

आयकर अपीलीय अधिकरण, हैदराबाद पीठ में  
IN THE INCOME TAX APPELLATE TRIBUNAL  
HYDERABAD BENCHES "A", HYDERABAD

BEFORE  
SHRI RAMA KANTA PANDA, ACCOUNTANT MEMBER  
&  
SHRI K.NARASIMHA CHARY, JUDICIAL MEMBER

आ.अपी.सं / ITA-IT No. 471/Hyd/2022  
(निर्धारण वर्ष / Assessment Year: 2014-15)

S&P Capital IQ (India)  
Private Limited,  
Hyderabad  
[PAN No. AACCS8657G]

Dy. Commissioner of  
Income Tax  
Vs. (International Taxation)-2,  
Hyderabad

अपीलार्थी / Appellant

प्रत्यर्थी / Respondent

निर्धारिती द्वारा/Assessee by: Shri K.C. Devdas, AR  
राजस्व द्वारा/Revenue by: Shri Rajendra Kumar, CIT-DR

सुनवाई की तारीख/Date of hearing: 01/03/2023  
घोषणा की तारीख/Pronouncement on: 07/03/2023

आदेश / ORDER

**PER K. NARASIMHA CHARY, JM:**

Aggrieved by the order dated 25/07/2022 passed by the learned Commissioner of Income Tax (Appeals)-10, Hyderabad ("Ld. CIT(A)"), in the case of M/s. S&P Capital IQ (India) Private Limited ("the assessee") for the assessment year 2014-15, assessee preferred this appeal.

2. Briefly stated relevant facts are that the assessee Company is engaged in the business of providing Information Technology Enabled Services (ITES) to its parent company S&P Global Market Intelligence LLC, USA (earlier known as Capital IQ Inc., USA). During the year under consideration, the assessee had made certain remittances aggregating to Rs. 14,95,53,994/- to S&P Global Inc. (formerly known as McGraw Hill Financial Inc.) towards reimbursement for software licenses. On completion of proceedings, the learned Assessing Officer passed an order under section 201(1)/(1A) of the Act on June 15, 2018, treating the said remittances liable to tax deduction as 'Royalty payments' and thereby raising a demand of Rs.4,66,60,846/-. Learned Assessing Officer made addition of Rs. 2,99,10,799/- towards the 20% of TDS on the software license payment in the nature of royalty and also charged interest of Rs. 1,67,50,047/- under section 201(1A) of the Act.

3. Aggrieved by such an action of the learned Assessing Officer, assessee preferred an appeal before the learned CIT(A) and submitted that the matter is squarely covered by the decision of the Hon'ble Apex Court in the case of Engineering Analysis Centre of Excellence Private Limited (TS-106-SC-2021). Learned CIT(A), however, recorded that the assessee did not produce the agreement/terms of usage of software, the restrictions and rights granted under the Copy Rights Act. He further found that the invoices submitted by the assessee do not specify whether the licenses are in the nature of end user license, enterprise license, distributable or commercially exploitable license and in the absence of undertaking any detailed examination on this aspect, it would be difficult to say whether or not the decision of the Hon'ble Apex Court is applicable to the facts of the case.

4. Assessee is, therefore, before us in this appeal, stating that the learned Assessing Officer himself recorded that the licenses obtained by the parent company from the Microsoft could have directly been obtained by the licensee himself and, therefore, there is no role for the parent

company in the entire exercise except holding license in its own name and facilitating the assessee to use the same, and, therefore, absolutely there is no need to look into the agreement between the assessee and the parent company. He further submitted that the invoices submitted by the assessee clearly establish that it is only a matter of reimbursement and the assessee is bound by the terms of license granted by the Microsoft and Dell, irrespective of the nature of task performed on these softwares. He, therefore, submits that the decision of the Hon'ble Apex Court in the case of Engineering Analysis Centre of Excellence Private Limited (supra) is applicable to the facts of the case.

5. Per contra, learned DR heavily relied upon the decision of the authorities below and submitted that unless the facts are verified, the applicability of decision cannot be decided.

6. We have gone through the record in the light of the submissions made on either side. It is a fact that the learned Assessing Officer herself recorded that though the license agreement was entered into by the parent entity of the assessee with Microsoft and Dell and the assessee is provided with the same for its use, the invoices issued by the Microsoft specifying the various usages by the users, clearly show that the assessee could have directly accessed the software under the license from the Microsoft and Dell. She further recorded that the parent company infact has no role in the entire exercise except holding the license on its name but as a matter of fact irrespect of the nature of task performed on these softwares, it is the assessee who is using it, is bound by the terms of license issued by the Microsoft and Dell. She further held that the payments made by the assessee to the parent company for the use of the software licenses are in substance the payments made to the Microsoft and Dell for the use of their software.

7. The findings recorded by the learned Assessing Officer very clearly establish that there is no income component to the parent company in the payments made by the assessee to it towards software license. It shows that the parent company is only a pass through entity insofar as the software payment license are concerned. There is no doubt that the software in question is used by the assessee in rendering their services to the parent company itself and by nature it is shrink wrap computer software. In these circumstances, when the learned Assessing Officer herself recorded that the parent entity has no role to play in the transaction of assessee's access to the software, the agreement between the parent entity and Microsoft and Dell does not appear to be much relevant. Suffice to say that through the invoices produced by the assessee and as found by the learned Assessing Officer, there is no component of income involved in this license transaction accruing to the parent entity.

8. In the case of Engineering Analysis Centre of Excellence Private Limited (supra), the Hon'ble Supreme Court held that,-

*"54. There is no doubt that section 9 of the Income Tax Act refers to persons who are non-residents and taxes their income as income which is deemed to accrue or arise in India, thus, making such persons assesseees under the Income Tax Act, who are liable to pay tax. There is also no doubt that the "person responsible for paying" spoken of in section 195 of the Income Tax Act is not a non-resident assessee, but a person resident in India, who is liable to make deductions under section 195 of the Income Tax Act when payments are made by it to the nonresident assessee....."*

*55. What is made clear by the judgment in GE Technology (supra) is the fact that the "person" spoken of in section 195(1) of the Income Tax Act is liable to make the necessary deductions only if the non-resident is liable to pay tax as an assessee under the Income Tax Act, and not otherwise. This judgment also clarifies, after referring to CBDT Circular No. 728 dated 30.10.1995, that the tax deductor must take into consideration the effect of the DTAA provisions. The crucial link, therefore, is that a deduction is to be made only if tax is payable by the non-resident assessee, which is underscored by this judgment,*

*stating that the charging and machinery provisions contained in sections 9 and 195 of the Income Tax Act are interlinked.....*

*57. The absurd consequence that the resident in India, after making the deduction/payment, would not then get any excess payment made by way of refund when regular assessment takes place, as the non-resident assessee alone would be entitled to such refund, is also pointed out in paragraph 18 of the judgment in GE Technology (supra). It was after keeping all this in view that this Court then set aside the judgment of the High Court of Karnataka dated 24.09.2009 and remanded the case to the High Court for a decision of the question "on merits", i.e., on the sole question as to whether the ITAT was justified in holding that the amounts paid by the appellants to the foreign software suppliers did not amount to royalty, as a result of which, no liability to deduct TDS arose.....*

*117. The conclusions that can be derived on a reading of the aforesaid judgments are as follows:*

*i) Copyright is an exclusive right, which is negative in nature, being a right to restrict others from doing certain acts.*

*ii) Copyright is an intangible, incorporeal right, in the nature of a privilege, which is quite independent of any material substance. Ownership of copyright in a work is different from the ownership of the physical material in which the copyrighted work may happen to be embodied. An obvious example is the purchaser of a book or a CD/DVD, who becomes the owner of the physical article, but does not become the owner of the copyright inherent in the work, such copyright remaining exclusively with the owner.*

*iii) Parting with copyright entails parting with the right to do any of the acts mentioned in section 14 of the Copyright Act. The transfer of the material substance does not, of itself, serve to transfer the copyright therein. The transfer of the ownership of the physical substance, in which copyright subsists, gives the purchaser the right to do with it whatever he pleases, except the right to reproduce the same and issue it to the public, unless such copies are already in circulation, and the other acts mentioned in section 14 of the Copyright Act.*

*iv) A licence from a copyright owner, conferring no proprietary interest on the licensee, does not entail parting with any copyright, and is different from a licence issued under section 30 of the Copyright Act, which is a licence which grants the licensee an interest in the rights mentioned in section 14(a) and 14(b) of the Copyright Act. Where the core of a transaction is to authorize the end-user to have access to and make use of the “licensed” computer software product over which the licensee has no exclusive rights, no copyright is parted with and consequently, no infringement takes place, as is recognized by section 52(1)(aa) of the Copyright Act. It makes no difference whether the end-user is enabled to use computer software that is customised to its specifications or otherwise.*

*v) A non-exclusive, non-transferable licence, merely enabling the use of a copyrighted product, is in the nature of restrictive conditions which are ancillary to such use, and cannot be construed as a licence to enjoy all or any of the enumerated rights mentioned in section 14 of the Copyright Act, or create any interest in any such rights so as to attract section 30 of the Copyright Act.*

*vi) The right to reproduce and the right to use computer software are distinct and separate rights, as has been recognized in SBI v. Collector of Customs, 2000 (1) SCC 727 (see paragraph 21), the former amounting to parting with copyright and the latter, in the context of non-exclusive EULAs, not being so.*

*118. Consequently, the view contained in the determinations of the AAR in Dassault (AAR) (supra) and Geoquest (AAR) (supra) and the judgments of the High Court of Delhi in Ericsson A.B. (supra), Nokia Networks OY (supra), Infracsoft (supra), ZTE (supra), state the law correctly and have our express approval. We may add that the view expressed in the aforesaid judgments and determinations also accords with the OECD Commentary on which most of India’s DTAAAs are based.*

.....  
.....

*168. Given the definition of royalties contained in Article 12 of the DTAAAs 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 assessee, 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.*

*170. The appeals from the impugned judgments of the High Court of Karnataka are allowed, and the aforesaid judgments are set aside. The ruling of the AAR in Citrix Systems (AAR) (supra) is set aside. The appeals from the impugned judgments of the High Court of Delhi are dismissed.”*

9. In view of the fact that the payments made by the assessee were essentially for making use of the shrink wrap computer software wherein the assessee has non-exclusive and non-transferrable license enabling use of the programme in the copyrighted product, there is no transfer of any copyright in the product nor the assessee was granted any commercial right to exploit it other than for permissible usage. The matter is covered by the decision of the Engineering Analysis Centre of Excellence Private Limited (supra), respectfully following the same, we hold that the impugned payments made by the assessee do not fall in the definition of royalty and consequently, do not attract any addition on that score.

10. With this view of the matter, we direct the learned Assessing Officer to delete the same. Grounds raised by the assessee are allowed accordingly.

11. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on this the 7<sup>th</sup> day of March, 2023.

Sd/-  
**(RAMA KANTA PANDA)**  
**ACCOUNTANT MEMBER**

Sd/-  
**(K. NARASIMHA CHARY)**  
**JUDICIAL MEMBER**

Hyderabad,  
Dated: 07/03/2023

TNMM

Copy forwarded to:

1. S&P Capital IQ (India) Private Limited, Survey No. 83/1, Sky View 10, Floor No. 19, 20, 21, Knowledge City, Raidurgam Village, Serilingampally Mandal, Hyderabad.
2. Dy. Commissioner of Income Tax (International Taxation)-2, Hyderabad.
3. CIT(IT &TP)-Hyderabad.
4. DR, ITAT, Hyderabad.
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