

आयकर अपीलीय अधिकरण
मंबई पीठ "आर्ड "
श्री विकास अवस्थी. न्यायिक सदस्य एवं
श्री एम बालगणेश, लेखाकार सदस्य के समक्ष
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH " I ", MUMBAI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI M. BALAGANESH, ACCOUNTANT MEMBER
आअसं. 6804/मुं/ 2019 (नि.व. 2016-17)
ITA NO. 6804/MUM/2019(A.Y.2016-17)

Owens-Corning Composite Materials LLC
C/o.Owens Corning (India) Pvt. Ltd.
7th Floor, Alpha Building,
Hiranandani Gardens, Powai,
Mumbai – 400 076.

PAN:AABCO-4236-G

..... अपीलार्थी /Appellant

बनाम Vs.

The Deputy Commissioner of Income-tax
(International Tax), Circle – 3(2)(2) Mumbai,
Room No.X. 16th Floor, Air India Bldg.,
Nariman Point, Mumbai – 400 021

..... प्रतिवादी/Respondent

अपीलार्थी द्वारा/ Appellant by : Shri Sandeep Bhalla

प्रतिवादी द्वारा/Respondent by : Smt. Mahita Nair

सुनवाई की तिथि/ Date of hearing : 02/09/2022

घोषणा की तिथि/ Date of pronouncement : 28/11/2022

आदेश/ ORDER

PER VIKAS AWASTHY, JM:

This appeal by the assessee is directed against the assessment order dated 30/08/2019 passed under section 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 [in short "the Act"] for the assessment year 2016-17.

2. The assessee in appeal has raised two grounds. In ground No.1 of appeal, the assessee has assailed the findings of Assessing Officer in treating amount received on reimbursement of software supplied by the assessee to its Indian subsidiary as 'Royalty'. In ground No.2 of appeal, the assessee has assailed short credit of TDS.

3. The facts of the case as emanating from records are: The assessee is a Limited Liability Company incorporated in USA. The assessee developed a software "SAP-MII" (SAP Manufacturing Integration and Intelligence) with the support of a third party and the cost of the same has been charged to its eight Associated Enterprises (AEs) around the globe including its Indian AE. The software is a SAP application for synchronizing manufacturing operations, with Back Office business process and standardizing data. The software is a web based software and not installed on individual machines. The servers are in Toledo Ohio (USA) Data Centre. The assessee has purportedly charged reimbursement of costs to its AEs without any mark up. The amount received by assessee from its AEs including India AE Owens Corning (India) Pvt. Ltd.(in short ('OCIPL') was treated by assessee as reimbursement. Whereas, the Assessing Officer held the same as 'Royalty'.

4. Shri Sandeep Bhalla appearing on behalf of the assessee submits that the consideration received for the software is not in the nature of 'Royalty' as has been alleged by Dispute Resolution Panel (DRP) and the Assessing Officer. The assessee or any of its AEs has not been granted any right in the underlying copyright of the software. The assessee has purchased a 'copyrighted article' and not a right to exploit the copyright in a software. The assessee acquired

software at the total cost of USD 7.56 lakhs. The cost of acquisition of software was equally recovered from each of its plants having particular manufacturing line across the world i.e. USD 1.08 lakhs without any mark up. The ownership/title of the copyrighted software vests with the assessee. OCIPL has only right to use the software for a plant. The consideration paid by OCIPL is for the use of copyrighted article and not for the use of copyrights.

4.1 The Id. Authorized Representative of the assessee submits that now the issue is squarely covered by the decision of Hon'ble Supreme Court of India in the case of Engineering Analysis Centre of Excellence Pvt. Ltd. vs. CIT, 432 ITR 471(SC) (in short "Engineering Analysis"). The Id. Authorized Representative of the assessee further submits that similar issue has been decided by the Tribunal in the case of Essity Hygiene and Health AB, vs. DCIT reported as 129 taxman.com 70 (Mumbai –Trib).

5. Per contra, Smt. Mahita Nair representing the Department vehemently supported the impugned assessment order and prayed for dismissing the appeal of the assessee. The Id. Departmental Representative submits that in submissions before DRP, the assessee claimed that the payments are capital receipts. The Id. Departmental Representative referred to the submissions of assessee at page – 5 of the DRP directions. The Id. Departmental Representative further submits that the payments received by the assessee from its Indian AE are in the nature of royalty as defined in section 9(1)(vi) of the Act. The Id. Departmental Representative submits that the case of the assessee does not fall in any of the categories as mentioned in Para-4 of the Hon'ble Supreme Court decision in the case of Engineering Analysis (supra).

The Id. Departmental Representative further pointed that the aforesaid decision of Hon'ble Apex Court relates to assessment years 2001-02 and 2002-03. The provisions of section 9(1)(vi) were amended and Explanation -4 was introduced by the Finance Act, 2012. The case of the assessee is for assessment year 2016-17, therefore, the ratio laid down in the case of Engineering Analysis (supra) may not have any application in the case of assessee.

6. The Id. Authorized Representative of the assessee rebutting the arguments raised on behalf of the Revenue submits that in so far as reference to capital expenditure in the submissions before the DRP, the expenditure towards reimbursement of software expenditure is in the nature of capital expenditure in the hands of OCIPL. The Id. Authorized Representative of the assessee asserted that with reference of category as mentioned in the case of Engineering Analysis (supra), the assessee falls in category (i) or (iii) as a reseller. The Id. Authorized Representative of the assessee further pointed that Explanation -4 was inserted by Finance Act, 2012 with retrospective effect i.e. from 01/06/1976, therefore, it would have as much application to the assessment year 2001-02 as it is relevant for the assessment year in appeal. The Id. Authorized Representative of the assessee further submits that Hon'ble Supreme Court of India in the case of Engineering Analysis (supra) has considered Explanation -4 and has thereafter held that amount paid by Indian entity to non-resident computer software manufacturer/suppliers for resale/use of computer software, the payment thereof for use of copyright in computer software is not a payment of royalty, hence, the same is not taxable in India.

7. In respect of ground No.2 of appeal, the Id. Authorized Representative of the assessee submits that the Assessing Officer has erred in granting short credit of TDS. As against TDS of Rs.80,31,823/- claimed by the assessee in its return of income, the Assessing Officer has granted TDS credit of Rs.75,98,194/-. The Id. Authorized Representative of the assessee prayed that a direction may be given to the Assessing Officer to grant credit of balance TDS.

8. We have heard the submissions made by rival sides and have examined the orders of authorities below. The solitary contentious issue in the appeal is with respect to the amount paid by Indian AE of the assessee towards software charges, held to be "Royalty" by the Department. Whereas, the claim of assessee is that it is reimbursement of cost. The assessee has allegedly developed software SAP-MII with the help of a third party. The aforesaid is used by Owens Corning facilities worldwide. The assessee is having eight such facilities. A perusal of the impugned order reveals that the software is web based software and not installed on individual machines. This implies that Owens Corning facilities worldwide will have access to the software from their respective facilities, whereas the software is located on the server located in USA. The contention of the assessee is that SAP-MII held by the assessee is a copyrighted article and it has been purchased for the use and the assessee has merely purchased a copy of the copyrighted article. We are in agreement with the arguments of the assessee that where the payment is made for the use of copyrighted article, such payment is not in the nature of 'Royalty', hence, the same is not taxable under the provisions of section 9(1)(vi) of the Act.

9. The Hon'ble Apex Court in the case of Engineering Analysis (supra) while dealing with bunch of appeals has grouped assessee's in four categories as under:-

"4. The appeals before us may be grouped into four categories:

- (i) The first category deals with cases in which computer software is purchased directly by an end-user, resident in India, from a foreign, non-resident supplier or manufacturer.*
- (ii) The second category of cases deals with resident Indian companies that act as distributors or resellers, by purchasing computer software from foreign, non-resident suppliers or manufacturers and then reselling the same to resident Indian end-users.*
- (iii) The third category concerns cases wherein the distributor happens to be a foreign, non-resident vendor, who, after purchasing software from a foreign, non-resident seller, resells the same to resident Indian distributors or end-users.*
- (iv) The fourth category includes cases wherein computer software is affixed onto hardware and is sold as an integrated unit/equipment by foreign, non-resident suppliers to resident Indian distributors or end-users."*

The issue before Hon'ble Apex Court for consideration was; Whether the amounts paid by the persons resident in India to non-resident, foreign software suppliers, amounted to royalty and as this was so, the same constituted taxable income deemed to accrue in India under section 9(1)(vi) of the Act, thereby making it incumbent upon all such persons to deduct tax at source and pay such tax deductible at source under section 195 of the Act.

The Hon'ble Court after examining the issue threadbare in light of facts of the case, provisions of the Act, covenants of DTAA and catena of decisions on the issue, concluded as under:

"168. Given the definition of royalties contained in Article 12 of the DTAA's 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 assesseees, 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."*

Thus, the Honble Court held that amount paid by resident Indian end-user/distributors to non-resident computer software manufacturers/suppliers, as consideration for resale/use of computer software through EULAs/distribution agreement, is not payment of royalty for use of copyright in computer software, and thus, same does not give rise to any income taxable in India

10. In the facts of the case, the assessee can be bracketed in category (iii) (supra) as reseller. It is an unrebutted fact that the assessee has not charged any mark up on the cost of the software allocated to Indian entity. The assessee has not reflected software 'SAP-MII' in its books nor has claimed any depreciation on the same. Thus, in the facts of the case and in the light of the law expounded by the Hon'ble Supreme Court of India we hold that payment made by OCIPL to the assessee for providing copyrighted software would not fall within the definition of 'royalty' and is merely reimbursement of cost allocated to OCIPL. The ground No.1 of the appeal is thus, allowed.

11. In ground No.2 of appeal, the assessee is seeking direction to grant full credit of TDS as claimed. We deem it appropriate to restore this issue as well to the file of Assessing Officer to re-examine and allow TDS credit after verifying the documents on record.

12. In the result, appeal by the assessee is partly allowed, in the terms aforesaid.

Order pronounced in the open court on Monday the 28th day of November, 2022.

Sd/-

(M. BALAGANESH)

लेखाकार सदस्य/ACCOUNTANT MEMBER

मुंबई/ Mumbai, दिनांक/Dated 28/11/2022
Vm, Sr. PS(O/S)

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य/JUDICIAL MEMBER

प्रतिलिपि अग्रेषित Copy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त(अ)/ The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT, Mumbai
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BY ORDER,

(Dy./Asstt. Registrar) /
Sr.Private Secretary
ITAT, Mumbai