IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI L BENCH, MUMBAI
[Coram: Pramod Kumar AM and Pawan Singh JM]

I.T.A. No. 7340/Mum/2012
Assessment years: 2009-10

Dy. Director of Income Tax (Int'l Taxation)
Circle 2(1), Mumbai ***……Appellant***

Vs.

Savvis Communication Corporation ***……Respondent***
1, Savvis Parkway
Town & Country MO USA 63017
[PAN: AANCS2551E]

Appearances by:
Harsshad Vengurlekar *for the appellant*
Kanchan Kaushal and Dhanesh Bafna *for the respondent*

Date of concluding the hearing : January 6, 2016
Date of pronouncing the order : March 31st, 2016

O R D E R

Per Pramod Kumar, AM:

1. By way of this appeal, the Assessing Officer appellant has challenged correctness of the order dated 13th September 2012 passed by the learned CIT(A) in the matter of assessment under section of 143(3) of the Income Tax Act, 1961 for the assessment year 2009-10. Grievance of the appellant is that "**on the facts and in the circumstances of this case and in law, the learned CIT(A) erred in holding that the payment received for providing web hosting services, with all back up, maintenance, security and uninterrupted services, is not taxable as 'royalty' under clause (iva) to Explanation 2 to Section 9 (1)(vi) of the Act**"

2. The relevant material facts are like this. The assessee before us is a US based company, engaged in the business of providing information technology solutions, including, amongst other things, web hosting services. During the relevant financial period, the assessee earned income from provision of managed hosting services to Indian entities, namely Malayala Manorama Co. Ltd. (Rs.1,71,69,021) and Cybermedia India Online Limited (Rs.22,59,194). In the income tax return filed by the assessee, the income so earned was disclosed but claimed to be not taxable in India in view of the provisions of articles 12 and 7 of the India USA Double Taxation Avoidance Agreement [(1991) 187 ITR 102 (Sta); Indo US tax treaty, in short]. It was pointed out that the income so earned cannot be taxed in India as 'fees for included services' in view of the provisions of article 12 of the Indo US tax treaty, and it could also not be taxed under article 7, as the assessee did not have any permanent establishment in India fulfilling the requirements of article 5.

3. During the course of the scrutiny assessment proceedings, however, the Assessing Officer did not accept this claim. He was of the view that the web hosting companies provide space, on a server they own or lease, for use by the clients as well as providing internet connectivity typically in a data centre. It was noted that the user is disallowed full control so that the provider can guarantee quality of service by not allowing the user to modify the server or potentially create configuration problems, and that the user typically does not own the server. The server is leased to the client. Having made these observations, the Assessing Officer took note of the fact that the services provided by the assessee was essentially in the nature of limited period contracts for hosting data and applications on the data centres maintained by the assessee, outside India, which are in the nature of specialized facilities consisting of, inter alia, server on which data and applications are hosted, network and hardware which facilitate the connectivity of the server with the outside world. It was also noted that the assessee's obligations include ensuring the foolproof security systems in these data centres and ensuring the equipment

in these data centres runs smoothly. The Assessing Officer was of the view that in essence the receipt is for granting the right to use the scientific equipment which is taxable in India under item (va) of Explanation 2 to Section 9(1)(vi) as also Article 12(3) (b) of Indo US tax treaty. It was in this backdrop that the Assessing Officer held the receipts of the assessee are taxable in India.

4. Aggrieved by the stand so taken by the Assessing Officer, assessee carried the matter in appeal before the CIT(A). Learned CIT(A), in his brief operative part of the order, held that "these services are provided using own or customer provided equipment and payments received are towards providing managed we hosting services with all back up, maintenance, security and uninterrupted use of services and not for any equipment", that "the appellant does not exercise ay control over the customers' content nor is responsible for the same", and that "use of servers, rack space, wires and cables, internet facility, software etc are incidental to providing managed web hosting services". It was then concluded, following decisions of coordinate benches of this Tribunal, that "providing web hosting services, with all back up, maintenance, security and uninterrupted services" does not amount to royalty under the provisions of the Act or the tax treaty. The addition of Rs.1,94,28,215 was thus deleted.

5. The Assessing Officer is aggrieved by the relief so granted by the CIT(A) and is in appeal before us.

6. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

7. We have noted that while the CIT(A) has given relief in the light of the provisions of the Indo US tax treaty as also the provisions of the Act, but limited grievance raised before us is with respect to the provisions of the Act. The issue so raised is purely academic in the sense that even if the grievance of the Assessing Officer is upheld, the findings on the treaty aspect will remain intact,

and as the provisions of the Act come into play only when these provisions are more beneficial vis-à-vis the treaty provisions, the relief under the treaty provisions will continue to hold the field. The success of the Assessing Officer, even if he was actually entitled to the same on merits, would have been rather hollow.

8. That, however, is not the only reason why the appeal must fail.

9. We have noted that the very basis of the impugned addition is Assessing Officer's finding that the receipts in question were on account of use of scientific equipment, and, for that reason, giving rise to an income taxable under section 9(1)(vi) of the Act as also article 13(1)(b) of the Indo US tax treaty. This finding, however, proceeds on the fallacy that when a scientific equipment is used by the assessee for rendering a service, the receipt will be construed as a receipt for use of scientific equipment. Undoubtedly, when the assessee receives an income on account of allowing a customer to use a scientific equipment, it does become taxable for the reason of its being characterized as such, but the use of a scientific equipment by the assessee, in the course of giving a service to the customer, is something very distinct from allowing the customer to use a scientific equipment. The true test is in finding out the answer to the fundamental question- is it the consideration for rendition of services, even though involving the use of scientific equipment, or is it the consideration for use of equipment *simplictor* by the assessee? In the case of former, the consideration is not taxable, in the case of the latter, the consideration is taxable. In the case of **Kotak Mahindra Primus Ltd Vs DDIT [(2007) 11 SOT 578 (Bom)],** a coordinate bench, dealing with a situation in which the mainframe computer and the specialized software was used for rendering data processing services to an Indian entity, held so and observed that, "**No part of this payment can be said to be for the use of specialized software on which data is processed or for the use of mainframe computer because the Indian company does not have any independent right to use the computer or even**

physical access to the mainframe computer, so as to use the mainframe computer or the specialized software." A payment cannot be said to be consideration for use of scientific equipment when person making the payment does not have an independent right to use such an equipment and physical access to it. In the present case also, what the assessee is providing is essentially web hosting service, though with the help of sophisticated scientific equipment, in the virtual world. The scientific equipment used by the assessee enable rendition of such a service, and such a use, which is not even by the Indian entity, is not an end in itself. In this view of the matter, even though the services rendered by the assessee to the Indian entities may involve use of certain scientific equipment, the receipts by the assessee cannot be treated as "**consideration for the use of, or right to use of, scientific equipment**" which is a *sine qua non* for taxability under section 9(1)(vi) read with Explanation 2 (iva) thereto.

10. In view of the above discussions, as also bearing in mind entirety of the case, we approve the conclusions arrived at by the learned CIT(A) and decline to interfere in the matter.

11. In the result, the appeal is dismissed. Pronounced in the open court today on 31st day of March, 2016.

Sd/- **Sd/-**
Pawan Singh **Pramod Kumar**
(Judicial Member) (Accountant Member)
Dated: 31st day of March, 2016.

Copies to:	*(1)*	*The appellant*	*(2)*	*The respondent*
	(3)	*Commissioner*	*(4)*	*CIT(A)*
	(5)	*Departmental Representative*	*(6)*	*Guard File*

By order

Assistant Registrar
Income Tax Appellate Tribunal
Mumbai benches, Mumbai