

| आयकर अपीलिय अधिकरण न्यायपीठ, मुंबई |
IN THE INCOME TAX APPELLATE TRIBUNAL
"I" BENCH, MUMBAI

BEFORE SHRI NARENDRA KUMAR BILLAIYA, HON'BLE ACCOUNTANT MEMBER
&
SHRI SUNIL KUMAR SINGH, HON'BLE JUDICIAL MEMBER

I.T.A. No. 4534/Mum/2023
Assessment Year: 2021-22

Dassault Systèmes SolidWorks Corporations C/o Deloitte Haskins and Sells LLP 7 th Floor, ASV Ramana Towers 52, Venkatnarayana Road Chennai - 600017 [PAN: AAFCS8787E]	Vs	The Asstt. Commissioner of Income-tax (International Taxation)-2(1)(2), Mumbai
अपीलार्थी/ (Appellant)		प्रत्यर्थी/ (Respondent)

Assessee by :	Shri Akshay Kumar, A/R
Revenue by :	Shri Vivek Perampurna, D/R

सुनवाई की तारीख/**Date of Hearing** : 05/11/2024
घोषणा की तारीख/**Date of Pronouncement** : 08/11/2024

आदेश/ORDER

PER NARENDRA KUMAR BILLAIYA, AM:

This appeal by the assessee is preferred against the order dated 18/10/2023 framed u/s 143(3) r.w.s. 144C(13) of the Act, pertaining to AY 2021-22.

2. The grievance of the assessee reads as under:-

1. General

1.1. *The order of the learned Assessing Officer ("AO") is contrary to canons of equity and natural justice, contrary to law and facts involved, not based on facts and circumstances of the case, contrary to mandatory provisions of the Income-tax Act, 1961 ("Act"), lacks jurisdiction and is liable to be struck down.*

1.2. *The learned AO has erred in law and on facts in computing the total income of the Appellant at INR 1,05,78,50,059/-.*

2. Taxability of receipts towards sale of software products

2.1. *The Honourable DRP has erred in upholding the draft assessment order after rejecting the Appellant's objections, even as it noted that the binding decisions of the*

jurisdictional Mumbai Bench of the Income Tax Appellate Tribunal on identical issue in the appellant's own case for the earlier assessment years 2003-04, 2005-06 and 2006-07, 2007-08, 2009-10, 2011-12, 2013-14, 2014-15, 2015-16, 2016-17, 2017-18, 2018-19 & 2019-20.

2.2. *The Honourable DRP has erred in upholding the draft assessment order without considering the fact that the Hon'ble High Court of Bombay for the AY 2011-12 has held that the order of the Supreme Court of India in the case of Engineering Analysis Centre of Excellence Private Limited is squarely applicable to the Appellant.*

2.3. *On the facts and the circumstances of the case and in law, the learned AO and DRP have erred in holding that the income from sale of shrink-wrapped software is taxable in India, being in the nature of royalty under the provisions of section 9(1)(vi) of the Act as well as Article 12(3) of the Double Taxation Avoidance Agreement ("DTAA") between India and USA.*

2.4. *On the facts and circumstances of the case and in law, the learned AO and DRP have erred in not appreciating that the payments received on sale of shrink-wrapped software is for 'sale of copyrighted article' and not 'transfer of copyright right' as the end users in India obtained only a right to use the software products as against any copyright right.*

2.5. *On the facts and circumstances of the case and in law, the learned AO has erred in holding that software is a process or a property similar to patent, invention, design, secret formula, process, etc as defined under Explanation 2 to section 9(1)(vi) of the Act.*

2.6. *The learned AO has erred in law in stating that the retrospective amendment to section 9(1)(vi) of the Act by way of insertion of Explanation 4 to the said section through Finance Act 2012 is applicable also to the definition of "Royalty" under Article 12 of the DTAA.*

2.7. *The learned AO ought to have appreciated that the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Private Limited (Civil Appeal No(s). 8733-8734/2018) (vide order dated 02 March 2021) held that the amount paid by resident Indian end users/ distributors to non-resident computer software manufacturers/ suppliers, is not payment for royalty for the use of copyright in the computer software, and held that such income shall not taxable in the hands of the non-resident.*

2.8. *The learned AO erred in levying interest under section 234B of the Act.*

Each of the above ground is independent and without prejudice to the other grounds of appeal preferred by the Appellant.

The Appellant craves leave to add, alter, vary, omit, substitute or amend the above grounds of appeal, at any time before or at, the time of hearing, of the appeal, so as to

enable the Honourable Income Tax Appellate Tribunal to decide this appeal according to law."

3. At the very outset, the Id. Counsel for the assessee stated that the impugned issues have been decided in favour of the assessee and against the revenue in assessee's own case for earlier AYs 2003-04 to 2019-20. It is the say of the Id. Counsel that the impugned quarrel is now well-settled by the Hon'ble Supreme Court in the case of *Engineering Analysis Centre of Excellence (P.) Limited v. CIT [2021] 432 ITR 471 (SC)*.

Per contra, the Id. D/R could not bring any decision in favour of the revenue and strongly relied upon the findings of the lower authorities.

4. We have given a thoughtful consideration to the orders of the authorities below.

5. Briefly stated the facts of the case are that the assessee filed its return of income on 14/03/2022 declaring total income of Rs. 69,33,067/-. The assessee is a non-resident company incorporated in the United States of America and is engaged in the business of developing and marketing 3D mechanical design solutions. It entered into software distribution agreements with resellers in India, who buy shrink wrapped software from the assessee and in turn sell to customers in India. During the year under consideration, the assessee has offered royalty income of Rs.14,80,656/- @10% as per the relevant provisions of the Act and also declared interest income of Rs.54,52,411/- on income tax refund @15% as per DTAA. Further the assessee also received Rs.1,05,09,16,992/- on account of sale of software solutions which has not been offered for taxation for the following reasons:-

(i) The assessee does not impart any right in the software to the resellers in India.

(ii) The reseller/end user has no right to reproduce or replicate the software.

(iii) The receipts are not in the nature of royalty since the sale of the shrink wrap software is for the purpose of resale in India.

(iv) The receipt cannot be termed as royalty as per the DTAA between India and USA.

(v) In absence of any amendments to the DTAA, the payments cannot be held to be royalty even after the retrospective amendments to section 9(1)(vi) of the Act.

6. The above contentions of the assessee did not find any favour with the AO who, drawing support from the previous assessment history of the assessee treated the receipts as royalty and taxed @15% as per DTAA.

6.1. The objections raised by the assessee did not find any favour with the DRP as the DRP also followed the orders of the previous assessment years.

7. We have given a thoughtful consideration to the orders of the authorities below. We find force in the contentions of the Id. Counsel for the assessee. The impugned issues are squarely covered in favour of the assessee and against the revenue by the judgment of the Hon'ble High Court of Bombay in assessee's own case in *ITA No. 302 of 2018; judgment dt. 28/06/2023*, wherein it was held as under:-

*"1. Ms. Nagraj in all fairness, as an officer of the Court, submits that the issue in this appeal is squarely covered by the judgment of the Apex Court in **Engineering Analysis Centre of Excellence Private Limited Vs. Commissioner of Income Tax and another**. At the same time, Ms. Nagraj submits that there is a review petition pending in the Supreme Court and therefore, the Court may dispose the appeal with liberty to appellant to approach this Court to either revive the appeal or file a fresh appeal in case the review petition is allowed in favour of Revenue.*

2. Appeal disposed with liberty as prayed for."

8. This quarrel has attained finality by the decision of the Hon'ble Supreme Court in the case of *Engineering Analysis Centre of Excellence (P.) Limited v. CIT* [2021] 432 ITR 471 (SC). The most relevant findings of the Hon'ble Supreme Court reads as under:-

156. It is significant to note that after India took such positions qua the OECD Commentary, no bilateral amendment was made by India and the other Contracting States to change the definition of royalties contained in any of the DTAAAs that we are concerned with in these appeals, in accordance with its position. As a matter of fact, DTAAAs that were amended subsequently, such as the Convention between the Republic of India and the Kingdom of Morocco for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes On Income, 17 "India-Morocco DTAA"], which was amended on 22-10-2019,⁴⁸ incorporated a definition of royalties, not very different from the definition contained in the OECD Model Tax Convention, as follows:

"The term "royalties" as used in this Article means:

- (a) 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 recordings on any means of reproduction for use for radio or television broadcasting, any patent, trade mark, design or model, plan, computer software programme, secret formula or process, or for information concerning industrial, commercial or scientific experience; and
- (b) payments of any kind received as consideration for the use of, or the right to use, any industrial, commercial or scientific equipment"

(Article 12.3)

157. Similarly, though the India-Singapore DTAA came into force on 8-8-1994, it has been amended several times, including on 01-9-2011 and 23-3-2017. However, the definition of "royalties" has been retained without any changes. Likewise, the Convention between the Government of the Republic of India and the Government of Mauritius for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains and for the Encouragement of Mutual Trade and Investment,* ["India-Mauritius DTAA"] was entered into on 6-12-1983, and was amended subsequently on 10-8-2016 without making any change to the definition of "royalties".

158. It is thus clear that the OECD Commentary on Article 12 of the OECD Model Tax Convention, incorporated in the DTAAAs in the cases before us, will continue to have persuasive value as to the interpretation of the term "royalties" contained therein.

159. Viewed from another angle, persons who pay TDS and/or assesseees in the nations governed by a DTAA have a right to know exactly where they stand in respect of the treaty provisions that govern them. Such persons and/or assesseees can thus place reliance upon the OECD Commentary for provisions of the OECD Model Tax

Convention, which are used without any substantial change by bilateral DTAA's, in the absence of judgments of municipal courts clarifying the same, or in the event of conflicting municipal decisions. From this point of view also, the OECD Commentary is significant, as the Contracting States to which the persons deducting tax/assessee's belong, can conclude business transactions on the basis that they are to be taxed either on income by way of royalties for parting with copyright, or income derived from licence agreements which is then taxed as business profits depending on the existence of a PE in the Contracting State.

160. *The learned Additional Solicitor General, however, relied upon the HPC Report 2003 and the E-Commerce Report 2016. The HPC Rol 2003, noting the various characterisation issues in relation to e-commerce payments, recommended as follows:*

"...The Committee also recommends that a clear position on each category of transactions should be taken by the Central Board of Direct Taxes ('CBDT'). This will ensure uniformity of approach among all the assessing officers. Since new categories of transactions are likely to emerge at a fast pace with advances in technology, it is also recommended that the CBDT should closely monitor the developments and issue guidelines to the assessing officers on new emerging categories of transactions as a continuing process. The monitoring should be through an expert advisory body on which the tax administration, the professions and the concerned industry is represented."

161. *The E-Commerce Report 2016 proposed an equalization levy to be chargeable on specified digital services (see paragraph 11.2) and noted that its recommendation to impose a withholding tax on digital transactions would require an express inclusion in tax treaties in order to be feasible, as follows:*

"108. After taking cognizance of these observations, the Committee considers that the option of "withholding tax" offers a practical way of allocating partial taxing rights in respect of income from digital economy, which shares attributes that may be similar to royalty or fee for technical services, and which can be complied in respect of B2B transactions by the process of withholding. However, such a tax on income would be feasible only if it is included in the tax treaties, which take precedence over Indian domestic laws, unless it is designed as a tax on the gross payment." (emphasis supplied)

162. *These reports also do not carry the matter much further as they are recommendatory reports expressing the views of the committee members, which the Government of India may accept or reject. When it comes to DTAA provisions, even if the position put forth in the aforementioned reports were to be accepted, a DTAA would have to be bilaterally amended before any such recommendation can become law in force for the purposes of the Income-tax Act.*

163. *The learned Additional Solicitor General also sought to rely on a decision of the Audiencia Nacional (Spanish National Court) in Case No. 207019/1990 dated 28-2-1995 and a decision of the Tribunal Supremo (Spanish Supreme Court) in Case No. 8066/1994 dated 2-10-1999. Quite apart from the fact that he only presented certain*

extracts and not the entire judgment rendered in these cases, these authorities have no relevance to the appeals before us, having been decided on the basis of the taxation law of Spain.

164. *The learned Additional Solicitor General then referred to the judgment of this Court in Commissioner of Customs v. G.M. Exports [2015] 62 taxmann.com 184 (SC), and in particular on the four propositions that were culled out in the context of the levy of an anti-dumping duty in consonance with the General Agreement on Tariffs and Trade (GATT), 1994, as follows:*

"23. A conspectus of the aforesaid authorities would lead to the following conclusions:

(1) Article 51(c) of the Constitution of India is a directive principle of State policy which states that the State shall endeavour to foster respect for international law and treaty obligations. As a result, rules of international law which are not contrary to domestic law are followed by the courts in this country. This is a situation in which there is an international treaty to which India is not a signatory or general rules of international law are made applicable. It is in this situation that if there happens to be a conflict between domestic law and international law, domestic law will prevail.

(2) In a situation where India is a signatory nation to an international treaty, and a statute is passed pursuant to the said treaty, it is a legitimate aid to the construction of the provisions of such statute that are vague or ambiguous to have recourse to the terms of the treaty to resolve such ambiguity in favour of a meaning that is consistent with the provisions of the treaty.

(3) In a situation where India is a signatory nation to an international treaty, and a statute is made in furtherance of such treaty, a purposive rather than a narrow literal construction of such statute is preferred. The interpretation of such a statute should be construed on broad principles of general acceptance rather than earlier domestic precedents, being intended to carry out treaty obligations, and not to be inconsistent with them.

(4) In a situation in which India is a signatory nation to an international treaty, and a statute is made to enforce a treaty obligation, and if there be any difference between the language of such statute and a corresponding provision of the treaty, the statutory language should be construed in the same sense as that of the treaty. This is for the reason that in such cases what is sought to be achieved by the international treaty is a uniform international code of law which is to be applied by the courts of all the signatory nations in a manner that leads to the same result in all the signatory nations."

165. *The conclusions in the aforesaid 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.*

For all these reasons therefore, these submissions of the learned Additional Solicitor General are rejected."

9. Respectfully following the decision of the Hon'ble High Court and the Hon'ble Supreme Court (*supra*), we direct the AO to delete the impugned addition.
10. In the result, appeal of the assessee is allowed.

Order pronounced in the Court on 8th November, 2024 at Mumbai.

Sd/-
(SUNIL KUMAR SINGH)
JUDICIAL MEMBER

Sd/-
(NARENDRA KUMAR BILLAIYA)
ACCOUNTANT MEMBER

Mumbai, Dated 08/11/2024

S.S.P.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. संबंधित आयकर आयुक्त / Concerned Pr. CIT
4. आयकर आयुक्त (अपील)/ The CIT(A)-
5. विभागीय प्रतिनिधि , आयकर अपीलीय अधिकरण, मुंबई /DR,ITAT, Mumbai,
6. गार्ड फाई/ Guard file.

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Assistant Registrar
आयकर अपीलीय अधिकरण
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