

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D": NEW DELHI
Before Shri G.S. Pannu, Hon'ble President
And
Shri Anubhav Sharma, Judicial Member

ITA No. 670/Del/2020 & 244/Del/2021
(Assessment Year: 2015-16 & 2016-17)

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| SDL Multi-Lingual Solutions (Singapore) Pte Ltd, Level-NV Wing the Ruby, Senapati Bapat Marg, Dadar West, Mumbai (Appellant) | Vs. | ACIT, Circle-3(1)(2), International Taxation, New Delhi (Respondent) |
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| Assessee by : | Shri Bhavin Shah, CA Shri Jai Shah, CA |
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| Revenue by: | Ms. Sapna Bhatia, CIT DR Sh. Kanv Bali, Sr. DR |
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| Date of Hearing | 13/01/2023 |
| Date of pronouncement | 07/02/2023 |

ORDER

PER ANUBHAV SHARMA, J. M.:

1. These appeals have been preferred by the Assessee against the order dated 29.11.2019 for Assessment Year 2015-16 and 06.07.2020 for Assessment Year 2016-17 respectively of Ld. CIT(A)-43, New Delhi (hereinafter referred as the First Appellate Authority "FAA") in appeal No. 1030/2017-18 and 10307/2018-19 respectively arising out of an appeals before it against the order dated 24.01.2018 and 22.02.2019 for respective years passed u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred as 'the Act') by the Id AO, Addl. CIT, Circle-3(1)(2), New Delhi (hereinafter referred as the Ld. AO).

2. The Assessee Company is incorporated under the laws prevalent in Singapore and is engaged in the business of developing software and

providing allied services. A return of income was filed declaring total income as Nil and the case was selected for complete scrutiny. During the year under consideration the Assessee company has licensed software to Reliance Jio Infocomm Ltd (hereinafter also mentioned as Reliance Jio) under two separate agreements and the Id AO had considered that the receipts to be taxed as royalty on the basis that the transaction squarely falls within the provisions of section 9(1)(vi) of the Act and also under the relevant Article 12 of India-Singapore Treaty.

3. Accordingly, the appeal was dismissed. The Assessee is in appeal before the tribunal raising following grounds in both the appeals:-

"1. On the facts and circumstances of the case, the learned CIT(A) has factually and legally erred in upholding the order of the learned Assessing officer, treating the receipts of the appellant company as Royalty and consequently chargeable to tax in India in the hands of the appellant company at 10%."

4. Heard and perused the record.

5. It was submitted on behalf of the Assessee that in the light of the judgment of Hon'ble Supreme Court in **Engineering Analysis Centre Excellence Pvt. Ltd Vs. CIT (2021) 125 Taxmann.com 42 (SC)** the controversy is no more re integra. It was submitted that in Assessee's own case for Assessment Year 2019-20 the Id CIT(A) has considered the judgment of Hon'ble Supreme Court in **Engineering Analysis Centre Excellence Pvt. Ltd Vs. CIT (supra)** case and held that the receipts in the hands of the Assessee is only business profits not taxable in India in the absence of PE in India. It was submitted that the in the case of **Dy. CIT Vs. Reliance Jio Infocom Ltd in ITA No. 2216/Mum/2019 vide order dated 22.03.2021**, wherein, the question with regard to no tax is deductible on the payment/ credit made by M/s. Reliance Jio Infocom Ltd to present Assessee as SDL for software was considered and again relying on the judgment of the Hon'ble Supreme Court in Engineering Analysis Centre of Excellence Pvt Ltd Vs. CIT (supra) case it was held that the

Assessee in that case i.e. Reliance Jio Infocom Ltd does not have any tax withholding obligation u/s 195 from payment made on account of software.

6. The Id DR defended the findings of the Id Tax Authorities below. She submitted that since there is provision of parting away with source code, the principles laid in the judgment of the Hon'ble Karnataka High Court, in the case of Samsung Electronics Co.Ltd, are applicable.

7. Now, appreciating the matter on record it can be observed that there is no dispute to the fact that the Assessee is a company incorporated in Singapore and certificate of residence for the purpose of claiming benefit under Singapore/India DTA for software technologies is on record at page No. 112-113 of the paper book. The Id AO has referred to two agreement entered between the Assessee and Reliance Jio Infocom Ltd (hereinafter referred as "Reliance Jio"). The agreement dated 11.08.2017 is on record at page No. 1-38 of the paper book and the same shows that the terms of agreement is for five years.

7.1 Further, Clause 6 defines the scope of deliverables as software. It is shown to be agreed that

- "1. *Vendor grants to Buyer a non-exclusive, non-transferable (unless otherwise as detailed hereunder), irrevocable (subject to compliance with the license grant as detailed under clause 6(1) and clause 6(9)), royalty free, fully paid up, perpetual, worldwide, (unless otherwise indicated in this Agreement), enterprise wide, unlimited use and related Documentation for Buyer's business operations.*
2. *Subject to the Buyer having a valid AMC or during the Warranty Period the Buyer will have a right to all future updates/upgrades/enhancements as and when released to any customer by the Vendor.*
3. *Warranty Period of Software: 1 year from the effective date. Except in the case of minor."*

7.2 Further, the restriction clause 9 mentions as under:-

"9. Except as otherwise agreed in the License Grant the Buyer may not:

- (a) *assign, lease, transfer or sublicense the Software licences or Documentation to any third party for use in that third party's business operations except in cases where such business operations are related to providing services to Buyer, nor use the licensed Software to support any third party processing ;*
- (b) *cause or permit decompilation, disassembly or reverse engineering of the Software, in whole or in part, except to the extent as permitted by mandatory provisions of the applicable law;*
- (c) *disclose or make available to, or permit use of the Software by persons other than Buyer's employees, consultants or implementors of the Software;*
- (d) *write or develop derivative work (meaning any new code or original works based on the Vendors pre-existing intellectual property rights) or any other program based solely on Vendor's Confidential Information; or*
- (e) *remove or modify any Software markings or any notice of Vendor's or its licensors proprietary rights.*
- (f) *The Buyer is only authorised to use the Software in accordance with the license grant and rights not detailed hereunder are prohibited by the Vendor."*

8. The Id CIT(A) after taking into consideration relevant clauses of the two agreements held that the consideration/receipt is chargeable to tax as royalty under Article 12 of India-Singapore treaty and following were held to be the main reason for the same:-

- " 1. *For business purpose, the rights received by Reliance Jio may be transferred, assigned, sub-licensed or leased to any third party.*
2. *The client has a right to decompile the software even though it is limited.*
3. *The vendor has agreed to part with the source code (though in a protected manner) so as to enable continuity of business operations of the buyer.*
4. *The vendor is granted unlimited users for the right to use the software.*
5. *The right to reproduce the software is de facto transferred as use of the software in unlimited CPUs would be possible after reproduction only."*

9. It will be appropriate to discuss each of the reason individually and consider how far the same are sustainable or not. In regard to **first reason** it can be observed that clause 9(a) as reproduced above seems to have been selectively quoted and applied by the Id CIT(A). The Assessee has not agreed for absolute transfer or assignment, sub-license or lease of the rights to the Reliance Jio as 3rd Party but rather the right has been restricted by the Clause 9(a) as it is an exception clause. Further, it is only in regard to the business operation related to providing services to Reliance Jio assignment, lease, transfer or sub-license to a 3rd party is permitted. That only indicates that when the 3rd party is providing any service by its business operations to Reliance Jio only, in those circumstances the said 3rd party may be allowed to use the software license or documents by the buyer, reliance Jio. Such transfer of any interest by assignment, lease, transfer or sub-license to 3rd party is not for the own benefit of the 3rd party or generate revenue from independent business operations in which Reliance Jio would have no interest. Thus the first reason cited by the Id CIT(A) is not sustainable.

10. Coming to the **second reason** it can be observed that the Id CIT(A) himself has found that right to decompile the software has been given for a limited extent. Clause 9(b) again is part of exception clause and infact restricts decompilation, re-assemble or reverse engineering of

the software and the clause mentions that it is only when the law, if any, mandates such decompilation the same would be permitted under the agreement in favour of the Reliance Jio. Thus, it is not under the agreement entered between the parties, the right to decompile has been allowed but only as exception, where the law of the land would mandate or to say casts duty for such decompilation, then the Reliance Jio has been permitted to do the same.

11. The **third reason** cited by the Id CIT(A) is not sustainable as the provision made of source code escrow arrangement is only to deal with the contingency so that the buyer's business continues during the term of agreement of five years if likely to be effected by uncertainty like Bankruptcy etc of the assessee. Escrow arrangement is merely remedial measures to give continuity to the agreement during its life and cannot be said to be arrangement to part of the rights in favour of the buyer to use the license software to support any 3rd party processing.

12. In regard to **fourth reason**, the Id CIT(A) has failed to appreciate that in the case in hand, when the agreement specifically mentions that the Assessee has given to his buyer non-exclusive and non transferable but *enterprise wide unlimited use rights* in the software, then reproduction for multiple end users, within the association of buyers cannot be construed to be conferring proprietary interest on the licensee, by parting with any copyright in the software. It is merely for the convenience and to avoid multiple transactions and consequent agreement for every end user of the Reliance Jio.

13. Coming to the **last reason number five**, it can be observed that reproduction of the software in unlimited CPUs cannot be considered to be a license in terms of section 30 of Copyright Act. The concept of end user License Agreement (EULA) has been examined extensively by the Hon'ble Supreme Court in case of **Engineering Centre of Excellence Pvt. Ltd (supra)** and held that it is not agreement under which the

vendor part of any interest relatable to any right mentioned in section 14A and 14B of the Copyright Act. The CPUs being used by Reliance Jio's employees, consultants and implementers of the software, would certainly require installation by reproductions, when the enterprise wide unlimited use rights in the software are given.

14. Furthermore, it can be appreciated that in the case of the buyer Reliance Jio, the **Mumbai Bench in ITA NO. 2216/Mum/2019 for Assessment Year 2018-19** has upheld the order of the Id CIT(A) in holding that no tax is deductible of the payment/ credit made by Reliance Jio to present Assessee, SDL, for the software. The coordinate bench has relied on the judgment of the Hon'ble Supreme Court in case of **Engineering Analysis Centre of Excellence Pvt. Ltd (supra)**. Impliedly, not treating the receipts of the present appellant company as Royalty and consequently not chargeable to tax in India.

15. That being so, this bench is of considered opinion Ld. FAA has fallen in error in sustaining the Assessment order and the ground raised is allowed in favour of the Assessee/ appellant. The appeals are allowed.

Order pronounced in the open court on 07/02/2023.

-Sd/-
(G.S. PANNU)
HON'BLE PRESIDENT

-Sd/-
(ANUBHAV SHARMA)
JUDICIAL MEMBER

Dated: /02/2023
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi