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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **ITA 810/2023**

THE COMMISSIONER OF INCOME TAX –

INTERNATIONAL TAXATION -3 Appellant

**Through: Mr. Ruchir Bhatia, SSC with
Ms. Deeksha Gupta, Adv.**

Versus

SDL MULTI - LINGHUAL SOLUTIONS (SINGAPORE)

PTE LTD.

..... Respondent

**Through: Mr. Harsh Kothari, Mr. Mahesh
Singh & Mr. Kishore Kunal,
Advs.**

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR

KAURAV

ORDER

07.03.2024

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CM APPL. 67288/2023 (130 days delay in re-filing the appeal)

1. Bearing in mind the disclosures made, the delay of 130 days in re-filing of the appeal is condoned.

2. Application stands disposed of.

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3. The Commissioner of Income Tax seeks to impugn the order dated 07 February 2023 passed by the Income Tax Appellate Tribunal [“ITAT”] and has framed the following questions for our consideration:

“2.1 Whether on the facts and in the circumstances of the case, Ld. ITAT has erred in holding that the consideration received by the Assessee on account of licensing of software to Reliance JioInfocom Ltd. (RJIL) is not royalty within the meaning of Article 12(3) of the India-Singapore DTAA?”



2.2 Whether on the facts and in the circumstances of the case, Ld. ITAT has erred in not considering the effect of Article 3(2) of the said DTAA in terms of which any term not defined in the DTAA is deemed to have the same meaning as it has under the domestic law, and therefore, the clarification provided in Explanation 4 to the section 9(1)(vi) of the Act may be applied for interpreting the scope of Article 12(3) of the DTAA?

2.3 Whether on the fact and in the circumstances of the case, Ld. ITAT has erred in applying the definition of royalty under Article 12(3) of India-Singapore DTAA being beneficial to tax payer without appreciating the fact that the provision of domestic law was in fact applied by reference to Article 3(2) of the said DTAA and therefore, the definition of royalty under explanation 2 read with explanation 4 of section 9(1)(vi) would apply instead of the meaning defined in any allied law i.e. Copyright Act, 1957?

2.4 Whether on the facts and in the circumstances of the case, Ld. ITAT has erred in allowing the appeal of the Assessee by following the decision of the Hon'ble Supreme Court in the case of M/s Engineering Analysis Centre of Excellence Pvt. Ltd. (supra) without appreciating the fact that department has filed a review petition before the Hon'ble Apex Court in that case which is pending for adjudication.

2.5 Whether on the facts and in the circumstances of the case, Ld. ITAT was justified in not considering that both the OECD and UN adopt a dynamic approach instead of a static approach for the purposes of interpretation of Tax Treaties?"

4. However, before us it has remained undisputed that no rights in the copyright which existed in the software were transferred to the assessee. We have heard Mr. Bhatia, learned counsel appearing for the appellant at some length and who has also taken us through some of the conclusions which were recorded by the Commissioner of Income Tax (Appeals) [**"CIT(A)"**] including the observations as they appear in para 5.6. The aforementioned conclusions of the CIT (A) are reproduced hereunder:-

"5.6 The second clause 9(b) states that the buyer may not close or permit decompilation, dispermit or reverse engineering of the software. This clause is also limited by the phrase which states that such decompilation maybe possible if it is allowed under the mandatory provisions of law. This in turn, also supports the view



that the client has a right to decompile the software even though it is limited. That further indicates that the copyright has been transferred to the client.

With reference to the source code clause 22 indicates that the vendor shall deposit the software and upgrades thereto, it is known to facilitate the buyers business continuity. This clearly implies that **the vendor has agreed to part with the source code so as to enable continuity of business operations of the buyer.** The buyer therefore has further rights on the software which are apparent from the aforesaid discussion.

While examining the annexures to the agreement, it is seen that the appellant has granted unlimited CPUs which can be use the software transferred. This further indicates that the entire rights in the software are actually being transferred to the client i.e. M/s Reliance. The product or form is reproduced hereunder which reinforces this agreement:

“ANNEXURE-E PRODUCT ORDER

Products/ Module		Quantities/ Packs/ Support Hours		
SDL Tridion	Support Hours	Module (incl. 1 CPU, If applicable)	Language Pack(s)for UIs	Total CPU(s)
Content Manager Explorer & Experience Manager	Std; Local business hours (08:30am-5:30pm) 24x7 for critical issues available*	Yes	FR, GE, JP, NL, SP	unlimited
Content Manager		Yes	n.a.	unlimited
Translation Manager		Yes	FR, GE, JP, NL, SP	unlimited
Presentation Server		Yes	n.a.	unlimited
Dynamic Content Broker		Yes	n.a.	unlimited
Content Porter		Yes	n.a.	unlimited
Archive Manager		Yes	n.a.	unlimited
SDL Mobile		Yes	n.a.	unlimited
Profiling & Personalization		Yes	FR, GE, JP, NL, SP	unlimited
SmartTarget		Yes	FR, GE, JP, NL, SP	unlimited
Audience Manager		Yes	FR, GE, JP, NL, SP	unlimited
SDL Language Technology Products				



SDLWorldserver	Std: 9:00a.m. to 6:00 p.m. Japan Standard Time (JST) OR GET OR EST, from Monday through Friday Optional 24x7 for critical issues available for WorldServer only*	Yes	CH,GE, JP	unlimited
SDLTrados MultiTerm		Yes	CH,FR, GE, JP, SP	unlimited
SDLTrados Studio		Yes	CH,FR, GE, JP, SP	unlimited
SDLQuatron				
SDLQuatron	CET/GMT business hours only*	Yes	n.a.	unlimited
SDL Intelligent Marketing Suite				
Customer Analytics	Std: Local business hours (08:30am-5:30pm) 24x7 for critical issues available*	Yes	n.a.	unlimited
Campaign Manager		Yes	n.a.	unlimited
SDL LiveContent				
LiveContent Architect	Std: Local business hours (08:30am-5:30pm) 24x7 for critical issues available*	Yes	FR, GE, JP, NL, SP	unlimited
LiveContent Create		Yes	FR, GE, JP, NL, SP	unlimited
LiveContent Reach		Yes	FR, GE, JP, NL, SP	unlimited

In most cases where the user licenses are transferred and consideration for software sale has been received **the number of users are limited** in the end user agreement or the service agreement or the license agreement. In the present case, **it is clear that once the vendor is granted unlimited users the right to reproduce the software is de facto transferred as use of the software in unlimited CPUs would be possible after reproduction only. Here also the basic facts are substantially different from the Infrasoft judgement.** The other cases quoted by the appellant also do not clearly fit into the facts of the appellant's case. In the appellant's case, the consideration received is therefore chargeable to tax as royalty under article 12 of the India Singapore treaty. The main reasons for the same are as under:

1. For business purpose, the rights received by Reliance Jio



may be transferred, assigned, sub-licensed or leased to any third party.

2. The client has a right to decompile the software even though it is limited.
3. The vendor has agreed to part with the source code (though in a protected manner) so as to enable continuity of business operations of the buyer.
4. The vendor is granted unlimited users for the right to use the software.
5. The right to reproduce the software is de facto transferred as use of the software in unlimited CPUs would be possible after reproduction only.

The grounds of appeal are therefore dismissed.”

5. We however find ourselves unable to discern any sustainable logic which may be read in support of the conclusions as drawn. In our considered opinion, therefore, the ITAT was clearly justified in setting aside the aforesaid order.

6. The issue in any case would be governed by the principles enunciated by the Supreme Court in **Engineering Analysis Centre of Excellence Private Limited v. Commissioner of Income Tax & Anr** [(2022) 3 SCC 321]. Recently, we also had an occasion to examine the transfer of software usage rights and whether that would amount to royalty in **Commissioner of Income Tax- International Taxation – 3 v. Relx Inc**, [ITA 630/2023 order dated 07 February 2024]. While dealing with the aforesaid question, we had held as follows:

“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. Infrasoftware**. 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 licensees 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/sublicence 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.”

7. In view of the aforesaid we find no merit in the instant appeal. The same shall stand dismissed on the aforesaid terms.

YASHWANT VARMA, J.

PURUSHAINDR KUMAR KAURAV, J.

MARCH 7, 2024/kk