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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 03.09.2021

CORAM :

THE HON'BLE MR. JUSTICE T.S. SIVAGNANAM
AND
THE HON'BLE MR. JUSTICE SATHI KUMAR SUKUMARA KURUP

Tax Case Appeal No.154 of 2015

The Commissioner of Income tax,
Chennai

... Appellant

Vs.

M/s. Financial Software and Systems Private Ltd
'Saradha' Ground Floor, No.42, Third Main Road,
Gandhi Nagar, Adyar, Chennai - 600 020.

... Respondent

Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Madras "A" Bench, dated 05.06.2014 passed in I.T.A.No.2194/Mds/2013. Against the order of the Commissioner of Income Tax (Appeals)-II, Chennai, dated.30.08.13 in I.T.A.No.564/2013-14 and against the order of the Deputy Commissioner of Income Tax, Company Circle II (i), Chennai-34, dated.31.12.2010 in PAN/GIR No.AAACF2351C for the Assessment Year 2007-2008.

For Appellant : Mr.Karthik Ranganathan
Senior Standing Counsel

For Respondent : Mr.N.V.Balaji

J U D G M E N T

(Judgment was delivered by T.S. SIVAGNANAM, J.)

This Tax Case Appeal filed by the Revenue under Section 260A of the Income Tax Act, 1961 ('the Act' for brevity), is directed against the order of the Income Tax Appellate Tribunal, Madras "A" Bench, dated 05.06.2014 passed in I.T.A.No.2194/Mds/2013 for the Assessment Year 2007-08.



2.The appeal has been admitted on 06.07.2015 on the following substantial questions of law :

"1.Whether on the facts and circumstances of this case, the Tribunal was right in deleting the disallowance made by the AO holding that the amendment to Section 9(1)(vi) introduced by Finance Act, 2012 with retrospective effect from 01.06.1976 is not applicable and therefore no TDS needs to be deducted?

2.Is not the finding of the Tribunal bad, especially when a non resident companies, ACI of Singapore and IRPL of Australia have permanent establishment in India through the medium of assessee company and as such liable to deduct tax at source on the payment received?

3.Whether the Tribunal was right in holding that the amounts paid by the assessee company to the non resident company for use of the assessee customer in India of operating net work payments, ATMs is not Royalty as per the provisions of Section 9(1)(vi) of the Income Tax Act?

4.Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in holding that payments made to two companies no TDS is required to be deducted under Section 195 of the Income Tax Act?

5.Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that the expenses incurred in relation to travel in foreign country and communication charges are to be allowed both from the Export turnover and Total turnover which is contrary to the Statute?

6.Whether on the facts and in the circumstances of the case, the Tribunal was right in granting relief to the assessee especially when the unrealized foreign exchange was to be allowed both from the Export turnover without making corresponding deduction from the total turnover?"



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3. We have heard Mr. Karthik Ranganathan, learned Senior Standing Counsel for the appellant/Revenue and Mr. N.V. Balaji, learned counsel for the respondent/assessee.

4. It is not disputed before us, rather admitted that, insofar as the substantial questions of law Nos. 1 to 4 are concerned, the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Private Limited v. Commissioner of Income Tax and another reported in (2021) SCC Online SC 159, has held in favour of the assessee.

5. In the said decision, there were four categories of cases as mentioned below :

"4. The appeals before us may be grouped into four categories:

- i) The first category deals with cases in which computer software is purchased directly by an end-user, resident in India, from a foreign, non-resident supplier or manufacturer.
- ii) The second category of cases deals with resident Indian companies that act as distributors or resellers, by purchasing computer software from foreign, nonresident suppliers or manufacturers and then reselling the same to resident Indian end-users.
- iii) The third category concerns cases wherein the distributor happens to be a foreign, non-resident vendor, who, after purchasing software from a foreign, nonresident seller, resells the same to resident Indian distributors or end-users.
- iv) The fourth category includes cases wherein computer software is affixed onto hardware and is sold as an integrated unit/equipment by foreign, non-resident suppliers to resident Indian distributors or end-users."

6. After elaborately considering the entire issues, the Hon'ble Supreme Court held as follows :

"172. Given the definition of royalties contained in Article 12 of the DTAAAs mentioned in paragraph 41 of this judgment, it is clear that there is no obligation on the persons mentioned in section 195 of



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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.

173. 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 paragraph 4 of this judgment.

174. The appeals from the impugned judgments of the High Court of Karnataka are allowed, and the aforesaid judgments are set aside. The ruling of the AAR in Citrix Systems (AAR) (supra) is set aside. The appeals from the impugned judgments of the High Court of Delhi are dismissed."

7. Therefore, the substantial questions of law Nos.1 to 4 are answered against the Revenue.

8. Insofar as the substantial questions of law Nos.5 and 6 are concerned, the same have to be answered against the Revenue by following the decision of the Hon'ble Supreme Court in the case of Commissioner of Income-tax, Central-III v. HCL Technologies Ltd. reported in (2018) 93 taxmann.com 33 (SC).

9. In the said decision, it was held that the definition of 'total turnover' given under Sections 80HHC and 80HHE cannot be



adopted for the purpose of Section 10A as technical meaning of total turnover, which does not envisage reduction of any expenses from total amount, is to be taken into consideration for computing deduction under Section 10A; when meaning is clear, there is no necessity of importing meaning of 'total turnover' from other provisions.

10. Thus, by applying the said decision, the substantial questions of law Nos.5 and 6 are answered against the Revenue.

11. In the result, this Tax Case Appeal is dismissed and the substantial questions of law are answered against the Revenue. No costs.

Sd/-

Assistant Registrar(CS IX)

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Sub Assistant Registrar

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To

1. The Income Tax Appellate Tribunal,
Madras 'A' Bench,
Chennai
2. The Commissioner of Income tax,
Chennai.
3. The Deputy Commissioner of Income Tax,
Company Circle II(i),
Chennai

+1CC to Mr.Karthik Ranganathan, Advocate, Sr.No.45043

+1CC to Mr.N.V.Balaji, Advocate, Sr.No.45266

Tax Case Appeal No.154 of 2015

AJS (CO)

K.RK. (27.10.2021)