

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.01.2017

CORAM

THE HONOURABLE MR. JUSTICE M.SATHYANARAYANAN
AND
THE HONOURABLE DR. JUSTICE ANITA SUMANTH

Tax Case Appeal No.861/2016

The Commissioner of Income Tax
Company Circle-3 [4]
Chennai. ..Appellant/Respondent

Vs

M/s.Vinzas Solutions India Private Limited
W-97, New No.23, Second Street,
Anna Nagar, Chennai 600 040. ..Respondent/Appellant
PAN:AACCV 7736 K

Prayer:- Appeal Memorandum preferred under section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal 'B' Bench, Chennai, dated 15.06.2016 in ITA.No.2048/MDS/2015.

Against the order of the Commissioner of Income-Tax (Appeals)II, Chennai-34 dt.14.9.15 and made in ITA.No.123/14-15 CIT(A)II for the Assessment year 2011-12 and against the order of the Assistant Commissioner of Income-Tax, Company Circle-III(4), Chennai-34 dt.21.3.14 and made in GIR.No./PAN.AACCV7736K for the Assessment year 2011-12.

For Appellant : Mr.M.Swaminathan

JUDGMENT

[Judgment of the Court was delivered by DR. ANITA SUMANTH,J.,]

The Department / Income Tax challenges the order of the Income Tax Tribunal dated 15.06.2016 made in ITA.No.2048/MDS/2015 on the following substantial questions of law:-

"(1) Whether on the facts and in the circumstances of the case the Tribunal is justified in holding that the provisions of Tax Deducted at Source will not be applicable in the assessee case by overlooking the provisions of explanation 2, 4 and 5 to section 9[1][vi] of the Income Tax Act, 1961?

(2) Whether on the facts and in the circumstance of the case the Tribunal was correct in deleting the disallowance u/s.40(a)(ia) without considering that the payments were in the nature of Royalty subject to TDS under section 194J?"

2 The admitted facts are as follows:-

[a] The assessee / respondent is a dealer in Computer Software, having purchased the same from various companies such as Redington India Limited, Ingram Micro [India] Limited etc. In the course of assessment, a disallowance was effected in terms of 40(a)(ia) of the Income Tax Act, 1961, [hereinafter referred to as the Act] by the Assessing Officer, on the ground that consideration for purchase was of the nature of "Royalty" and tax ought to have been deducted at source in accordance with the provisions of section 194J of the Act.

[b] The Appeal of the Assessee before the Commissioner of Income Tax [Appeals] was rejected, confirming the order of assessment invoking the provisions of section 40(a)(ia) of the Act to the effect that the consideration paid would come within the ambit of the definition of 'Royalty' under Explanations 4 and 5 of section 9(1)(vi) of the Act.

[c] The matter was further assailed in Appeal by the assessee before the Income Tax Appellate Tribunal, which reversed the order of the lower authorities. Hence, the present Appeal by the Income Tax Department.

3 It is an admitted fact that the assessee in the present case is a dealer engaged in buying and selling software in the open market. The transaction in question is thus one of purchase and sale of a product and nothing more. The explanation tendered before the officer at the time of assessment is thus:-

"Agreement:-

"Software purchased is that of AutoDesk Asia Pte Ltd. The assessee company has been appointed by AutoDestk, the owner of the Software brought and sold by the assessee company, as Value Added Reseller [Dealer] to purchase, market, distribute, sell and support the authorised products made available by AutoDesk. The above principal company has appointed companies like Redington, Ingram Micro as distributors.

The assessee company procures orders for the AutoDesk authorised produces from the end users and place back to back orders on the distributors for supply of customized software only for that particular customer. The

software, bought from the Resident distributors, being customized for the end users who has placed orders on the assessee company it cannot be used by another customer or by the assessee company. The right to use the software lies absolutely with the end user only the assessee company does not acquire any right in the software whatsoever whether to use, modify, download or install. The agreement between the principal and the assessee company clearly mentions in clause 2 as to what the VAR is authorized to do.

Clause 5 of the Confidentiality and Non-Disclosure Agreement excludes the following:-

1. Receiving Party [Assessee Company] acquires no rights or licenses in the intellectual property of AutoDesk including but not limited to Patents, Trademarks, Copyrights or Service marks under this agreements or through disclosures hereunder....."
2. AutoDesk hereby grants Receiving Party a non-exclusive, personal, limited, non-assignable, non-sub-licensable, ROYALTY-FREE license to use a single copy of any software provided at Receiving Party's principal office in a secure location, solely in connection with and for purpose of evaluation and providing feedback."

4 We are of the view that the provisions of section 9[1][vi] dealing with and defining 'Royalty' cannot be made applicable to a situation of outright purchase and sale of a product. The Corpus Juris Secundum understands Royalty thus:

"The word 'royalty' means a share of the product or profit reserved by the owner for permitting another to use the property, the share of the production or profit paid the owner ; a share of the product or proceeds therefrom reserved to the owner for permitting the another to use the property ; the share of the produce reserved to the owner for permitting another to exploit and use the property ; a share of the profit, reserved by the owner for permitting another to use the property ; the amount reserved or the rental to be paid the original owner of the whole estate."

5 The Madras High Court in CIT Vs. Neyveli Lignite Corporation Ltd., reported in 243 ITR 458 states thus explaining the concept of Royalty:-

“The term ‘royalty’ normally connotes the payment made by a person who has exclusive right over a thing for allowing another to make use of that thing which may be either physical or intellectual property or thing. The exclusivity of the right in relation to the thing for which royalty is paid should be with the grantor of that right. Mere passing of information concerning the design of a machine which is a tailor-made to meet the requirement of a buyer does not by itself amount to transfer of any right of exclusive user, so as to render the payment made therefor being regarded as ‘royalty’ .

6 Courts have consistently noted the difference between a transaction of sale of a ‘copyrighted article’ and one of ‘copyright’ itself. See Tata Consultancy Services Vs. State of Andhra Pradesh [2004] 271 ITR 401[SC] ; Sundwiger EMFG [2004] 266 ITR 110 ; Dassault Systems K.K., In Re, (2010) 229 CTR 125 [AAR] ; ISRO Satellite Centre [ISAC] , In Re [2008] 307 ITR 59 [AAR] ; and Asia Satellite Telecommunications Co. Vs. DIT [2011] 332 ITR 340 [Delhi].

7 The provisions of section 9(1)(vi) as a whole, would stand attracted in the case of the latter and not the former. Explanations 4 and 7 relied by the authorities would thus have to be read and understood only in that context and cannot be expanded to bring within its fold transaction beyond the realm of the provision. The Tribunal has relied on the decision of the Division Bench of the Delhi High Court in the case of The Principal Commissioner of Income Tax-6 V. M.Tech India Pvt Ltd, which supports our view as above. It is brought to our notice that the decision of the Delhi High Court has not been accepted by the Department and an SLP is pending. Be that as it may, in view of the facts and circumstances as observed above, we have no hesitation in dismissing the Departmental Appeal answering the questions of law in favour of the assessee and against the Revenue. No costs.

Sd/-

Asst.Registrar (CS IV)

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Sub Asst. Registrar

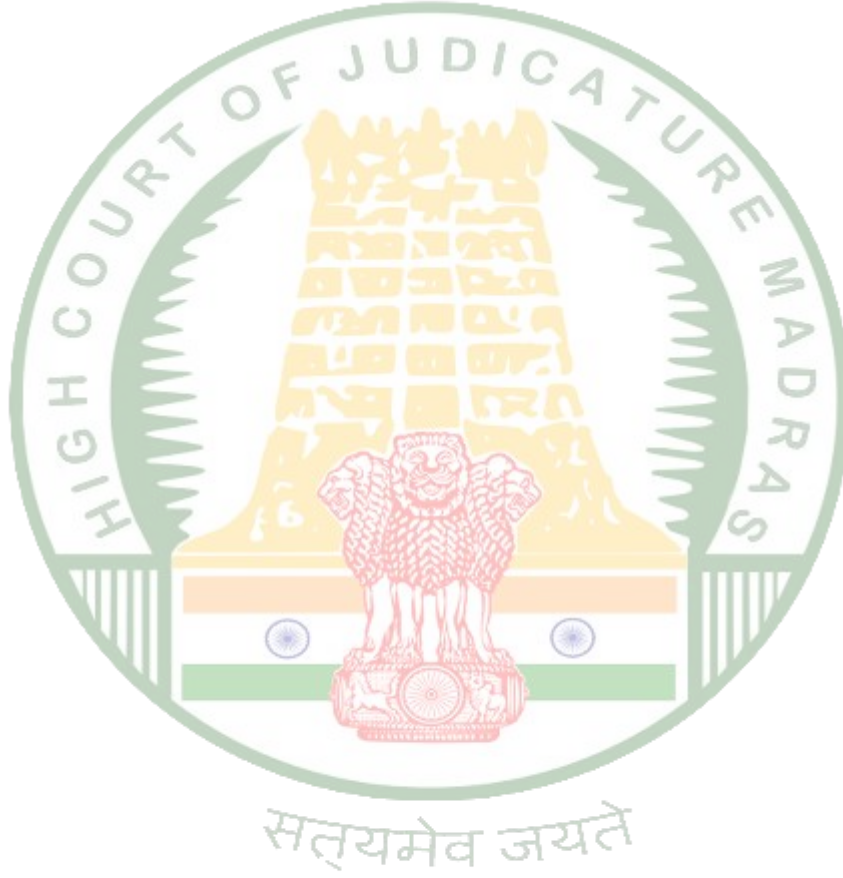
To

The Commissioner of Income Tax
Company Circle-3 [4]
Chennai.

+1 cc to Mr.M.Swaminathan, advocate,sr.517

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TCA.No.861/2016



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