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

BEFORE SHRI SAKTIJIT DEY, VICE PRESIDENT, AND SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER

ITA No. 2142/DEL/2016 [A.Y. 2011-12]
ITA No. 572/DEL/2017 [A.Y. 2012-13]
ITA No. 573/DEL/2017 [A.Y. 2013-14]
ITA No. 199/DEL/2018 [A.Y. 2014-15]

HP Services [Singapore] PTE Ltd [Earlier known as EDS International [Singapore] PTE Ltd, 450, Alexandra Road Singapore	Vs.	The Dy. .C.I.T., Circle 2(1)(1) International Taxation New Delhi
PAN – AABCE 1256 C		
(Applicant)		(Respondent)

Assessee By : Shri Satyen Sethi, Adv
Shri A.T. Panda, Adv

Department By : Shri Vizay B. Vasanta, CIT- DR

Date of Hearing : 05.10.2023

Date of Pronouncement : 10.10.2023

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:-

The above captioned four separate appeals by the assessee are preferred against 4 separate orders framed u/s 143(3) r.w.s 144C of the Income-tax Act, 1961 [the Act, for short] pertaining to Assessment Years 2011-12 to 2014-15.

2. Since common grievances are involved in the captioned appeals, they were heard together and are disposed of by this common order for the sake of convenience and brevity

3. At the very outset, the ld. counsel for the assessee stated that all the issues have been considered and decided by this Tribunal in earlier A.Ys in assessee's own case in favour of the assessee and against the revenue.

4. The ld. DR could not bring any distinguishing decision in favour of the Revenue.

5. We have carefully considered the orders of the authorities below and have the benefit of earlier orders of this Tribunal. We find force in the contention of the ld. counsel for the assessee. All the issues raised in the impugned appeals have been considered and decided by this Tribunal in earlier years.

6. First common grievance is in respect of sale of off the shelf software considered as royalty.

7. This issue is no more res integra as the quarrel has been settled by the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Pvt Ltd 432 ITR 471, which has been followed by this Tribunal in assessee's own case in A.Ys 2009-10 and 2010-11 in ITA Nos. 3209 & 3210/DEL/2018. The relevant findings read as under:

> "9.2 We observe, recently the Hon'ble Apex Court in para no 173 of its judgment in the case of Engineering Analysis Centre of Excellence Pvt. Ltd (supra), clearly held 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.

9.3. The jurisdictional Hon'ble High Court recently in the case of CIT (International Taxation) Vs. GRACEMAC CORPORATION {ITA No. 32/2022 decided on 07.03.2022} wherein, the Assessee was also holding the licensing of software products of „Microsoft company' in the Page | 7 Territory of India and selling to its customers in India, dealt with the identical issue as involved in the instant cases and while relying upon dictum laid down in Engineering Analysis Centre of Excellence Pvt. Ltd. case, accepted the proposition that licensing of software products of „Microsoft" in the territory of India by the Respondent (Assessee) is not taxable in India as „Royalty" under Section 9(1)(vi) of the Act read with Article 12 of the Indo US DTAA, by concluding as under:-

> "2. Learned counsel for the appellant-Revenue submits that ITAT has erred in holding that licensing of software products of Microsoft in the Territory of India by the Respondent was not taxable in India as Royalty under Section 9(1)(vi) of the Act read with Article 12 of the Indo US DTAA.{highlighted by us}

3. He states that the Tribunal has failed to appreciate that the distribution model in the case of the respondent assessee involved making of multiple copies of the software clearly indicating transfer of copyright.

4. Having heard learned counsel for the appellant, this Court finds that the issue raised in the present appeals is no longer res integra as the Supreme Court in Engineering Analysis Centre of Excellence

Private Limited vs. Commissioner of Income Tax and Anr., (2021) SCC On Line SC 159 has held as under:-

"…4. The appeals before us may be grouped into 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, nonresident suppliers or manufacturers and then reselling the same to resident Indian end-users.

iii) The third category concerns cases wherein the distributor 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. Xxxx xxxx xxxx

97. The AAR then reasoned that the fact that a licence had been granted would be sufficient to conclude that there was a transfer of copyright, and that there was no justification for the use of the doctrine of noscitur a sociis to confine the transfer by way of a licence to only include a licence which transferred rights in respect of

copyright, by referring to explanation 2 to section 9(1)(vi) of the Income Tax Act. It then held:

> "Considerable arguments are raised on the so called distinction between a copyright and copyrighted articles. What is a copyrighted article? It is nothing but an article which incorporates the copyright of the owner, the assignee, the exclusive licensee or the licencee. So, when a copyrighted article is permitted or licensed to be used for a fee, the permission involves not only the physical or electronic manifestation of a programme, but also the use of or the right to use the copyright embedded therein. That apart, the Copyright Act or the Income-tax Act or the DTAC does not use the expression „copyrighted article", which could have been used if the intention was as claimed by the applicant. In the circumstances, the distinction sought to be made appears to be illusory."

98. This ruling of the AAR flies in the face of certain principles. When, under a non-exclusive licence, an enduser gets the right to use computer software in the form of a CD, the end-user only receives a right to use the software and nothing more. The end-user does not get any of the rights that the owner continues to retain under section 14(b) of the Copyright Act read with subsection (a)(i)-(vii) thereof. Thus, the conclusion that when computer software is licensed for use under an EULA, what is also licensed is the right to use the copyright embedded therein, is wholly

incorrect. The licence for the use of a product under an EULA cannot be construed as the licence spoken of in section 30 of the Copyright Act, as such EULA only imposes restrictive conditions upon the end-user and does not part with any interest relatable to any rights mentioned in sections 14(a) and 14(b) of the Copyright Act.

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101. Also, any ruling on the more expansive language contained in the explanations to section 9(1)(vi) of the Income Tax Act would have to be ignored if it is wider and less beneficial to the assessee than the definition contained in the DTAA, as per section 90(2) of the Income Tax Act read with explanation 4 thereof, and Article 3(2) of the DTAA. Further, the expression "copyright" has to be understood in the context of the statute which deals with it, it being accepted that municipal laws which apply in the Contracting States must be applied unless there is any repugnancy to the terms of the DTAA. For all these reasons, the determination of the AAR in Citrix Systems (AAR) (supra) does not state the law correctly and is thus set aside.

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173. Our answer to the question posed before us, is that the amounts paid by resident Indian endusers/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. 174. 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."

5. Further, this Court on similar facts has allowed writ petitions filed by the similarly placed assessee in EY Global Services Limited vs. Assistant Commissioner of Income Tax &Anr, W.P.(C) 11957/2016 and EYGBS (India) Private Limited vs. Joint Commissioner of Income Tax & Ors., W.P.(C) 12003/2016. The relevant portion of the said judgment is reproduced hereinbelow:- "…

13. A reading of the above judgment would clearly show that for the payment received by EYGSL (UK) from EYGBS (India) to be taxed as „royalty", it is essential to show a transfer of copyright in the software to do any of the acts mentioned in Section 14 of the Copyright Act, 1957. A licence conferring no proprietary interest on the licencee, does not entail parting with the copyright. Where the core of a transaction is to authorise the enduser to have access to and make use of the licenced software over which the licencee has no exclusive rights, no copyright is parted with and therefore, the payment received cannot be termed as „royalty".

14. In the present case, the EYGBS (India), in terms of the Service Agreement and the MOU, merely receives the right to use the software procured by the EYGSL (UK) from third-party vendors. The consideration paid for the use of the same therefore, cannot be termed as „royalty" as held by the Supreme Court in Engineering Analysis Centre (supra). In determining the same, the rights acquired by the EYGSL (UK) from the third-party software vendors are not relevant. What is relevant is the Agreement between the EYGSL (UK) and the EYGBS (India). As the same does not create any right to transfer the copyright in the software, the same would not fall within the ambit of the term „royalty" as held by the Supreme Court in Engineering Analysis Centre (supra).

15. We may also note that the learned AAR in its Impugned Order has relied upon its earlier view in Citrix Systems Asia Pacific Pty Ltd., In Re., (2012) 343 ITR 1 (AAR), which has been expressly stated to be bad law in Engineering Analysis Centre (supra).

16. The submission of the learned counsel for the Revenue that the judgment of the Supreme Court in Engineering Analysis Centre (supra) cannot be applied because it confines itself only to the four categories mentioned in paragraph 4, also cannot be accepted. Though the Supreme Court was on facts considering the four categories of cases that arose in the appeals before it, it has laid down the law for general application. The law, as laid down by the Supreme Court, when applied to facts of the present case, squarely covers the same in favour of the petitioners.

17. The submission made by the learned counsel for the revenue relying upon the amendment to Section 9(1)(vi) of the Income Tax Act, 1961 has also been specifically considered and rejected by the Supreme Court.

18. In view of the above, the Impugned Rulings dated 10.08.2016 passed by the learned AAR are set aside and it is held that the payment received by EYGSL (UK) for providing access to computer software to its member firms of EY Network located in India, that is, EYGBS (India), does not amount to „royalty" liable to be taxed in India

under the provisions of the Income Tax Act, 1961 and the India-UK DTAA."

6. Since, the issue of law raised in the present appeals has been conclusively decided in the favour of the assessee by the Supreme Court, no substantial question of law arises for consideration Page | 12 in the present appeals. It is also pertinent to mention that the appellant had admitted before the ITAT that the dispute in question had been decided in favour of the assessee by the Tribunal in earlier years. Accordingly, the present appeals are dismissed. {highlighted by us}."

8. Respectfully following the decision of the co-ordinate bench which has followed the binding decision of the Hon'ble Supreme Court [supra], this grievance is partly allowed in favour of the assessee for the reasons mentioned hereinabove.

9. Before parting with this issue, it would be pertinent to refer to the revenue from sale of off the shelf software to two new companies which were not there in the earlier A.Ys, namely, Mphasis Finsource Ltd and Mphasis Software and Services [India] Limited. Since the ld. counsel for the assessee has fairly conceded that the revenue from these two companies are not covered by the agreement and the

agreements are also not available, therefore, these companies may be taxed in the hands of the assessee as royalty.

10. On such concession, we direct the Assessing Officer to consider revenue from these two companies as royalty and tax as per the relevant provisions of the Act.

11. Second grievance in A.Y 2011-12 relates to the receipts for use of telecom bandwidth facility considered as royalty and /Fees for technical services.

12. In earlier A.Ys. though the Assessing Officer has taken the same view but the first appellate authority had deleted the addition and the revenue did not raise this issue before the Tribunal. A similar view was considered and decided by the co-ordinate bench in the case of Planetcast International Pvt Ltd 152 Taxmann.com 422. The relevant findings read as under:

> "39. In ground No. 8, the assessee has challenged taxability of receipts from internet bandwidth charges as royalty income.

40. Briefly, the facts are, in course of assessment proceedings, the Assessing Officer noticed that though the assessee had received an amount of Rs.15,66,888/- towards internet bandwidth charges, however, such income was not offered to tax in India. Being of the view that the receipts are in the nature of equipment royalty as scientific / commercial equipment in the form of lease line/router is provided by the assessee to the customer, the Assessing Officer proceeded to treat the receipts as royalty income under section 9(1)(vi) of the Act read with Article 12(3) of India-Singapore DTAA and added to the income of the assessee. Though, the assessee contested the aforesaid addition by filing objections before learned DRP, however, the addition was upheld.

41. Before us, learned Sr. Counsel appearing for the assessee submitted that by referring to the amendment made to section 9(1)(vi) of the Act by insertion of Explanation 4 & 5 by Finance Act, 2012, the Assessing Officer has treated the receipts as royalty. He submitted, the amendment made to the Act cannot be automatically imported to the treaty provisions. He submitted, unless corresponding amendment is made to the treaty provisions, the provisions of the Act cannot be read into the treaty provisions. He submitted, as per the treaty provision, the receipts cannot be treated as royalty income. In support of such contention, learned counsel relied upon following decisions :

(i). Telstra Singapore Pte. Ltd. vs. DCIT (2021) 123 taxmann.com 124 (Delhi Trib.)

(ii). ACIT vs. Reliance Jio Infocomm Ltd. (2019) 111 taxmann.com 371 (Mumbai Trib.)

(iii). Qualcomm India (P) Ltd. vs. ADIT (2017) 77 taxamann.com 56 (Hyderabad-Trib.)

(iv). Essity Hygiene and Health AB vs. DCIT, (2021) 129 taxmann.com 70 (Mumbai-Trib.).

42. Learned Departmental Representative strongly relied upon the observation of the Assessing Officer and learned DRP.

43. We have considered rival submissions and perused materials on record. Undisputedly, referring to the amended provisions of section 9(1)(vi) of the Act, the Assessing Officer has treated the receipts from internet bandwidth charges as equipment/process royalty. However, it is observed, no corresponding amendment in line with the amendment brought to section 9(1)(vi) of the Act has been made to Article 12(3) of India-Singapore DTAA. Therefore, in absence of any such amendment widening the scope of expression 'royalty' under the treaty provisions, the amendment made to section 9(1)(vi) of the Act cannot be automatically brought or imported to Article 12(3) of India-Singapore DTAA, as the treaty provisions have to be construed strictly in accordance with the language used in the provision. While coming to such view, we have found support from the ratio laid down in the decisions cited by learned Sr. Counsel for the assessee. Thus, for the aforesaid reasons, we hold that the receipts from internet bandwidth charges cannot be treated as royalty income under Article

12(3) of India-Singapore DTAA. Accordingly, we direct the Assessing Officer to delete the addition."

13. On finding parity of facts, respectfully following the decision of the co-ordinate bench [supra], this addition is also deleted.

14. Third common grievance in the captioned appeals relates to the receipts from providing information technology related support services considered as royalty and/fees for technical services.

15. The underlying facts in this issue are that India Singapore DTAA requires that services should be such that enable the person acquiring the services to apply the technology contained therein. The claim of the assessee is that the services do not result in transmitting technical knowledge. This claim of the assessee was rejected by the Assessing Officer/DRP.

16. We find that under identical situation, this Tribunal in the case of Planetcast International Pte Ltd 152 taxmann.com 422 had held that while running the services, the assessee has not made available any technical knowledge, experience, skill in terms of Article 12(4)(b) of the DTAA and as such, receipts in question were not FTS liable to tax in India.

17 Applying the same ratio, we are of the considered view that payments received from Mphasis Ltd were not covered by Article 12(4) of the India Singapore DTAA. This addition is, accordingly, directed to be deleted.

18. In the result, the appeals of the assessee in :

ITA No. 2142/DEL/2016	-	Allowed
ITA No. 572/DEL/2017	-	Allowed
ITA No. 573/DEL/2017	-	Partly Allowed
ITA No. 199/DEL/2018	-	Partly Allowed

The order is pronounced in the open court on 10.10.2023.

Sd/- **Sd/-**

[SAKTIJIT DEY**]**
VICE PRESIDENT

[N.K. BILLAIYA]
ACCOUNTANT MEMBER

Dated: 10th October, 2023.

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