

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "D" NEW DELHI**

**BEFORE SHRI G.S. PANNU, HON'BLE PRESIDENT  
AND  
SHRI SAKTIJIT DEY, JUDICIAL MEMBER**

**आ.अ.सं./I.T.A No.8230/Del/2018  
निर्धारणवर्ष/Assessment Year: 2015-16**

<b>Mentor Graphics (Ireland) Ltd. Plot No. 7A/2, Sector-142, Noida, Uttar Pradesh.</b>	<b>बनाम Vs.</b>	<b>ACIT (International Taxation), Circle 2(2)(1), New Delhi.</b>
<b>PAN No. AAGCM6465H</b>		
<b>अपीलार्थी Appellant</b>		<b>प्रत्यर्थी/Respondent</b>

<b>निर्धारितीकीओरसे /Assessee by</b>	<b>Shri Tarandeep Singh, Adv.</b>
<b>राजस्वकीओरसे /Revenue by</b>	<b>Shri Anand Kumar Kedia, CIT DR</b>

<b>सुनवाईकीतारीख/ Date of hearing:</b>	<b>17.10.2022</b>
<b>उद्घोषणाकीतारीख/Pronouncement on</b>	<b>26 .12.2022</b>

**आदेश /O R D E R**

**PER SAKTIJIT DEY, J.M.**

Captioned appeal has been filed by the assessee challenging the final assessment order passed for the assessment year 2015-16 in pursuance to the directions of learned Dispute Resolution Panel (DRP).

2. The core issue arising for consideration in the present appeal is whether the Revenue earned from sale/distribution of software is chargeable to tax in India as Royalty under Article 12 of India-Ireland Double Taxation Avoidance Agreement (DTAA).

3. Briefly the facts are that assessee is a non-resident corporate entity incorporated in Ireland. Assessee is basically engaged in the business of sale of software and hardware and provision of support services. During the year under consideration, the assessee had earned Revenue from sale of software as well as provision of support services in India. In the return of income filed for the assessment year under dispute, assessee offered the Revenue earned from provision of support services to tax by treating it as fee for technical services under Article 12 of India-Ireland tax treaty. Whereas, the amount received towards supply of software was treated as business income and not offered to tax by taking shelter under Article 7 of India - Ireland tax treaty, in absence of a Permanent Establishment (PE) in India. In course of assessment proceedings, the Assessing Officer, while examining the assessee's claim of exemption under Article 12 of the tax treaty in respect of income earned from sale of software was of the view that the revenue received is in the nature of Royalty, hence, taxable in

India. While coming to such conclusion, he relied upon the decision of the Hon'ble Karnataka High Court in case of Samsung Electronics Co. Ltd. (345 ITR 494). Accordingly, he brought to tax the receipts from sale of software by applying the rate of 10% on gross receipts. Against the draft assessment order so framed assessee raised objections before learned Dispute Resolution Panel (DRP). However, relying upon the directions in assessee's own case in assessment years 2013-14 and 2014-15, learned DRP upheld the decision of the Assessing Officer.

4. We have heard Shri Tarandeep Singh, learned Counsel appearing for the assessee and Shri Anand Kumar Kedia, learned CIT (DR).

5. Before us, it is a common point between the parties that the Tribunal has decided identical issue in assessee's favour in assessment years 2013-14 and 2014-15.

6. Having considered the submissions of the parties, we find, while deciding identical issue in assessee's own case in assessment year 2013-14 the coordinate bench in ITA No. 6693/Del/2016 dated 26.11.2018 has decided the issue in favour of the assessee holding as under:

*“5.0 We have carefully considered the facts of the case and the material available on record. There is no dispute as regards the facts of the case. After considering the facts of the case and the arguments of both the sides, we are of the opinion that the issue is squarely covered in favour of the assessee by the decision of Hon’ble Jurisdictional High Court. In the case of Ericsson A.B., (supra), the Hon’ble Jurisdictional High Court has held as under:—*

*“Once one proceeds on the basis of aforesaid factual findings, it is difficult to hold that payment made to the assessee was in the nature of royalty either under the Act or under the DTAA. It is apparent that what was sold by the assessee to the Indian customers was a GSM which consisted both of the hardware as well as the software, therefore, the Tribunal is right in holding that it was not permissible for the revenue to assess the same under two different articles. The software that was loaded on the hardware did not have any independent existence. The software supply is an integral part of the GSM mobile telephone system and is used by the cellular operator for providing the cellular services to its customers. There could not be any independent use of such software. The software is embodied in the system and the revenue accepts that it could not be used independently. This software merely facilitates the functioning of the equipment and is an integral part thereof.*

*A fortiori when the assessee supplies the software which is incorporated on a CD, it has supplied tangible property and the payment made by the cellular operator for acquiring such property cannot be regarded as a payment by way of royalty.*

*It is also to be borne in mind that the supply contract cannot be separated into two viz., hardware and software.*

*No doubt, in an annexure to the supply contract the lump sum price is bifurcated in two components, viz., the consideration for the supply of the equipment and for the supply of the software. However, it was argued by the assessee that this separate specification of the hardware/software supply was necessary because of the differential customs duty payable.*

*Be as it may, in order to qualify as royalty payment, within the meaning of section 9(l)(vi) and particularly clause (v) of*

*Explanation - If thereto, it is necessary to establish that there is transfer of all or any rights (including the granting of any license) in respect of copy right of a literary, artistic or scientific work. Section 2(o) of the Copyright Act makes it clear that a computer programme is to be regarded as a literary work. Thus, in order to treat the consideration paid by the cellular operator as royalty, it is to be established that the cellular operator, by making such payment, obtains all or any of the copyright rights of such literary work. In the presence case, this has not been established. It is not even the case of the revenue that any right contemplated under section 14 of the Copyright Act, 1957 stood vested in this cellular operator as a consequence of the supply contract. Distinction has to be made between the acquisition of a 'copyright right' and a 'copyrighted article'."*

5.1 Similar view is expressed by the Hon'ble Jurisdictional High Court in the case of *Infrasoft Ltd.* (supra), wherein their Lordships held as under:—

*"86. The Licensing Agreement shows that the license is non-exclusive, non-transferable and the software has to be uses in accordance with the agreement. Only one copy of the software is being supplied for each site. The licensee is permitted to make only one copy of the software and associated support information and that also for backup purposes. It is also stipulated that the copy so made shall include Infrasoft's copyright and other proprietary notices. All copies of the Software are the exclusive property of Infrasoft. The Software includes a licence authorization device, which restricts the use of the Software. The software is to be used only for Licensee's own business as defined within the Infrasoft Licence Schedule. Without the consent of the Assessee the software cannot be loaned, rented, sold, sublicensed or transferred to any third party or used by any parent, subsidiary or affiliated entity of Licensee or used for the operation of a service bureau or for data processing. The Licensee is further restricted from making copies, decompile, disassemble or reverse-engineer the Software without Infrasoft's written consent. The Software contains a mechanism which Infrasoft may activate to deny the Licensee use of the Software in the event that the Licensee is in breach of payment terms or any other provisions of this Agreement. All copyrights and intellectual property*

*rights in and to the Software, and copies made by Licensee, are owned by or duly licensed to Infracsoft.*

87. *In order to qualify as royalty payment, it is necessary to establish that there is transfer of all or any rights (including the granting of any licence) in respect of copyright of a literary, artistic or scientific Work. In order to treat the consideration paid by the Licensee as royalty, it is to be established that the licensee, by making such payment, obtains all or any of the copyright rights of such literary work. Distinction has to be made between the acquisition of a "copyright right" and a copyrighted article". Copyright is distinct from the material object/ copyrighted. Copyright is an intangible incorporeal right in the nature of a privilege, quite independent of any material substance, such as a manuscript. Just because one has the copyrighted article, it does not follow that one has also the copyright in it. It does not amount to transfer of all or any right including licence in respect of copyright. Copyright or even right to use copyright is distinguishable from sale consideration paid for "copyrighted" article. This sale consideration is for purchase of goods and is not royalty.*

88. *The license granted by the Assessee is limited to those necessary to enable the licensee to operate the program. The rights transferred are specific to the nature of computer programs. Copying the program onto the computer's hard drive or random access memory or making an archival copy is an essential step in utilizing the program. Therefore, rights in relation to these acts of copying, where they do no more than enable the effective operation of the program by the user, should be disregarded in analyzing the character of the transaction for tax purposes. Payments in these types of transactions would be dealt with as business income in accordance with Article 7.*

89. *There is a clear distinction between royalty paid on transfer of copyright rights and consideration for transfer of copyrighted articles. Right to use a copyrighted article or product with the owner retaining his copyright, is not the same thing as transferring or assigning rights in relation to the copyright. The enjoyment of some or all the rights which the copyright*

*owner has, is necessary to invoke the royalty definition. Viewed from this angle, a non-exclusive and non-transferable licence enabling the use of a copyrighted product cannot be construed as an authority to enjoy any or all of the enumerated rights ingrained in Article 12 of DTAA. Where the purpose of the licence or the transaction is only to restrict use of the copyrighted product for internal business purpose, it would not be legally correct to state that the copyright itself or right to use copyright has been transferred to any extent. The parting of intellectual property rights inherent in and attached to the software product in favour of the licensee/customer is what is contemplated by the Treaty. Merely authorizing or enabling a customer to have the benefit of data or instructions contained therein without any further right to deal with them independently does not, amount to transfer of rights in relation to copyright or conferment of the right of using the copyright. The transfer of rights in or over copyright or the conferment of the right of use of copyright implies that , the transferee/licensee should acquire rights either in entirety or partially co-extensive with the owner/ transferor who divests himself of the rights he possesses pro tanto.”*

5.2 We find that treaty provisions between India and Ireland unambiguously require that the use of copyright is to be taxed in the source country. In the present case, the payment has been made by assessee for use of "copyrighted material" rather than for the use of copyright. The facts of the present case are identical with the facts before the Hon'ble Jurisdictional High Court. None of the lower authorities have factually doubted the contention of the assessee that it has received consideration for the transfer of a copyrighted product and not for the transfer of copyrights in the computer software programme. The distinction between the transfer of a copyright and the transfer of a copyrighted product is prominent. The sole contention of the AO and the Ld DRP is that the department is in appeal against the decision s of the Jurisdictional High Court before the Hon'ble Apex Court. The AO has relied upon the decision of the Hon'ble Karnataka High Court in case of Samsung Electronics (supra) and GracemacCorpn (supra). These decisions are not being considered as the issue is extensively dealt with by the Hon'ble Jurisdictional High Court in the cases of Ericsson A.B. and Infrasoft Ltd

*(supra) which are binding on this Tribunal. Once it is not in dispute that there is no transfer of any copyright in the computer software by the assessee to its customers, we observe that all the arguments put forth by the AO and the assessee are considered and answered by the Jurisdictional High Court in these decisions. Further, the Delhi High Court in Infra soft (supra) has specifically expressed its disagreement with the view taken by the Hon'ble Karnataka High Court in the case of Samsung Electronics Co Ltd. (supra). Hence, the decisions relied by the AO in the case of Samsung Electronics and GracemacCorpn. (supra) does not help the case of the Revenue, as we are under the Jurisdiction of the Hon'ble Delhi High Court.*

*5.3 Accordingly, respectfully following decision of the Hon'ble jurisdictional High Court in the case of Infrasoftware Ltd. (supra) and on the basis of discussions above we hold that receipts derived by the assessee from "Sale of Software" is not in nature of "Royalty" as defined under Article 12 of India-Ireland DTAA. Since treaty provisions are more beneficial, an adjudication on nature of receipts vis a vis provisions of Section 9(1)(vi) is not required. Grounds Nos. 1 to 4 are accordingly allowed."*

6.1 Identical view was reiterated by the Tribunal while deciding assessee's appeal in assessment year 2014-15 vide order dated 09.07.2020 passed in ITA No. 3966/Del/2017. The fact that the factual position in the impugned assessment year is identical to assessment years 2013-14 and 2014-15 cannot be doubted for the simple reason that learned DRP while deciding the objections of the assessee relied upon the decision taken by it in assessment years 2013-14 and 2014-15.

7. In view of the aforesaid, respectfully following the consistent view of the Tribunal in assessee's own case as discussed above, we

hold that the amount received by the assessee from sale of software cannot be treated as royalty under Article 12 of India - Ireland tax treaty. In any case of the matter, now the issue is no more *res integra* in view of the decision of the Hon'ble Supreme Court in case of Engineering Analysis Centre of Excellence Pvt. Ltd. vs. CIT (2021-TII-02-SC-INTL-LB). Accordingly, we delete the addition of Rs.18,16,14,910/-. Grounds are allowed.

8. In the result, the appeal is allowed, as indicated above.

Order pronounced in the open court on 26 /12/2022

Sd/-  
(G.S. PANNU)  
PRESIDENT

Sd/-  
(SAKTIJIT DEY)  
JUDICIAL MEMBER

Dated: 26 .12.2022

\*Kavita Arora, Sr. P.S.

Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT (DR)/Guard file of ITAT.

By order

Assistant Registrar, ITAT: Delhi Benches-Delhi