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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ ITA 282/2024
COMMISSIONER OF INCOME TAX INTERNATIONAL
TAXATION 1 NEW DELHI Appellant
Through: Mr.Sunil Agarwal, Sr.SC with
Mr.Shivansh B.Pandya, Jr.SC
and Mr.Utkarsh Tiwari, Adv for
I.T.Dept.

versus

GOTO TECHNOLOGIES IRELAND UNLIMITED
COMPANY (EARLIER KNOWN AS LOGMEIN IRELAND
UNLIMITED COMPANY) Respondent
Through: Appearance not given.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE PURUSHAINDR KUMAR
KAURAV

% **ORDER**
14.05.2024

CM APPL. 28823/2024 (Exemption)

1. Allowed, subject to all just exceptions.
2. Application is disposed of.

CM APPL. 28822/2024 (Delay)

3. Bearing in mind the disclosures made, the delay of 53 days in filing the appeal is condoned.
4. The application stands disposed of.

ITA 282/2024

5. The Principle Commissioner of Income Tax ["PCIT"] impugns the judgment rendered by the Income Tax Appellate Tribunal ["ITAT"] dated 25 September 2023 and posits the following questions for our consideration:-



A. Whether on the facts and circumstances of the case and in law, the ITAT erred in holding that the subscription payments received towards Cloud Services by the assessee is not taxable as Royalty income within the meaning of Article 12(3) of the India-Ireland DTAA as well as Section 9(1)(vi) of the Income-tax Act, 1961?

B. Whether on the facts and circumstances of the case and in law, the ITAT erred in holding that the payments received by the assessee from customers is not royalty without appreciating the fact that the assessee company grants access to the Indian customers to online services maintained by it rather than providing service to them as an end user & is in the business of providing information and communication technology solutions to its customers and hence constitutes 'royalty' in terms of clause (iv) of Explanation 2 to Section 9 (1)(vi) of the Act?

C. Whether on the facts and circumstances of the case and in law, the ITAT erred in relying on the decision this Court in the case of **Commissioner of Income Tax (International Taxation)-2 v. MOL Corporation** (ITA No. 99/2023) vide order dated 16 February 2023 and on the decision of coordinate Bench in the case of **Amazon Web Services, Inc. v. Assistant Commissioner of Income Tax, Circle-1(1)(1)** (2023 SCC OnLine ITAT 584) as the facts of these cases are differentiable to the facts of the case of the assessee?

6. Having heard Mr. Agarwal, learned counsel representing the respondent we find that the principal contention appears to be that the



decision of the Supreme Court in **Engineering Analysis Centre of Excellence (P) Ltd. v. CIT**, [(2022) 3 SCC 321] would stand restricted to software which stands embedded in a computer.

7. In our considered opinion the aforesaid view is clearly misconceived bearing in mind the following observations which were rendered in *Engineering Analysis* and in respect of software and whether subscription or a licence fee paid in respect thereof would fall within the ambit of royalty.

8. We deem it apposite to extract the following pertinent observations rendered in *Engineering Analysis*:-

“179. The Revenue, therefore, when referring to “royalties” under the DTAA, makes a distinction between such royalties, no doubt in the context of technical services, and remittances for supply of computer software, which is then treated as business profits, taxable under the relevant DTAA depending upon whether there is a PE through which the assessee operates in India. This is one more circumstance to show that the Revenue has itself appreciated the difference between the payment of royalty and the supply/use of computer software in the form of goods, which is then treated as business income of the assessee taxable in India if it has a PE in India.

Conclusion

180. Given the definition of “royalties” contained in Article 12 of the DTAAs mentioned in para 46 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 assessee, have no application in the facts of these cases.

181. 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 para 3 of this judgment.”

9. We additionally note that the aspect of royalty provisions being applicable to the provision of software services was one which was considered by us independently in **SFDC Ireland Ltd. v. CIT**, [2024 SCC OnLine Del 1702] as well as in our order dated 14 February 2024 in **The Commissioner Of Income Tax - International Taxation -3 v. Salesforce.com Singapore PTE LTD.** [ITA 144/2023].

10. While dealing with this aspect in *Salesforce.com Singapore*, we had held as follows:-

“8. It becomes pertinent to note that while dealing with a similar issue of whether subscription fee to a software could be viewed as royalty under Article 12 of the Indo-US DTAA, this Court in *The Commissioner of Income Tax-International Taxation-3 vs. Relx Inc.* [ITA 630/2023] on 07 February 2024 had held as under:-

“11. We find that similar would be the position which would obtain when subscription fee is examined on the anvil of Article 12 of the DTAA. If the Department were to describe subscription fee as ‘royalty’, they would necessarily have to establish that the payments so received by the assessee was consideration for the use of or the right to use any copyright or a literary, artistic or scientific work as defined by Article 12(3) of the DTAA. Granting access to the database would clearly not amount to a transfer of a right to use a copyright. We must bear in mind the clear distinction that must be recognised to exist between the transfer of a copyright and the mere grant of the right to use and take advantage of copyrighted material. Neither the subscription agreement nor the advantages accorded to a subscriber can possibly be considered in law to be a transfer of a copyright. In fact, it was the categorical assertion of the assessee that the copyright remains with it at all times.

12. This issue in any case no longer appears to be res



integra in light of the judgment of this Court in **Director of Income Tax Vs. Infrasoft**. We deem it apposite to extract the following passages from that decision:-

“89. There is a clear distinction between royalty paid on transfer of copyright rights and consideration for transfer of copyrighted articles. Right to use a copyrighted article or product with the owner retaining his copyright, is not the same thing as transferring or assigning rights in relation to the copyright. The enjoyment of some or all the rights which the copyright owner has, is necessary to invoke the royalty definition. Viewed from this angle, a non-exclusive and non-transferable licence enabling the use of a copyrighted product cannot be construed as an authority to enjoy any or all of the enumerated rights ingrained in Article 12 of DTAA. Where the purpose of the licence or the transaction is only to restrict use of the copyrighted product for internal business purpose, it would not be legally correct to state that the copyright itself or right to use copyright has been transferred to any extent. The parting of intellectual property rights inherent in and attached to the software product in favour of the licensee/customer is what is contemplated by the Treaty. Merely authorising or enabling a customer to have the benefit of data or instructions contained therein without any further right to deal with them independently does not, amount to transfer of rights in relation to copyright or conferment of the right of using the copyright. The transfer of rights in or over copyright or the conferment of the right of use of copyright implies that the transferee/licensee should acquire rights either in entirety or partially co-extensive with the owner/transferor who divests himself of the rights he possesses pro tanto.

90. The licence granted to the licensee permitting him to download the computer programme and storing it in the computer for his own use is only incidental to the facility extended to the licensee to make use of the copyrighted product for his internal business purpose. The said process is necessary to make the programme functional and to have access to it and is qualitatively different from the right contemplated by the said paragraph because it is only integral to the use of copyrighted product. Apart from such incidental facility, the licensee has



no right to deal with the product just as the owner would be in a position to do.

91. There is no transfer of any right in respect of copyright by the Assessee and it is a case of mere transfer of a copyrighted article. The payment is for a copyrighted article and represents the purchase price of an article and cannot be considered as royalty either under the Income Tax Act or under the DTAA.

92. The licencees are not allowed to exploit the computer software commercially, they have acquired under licence agreement, only the copyrighted software which by itself is an article and they have not acquired any copyright in the software. In the case of the Assessee Company, the licensee to whom the Assessee Company has sold/licenced the software were allowed to make only one copy of the software and associated support information for backup purposes with a condition that such copyright shall include Infracsoft copyright and all copies of the software shall be exclusive properties of Infracsoft. Licensee was allowed to use the software only for its own business as specifically identified and was not permitted to loan/rent/sale/sub-licence or transfer the copy of software to any third party without the consent of Infracsoft.

93. The licensee has been prohibited from copying, de-compiling, de-assembling, or reverse engineering the software without the written consent of Infracsoft. The licence agreement between the Assessee Company and its customers stipulates that all copyrights and intellectual property rights in the software and copies made by the licensee were owned by Infracsoft and only Infracsoft has the power to grant licence rights for use of the software. The licence agreement stipulates that upon termination of the agreement for any reason, the licensee shall return the software including supporting information and licence authorisation device to Infracsoft.

94. The incorporeal right to the software i.e. copyright remains with the owner and the same was not transferred by the Assessee. The right to use a copyright in a programme is totally different from



the right to use a programme embedded in a cassette or a CD which may be a software and the payment made for the same cannot be said to be received as consideration for the use of or right to use of any copyright to bring it within the definition of royalty as given in the DTAA. What the licensee has acquired is only a copy of the copyright article whereas the copyright remains with the owner and the Licensees have acquired a computer programme for being used in their business and no right is granted to them to utilize the copyright of a computer programme and thus the payment for the same is not in the nature of royalty.”

13. The distinction between the transfer of a copyright as distinct from a mere right to use copyrighted material was again highlighted by the Supreme Court in **Engineering Analysis Centre for Excellence Vs. CIT** when it observed:-

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12. We deem it appropriate to additionally observe that the right of subscription to a cloud-based software cannot possibly be said to be equivalent to the ‘use’ or ‘right to use’ any industrial, commercial or scientific equipment. This more so since the respondents sought to place the consideration received under Article 12 (4)(b) and which is specifically excluded from sub-article (3)(b).

13. The argument based upon Article 12(4)(a) also cannot sustain since the same pertains to payments received as consideration for managerial, technical or consultancy services and which are ancillary or subsidiary to enjoyment of the right, property or information referable to paragraph 3. This again would be founded upon the payment foundationally falling within the ambit of royalty as defined therein.”

11. In view of the aforesaid, we find no ground to interfere with the view as expressed by the ITAT.

12. Consequently, the appeal fails and shall stand dismissed.

YASHWANT VARMA, J.

PURUSHAINDRA KUMAR KAURAV, J.

MAY 14, 2024/MJ