IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH : BANGALORE

BEFORE SHRI GEORGE GEORGE K, VICE PRESIDENT AND
SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER

IT(IT)A No.959/Bang/2023
Assessment Year : 2016-17

DCIT (International Taxation), Circle – 2(2), Bengaluru.	Vs.	M/s. The Oasis Centre LLC, Land Mark Group West Wing Building No.3, Off HAL Airport Main Road, Yamlur – 560 037, Bangalore. **PAN : AAFCT 2481 C**
APPELLANT		RESPONDENT

Assessee by	:	Shri. K. R. Vasudevan, Advocate
Revenue by	:	Ms. Neera Malhotra, CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	07.02.2024
Date of Pronouncement	:	08.02.2024

O R D E R

Per George George K, Vice President:

This appeal at the instance of the Revenue is directed against CIT(A)'s order dated 25.10.2023, passed under section 250 of the Income Tax Act, 1961 (hereinafter called 'the Act'). The relevant Assessment Year is 2016-17.

2. The Revenue has raised six grounds and one additional ground. The grounds raised were not pressed by the learned DR. The surviving additional ground read reads as follows:

"1. Whether on the facts and in the circumstances of the case, the Ld.CIT(A) erred in ignoring that the Software and its licensing in the instant case is different from those considered by the Apex court in the case of Engineering analysis and whether the Ld.CIT(A) erred in not appreciating the fact that the Apex court had analyzed various Master service agreements and the case of the Engineering analysis is not applicable in the instant case ?"

3. Brief facts of the case are as follows:

Assessee is a foreign company incorporated in United Arab Emirates (UAE). Assessee is engaged in the business of operating, managing, leasing, running shopping malls and shopping centres. For the Assessment Year 2016-17, assessee was in receipt of Rs.13.26 Crores of Oracle licence fee from three of its group entities. The return of income was filed for Assessment Year 2016-17 on 30.11.2016 declaring 'Nil' income. The assessment was selected for scrutiny under CASS for verification of high ratio of refund. The notice under section 143(2) of the Act was issued on 06.07.2017. During the course of assessment proceedings, copies of the agreement entered between the assessee and the Oracle were submitted. The copies of the agreement entered by assessee and its group entities were also submitted. The AO after verification of the above agreements held that assessee is owner of software licence and treated the payment received by the assessee as "royalty" under section 9(1)(vi) of the Act. The AO, *inter alia*, observed that distinction between copyright and copyrighted article is nullified by explanation 4 to section 9(1)(vi) of the Act and hence the payment towards use of software shall be treated as "royalty". In this context, the learned AR relied on the judgment of the Hon'ble jurisdictional High Court in the case of M/s. Samsung Electronic Ltd., reported in (2010) 320 ITR 209 (Karnataka). The AO had also relied on the following judicial pronouncements:

1. *Citrix Systems Asis Pacific Pry Ltd lnre vs (2012) 18 taxmann.com 172 (AAR-New Delhi)*
2. *C1T vs. Synopsis International Old Ltd., (2012) 28 taxmann.com 162. the HC of Karnataka.*
3. *CIT vs CGI Information Systems and Management consultants (P.) Ltd, the Hon'ble HC of Karnataka)*

4. Aggrieved by the order of the AO, assessee filed appeal before the CIT(A). The CIT(A) allowed appeal of the assessee. The CIT(A) relied on the judgment of the Hon'ble Apex Court in the case of Engineering Analysis Centre of Excellence Private Limited Vs. CIT and Anr. (2021) 432 ITR 472 (SC). The CIT(A) held that it is a sale of copyrighted article, and not copyright itself, hence, cannot be brought to tax as 'Royalty'.

5. Aggrieved by the order of the CIT(A), assessee has filed the present appeal before the Tribunal. The learned DR had filed a brief synopsis. The synopsis filed by the learned DR is reproduced below:

1. *Department has filed Additional Ground of Appeal vide letter dated 02,02.2024. and the same was sent to the Ld. AR of the appellant vide e-mail. The Additional Ground of appeal reads as follows :*

   " Whether on the facts and in the circumstances of the case, the Ld.CIT(A) erred in ignoring that the Software and its licensing in the instant case is different from those considered by the Apex court in the case of " Engineering Analysis Centre of Excellence" (432 ITP 471) and whether the Ld.CIT(A) erred in not appreciating the fact that the Apex court had analyzed various Master service agreements and the case of Engineering analysis is not applicable in the instant case?"

2. *In the case of Engineering Analysis Centre of Excellence Private Limited Vs CIT & Anr. (2021) 432 ITP 471 (SC) the Hon'ble Supreme Court* ***has rendered its decision only on 4*** *categories of cases. The relevant Para 4 of the order of the Hon'ble Supreme Court is reproduced below:*

   "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."

3. *With utmost humility and respect the undersigned wishes to state that the case of the appellant is **NOT COVERED** by the decision of Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Private Limited Vs CIT & Anr. (2021) 432 ITR 471 (SC) as the business transaction of the appellant DOES NOT fall in any of the 4 categories of cases on which the Hon'ble Supreme Court has rendered its decision in the case of Engineering Analysis Centre of Excellence Private Limited (supra).*

4. *Accordingly, as the Ld.CIT(A) failed appreciating the fact that the Apex court had analyzed Master service agreements in case of ONLY THOSE GROUP OF APPELLANTS, and the appellant was not in the group of cases, the case of Engineering analysis is not applicable in the instant case and, therefore, **the reliance placed by the Ld.CIT(A) on the decision in the case of Engineering Analysis Centre of Excellence Private Limited IS MISPLACED.***

5. *Therefore, it is prayed that the order of Ld.CIT(A) may please be reversed and the order of AO may please be upheld.*

6. The learned AR had filed notes on arguments, submissions made before the AO and the CIT(A) (enclosing therein the relevant agreements entered between

the assessee and Oracle / end users). The learned AR supported the orders of the CIT(A) and relied on the submissions made before the AO and the CIT(A).

7. We have heard the rival submissions and perused the material on record. Assessee had entered into an agreement with Oracle Systems Ltd., wherein the licence was granted to group entities of the assessee by Oracle towards the use of software. The payment of the same was to be made by the assessee on behalf of Land Mark Group. Pursuant to the above agreement entered between assessee and Oracle, it had entered into agreement with its group entities viz., Lifestyle International Private Limited (Lifestyle), Splash Fashions India Private Limited (Splash) and Max Hypermarkets India Private Limited (Max), wherein it only conferred the right of aforesaid entities to use software. The software granted by Oracle was used by Lifestyle, Splash and Max for its business purposes. It is contended by learned AR that as the above transactions does not involve any transfer of copyright in the software, it is squarely covered by the judgment of the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Private Limited Vs. CIT and Anr. (supra).

8. The Hon'ble Apex Court in the case of Engineering Analysis Centre of Excellence Private Limited Vs. CIT and Anr. (supra) had categorically held that assessees in those cases are entitled to benefit under the respective DTAAs since the sale of software did not involve sale of copyright *per se* but only a copyrighted article. The Hon'ble Apex Court had held that though Income Tax Act is clear with regard to taxability of sale of software licence fee, the DTAA being beneficial to the assessee in those cases overrides the provision of the Income Tax Act. The Hon'ble Supreme Court was considering the following DTAAs (Refer para 40 of the Hon'ble Supreme Court judgment 432 ITR 471 (SC) at page 515 and 516).

These appeals concern the DTAAs between India and the following countries/parties :

1. Commonwealth of Australia
2.Canada
3. People's Republic of China
4. Republic of Cyprus
5.Republic of Finland
6.Republic of France
7.Federal Republic of Germany
8.Hong Kong Special Administrative Region of the People's Republic of China
9.Republic of Ireland
10. Republic of Italy
11. Japan
12. Republic of Korea
13. Kingdom of Netherlands
14. Republic of Singapore
15. Kingdom of Sweden
16. India-Taipei Association in Taipei (Taiwan
17. United States of America
18. United Kingdom of Great Britain and Northern Ireland

9. In analyzing the above DTAA, the Hon'ble Apex Court held that receipt on sale of copyright alone can only be brought to tax as 'royalty' and not sale of copyrighted article. Thereafter, the Hon'ble Apex Court examined the definition of 'Royalty' in the DTAAs vis-vis the Income Tax Act, 1961 (Refer para 62 of the Hon'ble Supreme Court judgment). The Hon'ble Apex Court after examining the definition of 'royalty' under the Act and DTAA held that notwithstanding what may be contained in the Income Tax Act, 1961, since DTAA is more beneficial, the DTAA shall prevail over Act. The relevant conclusion of Hon'ble Apex Court at para 165 read as follows:

> *"The conclusions in the aforestated paragraph have no direct relevance to the facts at hand as the effect of section 90(2) of the Income-tax Act, read with Explanation 4 thereof, is to treat the DTAA provisions as the law that must be followed by Indian courts, notwithstanding what may be contained*

in the Income-tax Act to the contrary, unless more beneficial to the assessee."

10. In the instant case, there has been no examination with regard to taxability of software fees under the DTAA entered between India and UAE. In other words, whether the DTAA entered between India and UAE restrict the taxability to only fees received on sale of copyright and not to sale of copyrighted articles. If the DTAA restricts such taxability, assesssee cannot be made taxable under the Income Tax Act, 1961. On the contrary, if the DTAA does not have such a restriction, assessee would be liable for the receipt of Rs.13.26 Crores, since distinction between copyright and copyrighted article is nullified by Explanation 4 to section 9(1)(vi) of the Act. For examination of the above issue, the matter is restored to AO. It is ordered accordingly.

11. In the result, appeal filed by the Revenue is allowed for statistical purposes.

Pronounced in the open court on the date mentioned on the caption page.

Sd/-	**Sd/-**
(CHANDRA POOJRAI)	**(GEORGE GEORGE K)**
Accountant Member	**Vice President**

Bangalore.
Dated: 08.02.2024.
/NS/*

Copy to:

1. Appellants
2. Respondent
3. DRP
4. CIT
5. CIT(A)
6. DR, ITAT, Bangalore.
7. Guard file

By order

Assistant Registrar,
ITAT, Bangalore.