IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH: 'D' NEW DELHI

BEFORE SHRI G.S. PANNU, HON'BLE PRESIDENT
AND
SHRI SAKTIJIT DEY, VICE PRESIDENT

ITA No.4721/Del/2019
Assessment Year: 2015-16

Aircon Beibars (FZE), C/o-AL Sehgal & Co., CA 514, Arunachal Building 19, Barakhamba Road, New Delhi	**Vs.**	DCIT, Circle -1(1)(1), International Taxation, New Delhi
PAN :AALCA6824C		
(Appellant)		**(Respondent)**

Assessee by	Sh. K. Sampath, Advocate Sh. V. Rajkumar, Advocate Sh. Vishal Sehgal, FCA
Department by	Sh. Vizay B. Vasanta, CIT(DR)

Date of hearing	15.05.2023
Date of pronouncement	31.07.2023

ORDER

The present appeal of the assessee arises out of order dated 29.03.2019 of learned Commissioner of Income Tax (Appeals)-42, New Delhi, pertaining to assessment year 2015-16.

2. The solitary dispute arising in the appeal relates to taxability of Rs.1,43,59,792/- as income from royalty.

3. Briefly the facts are, the assessee is a non-resident corporate entity incorporated under the laws of United Arab Emirates (UAE)

and stated to be engaged in the business of leasing of helicopter to the clients across the world. For the assessment year under dispute, the assessee filed its return on 28.03.2017, declaring total income of Rs.5,28,58,080/-. However, the assessee claimed that the amount received, being in the nature of business income, is not taxable in India, in absence of a Permanent Establishment (PE). In course of assessment proceedings, the Assessing Officer called for the necessary details relating to the lease charges. After examining the details furnished by the assessee, he observed that the assessee has leased one helicopter to M/s. Heligo Charter Pvt. Ltd. through a dry lease agreement executed on July 13, 2012 for a period of three years. He observed, as per the agreement, the assessee has transferred the right to use/operate the helicopter in India. Thus, based on the aforesaid facts, the Assessing Officer issued a show-cause notice to the assessee to explain, why the lease charges received from leasing of the helicopter should not be treated as royalty under Article 12 of India – UAE Double Taxation Avoidance Agreement (DTAA) read with section 9(1)(vi) of the Income-tax Act, 1961 (in short 'the Act').

4. In response to the show-cause notice, the assessee furnished a detailed reply denying its liability under the Act as

well as under the treaty provisions by stating that it has simply given lease of asset (helicopter) to an Indian entity and not any license or privilege to use an intellectual property in the asset. Thus, the assessee submitted that the lease rental cannot be taxed as royalty, either under the Act or under the treaty provisions. The Assessing Officer, however, was not convinced with the submission of the assessee. Referring to clause (iva) of Explanation (2) to section 9(1)(vi) of the Act, the Assessing Officer observed that word 'equipment' is neither defined under the Act, nor under the DTAA. Therefore, according to him, the dictionary meaning of the word has to be adopted. Thereafter, referring to the dictionary meaning of the word, the Assessing Officer concluded that lease of helicopter would fall under the definition of royalty as per section 9(1)(vi) of the Act. Without prejudice, he held that even as per Article 12(3) of India – UAE DTAA, the income from leasing of helicopter is taxable in India. While doing so, he observed that some other tax treaties, such as, India – Ireland and India – Netherlands tax treaties specifically exclude use of aircraft from the definition of royalty. Whereas, it is not so in case of India – UAE DTAA. Thus, ultimately, he held that the lease amount of Rs.5,28,58,080/- is taxable as royalty in India.

5. Though, the assessee contested the aforesaid addition by filing appeal before learned Commissioner (Appeals), however, he upheld the addition made by the Assessing Officer.

6. Before us, learned counsel appearing for the assessee submitted that, though, the word 'equipment' is used in clause (iva) of Explanation to section 9(1)(vi) and as well as under Article 12(3) of India – UAE DTAA, however, the expression 'equipment' used therein is qualified by the phrase "the use or right to use industrial, commercial and scientific". Therefore, the word 'equipment' has to be read in the context of qualifying words and also in sync with the contents of other sub-clauses of Explanation 2 to ensure a harmonious, rational and correct construction by applying the rules of *ejusdem generis*. He submitted, the agreement for leasing the helicopter did not envisage transfer of any intellectual property rights or brand rights or sharing of any secret formula, etc. He submitted, in case of leasing of ships, the Tribunal in various decisions have held that the lease income received is not in the nature of royalty. In support of such contention, he relied upon the following decisions:

1. *ACIT Vs. Kin Ship Services (India) P. Ltd. [2009] 31 SOT 375 (Cochin)*

2. *Mathewsons Exports & Imports (P) Ltd. Vs. ACIT, [2014] 50 Taxmann.com 378 (Cochin-Trib.)*

7. Thus, he submitted, the ratio laid down in these decisions will squarely apply. Without prejudice, he submitted, even assuming that the amount in dispute can be classified as royalty, however, considering the fact that the assessee has not received any amount from the lessee, no income arose to the assessee during the year through the said transaction. He submitted, as per the provisions of the Act as well as India – UAE Treaty, royalty income can be taxed purely on receipt basis. In support of such contention, he relied upon the following decisions:

1. *DIT (IT) Vs. Seimens in ITA No. 124 of 2010 (Bom.), order dated 22.10.2012*
2. *ADIT (IT-3) Vs. Johnson & Johnson [2013] 32 taxmann.com 102 (Mumbai)*

8. He submitted, the first appellate authority has completely misconceived the provisions of section 279 of the Companies Act, 2013 while concluding that as per the said provision, the assessee should have accounted for its income on accrual basis. He submitted, the first appellate authority has completely overlooked the fact that section 279 of the Companies Act applies in specific

condition. He submitted, as per the established facts on record, except the TDS credit, the assessee did not receive any amount of income from the Indian entity during the year. He submitted, at best, TDS credit could be treated as business income of the assessee. However, in absence of a PE in India, such income is not taxable in India. Thus, he submitted, the addition made should be deleted.

9. Relying upon the observations of the departmental authorities, the learned Departmental Representative submitted, section 9(1)(vi) of the Act clearly provides for taxability of income from use or right to use of equipment as royalty. He submitted, identical provision is contained under Article 12(3) of India – UAE DTAA. He submitted, unlike some other treaties, India – UAE DTAA does not provide for exclusion of aircraft/helicopter from being treated as equipment. Thus, he submitted, in view of such clear provision, both under the Act and the treaty, the income from leasing of the helicopter has to be treated as royalty. As regards assessee's claim that no lease income was received during the year, learned Departmental Representative submitted that the royalty income can also be taxed on accrual basis.

10. We have considered rival submissions in the light of the decisions relied upon and perused the materials on record. The short issue arising for consideration is whether the alleged lease income received by the assessee towards leasing of a helicopter is taxable as royalty income under the provisions of Act as well as under the treaty provisions. Undisputed facts are, by virtue of a dry lease agreement executed on 03.07.2012, the assessee had leased a helicopter to an Indian entity M/s. Heligo Charters Pvt. Ltd. for a period of 3 years. It is also an undisputed fact that in the financial year relevant to the assessment year under dispute, the assessee had raised only four invoices for the months of April, 2014 to July, 2014 for an amount of Rs.1,43,59,792/-. It is established on record, due to serious dispute between the parties regarding the terms of lease and other issues, the assessee did not receive any payment towards leasing of the helicopter from the lessee, leave alone, the amount for which four invoices were raised. It is also a fact on record that the parties went into litigation on the issue of implementation of the terms of lease agreement through arbitration proceeding and thereafter before the Hon'ble Bombay High Court.

11. It is observed, though an arbitration award was passed for sale of the helicopter to the lessee for an amount of USD $ 5,00,000, however, ultimately, the sale of helicopter did not happen as the assessee challenged the arbitration award before the Hon'ble Bombay High Court and a Single Judge Bench of the Hon'ble Bombay High Court stayed the arbitration award. The injunction granted by the Hon'ble Single Judge of the Hon'ble Bombay High Court was subsequently confirmed by Hon'ble Division Bench of the Hon'ble Bombay High Court. While dismissing the appeal filed by Heligo Charters Pvt. Ltd.. The aforesaid facts clearly reveal that though in Form 26AS the amount of Rs.5,28,58,080/- was reflected as the income paid/credited to the assessee, since, the lessee deducted tax on the said amount, however, in reality the assessee did not receive even a single rupee towards lease income.

12. In fact, the learned first appellate authority has acknowledged the aforesaid factual position, which is clearly reflected in the observations made in paragraph 6.20 of the first appellate order. Keeping in perspective the aforesaid factual position, it has to be decided whether the so called royalty income is taxable at the hands of the assessee on notional basis. Article

12 of India – UAE DTAA deals with taxability of royalty. As per paragraph 1 of Article 12, royalty income paid to a resident of another contracting State is taxable in that State. However, paragraph 2 provides that such royalty income arising in the source State can also be taxed in the source state in accordance with domestic law of that State. However, if the recipient of royalty income is a beneficial owner, the tax chargeable shall not exceed 10% of the gross royalty income. Paragraph 3 of Article 12 defines the term 'royalty' to mean, payment of any kind received as a consideration for the use of or the right to use of copy right, patent, trademark, secret formula, processes, industrial, commercial or scientific equipment, etc. Thus, as per the definition of royalty in paragraph 3 of Article 12, the royalty income has to be received for use or right to use of any copyright, trademark, patent etc. In the facts of the present appeal, admittedly, no income was actually received by the assessee from the lessee. This factual position has been accepted by the departmental authorities.

13. That being the case, the condition in paragraph 3 of Article 12 of India – UAE DTAA is not fulfilled. In this context, we may refer to the decision of the Coordinate Bench in case of ADIT (IT-

3) Vs. Johnson & Johnson (supra), wherein, the Hon'ble Bench dealt with *pari materia* provision contained in India – USA DTAA. In any case of the matter, the receipt of lease income is fraught with uncertainties as parties are in dispute and litigations are pending for past so many years. Even, there is no likelihood of end of the litigation in near future. In the aforesaid scenario, it cannot be said that the assessee has received any royalty income, either under the domestic law or under the treaty provisions. Further, in our considered opinion, the expression 'received' used in paragraph 3 of Article 12 of India – UAE DTAA read in conjunction with paragraph 1 & 2 of Article 12 would mean 'actual receipt' of royalty and not any receipt on accrual or deemed basis. At this stage, it is necessary to observe, though, the Assessing Officer had treated an amount of Rs. 5,28,58,080/- as royalty income of the assessee during the year purely based on the amount shown in Form 26AS, however, learned Commissioner (Appeals) has restricted the addition to Rs.1,43,59,792/- purely based on the four invoices raised by the assessee. When the admitted factual position is that the assessee has not even received any amount against those four invoices, in our view, the royalty income cannot be added on notional basis.

Thus, we direct the Assessing Officer to delete the addition of Rs. 1,43,59,792/- sustained by learned Commissioner (Appeals).

14. Since, we have deleted the addition holding that the amount is not taxable under Article 12(3) of India – UAE DTAA as no royalty income was actually received by the assessee in this year, we do not find it necessary to go into the issue, as to whether the amount in dispute can at all be treated as equipment royalty both under the domestic law as well as under treaty provision. Hence, the issue is kept open.

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

Order pronounced in the open court on 31st July, 2023

Sd/-	***Sd/-***
(G.S. PANNU)	**(SAKTIJIT DEY)**
PRESIDENT	**VICE PRESIDENT**

Dated: 31st July, 2023.
RK/-
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi