

आयकर अपीलिय अधिकरण, 'बी' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL
'B' BENCH, CHENNAI

श्री महावीर सिंह, उपाध्यक्ष एवं श्री एस. आर. रघुनाथा, लेखा सदस्य के समक्ष
BEFORE SHRI MAHAVIR SINGH, HON'BLE VICE PRESIDENT AND
SHRI S. R. RAGUNATHA, HON'BLE ACCOUNTANT MEMBER

आयकर अपील सं./ITA No.: **1572/Chny/2023**

निर्धारण वर्ष / Assessment Year: 2021-22

Kony Inc.,
5301, Southwest Parkway,
Suite 250,
Austin, Texas,
USA - 5301

[PAN: AAECK-4771-D]

(अपीलार्थी/Appellant)

अपीलार्थी की ओर से/Appellant by
प्रत्यर्थी की ओर से/Respondent by

सुनवाई की तारीख/Date of Hearing

घोषणा की तारीख/Date of Pronouncement

v. Deputy Commissioner of
Income Tax,
International Taxation -1(2),
Chennai.

(प्रत्यर्थी/Respondent)

: Shri. R. Sivaraman, Advocate

: Shri. D. Hema Bhupal, JCIT

: 24.04.2024

: 30.05.2024

आदेश / O R D E R

PER S. R. RAGHUNATHA, ACCOUNTANT MEMBER:

This appeal filed by the assessee is directed against the order passed by the learned Commissioner of Income Tax (Appeals), Chennai-16, dated 06.11.2023 and pertains to assessment year 2021-22.

2. The issues in this appeal are as regards to the order of the CIT(A) confirming the action of Assessing Officer treating:

(a) software license subscription fees of Rs.5,38,36,962/- taxable as 'royalty' and

(b) annual maintenance service fees of Rs.1,76,25,759/- taxable as 'fees for included service' both under I.T. Act, 1961 and also Article 12 of the India-USA DTAA.

For this, the assessee has raised various grounds which are argumentative, exhaustive and hence, need not be reproduced.

3. The brief facts of the case are that, the assessee M/s. Kony Inc, is a non-resident company incorporated under the laws of USA. The assessee company is a developer of Kony Mobile Application platform (KMAP) and provides the software license to its customers. KMAP is a standard application platform which enables the development of mobile applications. The assessee company provides end-to-end integrated, cloud-based platform that enables enterprises to quickly design, build, test, deploy and manage multi-channel application experience. The assessee company also provides a suite of customizable, ready-to-run application that lower costs, ensure faster time to market, and provide enterprises

the flexibility to evolve at the speed of mobile technology. For this purpose, the employees a specialized staff of professionals globally dedicated to development, delivery and support of mobile solutions and technologies.

4. During the assessment year 2021-22, the assessee company filed its original return of income on 11.02.2022, admitting total income of Rs.13,03,630/- and claimed a refund of Rs.70,17,580/-. The case was selected for complete scrutiny through CASS for the reasons 'refund claim' and 'receipt of foreign remittance'. During the course of assessment proceedings, the Assessing Officer called upon the assessee to furnish details and issued notices u/s. 143(2) and 142(1) of the Income-tax Act, 1961 (hereinafter referred to as "the Act") dated 27.06.2022 and 14.11.2022, respectively. In response to the notices, the assessee filed a reply stating the background of the company, nature of services, break up of payments made etc. After verification of relevant details of the operations of the company, the Assessing Officer obtained information about the nature of software provided to the assessee's customers and the Assessing Officer concluded the assessment as under:

"26. On the aforesaid, facts and circumstances of the case along with the assessee's submissions and considering the materials placed on record, the Draft assessment Order u/s. 143(3) r.w.s 144C(1) of the Income Tax Act, 1961 is passed as under:

Income from Software License Subscription fee amounting to Rs.5,38,36,962 is taxable as 'Royalty' and Annual Maintenance Service Fee amounting to Rs. 1, 76,25,759/- is taxable as 'Fees for Included Services' both under the Income Tax Act and also as per the provisions of Article 12 of the India-USA DTAA. Applying the beneficial provisions of the DTAA, Income from 'Royalty' amounting to Rs.5,38,36,962/- is brought to tax at the rate of 10% and Annual Maintenance Service Fee amounting to Rs. 1, 76,25,759- is brought to tax at the rate of 10% under India - USA DTAA.

| Particulars | Amount |
|--|--------------------|
| Returned Income | Rs. 13,03,630/- |
| Income Assessed as per this Draft Assessment Order : | Rs. 5,38,36,962/- |
| 1. Income from Software Licence Subscription fee (charged at the rate of 10% under India - USA DTAA) | Rs. 1, 76,25,759 |
| 2. Income from Annual Maintenance Service Fee(charged at the rate 10% under India - USA DTAA) | |
| Total Income Assessed as per this Draft Assessment Order passed u/s 143(3) r.w.s 144C(1) of the Income Tax Act, 1961 : | Rs. 7, 14,62,722/- |

27. In view of section 144C (1) of the I.T. Act, 1961, a draft assessment order dated 30.12.2022 was forwarded to the assessee. As per the provisions of sub section (2) of section 144C, the assessee is required to file its acceptance or file its objections before the Dispute Resolution Panel and to the Assessing Officer within 30 days of the receipt of the draft assessment order. However, the assessee has not filed any objections with this office within the time prescribed u/s.144C (2) of the Act. Therefore, the assessment proceedings are

completed u/s. 143(3) r.w.s 144C (3) of the I.T. Act, 1961 as discussed above."

Aggrieved by the impugned order of the Assessing Officer, the assessee preferred an appeal before the Id. CIT(A).

5. The Id.CIT(A), after considering the submissions made by the assessee and the impugned order of the Assessing Officer, upholds the impugned action of the Assessing Officer. Aggrieved by the impugned order of the Id.CIT(A), the assessee is in appeal before us.

6. Before us, the Ld. Counsel for the assessee, submitted that the issues are squarely covered by the decision of Tribunal in assessee's own case in ITA Nos. 6018/Del/2017, 7462/Del/2018 and 616/Del/2018 for assessment years 2014-15, 2015-16 & 2017-18 respectively and pleaded to dismiss the decisions of the Assessing Officer and the Id. CIT(A) and allow the grounds of the assessee.

7. Per contra, the Id.DR has stated that he relies on the orders of the Assessing Officer and the Id.CIT(A).

8. We have heard both the parties, perused materials available on record and gone through orders of the authorities below. Upon perusal of case records and after considering the tribunal decisions in assessee's own case for the assessment years 2014-15, 2015-16 & 2017-18, the submissions of the Id.AR that the issue on legal grounds as well as on merits are covered in assessee's own case and there is no change in the material facts. The Hon'ble Tribunal of Delhi bench in their order in ITA No. 7462/Del/2018, dated 11.01.2023, after considering the decision taken in the assessment year 2014-15 of the assessee's own case, has held as under:

"7. We have considered rival submissions and perused materials on record. It is evident, the assessee had entered into End User Licence Agreement (EULA) with customers in India in terms of which the assessee has granted licence to use certain standardized software to the customer. The licences provided to the end users are non-exclusive and non-transferable. The end users of the licnese do not have any access to the source code, nor there was any transfer of right in process or use of any process. The limited right granted to the customers under EULA is to use the software for their own internal purposes. Notably, while deciding identical issue in assessee's own case in assessment year 2014-15, the Coordinate Bench in ITA No.6018/Del/2017, dated 01.06.2022 has held as under:

"5. We have carefully considered the submissions of both the parties and gone through the record.

6. Ld. counsel of the assessee submitted that the issue is now squarely covered by the decision of Hon'ble Supreme Court in the case of [Engineering Analysis Centre of Excellence Private Ltd. vs. The Commission of Income-tax](#) in Civil Appeal Nos.8733-8734 of 2018. In this case, Hon'ble Apex Court expounded that consideration for the resale of the computer software through End User License Agreement (EULA)/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. Ld. counsel submitted that the facts in the assessee's case are identical. He further submitted that ITAT in assessee's own case earlier also has decided the issue in favour of the assessee.

7. Ld. DR for the Revenue could not dispute the above proposition.

8. Accordingly, respectfully following the precedent from Hon'ble Apex Court and duly taking note that Revenue has not disputed that the facts in this case are not identical, we set aside the order of the Revenue authorities and decide the issue in favour of the assessee."

8. There is no dispute that factually the issue stands on the same footing as assessment year 2014-15. Therefore, respectfully following the decision of the Coordinate Bench in assessee's own case, as [referred to above](#), we hold that the receipt in dispute is not in the nature of royalty, hence, not taxable in India. The Assessing Officer is directed to delete the addition. These grounds are allowed.

9. In ground no. 6, the assessee has challenged the addition of Rs.1,23,20,383/- by treating it as Fee for Included Services (FIS) under [Article 12\(4\)\(a\)](#) of Indian - USA DTAA. As discussed earlier, while completing the assessment, the Assessing Officer held that the amount received by the assessee towards granting licence under EULA is in the nature of royalty, hence, taxable in India. In the context of the said reasoning, the Assessing Officer held the view that the receipts from annual maintenance charges of the software are in the nature of FIS/FTS, both under the tax treaty as well as under [section 9\(1\)\(vii\)](#) of the Act. Accordingly, he brought to tax the amount of Rs.1,23,20,383/-. Learned DRP, while deciding the objections of the assessee, upheld the decision of the Assessing Officer.

10. We have considered rival submissions and perused the materials on record. It is evident, being of the view that annual maintenance charges are ancillary and subsidiary to the grant of licence for right to use software, which is treated as royalty, the Assessing Officer concluded that receipt from annual maintenance charges is in the nature of FIS under [Article 12\(4\)\(a\)](#) of India - USA DTAA as well as under [section 9\(1\)\(vii\)](#) of the Act. However, while deciding the issue of taxability of receipts from granting of licence, we have held that they are not in the nature of royalty under the treaty provisions. That being the case, the receipt from annual maintenance charges being not ancillary or subsidiary to any royalty income cannot be brought to tax under [Article 12\(4\)\(a\)](#) of the tax treaty. Therefore, it has to be seen, whether it can come within the purview of [Article 12\(4\)\(b\)](#) of

the tax treaty. As could be seen, to be considered as FIS under [Article 12\(4\)\(b\)](#) under the tax treaty, the make available condition has to be satisfied. In the facts of the present appeal, the Departmental Authorities have failed to demonstrate that while rendering the services, the assessee had made available technical knowledge, experience, skills, knowhow etc. to the recipient of such services. That being the case, the amount received cannot be treated as FIS under [Article 12\(4\)\(b\)](#) of the tax treaty.

11. In any case of the matter, the entire case of the revenue is, the amount received falls under [Article 12\(4\)\(a\)](#) of the treaty. In view of the aforesaid, we hold that the amount received is not taxable in India as it cannot be treated as FIS under [Article 12\(4\)](#) of the tax treaty. Accordingly, we direct the Assessing Officer to delete the addition."

Therefore, the facts and circumstances being the same in the present appeal, by taking the same view, we set aside the order of the revenue authorities and decide the issue in favour of the assessee.

9. In the result, appeal filed by the assessee is allowed.

Order pronounced in the court on 30th May, 2024 at Chennai.

Sd/-
(महावीर सिंह)
(MAHAVIR SINGH)
उपाध्यक्ष /Vice President

Sd/-
(एस. आर. रघुनाथा)
(S. R. RAGUNATHA)
लेखासदस्य/Accountant Member

चेन्नई/Chennai,

दिनांक/Dated, the 30th May, 2024

JPV

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त/CIT – Chennai/Coimbatore/Madurai/Salem
4. विभागीय प्रतिनिधि/DR
5. गार्ड फाईल/GF