IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D": NEW DELHI

BEFORE SHRI G.S. PANNU, VICE PRESIDENT
AND
SHRI KUL BHARAT, JUDICIAL MEMBER

ITA No. 88/DEL/2022
[Assessment Year: 2017-18]

DCIT, Circle-2(2)(1), International Taxation, New Delhi.	Vs	Lonza Walkersville inc., SRBC & Associates, 5th Floor Plot no. 2B Tower-2, Sector-126, Noida-201304. PAN:AACCL6707C
APPELLANT		**RESPONDENT**
Assessee represented by	Shri Vishal Kalra Adv.; Shri SS Tomar, Adv. & Ms. Snigdha Gautam	
Department represented by	Shri Vijay B Vasanta, CIT(DR);& Shri Sanjay Kumar, Sr. DR	
Date of hearing	25.07.2024	
Date of pronouncement	26.07.2024	

O R D E R

PER KUL BHARAT, JM:

This appeal, by the Revenue, is directed against the order of the learned Commissioner of Income-tax (Appeals)-43, New Delhi, dated 17.11.2021, pertaining to the assessment year 2017-18. The Revenue has raised following grounds of appeal:

"1. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in holding that receipts of the assessee from sale of software is not taxable as royalty under the India and USA DTAA.

2. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in holding that income from sale of offshore sale of product to Lonza India Pvt. Ltd., is not taxable as royalty.

3. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in holding that reimbursement expenses is not taxable as FTS without considering the facts that the services are ancillary and subsidiary to the right/property for use of the Moda solution provided by the assessee to its customers.

4. The appellant craves to add, amend, modify or alter any grounds of appeal at any time or before the hearing of the appeal."

2. Facts giving rise to the present appeal are that in this case the assessee filed its return of income on 31.10.2017 declaring total income at Nil. The case was selected for scrutiny under CASS. The assessee is a company incorporated in USA and is in the business of providing biology based solutions to life-science customers, serving research organizations, pharmaceutical etc. The assessee during the year under consideration entered into sale agreements with third parties in India for sale of Moda Solution. Sale was effected outside India and is essentially sale of software products. The Assessing Officer observed that the consideration received in connection with the sale of Moda Solution was for the sale of a copyrighted article and not towards the use or right to use of the copyright in the software.

3. During the assessment proceedings the Assessing Officer noticed that the company had received a total receipt of Rs. 7,64,21,502/- from various entities

against which TDS had been withheld by them. The assessee did not offer these receipt for taxation. Accordingly, the assessing Officer issued notice to the assessee. In response thereof, the assessee filed its reply. The reply of the assessee was not found acceptable. The Assessing Officer proceeded to assess income and computed the same at Rs. 7,64,21,502/- i.e. income from software sale; income from sale of offshore sale of product to Lonza India Pvt. Ltd.; and reimbursement of temporary living expenses. It is also recorded by the Assessing Officer that a draft assessment order dated 15.12.2019 was passed against which the assessee neither filed any objection before the learned DRP nor submitted any acceptance of the draft assessment order within the prescribed period. Therefore, the Assessing Authority assessed income u/s 144C(3) of the Income-tax Act, 1961, hereinafter referred to as the "Act". Aggrieved against this the assessee carried the matter in appeal before the learned CIT(Appeals), who after considering the submissions deleted the impugned additions and allowed the appeal of the assessee. Now the Revenue is in appeal before this Tribunal.

4. Apropos to ground nos. 1 & 2 of the appeal, learned DR supported the assessment order and contended that the learned CIT(Appeals) was not justified in deleting the addition made by the Assessing Authority. He, therefore, prayed that the finding of the learned CIT(Appeals) may be set aside and the corresponding finding of the Assessing Officer be restored.

5. On the other hand, learned counsel for the assessee submitted that the issue is covered in favour of the assessee by the judgment of Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Private Limited Vs. CIT (civil appeal nos. 8733-8734 of 2018).

6. We have heard the rival contentions and perused the material available on record. Learned CIT(Appeals) has deleted the impugned additions relating to royalty by observing as under:

> *"5.1 I have gone through the submission of appellant. During the course of hearing and vide submission made on May 05, 2021, a part of above submission appellant relied on the recently passed judgement by Hon'ble Supreme court in the case of* ***Engineering Analysis Centre of Excellence Private Limited vs Commissioner of Income (civil appeal nos. 8733-8734 of 2018),*** *wherein Hon'ble SC disposed off a batch of 86 appeals in relation to taxability of supply of software in favour of taxpayer and held that same cannot be taxed as 'Royalty' under provisions of tax treaty.*
>
> *5.2 Upon perusal of facts of appellant and reading the same along with the case decided by Hon'ble SC in case of software royalty, I am of the view that under present circumstances as well what the appellant had transferred to customers in India was a copyrighted article and not the right to use the underlying copyright of MODA solution.*
>
> *5.3 Further, Hon'ble SC has clearly upheld the decisions of jurisdictional HC in case of Infrasoft, ZTE, Moforola efc. and held the judgements passed by Karnataka HC in the case of Samsung and Synopsis as erroneous. Thus, respectfully following the Hon'ble SC decision on underlying issue and considering the fact of appellant are same as in case of infra soft which has been upheld by SC, in my opinion, said consideration cannot be taxed as royalty under the provisions of India-USA tax treaty. Hence, this ground of appeal is allowed."*

7. There is no dispute with regard to the fact that the sales were effected offshore. Moreover, the issue relating to supply of software cannot be treated as royalty, is no more res-integra in view of the decision of the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Private Limited vs. Commissioner of Income Tax (supra), wherein the Hon'ble Supreme Court has held as under:

> *"168. Given the definition of royalties contained in Article 12 of the DTAAs mentioned in paragraph 41 of this judgment, it is clear that there is no obligation on the persons mentioned in section 195 of the Income Tax Act to deduct tax at source, as the distribution agreements/EULAs in the facts of these cases do not create any interest or right in such distributors/end-users, which would amount to the use of or right to use any copyright. The provisions contained in the Income Tax Act (section 9(1)(vi), along with* explanations *2 and 4 thereof), which deal with royalty, not being more beneficial to the assessees, have no application in the facts of these cases.*
>
> *169. Our answer to the question posed before us, is 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, 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.*
>
> *170. 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."*

8. In the light of the above judgment of the Hon'ble Supreme Court we do not see any infirmity into the order passed by the learned CIT(Appeals) on the issue in question. Accordingly, ground nos. 1 & 2 are dismissed.

9. Apropos to ground no. 3, learned DR supported the assessment order.

10. On the other hand, learned counsel for the assessee supported the order of the learned CIT(Appeals) and submitted that the AO was not justified in making the impugned addition. He contended that the AO treated the reimbursement expenses as fee for technical services.

11. We have heard rival submissions. The learned CIT(Appeals) has decided the issue by observing as under:

> *"5.5.1 Finding and Observation in relation to Ground 3: In relation to ground 3, I understand that AO had taxed the reimbursement of expenses in relation to travel and lodging recoverable from customers in India as Fee for technical services without any reasoning. I understand that such amount was not towards any services provided by appellant to customers in India rather it represented cost to cost reimbursements towards living expenses of employees.*
>
> *5.5.2 Thus, in my considered opinion, same cannot be taxed as Fee for technical services under the Act. Further, as contended by appellant during course of hearing, even otherwise, if AO had taxed the same as FTS, same should not satisfy the 'make available' clause as provided in definition of FTS under India- US tax treaty. Accordingly, same should not be taxable as FTS under tax treaty. Hence, this ground of appeal is allowed."*

12. The above finding of the learned CIT(Appeals) is not controverted by the Revenue by placing any contrary material on record. Therefore, we do not see any

reason to disturb the finding on fact given by the learned CIT(Appeals). The same is hereby affirmed. Accordingly, ground no. 3 is dismissed.

13. Ground no. 4 is general and needs no separate adjudication.

14. The appeal of the Revenue is dismissed.

Order pronounced in open court on 26th July, 2024.

Sd/-	**Sd/-**
(G.S.PANNU)	**(KUL BHARAT)**
VICE PRESIDENT	**JUDICIAL MEMBER**

MP

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI