

आयकर अपीलीय 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 अपीलसं./ITA Nos.: **1573, 1574 & 1575/Chny/2023**
निर्धारणवर्ष / Assessment Years: 2016-17, 2020-21 & 2021-22
&

S.A. Nos. 20, 21/Chny/2024

[In ITA Nos. 1574 & 1575/Chny/2023]

निर्धारण वर्ष / Assessment Years : 2020-21, 2021-22

Temenos Headquarters SA,
No.2, Rue De Lecole De
Chimie,
1205 Geneva,
Switzerland- 1205.

[PAN:AADCT-7868-H]

(अपीलार्थी/Appellant)

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

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओरसे/Appellant by
प्रत्यर्थी की ओरसे/Respondent by

: Shri. R. Sivaraman, Advocate
: Shri. V. Nandakumar, CIT

सुनवाई की तारीख/Date of Hearing

: 24.04.2024

घोषणा की तारीख/Date of Pronouncement

: 12.06.2024

आदेश /ORDER

PER S. R. RAGHUNATHA, ACCOUNTANT MEMBER:

These three appeals filed by the assessee are directed against the separate orders passed by the learned Commissioner of Income Tax (Appeals), Chennai-16, for the assessment year 2016-17, dated 14.11.2023 and for

assessment years 2020-21 & 2021-22 on 06.11.2023. Since, facts are identical and issues are common, for the sake of convenience, these appeals were heard together and are being disposed off, by this consolidated order.

2. The brief facts of the case are that, the assessee M/s. Temenos Headquarters SA, company incorporated under the laws of Switzerland and is a wholly owned subsidiary of Temenos AG. The registered office of the assessee is located in Geneva, Switzerland. The assessee company is engaged in the business of providing the software license to its customers. The assessee company provides non-exclusive, non-transferable basis with no right to modification of source code the Intellectual Property ('IP') rights in the software system and any material provided to the clients are the exclusive IP of Appellant. The Appellant is the sole owner of the copyright in the said software. Further, as per the agreement entered into by Appellant with its clients, it undertakes to provide client with updates which are in the form of recurring licenses with upgrades and enhancements to the current version in the form of modules. The said updates are inextricably and essentially

linked to the sale of software license and the activity of providing revised version of software (through software updation and maintenance) forms integral part and parcel of sale of software license(viz. software licensing activity). With regard to the same, the customers will be paying annual recurring licenses/ Annual maintenance service fee. Please note that, while the payment is made towards recurring licenses the payment for such recurring licenses are referred to as annual maintenance services.

ITA No: 1573/Chny/2023 for AY 2016-17:-

3. The sole issue involved in this appeal is as regards to the order of the CIT(A) confirming the action of Assessing Officer treating software license subscription fees taxable as 'royalty' at Rs.6,43,85,458/- received from Indian sister concerns namely M/s. Temenos India Private Limited and M/s. Energy Credit software Services Pvt Ltd.

4. During the assessment year 2016-17, the assessee company filed its original return of income on 30.11.2016, admitting total income of Rs.10,26,80,370/- and filed revised return of income on 10.07.2017, admitting an income of

Rs.4,57,97,846/-. The case was selected for scrutiny and issued notices u/s. 143(2) and 142(1) of the Income-tax Act, 1961 (hereinafter referred to as "the Act") dated 14.08.2018 and 09.11.2018, 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 passed the impugned assessment order u/s. 143(3) r.w.s. 144C(3) of the Act on 27.03.2019 as under:

"Based on the details available on record and the submissions given by the assessee, the assessment is completed as under:

1. From the submissions of the assessee it was seen that during the A.Y 2016-17, it received Rs.6,43,85,648/- from its Indian sister concerns namely M/s Temenos India Private Limited and M/s Energy credit Software Services Private Limited for providing them with software. In its original return, it had offered this income but in its revised return, it did not. When asked about this, the assessee stated that it is in the business of providing banking software. The income received from that had been offered to tax. But the above mentioned sum is received from its sister concerns as reimbursements for providing them with generic software such as those provided by Microsoft. It further elaborated that it enters into global contracts with companies like Microsoft for purchasing their software. The assessee makes these purchased software available to all its group companies globally and bills it to them in proportion to usage. Accordingly, payment

made by Temenos India Pvt. Ltd. and M/s Energy credit Software Services Private Limited to the assessee constitutes only a reimbursement of expenses which is not liable to be offered to tax. This explanation raises two questions:

- Whether payment received for sale of software is royalty income?
- Whether a reimbursement received for providing software can be treated as an income?

Taxability as per the Income Tax Act

2. Relevant portion of the Income Tax Act that defines 'Royalty' is

reproduced below:

"(vi) **Income by way of royalty** payable by-

(b) **a person who is a resident**, except where the royalty is payable in respect of any right, property or information used or services utilised for the purposes of a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India; or

Explanation 2.-For the purposes of this clause, "**royalty**" means **consideration** (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head "Capital gains") for

(v) the **transfer of all or any rights (including the granting of a licence) in respect of any copyright**, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, but not including consideration for the sale, distribution or exhibition of cinematographic films ..

Explanation 2.-For the purposes of this clause, "royalty" means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head "Capital gains") for-

(i) the transfer of all or any rights (including the granting of a licence) in respect of a patent, invention, model, design, secret formula or process or trade mark or similar property;

(ii) the imparting of any information concerning the working of, or the use of, a patent, invention, model, design, secret formula or process or trade mark or similar property ;

(iii) the use of any patent, invention, model, design, secret formula or process or trade mark or similar property;

(iv) the imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill ;

⁶³[(iva) the use or right to use any industrial, commercial or scientific equipment⁶⁴but not including the amounts referred to in section 44BB;]

(v) the transfer of all or any rights (including the granting of a licence) in respect of⁶⁴any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, but not including consideration for the sale, distribution or exhibition of cinematographic films ; or

(vi) the rendering of any services in connection with the activities referred to in sub-clauses (i) to ⁶³[(iv),(iva) and](v).

⁶⁵[Explanation3.-For the purposes of this clause, **"computer software" means any computer programme recorded on any disc, tape, perforated media or other information storage device and includes any such programme or any customized electronic data.**]

3. Clause (v)to explanation 2 of Section 9 (I)(vi) makes it abundantly clear that royalty means any consideration for **transfer of all or any rights (including the granting of a licence) in respect of any copyright etc.** In the instant case though

copyright vests with owner of the software, it allows the assessee to use the software by granting licence, subject to certain terms and conditions. The wording in this section is granting **"all or any right"**. This means that **"all"** rights associated with a copyrighted item may not necessarily have to be transferred in order to attract the said provisions. Even if **"any"** right is transferred, the said transaction can be hit by the Royalty provision. There can be many rights associated with a copyrighted item such as the right to use, the right to copy, etc. So even if the right to use the software is granted through a license, it can still come within the purview of Royalty.

4. In the case of such softwares as purchased by the assessee and used by its associated enterprises, the person purchasing the software will get the right to download or install the copyrighted programme and then use it. Therefore, in the case of such software, even though the actual copyright itself is not transferred but the right to use the copyrighted material is transferred. This transfer is sufficient to treat the payments made for such purchases to be in the nature of Royalty.

Taxability as per India-Switzerland DTAA:

5. The relevant DTAA defines Royalty as follows:

"The term **"royalties"** as used in this Article means **payments of any kind** received as a consideration **use of, or the right to use, any copyright** of a literary, artistic, or **scientific work**, including cinematograph films or work on film, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent trademark, design or model, plan, secret formula or **process**, or for the use of, or the right to use, any industrial, commercial, or scientific equipment, or for information concerning industrial, commercial or scientific experience.

6. Software is a set of programmes and data that enables a computer to perform certain functions. Such softwares will be copyrighted. The service providers having absolute copyright will agree to part with their

rights to use the same subject to certain terms and conditions. Use of such software without a license would make the user liable for infringement of copyright embedded in the software, and hence the sale or licensing of the software involves the grant of right to use the copyright in the software. Therefore, the right to use a copyrighted software, though for limited purpose, tantamounts to royalty as described in Article 12(3) of the India Switzerland DTAA. In view of the above, the payment for software and licensing fees are taxable as royalty as per Section 9(1)(vi) of the Act and as per Article 12 (3) of the India Switzerland DTAA.

*7. The assessee has contended that the above payments are not royalty because the Indian companies have only received a limited right to merely use the software without any right to modify the source code or replicate it. As already mentioned, there are various kinds of rights associated with a copyrighted article and the right to copy it is not the only right that attracts the provisions of Article 12 of the India Switzerland DTAA. The assessee also relied upon the Copyright Act to state that copyright means an "exclusive right". This argument however has been countered by various Court judgements such as the Karnataka High Court in the case of **CIT vs. CGI Information systems and Management consultants (P.) Ltd, [2014] 226 Taxman 319 (Karnataka)**, in which the Hon'ble Court has observed as follows:*

"Explanation-4 inserted by the Finance Act, 2012 has puts at rest all the controversies and doubts. It expressly states that transfer of all or any rights in respect of any right, property or information includes and has always included transfer of all or any right for use or right to use a computer software including granting of a licence irrespective of the medium through which such right is transferred. Therefore, the terms of Cost Sharing Agreement explicitly mention that the Canadian Company has developed internal telecommunication and communication tool which is accessible only to

the members of CGI worldwide. Therefore it is an intranet facility. Further it declares that the Canadian Company holds the intellectual property rights in the said CGI Information Technology Infrastructure facility. It has allowed the assessee to use the said facility subject to the terms and conditions stipulated in the said agreement."

One can therefore deduce from this that copyrighted item does not imply an "exclusive" right only and the right to use by granting license even for a software comes under the purview of Royalty .

8. With regards to the issue about re-imburement, there are numerous judicial decisions wherein, it is held that when an element of income is embedded in the receipt in the hands of the third party the reimbursements are also liable to tax. Reliance in this regard is placed on the following decisions:

SPX India (PJ Ltd vs CIT (2013} 36 taxmann.com 377 (Delhi-Tribunal]

Section 195, read with section 40(a)(i) of the Income-tax Act, 1961 Deduction of tax at source - Payment to non-resident [Reimbursement of audit fee to parent company] - Assessment year 2007-08 - whether, where assessee-company paid its share of expenses for ISO audit to its foreign parent company, tax was required to be deducted at source under section 195, as element of income was embedded in receipt of auditor - Held, yes Whether, therefore, assessee's claim that tax was not deducted under bonafide belief that it had only reimbursed expenses, was not acceptable and, amount was to be disallowed under section 40(a)(i) - Held, yes [Para 9] [in favour of revenue}

Ashok Leyland Ltd vs DCIT 92009} 120 ITO 14 (Chennai]

Section 195 of the Income-tax Act, 1961- Deduction of tax at source Payment to non-resident Assessment year 2005-06, Assessee-company, engaged in manufacturing of motor vehicles, entered into an agreement with a foreign company for supply of designs, drawings and consultancy in

development of engines - Assessee agreed to reimburse expenditures towards air fare, accommodation and subsistence cost of personnel disputed by foreign company - Foreign company raised invoices and assessee applied for exemption certificate under section 195 which was denied by Assessing Officer - On appeal, Commissioner (Appeals) confirmed order of Assessing officer - Whether since payment on account of reimbursement was part and parcel in process of advice of a technical character, it would attract provisions of section 195/ Held, yes

From the above judgements it can be inferred that for determining the taxability of a re-imburement, one has to see whether the original payment for which this re-imburement has been made contains an element o income or not. Since payment received for granting software license as discussed in earlier paragraphs is an income (Royalty) within the provisions of domestic law as well as the relevant DTAA, the re-imburement for the same by extension is also to be treated as an income.

In view of the discussion above, the re-imburement amounting to Rs.6,43,85,648/- received by the assessee from its Indian sister concerns is treated as Royalty Income and taxed as such."

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 by passing the following order:

"5.5 *Thus, in view of lack of an agreement which demonstrates how the software licenses were bought, how*

they are integrated into a centralized system, the infrastructure costs incurred, and how the cost allocation was done globally, the said costs incurred and claimed as reimbursements cannot constitute Software Royalty, Thus, the decision of the Honourable Supreme Court does not apply in the instant case. At best the same can be termed as fees for technical services and the beneficial tax rate of 10% is applicable to the appellant."

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 Id.CIT(A) erred on facts and circumstances of the case by taxing the cost-to-cost reimbursement received as income. The Ld. Counsel for the assessee also submitted that the Id.CIT(A) and the Assessing Officer ought to have considered the fact that amount received from Indian sister concerns namely M/s. Temenos India Private Limited and M/s. Energy Credit Software services Private Limited of Rs.6,43,85,458/- as reimbursement for providing them with such generic software such as those provided by Microsoft is not taxable under India-Switzerland DTAA. The Id.AR also filed a paper book of 287 pages, consisting of written submissions, return of income filed, assessment order, Form 26AS etc. The written submissions filed by the Id.AR are as follows:

Payment/Reimbursement on account of use of copyrighted article cannot be construed as 'royalty' under the provisions of the Act

- *The Appellant is a non-resident in India as per section 5 of the Act. Accordingly, it can opt for beneficial tax provisions prescribed in India-Switzerland DTAA as per section 90 of the Act.*
- *The para 3 of Article 12 of the India-Switzerland DTAA provides that the term 'royalties' shall mean: payments of any kind received as a consideration for the use of, or the right to use, any copyright of a literary, artistic, or scientific work, including cinematograph films or work on films, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent trademark, design or model, plan, secret formula or process, or for the use of, or the right to us, any industrial, commercial, or scientific equipment, or for information concerning industrial, commercial or scientific experience"*
- *From the plain reading of the Article it can be inferred that, it refers to payments of any kind received as a consideration for the use of, or the right to use any 'copyright' of literary, artistic or scientific work including cinematograph films, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience. Thus, in order to tax the payment in question as "royalty", it is essential that the said payment must fall within the ambit and scope of Para 3 of Article 12.*
- *Aforesaid section deals with consideration in respect of any copyright but not consideration for any copyrighted article. Usage of software by its group companies which was already purchased by the Appellant would be in the nature of 'copyrighted article' since the other rights (in the 'copyright') such as reproduction right, distribution right, etc. are not transferred. Further, by the virtue of cost allocation for software usage (i.e., the cost allotted is for utilization of the software for their internal business use), the end user cannot exploit the 'copyright' contained therein.*
- *In the instant case, the Appellant wishes to submit before your goodself that, it has no right to commercially exploit or make additional copies of software licenses. The Appellant centrally procures the software licenses required and allocate the same within its Group. Further, the Appellant does not have any right to reproduce/ sell to the third parties and is only for the internal use of Temenos Group. Given the above, it is evident that the*

Appellant and other Temenos Group entities only have the non-exclusive and non-transferable rights of an end user.

- In this regard, reliance can be placed on the recent decision of **Hon'ble Supreme Court in the case of Engineering Analysis Centre Of Excellence Private Limited ((Civil Appeal Nos. 8733-8734 of 2018))** wherein it was held that **"consideration for the resale/use of the computer software through 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"**.

- In the instant case, the payment made by the Temenos India and Energy Credits to the Appellant is for a non-exclusive and non-transferrable license and hence it is a payment for 'copyrighted' product. Accordingly, such payment shall not fall under the definition of 'royalty' under the India-Switzerland DTAA.

- Further, the following judicial precedents have followed the decision of Hon'ble Supreme Court in the case of **Engineering Analysis Centre Of Excellence Private Limited (supra)** held that the software purchased by assessee was a copyrighted article and accordingly, payment made by assessee for acquiring license in such software was outside scope of definition of 'royalty' as per DTAA.

- a) *Plintron Mobility Solutions Private Limited vs. Income Tax Officer, [Corporate Ward 5(2), Chennai [2021] 133 taxmann.com 366 (Chennai Tribunal)*
- b) *Temenos India Private Limited Vs DCIT, International taxation 2(2), Chennai. (ITA No. 1955/Chny/2017)*
- c) *Altisource Business Solutions (P.) Ltd v Assistant Commissioner of Income-tax (International Taxation), [2021] 127 taxmann.com 800 (Bangalore Tribunal)*
- d) *Bain & Company India (P.) Ltd. V Income-tax Officer (TDS), International Taxation, [2022] 136 taxmann.com 129 (Delhi Tribunal)*
- e) *IBM Singapore (Pte.) Ltd v Deputy Commissioner of Income tax (International Taxation) (2021) 131 taxmann.com 330 (Bangalore Tribunal)*

Reimbursements on cost-to-cost basis is not taxable under the provisions of the Act:

As per the group policy, the Appellant avails the facility of common software and license fees which is spread across the Temenos Group to maintain uniform functioning of resources to

provide the same quality of service to its customers across the Globe. Software usage and license fees are incurred by the Appellant for Temenos Group as a whole for administrative convenience. Accordingly, the cost had been incurred by a single entity and the same is allocated to the group entities based on usage, without any mark up.

Since the said payment to the Appellant does not include any income element, and are cost-to-cost reimbursement, taxability of such reimbursement is not warranted in the instant case.

*As per section 5(2) of the Act, the income of a non-resident is taxable in India only if such income accrues, arise or received in India. In the instant case, the aforesaid **reimbursement of expenses is on cost to cost basis and there is no income element embedded in it.** Accordingly, no income arises in the hands of the non-resident recipient in respect of the said reimbursement.*

In this regard, reliance could be placed on the following judicial precedents, wherein it has been held that reimbursement of expenses to a non-resident on cost to cost basis (without any profit element) would not be liable to taxes and relied on the following judicial precedents:

- *Hon'ble Supreme Court in the case of DIT vs A.P. Moller Maersk A S [2017] (78 txamann.com 287)*
- *The Chennai ITAT in the case of Hospira Healthcare India (P) Ltd vs DCIT [2018] (92 taxmann.com 225)*
- *The Chennai ITAT in the case of ITO vs CMS (India) Operations & Maintenance Co. P Ltd [2013] (ITA No 1264/Mds/2012).*

Annual Maintenance Services:

- *Further, annual maintenance services which is an integral part of sale of software license and not a separate service in itself, partakes the taxability of the sale of software licenses, hence, receipts earned by way of annual maintenance charges is not chargeable to tax in India.*
- *In this regard, the Appellant, places reliance on the following Judicial Precedents which have held that that payment for copyrighted software products including software updates which are inextricably linked to sale of software cannot be characterized as 'royalty':*
- *In the case of Adobe Systems Software Ireland Limited vs. Assistant Director of Income Tax (Delhi /TAT) (ITA No. 5433/DEL/2011),*

- *The Mumbai ITAT in the case of Netcracker Technology Solutions LLC v. Deputy Commissioner of Income-tax (116 taxmann.com 243)(2020)*
- *In the case of Ciena India Pvt Ltd (Delhi ITAT) (ITA Nos.- 959 &984/Del/2011)(2018),*
- *Hon'ble Supreme Court in the case of Engineering Analysis Centre Of Excellence Private Limited ((Civil Appeal Nos. 8733-8734 of 2018))*
- *In the case of Aspect Software Inc. V. ADIT, Circle 1(1), International Taxation, New Delhi [2015] 61 taxmann.com 36 (Delhi- Trib.)*
- *In the case of TSYS Card Tech Ltd vs DCIT (ITA No. 2006/Del/2022) (Delhi Tribunal):*
- *In the case of Murex Southeast Asia Private Limited vs Deputy Commissioner of Income tax, international tax 3(2)(2), Mumbai (ITA No. 2338/Mum/2022) (Mumbai Tribunal):*
- *In the case of Deputy Commissioner of Income-tax (International Taxation) Vs Mathworks Inc, Bangalore bench 'A' [2024] 159 taxmann.com 1478 (Bangalore-trib.)*

4.1 Favorable order in Appellant's group entity's case:

The Hon'ble Delhi Tribunal has passed a favorable order in the case of Kony Inc. (Appellant's group entity) for the AY 2014- 15, AY 2015-16 and A Y 2017-18 allowing the income earned by way of sale of software license and annual maintenance services as exempt income under India-USA DTAA."

and pleaded to quash the order of the lower authorities.

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

8. We have heard both the parties, perused materials available on record and gone through orders of the authorities below. It is an admitted fact that the assessee has made

payment to Microsoft on behalf of its group entities across the world towards license fee for using Microsoft utilities. Subsequently, the cost was apportioned to the respective group entities on the basis of number of users and the same was paid to the assessee as reimbursement. The above software is a copy righted article with restricted use. The transaction does not involve the use/right to use the copy right belonging to Microsoft. The assessee did not have the right to commercially exploit such software by replication and cannot sell or lease software to third parties. For administrative convenience, the cost is incurred by a single entity and the cost is allocated based on the software usage. As per the Para 3 of Article 12 of the India-Switzerland DTAA, the term 'royalties' shall means:

"payments of any kind received as a consideration for the use of, or the right to use, any copyright of a literary, artistic, or scientific work, including cinematograph films or work on films, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent trademark, design or model, plan, secret formula or process, or for the use of, or the right to use, any industrial, commercial, or scientific equipment, or for information concerning industrial, commercial or scientific experience"

The said assumption did not fall in the meaning of royalties and hence, not taxable as per the India-Switzerland DTAA.

Further, the similar issue has been decided in the assessee's group company M/s. Kony Inc vs DCIT in ITA No. 7462/Del/2018, dated 11.01.2023, for the assessment year 2015-16, which is decided in favour of the assessee. Upon perusal of case records and after considering the tribunal decisions in the case of M/s. Kony Inc vs DCIT (Supra), the submissions of the Id.AR that the issue on legal grounds as well as on merits is covered in the above said 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 (Supra), after considering the decision taken in the assessment year 2014-15 in ITA No. 6018/Del/2017 of the same assessee's 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.

Therefore, the facts and circumstances being the same in the present appeal, by respectfully following the view taken by the taking Delhi Tribunal, we are inclined to delete the addition and set aside the order of the revenue authorities and decide the issue in favour of the assessee.

ITA Nos. 1574 & 1575/Chny/2023 for AYs 2020-21 & 2021-22:

9. The sole issue involved in these two appeals is as regards to whether 'Annual maintenance service fees' for an amount of Rs.9,93,54,234/- and Rs.11,36,88,069/- for assessment years 2020-21 and 2021-22 respectively, taxable as 'fees for included service' both under I.T. Act, 1961 and also under Article 12 of the India-Switzerland DTAA.

10. The assessee company filed its original return of income, for the assessment years 2020-21 and 2021-22 on 09.01.2021 and 24.12.2021 declaring total income of Rs.78,21,970/- and Rs.44,39,720/- respectively. The case was selected for scrutiny and issued notices u/s. 143(2) and 142(1) of the Income-tax Act, 1961 (hereinafter referred to as "the Act"). 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 passed the impugned assessment orders u/s. 143(3) r.w.s. 144C(3) of the Act on 28.04.2022 and 23.01.2023 for assessment years

2020-21 and 2021-22 respectively, by treating the income received as 'Annual maintenance services' as taxable in India as under:

"The income earned by the assessee during the relevant assessment year under the head Annual Maintenance Service Fee or income is taxable as fees for technical services both under the Income Tax Act and also as per Article 12 of the India-Switzerland DTAA. Applying the beneficial provisions of the DTAA, Annual Maintenance Services Fee or Income amounting to Rs.9,93,54,234/-for the assessment year 2020-21 and Rs.10,92,48,345/- and service Income of Rs.44,39,724/- for assessment year 2021-22 is brought to tax at 10%.

11. We have noted that the annual maintenance services which is an integral part of sale of software license and not a separate service in itself, partakes the taxability of the sale of software licenses. Further, the issue involved in assessment years 2020-21 and 2021-22 are identical to the issue of assessee's group company M/s. Kony Inc., (Supra), considering in favour of the assessee and held as under:

"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 two appeals, by respectfully following the view taken by the coordinate bench, we are inclined to delete the addition and set aside the order of the revenue authorities and decide the issue in favour of the assessee for both the assessment years.

SA Nos: 20 & 21/Chny/2024:

12. These stay petitions are filed by the assessee seeking stay of outstanding demand of Rs.4,687,458/- and Rs.11,621,490/- for assessment years 2020-21 and 2021-22 respectively. Since, we have disposed off the main appeals in ITA No. 1574 & 1575/Chny/2023, the stay petitions becomes infructuous and hence, dismissed.

13. In the result, appeals filed by the assessee for assessment years 2016-17, 2020-21 & 2021-22 are allowed and stay applications filed by the assessee for assessment years 2020-21 & 2021-22 are dismissed as infructuous.

Order pronounced in the court on 12th June, 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 12th June, 2024

JPV

आदेशकीप्रतिलिपिअग्रेषित/Copy to:

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