

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

Reserved on: 24th November, 2021
Date of Decision: 9th December, 2021

+ **W.P.(C) 11957/2016 & CM 27602/2021**

EY GLOBAL SERVICES LIMITED Petitioner
Through Mr.Kamal Sawhney with
Mr.Sparsh Bhargava, Mr.Ankit
Sachdeva & Mr.Divyansh
Singh, Advs.
versus

ASSISTANT COMMISSIONER OF INCOME TAX & ANR.
..... Respondents
Through Ms.Vibhooti Malhotra, Sr.
Standing Counsel.

+ **W.P.(C) 12003/2016 & CM 26831/2021**

EYGBS (INDIA) PRIVATE LIMITED Petitioner
Through Mr.Kamal Sawhney with
Mr.Sparsh Bhargava, Mr.Ankit
Sachdeva & Mr.Divyansh
Singh, Advs.
versus

JOINT COMMISSIONER OF INCOME TAX & ORS.
..... Respondents
Through Mr.Zoheb Hossain, Sr. Standing
Counsel for the Revenue.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN
HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J.

1. These petition(s) challenge the Rulings/Orders both dated 10.08.2016 of the Authority for Advance Rulings (Income Tax), New Delhi (hereinafter referred to as the 'AAR') in the Application(s), being AAR No. 1043 of 2011; AAR No. 1408 of 2012; and AAR No. 1409 of 2012.

2. The Application, being AAR No. 1043 of 2011, was filed by EY Global Services Ltd. (formally known as EYGBS Ltd). The Application(s), being AAR No. 1408 of 2012 and 1409 of 2012, were filed by M/s EYME Technologies Private Limited and EYGBS (India) Private Limited, respectively. As recorded in the Impugned Ruling dated 10.08.2016, M/s EYME Technologies Private Limited has been amalgamated with EYGBS (India) Private Limited with effect from 01.04.2016 and therefore, at the request of EYGBS (India) Private Limited, a common order was passed in the two references. The same has been challenged by EYGBS (India) Private Limited before us by way of W.P. (C) 12003 of 2016.

3. In the Application(s), being AAR No. 1408 of 2012 and AAR No. 1409 of 2012, the learned AAR has followed its Ruling in AAR No. 1403 of 2011 and therefore, reference in the present judgment will be made to the facts from the writ petition, being W.P.(C) 11957 of 2016, which arises out of the said Impugned Ruling.

4. The learned AAR in its Impugned Ruling dated 10.08.2016 records that the EY Global Services Ltd. (EYGSL) UK [hereinafter

referred to as the ‘EYGS (UK)’] is a limited liability company engaged in providing technology and other support services and software licences to member firms of the EY network in various countries all over the world. All member firms, including EYGS (UK), use the brand Ernst & Young (EY). The Petitioner – EYGS (UK) has entered into contracts with various third-party vendors for the procurement of various software. It has also entered into a contract with EY member firms to provide support services and/or deliverables.

5. The EYGS (India) Private Limited [hereinafter referred to as the ‘EYGS (India)’] is an Indian company engaged in providing back-office support and data processing services. It has entered into an agreement with the EYGS (UK) whereby it receives ‘Right to benefit from the Deliverables and/or Services’ from EYGS (UK). The Impugned Ruling notes the specific services mentioned in the Services Schedule annexed to the Memorandum of Understanding (hereinafter referred to as the ‘MOU’), which are rendered by EYGS (UK) under the Service Agreement and the MOU executed between itself and the EYGS (India). The same is quoted herein below:

“4. The specific services mentioned in the services schedule annexed to the MOU, which are rendered by the Applicant under the service agreement and the Memorandum of Understanding between the Applicant and EYGS India are as follows:

1. **Common standards and policies**

- 1.1 Assisting in the development of Common Standards and Policies, including accounting policies, practices, principles and procedures.*
- 1.2 When considered appropriate by EYG Services, providing practice manuals and other reference materials and otherwise assisting in the adoption and consistent application of Common Standards and Policies.*

2. IT Services

- 2.1 Promoting the adoption, maintenance and development of high quality, common information technology and communication systems by Member Firms and providing advice and assistance in connection with the systems of Member Firms including where considered appropriate, developing or assisting in the development of such systems or any part of them.*
- 2.2 Procuring for the Member Firms external software licences for their internal business use.*
- 2.3 Coordinating and promoting a globally consistence policy with regard to technology infrastructure with the objective of delivering economies of scale for the Member Firms and avoiding duplicative systems or structures across the network.*

3. Knowledge

- 3.1 Promoting and establishing global websites (both internet and intranet), establishing projects to capture and disseminate global knowledge and developing or facilitating the development of methodology and techniques which further enhance the knowledge sharing capacity of Member Firms.*

The following services, mentioned in the MOU, have not been rendered:

4. Global Industry Centres

4.1 Providing the Members Firms with business support in relation to specific industry sectors through the operation of Global Industry Centres, thereby expanding Member Firms capacity to deploy relevant knowledge, learning and resources on client engagements.

5. Global Procurement Services

5.1 Providing the Member Firms with sourcing and demand management services for the globalized categories of spend including technology, travel, real estate and content. Additionally, for other subcategories (for example, professional services), global procurement services will facilitate (a) efforts to put in place master services agreements; and (b) contract negotiations, where appropriate. Finally, Global Procurement Services will develop strategies and drive transition plans to standardize tools to support category operations (for example, online booking tools, travel management operations / companies, source to pay solutions).

6. Global Shared Services Centres

6.1 Procuring for the Member Firms access to the Global Shared Services Centres.

7. Other Services

Providing such other services to the Member Firms as agreed from time to time with the Members Firms.”

6. EYGSL (UK) and EYGBS (India) filed an application before the learned AAR seeking a ruling on the following questions:

“3. The applicant has raised the following questions:-

- 1) Whether amounts received /receivable by EYGSL UK in accordance with the agreement entered into with EYGBS India Private Limited inter alia on account of services and / or Deliverables as defined in the Agreement is chargeable to tax in India as “fee for technical services” under Article 13 of the Agreement for avoidance of Double Taxation between India and UK (“the India-UK Tax Treaty”)?*
- 2) Whether the amounts received by EYGSL UK from EYGBS India Pvt. Ltd. ('EYGBS India'), as reimbursement of costs for giving the "Right to benefit from the Deliverables and/or Services" under the terms of the agreement would constitute “income” in the hands of EYGSL UK within the meaning of the term in Section 2(24) of the Income-tax Act, 1961 (“the Act”)?*
- 3) Whether the payments received by EYGSL UK for giving “Right to benefit from the Deliverables and/or Services” under the terms of the agreement would be in the nature of “royalty” within the meaning of the term in:*
 - (i) Explanation 2 to clause (vi) of Section 9(1) of the Act?*
 - (ii) Article 13 of the India-UK Tax Treaty?*
- 4) Based on the answers to Questions (1) to (3) above, and in view of the facts as stated in Attachment III, and also in light*

of the declaration provided by EYGSL UK that it does not have a permanent establishment in India in terms of Article 5 of India UK, whether the payments received by EYGSL UK would be chargeable to tax in India?

5) Based on the answers to Questions above, would the receipts by EYGSL UK from EYGBS India suffer withholding tax under section 195 of the Act, and at what rate?”

7. By the Impugned Ruling, the learned AAR has answered the questions as follows:

“36. In view of discussions in earlier paragraphs the following rulings are pronounced with respect to questions raised:-

*Q.1 Consideration received on account of provision of services/deliverables is **not** FTS.*

Q.2 Consideration received amounts to service fees and it does not amount to reimbursement of expenses.

*Q.3 Consideration received from giving right to benefit from the computer software procured from several third party vendors (deliverables) is in the nature of royalty under Article 13 of India -UK DTAA as well as section 9(1)(vi) of the Act whereas consideration received for giving right to benefit from services is **not** in the nature of royalty under Article 13 of India-UK DTAA.*

Q.4 In respect of Q.No.3, we have ruled that consideration for computer software is taxable as royalty. This is irrespective of the fact whether the applicant has a PE in India or not.

Q.5 Consideration received in respect of giving right to benefit from computer software (deliverables) by the applicant would suffer withholding of tax under section 195 of the IT Act.”

8. The Impugned Ruling also answered the question as to whether the consideration received in respect of the computer software (deliverables) by EYGSL (UK) is ‘royalty’. As submissions have been made by the learned counsels for the parties on this specific question, the finding of the learned AAR is quoted hereinbelow, in detail:

“32. There is no doubt that treaty provisions override the provisions of the Act. Therefore, we may first examine whether consideration received for allowing use of computer software can be treated as royalty within the meaning of Article 13(3) of DTAA. In order to decide whether procurement of computer software by the applicant from various third party vendors and providing the same to EYGBS India against consideration is royalty under Article 13(3) of DTAA the following issues emerge for our consideration:

- I. Whether computer software is a ‘literary work’ within the meaning of Article 13(3)(a) of DTAA.*
- II. Whether acquisition of computer software by the applicant from a third party vendor and providing the same to other member firms can be treated as commercial exploitation and, therefore, would be in the nature of royalty.*
- III. Whether the rights provided by the applicant to EYGBS India are restricted to use of copyrighted article as distinct from copyright and, therefore, are not covered within the meaning of royalty.*

33. We have noticed that in this case the applicant purchased software from various third party vendors. Such software was protected by copy rights. The applicant itself is not using such software and has obtained licence for use of software by all member E&Y firms. The applicant has created a standard facility and is allowing access to all E&Y firms, including EYGBS India, and is charging them with respect to number of users. The payments received are for use of computer software loaded on applicant's server. Under Article 13(3)(a) consideration received for the use of, or the right to use, any copyright of a literary work is royalty. The applicant's main contention is that 'literary' does not include computer software because it is not specifically included and its meaning cannot be imported from section 9(1)(vi) of the Act. In this context we have to see whether computer software has all along been included in literary work or not. We have analyzed the meaning of 'software' under the Indian copy right Act and under the copy right of several countries. Here it is relevant to mention that Article 10 of the Trade Related Aspects of Intellectual property (TRIPS) Agreement, which came into effect on 1 January 1995 contains an interpretive provision stating that computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971). This provision confirms that computer programs must be protected under copyright and that those provisions of the Berne Convention that apply to literary works shall be applied also to them. Article 4 of the 1996 WIPO Copyright Treaty (WCT) includes the same clarification in very similar terms. Article 4 of the WCT states that computer programs (software) are protected as literary works within the meaning of Article 2 of the Berne Conventions. Such protection applies to computer programs, whatever may be the mode or form of their expression. We also see

that similar provisions exist in various countries around the world. Almost all developed countries give the same meaning to computer programme as literary work. As per the Indian Copyright Act, 1957, Section 2(o) defines literary works as “literary work” includes computer programmes, tables and compilations including computer “literary data base”. This discussion clearly establishes that computer software is literary work protected by copyright laws around the world and, therefore, is covered under the definition of royalty under Article 13(3) of DTAA.

34. Whether consideration received for the use, or the right to use computer software is royalty or business profits will depend on the facts and circumstances of the transaction. If the consideration is for the right to commercially exploit the intellectual property in the software, its nature is royalty. The OECD Revised Software commentary also favours a characterization based on the rights acquired by the transferee under the particular arrangement regarding the use and exploitation of a software. As regards the issue relating to exploitation of computer software, the matter relating to acquisition of software by the applicant and onward distribution of the same to member firms it is seen that the applicant obtains licence from third party vendors for all its entities under common control and creates a standard facility to be accessed and used by all entities and in lieu of that it receives consideration based on certain parameters. This is nothing but commercial exploitation of standard facility created.

Based on above conclusions and following our rulings in the case of Skillsoft Ireland we are of the opinion that procurement of computer software from different vendors and providing the same to member firms for consideration is covered within the meaning of royalty under Article 13 of the DTAA. As

regards the consideration being royalty within the meaning of Explanation 2 to section 9(1)(vi) of the Act there is no dispute that computer software is covered within the definition of royalty.

However, we do not find any force in the argument of the Revenue that the provisions of DTAA should not be applicable because the applicant is a conduit company and not a 'beneficial owner' of royalty and, therefore, it should not be given benefit of reduced rate of taxation. The applicant is entitled to rate of taxation applicable for royalty under DTAA."

9. The learned counsel for the petitioner submits that the Impugned Ruling is liable to be set aside as it is contrary to the law declared by the Supreme Court in its recent judgment dated 02.03.2021, ***Engineering Analysis Centre of Excellence Private Limited v. Commissioner of Income Tax and Anr.***, 2021 SCC OnLine SC 159. He submits that vide the Service Agreement and the MOU, the EYGSL (UK) provides to EYGBS (India) a non-exclusive non-assignable sub-licence (with no right to grant further sub-licences) to use the deliverables and/or services. The EYGSL (UK) purchases the software from third-party vendors by way of a licence for the use of the same by member EY firms. The payment received by EYGSL (UK) from its members is for the use of computer software loaded on its server by the creation of a standard facility for which access is granted to all the EY member firms. He submits that in terms of the judgment of the Supreme Court in ***Engineering Analysis Centre*** (supra), there is no transfer of copyright in favour of the member firms, including EYGBS (India), and therefore, the payment received from EYGBS (India) by EYGSL (UK) does not amount to royalty

under Article 13 of the Double Taxation Avoidance Agreement between India and the United Kingdom (hereinafter referred to as the ‘India-UK DTAA’).

10. On the other hand, the learned counsel for the Revenue submits that the judgment of the Supreme Court in *Engineering Analysis Centre* (supra) has no application to the facts of the present case. He submits that the said judgment is confined only to the four categories of cases as mentioned in the judgment itself in paragraph 4 thereof. The EYGSL (UK) and the EYGBS (India) do not fall in any of the said four categories. He submits that in the present case, the EYGSL (UK) procures the computer software from different vendors and provides the same to its member firms. The purpose is to obtain a licence from the third-party vendors for all its entities under common control and create a standard facility to be accessed and used by all entities and in lieu of that, it receives consideration based on certain parameters. This is nothing but commercial exploitation of standard facilities created. He submits that the licence fee paid by the EYGSL (UK) for the software is with respect to the number of users. The computer programme is a ‘literary work’ under the terms of Article 13(3) of the India-UK DTAA and payments for the use or right to use such copyright of the literary work would constitute ‘royalty’. Through the licence, the owner of the computer programme lawfully enables a person to use the confidential information contained therein and even in terms of the India-UK DTAA, the consideration paid for the use or right to use such confidential information would constitute

‘royalty’ and attract tax. He submits that Income Tax Act, 1961 has been amended retrospectively to incorporate an inclusive definition of ‘royalty’ vide Explanation (5) to Section 9(1)(vi) of the Act. It is only a clarificatory amendment and, therefore, would have retrospective application.

11. We have considered the submissions made by the learned counsels for the parties.

12. At the outset, we would quote the law declared by the Supreme Court in ***Engineering Analysis Centre*** (supra), hereinbelow:

“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.¹

ii) The second category of cases deals with resident Indian companies that act as distributors or resellers, by purchasing computer software from foreign, non-resident suppliers or manufacturers and then reselling the same to resident Indian end-users.²

¹ This category includes C.A. Nos. 8733-8734/2018, C.A. No. 10114/2013, C.A. Nos. 10112-10113/2013, C.A. No. 10106/2013, C.A. No. 10103/2013, C.A. No. 10104/2013, C.A. Nos. 10098-10102/2013, C.A. Nos. 8735-8736/2018, C.A. Nos. 8948-8949/2018, C.A. No. 8956/2018, C.A. No. 8957/2018, C.A. No. 7852/2012, C.A. Nos. 8974-8975/2018, C.A. No. 2304/2013, C.A. No. 2305/2013, C.A. No. 2306/2013, C.A. Nos. 2307 2308/2013, C.A. No. 10097/2013, C.A. No. 8976/2018, C.A. No. 3402/2017, SLP(C) No. 450/2019, C.A. No. 2006/2019.

² This category includes C.A. Nos. 8737-8941/2018, C.A. No. 8942-8947/2018, C.A. No. 4420/2012, C.A. No. 8959/2018, C.A. No. 8963/2018, C.A. No. 8962/2018, C.A. No. 8958/2018, C.A. No. 8961/2018, C.A. No. 8960/2018, C.A. Nos. 8950-8953/2018, C.A. No. 8966/2018, C.A. No. 8973/2018, C.A. No. 8965/2018, C.A. No. 8972/2018, C.A. No. 8969/2018, C.A. No. 8971/2018, C.A. No. 8970/2018, C.A. No. 8964/2018, C.A. No. 8967/2018, C.A. No. 8968/2018, C.A. No. 1403/2013, C.A. No. 1414/2013, C.A. No. 1412/2013, C.A. No. 1413/2013, C.A. Nos. 1416-1418/2013, C.A. No. 1405/2013, C.A. No. 1410/2013, C.A. No. 1421/2013, C.A. No. 1409/2013,

iii) *The third category concerns cases wherein the distributor happens to be a foreign, non-resident vendor, who, after purchasing software from a foreign, non-resident seller, resells the same to resident Indian distributors or end-users.*³

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.*⁴

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42. *The subject matter of each of the DTAA's with which we are concerned is income tax payable in India and a foreign country. Importantly, as is now reflected by explanation 4 to section 90 of the Income Tax Act and under Article 3(2) of the DTAA, the definition of the term "royalties" shall have the meaning assigned to it by the DTAA, meaning thereby that the expression "royalty", when occurring in section 9 of the Income Tax Act, has to be construed with reference to Article 12 of the DTAA. This position is also clarified by CBDT Circular No. 333 dated 02.04.1982,⁵ which states as follows:*

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C.A No. 1415/2013, C.A No. 1419/2013, C.A No. 1411/2013, C.A No. 1420/2013, C.A No. 1404/2013, C.A No. 1406/2013, C.A No. 1408/2013, C.A No. 1407/2013, C.A Nos. 4666-4667/2013, C.A No. 6764/2013, C.A No. 4419/2012, C.A Nos. 8977-8988/2018, C.A No. 4629/2014, C.A No. 4631/2014, C.A No. 4630/2014, C.A No. 10105/2013.

³ This category includes C.A. No. 10758/2017, C.A. No. 8990/2018, C.A. No. 9486/2017, C.A. No. 8711/2018, C.A. No. 8722/2018, C.A. No. 8724/2018, C.A. No. 8725/2018, C.A. No. 9551/2018, SLP(C) No. 6736/2020, C.A. No. 4634/2014.

⁴ This category includes C.A. Nos. 10115-10117/2013, C.A. Nos. 6386-6387/2016, C.A. Nos. 8954-8955/2018, SLP(C) No. 37580/2016, SLP(C) No. 28867/2016, SLP(C) No. 28868/2016, C.A. No. 10673/2016, SLP(C) No. 29571/2016, C.A. No. 10674/2016, SLP(C) No. 36782/2016.

⁵ F. No. 506/42/81-FTD.

43. Thus, by virtue of Article 12(3) of the DTAA, royalties are payments of any kind received as consideration for “the use of, or the right to use, any copyright” of a literary work, which includes a computer programme or software.

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45. A reading of the aforesaid distribution agreement would show that what is granted to the distributor is only a non-exclusive, non-transferable licence to resell computer software, it being expressly stipulated that no copyright in the computer programme is transferred either to the distributor or to the ultimate end-user. This is further amplified by stating that apart from a right to use the computer programme by the end-user himself, there is no further right to sub-license or transfer, nor is there any right to reverse-engineer, modify, reproduce in any manner otherwise than permitted by the licence to the end-user. What is paid by way of consideration, therefore, by the distributor in India to the foreign, non-resident manufacturer or supplier, is the price of the computer programme as goods, either in a medium which stores the software or in a medium by which software is embedded in hardware, which may be then further resold by the distributor to the end-user in India, the distributor making a profit on such resale. Importantly, the distributor does not get the right to use the product at all.

46. When it comes to an end-user who is directly sold the computer programme, such end-user can only use it by installing it in the computer hardware owned by the end-user and cannot in any manner reproduce the same for sale or transfer, contrary to the terms imposed by the EULA.

47. In all these cases, the “licence” that is granted vide the EULA, is not a licence in

terms of section 30 of the Copyright Act, which transfers an interest in all or any of the rights contained in sections 14(a) and 14(b) of the Copyright Act, but is a “licence” which imposes restrictions or conditions for the use of computer software. Thus, it cannot be said that any of the EULAs that we are concerned with are referable to section 30 of the Copyright Act, inasmuch as section 30 of the Copyright Act speaks of granting an interest in any of the rights mentioned in sections 14(a) and 14(b) of the Copyright Act. The EULAs in all the appeals before us do not grant any such right or interest, least of all, a right or interest to reproduce the computer software. In point of fact, such reproduction is expressly interdicted, and it is also expressly stated that no vestige of copyright is at all transferred, either to the distributor or to the end-user. A simple illustration to explain the aforesaid position will suffice. If an English publisher sells 2000 copies of a particular book to an Indian distributor, who then resells the same at a profit, no copyright in the aforesaid book is transferred to the Indian distributor, either by way of licence or otherwise, inasmuch as the Indian distributor only makes a profit on the sale of each book. Importantly, there is no right in the Indian distributor to reproduce the aforesaid book and then sell copies of the same. On the other hand, if an English publisher were to sell the same book to an Indian publisher, this time with the right to reproduce and make copies of the aforesaid book with the permission of the author, it can be said that copyright in the book has been transferred by way of licence or otherwise, and what the Indian publisher will pay for, is the right to reproduce the book, which can then be characterised as royalty for the exclusive right to reproduce the book in the territory mentioned by the licence.

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72. The transfer of “all or any rights (including the granting of a licence) in respect of any copyright”, in the context of computer software, is referable to sections 14(a), 14(b) and 30 of the Copyright Act. As has been held hereinabove, the expression “in respect of” is equivalent to “in” or “attributable to”. Thus, explanation 2(v) to section 9 (1)(vi) of the Income Tax Act, when it speaks of “all of any rights...in respect of copyright” is certainly more expansive than the DTAA provision, which speaks of the “use of, or the right to use” any copyright. This has been recognised by the High Court of Delhi in CIT v. DCM Limited, ITA Nos. 87-89/1992 in its judgment dated 10.03.2011, as follows:

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73. However, when it comes to the expression “use of, or the right to use”, the same position would obtain under explanation 2(v) of section 9(1)(vi) of the Income Tax Act, inasmuch as, there must, under the licence granted or sale made, be a transfer of any of the rights contained in sections 14(a) or 14(b) of the Copyright Act, for explanation 2(v) to apply. To this extent, there will be no difference in the position between the definition of “royalties” in the DTAA and the definition of “royalty” in explanation 2(v) of section 9(1)(vi) of the Income Tax Act.

74. Even if we were to consider the ambit of “royalty” only under the Income Tax Act on the footing that none of the DTAA's apply to the facts of these cases, the definition of royalty that is contained in explanation 2 to section 9(1)(vi) of the Income Tax Act would make it clear that there has to be a transfer of “all or any rights” which includes the grant of a licence in respect of any copyright in a literary work. The expression “including the granting of a licence” in clause (v) of explanation 2 to section 9(1)(vi) of the Income Tax Act, would necessarily mean a licence in

which transfer is made of an interest in rights “in respect of” copyright, namely, that there is a parting with an interest in any of the rights mentioned in section 14(b) read with section 14(a) of the Copyright Act. To this extent, there will be no difference between the position under the DTAA and explanation 2 to section 9(1)(vi) of the Income Tax Act.

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119. *The conclusions that can be derived on a reading of the aforesaid judgments are as follows:*

- i) Copyright is an exclusive right, which is negative in nature, being a right to restrict others from doing certain acts.*
- ii) Copyright is an intangible, incorporeal right, in the nature of a privilege, which is quite independent of any material substance. Ownership of copyright in a work is different from the ownership of the physical material in which the copyrighted work may happen to be embodied. An obvious example is the purchaser of a book or a CD/DVD, who becomes the owner of the physical article, but does not become the owner of the copyright inherent in the work, such copyright remaining exclusively with the owner.*
- iii) Parting with copyright entails parting with the right to do any of the acts mentioned in section 14 of the Copyright Act. The transfer of the material substance does not, of itself, serve to transfer the copyright therein. The transfer of the ownership of the physical substance, in which copyright subsists, gives the purchaser the right to do with it whatever he pleases, except the right to reproduce the same and issue it to the public, unless such copies are already in*

circulation, and the other acts mentioned in section 14 of the Copyright Act.

- iv) *A licence from a copyright owner, conferring no proprietary interest on the licensee, does not entail parting with any copyright, and is different from a licence issued under section 30 of the Copyright Act, which is a licence which grants the licensee an interest in the rights mentioned in section 14(a) and 14 (b) of the Copyright Act. Where the core of a transaction is to authorize the end-user to have access to and make use of the “licensed” computer software product over which the licensee has no exclusive rights, no copyright is parted with and consequently, no infringement takes place, as is recognized by section 52(1)(aa) of the Copyright Act. It makes no difference whether the end-user is enabled to use computer software that is customised to its specifications or otherwise.*
- v) *A non-exclusive, non-transferable licence, merely enabling the use of a copyrighted product, is in the nature of restrictive conditions which are ancillary to such use, and cannot be construed as a licence to enjoy all or any of the enumerated rights mentioned in section 14 of the Copyright Act, or create any interest in any such rights so as to attract section 30 of the Copyright Act.*
- vi) *The right to reproduce and the right to use computer software are distinct and separate rights, as has been recognized in SBI v. Collector of Customs, (2000) 1 SCC 727 (see paragraph 21), the former amounting to parting with copyright and the latter, in the context of non-exclusive EULAs, not being so.*

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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.”

13. A reading of the above judgment would clearly show that for the payment received by EYGSL (UK) from EYGBS (India) to be taxed as ‘royalty’, it is essential to show a transfer of copyright in the software to do any of the acts mentioned in Section 14 of the Copyright Act, 1957. A licence conferring no proprietary interest on the licensee, does not entail parting with the copyright. Where the core of a transaction is to authorise the end-user to have access to and make use of the licenced software over which the licensee has no exclusive rights, no copyright is parted with and therefore, the payment received cannot be termed as ‘royalty’.

14. In the present case, the EYGBS (India), in terms of the Service Agreement and the MOU, merely receives the right to use the software procured by the EYGSL (UK) from third-party vendors. The consideration paid for the use of the same therefore, cannot be termed as ‘royalty’ as held by the Supreme Court in ***Engineering Analysis***

Centre (supra). In determining the same, the rights acquired by the EYGSL (UK) from the third-party software vendors are not relevant. What is relevant is the Agreement between the EYGSL (UK) and the EYGBS (India). As the same does not create any right to transfer the copyright in the software, the same would not fall within the ambit of the term 'royalty' as held by the Supreme Court in *Engineering Analysis Centre* (supra).

15. We may also note that the learned AAR in its Impugned Order has relied upon its earlier view in *Citrix Systems Asia Pacific Pty Ltd., In Re.*, (2012) 343 ITR 1 (AAR), which has been expressly stated to be bad law in *Engineering Analysis Centre* (supra).

16. The submission of the learned counsel for the Revenue that the judgment of the Supreme Court in *Engineering Analysis Centre* (supra) cannot be applied because it confines itself only to the four categories mentioned in paragraph 4, also cannot be accepted. Though the Supreme Court was on facts considering the four categories of cases that arose in the appeals before it, it has laid down the law for general application. The law, as laid down by the Supreme Court, when applied to facts of the present case, squarely covers the same in favour of the petitioners.

17. The submission made by the learned counsel for the revenue relying upon the amendment to Section 9(1)(vi) of the Income Tax Act, 1961 has also been specifically considered and rejected by the Supreme Court.

18. In view of the above, the Impugned Rulings dated 10.08.2016 passed by the learned AAR are set aside and it is held that the payment received by EYGSL (UK) for providing access to computer software to its member firms of EY Network located in India, that is, EYGBS (India), does not amount to 'royalty' liable to be taxed in India under the provisions of the Income Tax Act, 1961 and the India-UK DTAA.

19. The petitions are accordingly allowed in the above terms. There shall be no order as to costs.

NAVIN CHAWLA, J

MANMOHAN, J

DECEMBER 9, 2021/Arya/P/U