to the Ld.AO for fresh consideration in the light of principles laid down by *Hon'ble Supreme Court* in case of *Engineering Analysis Centre of Excellence Pvt. Ltd. vs. CIT reported in (2012) 432 ITR 471*.

4.9 On the contrary, the Ld.AR objected for the same to be admitted. We have perused the submissions advanced by both sides in respect to the request made by the Ld.CIT.DR under Rule 29 of I.T. Rules, 1963.

5. We have perused the submission advanced by both sides in light of records placed before us.

The Ld.AR submitted that under India Malayasia DTAA as per Article 12(3) of the "Royalty" is defined as "payments of any kind received as a consideration for the, "use of", or the "right to use", any copyright of a literary, artistic, or scientific work, including cinematographic films or work on film, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trademark, design or model, plan, secret formula or process, or information concerning industrial, commercial, or scientific experience. The relevant article reads as under:

"12. Royalty

.....

3. 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 or films or tapes used for television or radio broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for the use of, or the right to use, industrial, commercial or scientific equipment, or for information (know-how) concerning industrial, commercial or scientific experience."

5.1 A perusal of Article 12(3) shows that, it brings within the ambit of the definition of 'Royalty', payment made for use of, or the right to use any copyright of a literary, artistic, or scientific work. *Hon'ble Supreme Court* in case of *Engineering Analysis Centre of Excellence Pvt.Ltd. vs CIT* reported in (2012) 432 ITR 471 has analysed the provisions of Income tax Act vis-a-vis provisions of DTAA.

5.2 We note that the details that were filed before the DRP were neither remanded nor has been verified by the DRP themselves and observes that assessee could not furnish any documents in para 2.1.3 which has been reproduced hereinabove in the preceding paras.

5.3 We note that the various agreements / documents that has been filed in piece meal before the Ld.AO and the DRP has not thoroughly verified the materials / document that were filed by the assessee. Infact before the DRP, various documents filed by the assessee has not been considered. As has been submitted by Ld.CIT.DR that

identical issue has been remanded to the Ld.AO for fresh consideration for A.Y. 2014-15 in IT(IT)A No. 2496/Bang/2017 vide order dated 30/03/2022, we do not wish to express our opinion in the present facts as it would prejudice the rights of assessee as well as the revenue. In the interest of justice, we deem it proper to remand this issue back to Ld.AO to be decided along with A.Y. 2014-15 as there are voluminous details available in the present assessment year under consideration before us.

5.4 In the interest of justice it is appropriate to remit the issue in dispute to the file of the Ld.AO for deciding the comparability of these transactions in the light of the judgment of the *Hon'ble Supreme Court* in *Engineering Analysis Centre of Excellence Private Limited (supra)* and the decisions relied by the Ld.AR reproduced herein above.

Accordingly, the issue in dispute is remitted to the Ld.AO for fresh decision with the above directions.

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

Order pronounced in the open court on 30th August, 2022.

Sd/-
(CHANDRA POOJARI)
Accountant Member

Sd/-
(BEENA PILLAI)
Judicial Member

Bangalore,
Dated, the 30th August, 2022.
/MS /

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore
6. Guard file

By order

Assistant Registrar,
ITAT, Bangalore