

IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCHES : D : NEW DELHI

BEFORE SHRI G.S. PANNU, HON'BLE VICE PRESIDENT  
AND  
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No.3019/Del/2023  
Assessment Year: 2021-22

Finastra International Financial  
Systems Pte Limited,  
5 Shenton Way,  
12-01/04, UIC Building,  
Singapore – 68808.

Vs

ACIT,  
International Taxation,  
Circle 1(3)(1),  
Delhi.

PAN: AAICM2959D

(Appellant)

(Respondent)

|                       |   |                               |
|-----------------------|---|-------------------------------|
| Assessee by           | : | Ms Tanmayee, Advocate         |
| Revenue by            | : | Shri Vizay B. Vasanta, CIT-DR |
| Date of Hearing       | : | 24.04.2024                    |
| Date of Pronouncement | : | 27.06.2024                    |

ORDER

PER ANUBHAV SHARMA, JM:

This appeal is preferred by the Assessee against the final assessment order dated 28.08.2023 passed u/s 143(3) r.w.s.144C(13) of the Income Tax Act, 1961 (hereinafter referred as 'the Act'), by the ACIT, International Taxation, Circle 1(3)(1), Delhi (hereinafter referred to as the Ld. AO).

2. After hearing both the sides it comes up that controversy is out of the treatment given by AO to the receipts from the sale/distribution of software by

the assessee as 'royalty', which assessee, as tax resident of Singapore, has claimed not taxable in the light of India-Singapore DTAA. During the course of hearing, the ld. AR has primarily relied the findings in the case of the assessee for AY 2020-21 vide ITA No.915/Del/2023, order dated 02.01.2024. The ld. DR could not dispute the facts being similar. It comes up that in assessee's own case for AY 2020-21 (supra), the coordinate Bench following the ratio in the case of **Engineering Analysis Centre of Excellence Private Limited vs. CIT 125 taxmann.com 42 (SC)**, has considered the business module of assessee and held as follows:-

*“7. Before the ld. DRP, the assessee has submitted that the facts of his case are squarely covered by the judgment of the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Pvt. Ltd. It was submitted that as per the agreement between the assessee and the Indian entity (distributor, MTRM) there is only transfer of right to use software which is being granted. It is submitted that the assessee is merely licensee the software products to Indian end users without removing the name of the ultimate end user. It is further submitted that what is sold to the Indian customers is only a software product along with the non-exclusive, nontransferable license to merely enable the use of the product. The assessee has reiterated that the assessee is purchasing the software from its non-resident supplier/owner and selling/ distributing to Indian end users either for their own business or for onward selling and in the entire chain of event there is no transfer of copyright, rather only copyrighted article is getting transferred. It was accordingly submitted that the ruling in the aforementioned Supreme Court judgment is squarely applicable in its case.*

*8. With reference to the AO's observations on the various clauses of the agreement between the assessee and Indian AEs, the assessee has submitted before the DRP the following rebuttal. This submission as extracted from the order of the ld. DRP.*

*“(A). Agreement between the Assessee and MTRM*

*1. W.r.t. clause 5 of the agreement:*

*It is stated that the learned AO has grossly misinterpreted clause 5 of the agreement by concluding that the subsidiary i.e., MTRM is the sub-licensor,*

*whereas the agreement clearly defines that the assessee company is the sub-licensor. Further, the Assessee states that there are no development/ update rights passed on to MTRM by is the Assessee who shall undertake to develop or procure development to software including update to MTRM.*

*2. W.r.t clause 1 of the agreement:*

*With respect to clause 1 of the agreement, the term 'reproduce' included in the definition of the term "USE" commonly refers to the right to make copies of the work, which generally includes storage of such work, for its own business purpose. Hence, it is not a case that MTRM (i.e., distributor) has access to the source code and is reproducing the same for commercial use.*

*3. W.r.t clause 6 of the agreement:*

*Assessee submits that clause 6(a) and (b) is again misinterpreted by the learned AO by considering MTRM as the sub-licensor instead of the Assessee and stating that training is given by MTRM to Finastra Singapore. The sub-licensor as clearly defined under the agreement is the Assessee (i.e., Finastra Singapore) and not MTRM (which the distributor). Hence, on a reading of the said clauses, it is clear that, Assessee is the one liable to provide training to MTRM in order to enable it to solve the problems of the end users.*

*4. W.r.t clause 12 of the agreement:*

*The Assessee submits that clause 12 of the agreement talks about "copyright" and does not mention about "making copies". Further, the ultimate ownership lies with the original owner of the software and MTRM does not have any right to remove, alter, amend or obliterate such notices attached with each software.*

*5. W.r.t feature of software:*

*Assessee puts forward the explanation that features/ applications of the software do not have a direct nexus with whether the same is shrink wrapped software or not. It is stated that the features as noted by the learned AO merely indicates that the software performs the function of converting data points into information which clearly depicts that this is a standard software which can be used by various third parties.*

*(B). Agreement between the assessee and IndusInd Bank Limited:*

*1. W.r.t clause 16.4 of the agreement:*

*Assessee submits, that the actual terms of the agreement clearly restricts actions such as decompiling, disassembling etc. except to the extent permissible under the aforesaid Article. A lawful purchaser/acquirer of a computer program is entitled to copy, translate and, ultimately, decompile that program without fear of liability for copyright infringement where the*

*same is in accordance with the Article 6 read with Article 5 of Directive 91/250. In the instant case, Indusind bank can be allowed to decompile the software but only within the statutory guidelines and hence, it can be said that there is no transfer of source code by the Assessee so as to make it vulnerable to any copyright Infringements. The assessee has placed reliance on the extracts of clauses 16.4, 1.9, 1.33 and 21.5 of the agreement.*

*2. W.r.t clause 16.1 of the agreement:*

*Assessee disagrees with learned AO's understanding and submits that as per clause 16.1.8, the term "named affiliate" is defined under clause 1.24 and under clause 1.3 of the agreement wherein it states that name affiliate would include holding/subsidiary company of the sub-licensee. Hence, it is only for internal use (by the group companies of Indusind Bank) against the contention of the Learned AO that the sub-licensee can allow use by any third party. The assessee has also made reference to clauses 17.1 and 17.4 in this regard.*

*3. W.r.t clause 7 of the agreement:*

*The Assessee submits that the term Modification used in the above mentioned clause of the agreement merely means that Indusind Bank Limited can modify the configurations implemented through use of Finastra application toolkit or approved toolkit, and not through a source code change. As per clause 7, Indusind Bank Limited can only hold license to use such Modifications for as long original software license term.*

*4. W.r.t clause 1.27 of the agreement:*

*Assessee submits that clause 16.1 of the agreement clearly provides that Indusind Bank Limited has rights to make Copies of the software, only for the limited purpose of keeping back-ups. Owing to above explanations, it can be seen that there is no source code access given to Indusind Bank Limited by Finastra Singapore and hence, there is no parting with the copyrights on the software. It is further submitted that there is no access to source code being given up by Finastra Singapore to Indusind Bank Ltd.*

*(C). Agreement between the Assessee and ING Vysya Bank Ltd/ Kotak Mahindra Bank Ltd "end user"]*

*This agreement is entered between the Assessee and ING Vysya Bank Ltd/ Kotak Mahindra Bank Ltd, which is the end user of the software product. The Assessee is not only distributing the product but also earning receipts by directly selling the software product to Indian end users. The end user only acquires the right to use' the software product and shall retain a non-exclusive license to use the software as long as the license agreement is in force. The assessee has placed reliance upon the extracts of Para 7.2, 7.4 and para 16 as well as the definition of terms Computer software, License*

*matrix and License term contained in paras 1.9, 1.19 and 1.21 of the agreement in this regard.*

*(D). Agreement between the Assessee and IDFC Limited ['end user']*

*The assessee submits that this agreement is entered between the Assessee and IDFC United, which is the end user of the software product. The Assessee is not only distributing the product but also earning receipts by directly selling the software product to Indian end users. The end user only acquires the right to use the software product for its own business and cannot use the licensed software product for third parties. The end user has a personal non-exclusive and non-transferable right. The end user does not have any right on the source code of the software product. The end user does not own any right on the copyrights of the software.*

*9. Following the above, the assessee submitted that the Hon'ble SC Judgment squarely applicable, since the assessee is merely selling the software product to Indian end users for the purpose of its business for a determined period of time which is agreed upon as per the agreements. After going through the submissions of the assessee, the ld. DRP directed the AO to verify the factual contentions of the assessee with reference to clauses of the contract between the assessee and distributors/ end user and ascertain if the terms of the contracts meet the criteria laid down in the case of Engineering Analysis Centre of Excellence (supra) and pass a speaking order in this regard. The Assessing Officer restated the contents of draft Assessment Order in the final Assessment Order.*

*10. Aggrieved, the assessee filed appeal before the ITAT.*

*11. Before us, the ld. AR relied on the arguments taken up before the ld. DRP whereas the ld. DR supported the order of the Assessing Officer.*

*12. Heard the arguments of both the parties and perused the material available on record.*

*13. We find that the AO has read and interpreted the clauses of the agreement wrongly and selectively. While the AO has concluded that the agreements between the assessee and the end user/ distributor give credence to the fact that the terms of software sales by the assessee to its distributor/ end users in India are clearly distinguishable from the case of Engineering Analysis Centre of Excellence Pvt. Ltd., the assessee has contended that the AO has not read/ interpreted the agreements between the assessee and the distributor/ end user in the proper context. Having gone through the various clauses of the distributor agreement, we hereby hold that the subject matter is squarely covered by the judgment of Hon'ble*

*Supreme Court in the case of Engineering Analysis Centre of Excellence Private Limited vs. CIT 125 taxmann.com 42 (SC).”*

3. In the light of the aforesaid, as there are no distinguishing facts or position of law to benefit the Revenue, all the grounds, except 3, which was not pressed during hearing, are sustained. **The appeal is allowed.**

4. In the result, the appeal is allowed.

Order pronounced in the open court on 27.06.2024.

Sd/-

(G.S. PANNU)  
VICE PRESIDENT

Dated: 27<sup>th</sup> June, 2024.

dk

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Sd/-

(ANUBHAV SHARMA)  
JUDICIAL MEMBER

Asstt. Registrar, ITAT, New Delhi