

**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.103/Del/2022
निर्धारणवर्ष/Assessment Year: 2017-18**

DCIT Circle 3(1)(2) Int. Taxation, New Delhi.	बनाम Vs.	Software One Pte Ltd. 223, Mountbatten Road, Singapore.
		PAN No. AAPCS9237H
अपीलार्थी Appellant		प्रत्यर्थी/Respondent

निर्धारितकीओरसे /Assessee by	Ms. Ananya Kapoor, Adv.
राजस्वकीओरसे /Revenue by	Shri Gangadhar Panda, CIT DR

सुनवाईकीतारीख/ Date of hearing:	26.10.2022
उद्घोषणाकीतारीख /Pronouncement on	26.12.2022

आदेश /O R D E R

PER SAKTIJIT DEY, J.M.

Captioned appeal by the Revenue arises out of order dated 18.10.2021 passed by the learned Commissioner of Income Tax (Appeals)-43, New Delhi pertaining to Assessment Year 2017-18.

2. The grievance of the Revenue is with regard to the decision of learned First Appellate Authority holding that the amount received by the assessee from sale/distribution of software is not royalty

within the meaning of Article 12(3) of India - Singapore Double Taxation Avoidance Agreement (DTAA).

3. Briefly the facts are, the assessee is a non resident corporate entity incorporated under the laws of Singapore and a tax resident of Singapore. For the assessment year under dispute assessee filed its return of income on 31.03.2018 declaring total income of Rs.1,56,50,870/-. As observed by the Assessing Officer, the assessee is engaged in the business of providing end to end software and cloud technology solution to its clients. In the year under consideration the assessee entered into certain transactions in India and earned revenue as under:

- | | |
|-------------------------------------|--------------------|
| 1. Fees for Technical Service (FTS) | Rs. 1,56,50,875/-; |
| 2. Sale of software | Rs. 12,87,22,587/- |

4. In so far as FTS is concerned, the assessee voluntary treated as income in the nature of FTS and offered to tax in India. However, in so far as revenue earned from sale of software, the assessee pleaded before the Assessing Officer that it is sale/distribution of copyrighted article and not sale of copyright. Therefore, not in the nature of royalty. The Assessing Officer, however, was not convinced with the pleading of the assessee. Therefore, he issued a show cause notice to the assessee to explain

why income received from sale of software should not be treated as royalty in terms of provisions of the Act as well as India - Singapore DTAA. In response to the show cause notice issued by the Assessing Officer, assessee furnished a detailed reply in support of its claim that the income earned is from sale of copyright article and not sale copyright itself. The Assessing Officer, however, did not find merit in the submissions of the assessee. Ultimately, he concluded that the revenue earned by the assessee is from transfer of right to use of copyright, hence, in the nature of royalty both under the provisions of the Act as well as under the India - Singapore DTAA. Accordingly, he added the amount of Rs.12,87,22,857/- to the income of the assessee. Assessee contested the aforesaid addition before learned Commissioner (Appeals).

5. After considering the submissions of the assessee in the context of facts and materials available on record and following the ratio laid down by the Hon'ble Supreme Court in case of Engineering Analysis Centre of Excellence Pvt. Ltd. Vs. CIT (2021) 125 taxman.com 42 (SC). Learned Commissioner (Appeals) ultimately accepted assessee's claim that the revenue earned by the assessee is in the nature of sale of a copyrighted article and not for transferring the right to use any copyright. Thus, he held that the

amount received is not in the nature of royalty but in the nature of business income and in absence of a Permanent Establishment (PE) is not taxable in India.

6. Before us, learned Departmental Representative strongly relied upon the observations of the Assessing Officer and submitted that the assessee has distributed/sold software to various customers in India. He submitted, though, the software sold is a copyrighted article, however, along with the software the assessee has sold/transferred the right to use the copyright. Therefore, the amount received from sale of software has to be treated as royalty. He submitted, the fact that the assessee has offered the revenue earned from software sale related services as FTS also proves that what the assessee has transferred is right to use the copyright.

7. Referring to the decision of the Tribunal in case of M/s Microsoft Corporation Vs. Assistant Director of Income Tax in ITA No. 1392/Del/2005. learned Departmental Representative submitted, the software sold by the assessee involves computer programme which is a process when it executes instruction lying in it in passive state. Therefore, the consideration received is for use of process which will amount to royalty under section 9(1)(vi) of the

Act. Thus, he submitted, the Assessing Officer was justified in treating the amount received as royalty.

8. In reply, learned Counsel appearing for the assessee strongly relied upon the observations of learned First Appellate Authority and submitted that the facts on record would clearly reveal that what the assessee has sold to the customers are copyrighted articles and were sold on principal to principal basis. She submitted, the assessee is a non resident distributor who purchases software from non-resident manufacturers/sellers and re-sales them to distributors/end users in India. She submitted, when the assessee itself does not have any right in the copyright and purchases from another party for re-sale, how can it transfer such non-existent right to others? Thus, she submitted, assessee's case is squarely covered by the decision of the Hon'ble Supreme Court in case of Engineering Analysis Centre of Excellence Pvt. Ltd. Vs. CIT (supra). Further, she submitted the decision of the Tribunal in case of Microsoft Corporation (supra) relied upon by the Revenue could be of no help as in an appeal preferred by the said assessee the Hon'ble Delhi High Court has accepted assessee's claim and reversed the decision of the Tribunal.

9. We have considered rival submissions and perused the materials on record.

10. Undisputedly, the assessee is a tax resident of Singapore, hence, a non resident entity. Facts on record reveal that the assessee is simply a distributor of software. It purchases software from non-resident manufacturers/sellers, such as, Microsoft, Adobe etc. and distributes/sells them to distributors and customers in India. Thus, the assessee itself is not the manufacturer or creator of software. Therefore, assessee cannot own copyright over the softwares as the manufacturer or creator of the software can hold copyright over the software. From the submissions made before the departmental authorities, these facts are clearly discernible. Thus, the products sold by the assessee are ready to use off the shelf or shrink wrapped softwares, which are nothing but copyrighted articles. From the nature of software products sold by the assessee, it can be very well construed that the copyright over the software sold by the assessee were owned by the companies creating such softwares like Microsoft, Adobe, etc. The assessee is merely a trader of software, hence, has no domain or ownership over the software. Thus, when the assessee does not have any ownership over the softwares sold, it could not have transferred the

right to use of copyright of the software to distributors/customers in India. In case of Engineering Analysis (supra), the Hon'ble Supreme Court had an occasion to examine when the consideration received from sale of software can be considered to be in the nature of royalty. The Hon'ble Supreme Court had segregated the transactions relating to the sale of software to following 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 distributors 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.”*

11. Undisputedly, assessee's case falls within the third category. While deciding the issue whether the payment made is in the nature of royalty, the Hon'ble Supreme Court very clearly and categorically held that the amount paid by resident Indian end users/distributors

to non-resident computer software manufactures/suppliers as consideration for the re-sale/use of the computer software through end user license agreement/distribution agreement is not in the nature of royalty for the use of copyright in the computer software, hence, cannot be treated as royalty. Thus, the aforesaid ratio laid down by the Hon'ble Supreme Court clearly applies to the facts of the present appeal. Thus, in our considered opinion, learned Commissioner (Appeals) has adopted the right course of action while deleting the addition made by the Assessing Officer, following the ratio laid down by the Hon'ble Supreme Court in case of Engineering Analysis (supra). Pertinently, for the sake of completeness, we must observe, though, learned Departmental Representative had placed strong reliance upon the decision of the Tribunal in case of M/s Microsoft Corporation Vs. ADIT (supra), however, while deciding the appeal filed by Microsoft Corporation, the Hon'ble Jurisdictional High Court in order dated 18.07.2022 in ITA No. 663/Del/2011, following the decision of the Hon'ble Supreme Court in case of Engineering Analysis Center of Excellence Pvt. Ltd. Vs. CIT (supra), has allowed assessee's appeal, thereby, reversing the decision of the Tribunal. Therefore, the decision

cited by learned Departmental Representative would be of no help to the Revenue.

12. In view of the aforesaid, we do not find any infirmity in the decision of learned Commissioner (Appeals) on the issue. Grounds are dismissed.

13. In the result, appeal is dismissed.

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