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

% **Decision delivered on: 08.08.2023**

+ **ITA 434/2023**

THE COMMISSIONER OF INCOME TAX (INTERNATIONAL
TAXATION)-1, NEW DELHI Appellant

Through: Mr Puneet Rai, Sr. Standing Counsel with
Mr Ashvini Kumar and Ms Madhavi
Shukla, Jr. Standing Counsel.

versus

COGNYTE TECHNOLOGIES ISRAEL LTD. (FORMERLY
KNOWN AS M/S VERINT SYSTEMS LTD.) Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

HON'BLE MR. JUSTICE GIRISH KATHPALIA

[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J. (ORAL):

CM APPL. 40440/2023

1. Allowed, subject to just exceptions.

CM APPL.40441/2023*[Application filed on behalf of the
appellant/revenue seeking condonation of delay of 24 days in filing the
appeal]*

CM APPL.40442/2023*[Application filed on behalf of the
appellant/revenue seeking condonation of delay of 94 days in re-filing the
appeal]*

2. These are applications which seek condonation of delay in filing and



re-filing.

3. According to the appellant/revenue, there is a delay of 24 days in filing the appeal and 94 days in re-filing the appeal.

4. Having regard to the period of delay and the stand taken by the counsel for the appellant/revenue, we are inclined to condone the delay.

5. It is ordered accordingly.

6. The applications shall stand disposed of in the aforesaid terms.

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7. This appeal concerns Assessment Year (AY) 2012-13.

8. Insofar as AY 2011-12 (ITA No. 433/2023) is concerned, a separate appeal has been filed by the appellant/revenue, which is also on our board today.

9. The appeal arises out of a common order dated 03.10.2022 passed by the Income Tax Appellate Tribunal [in short, “Tribunal”].

10. The short question which arises for consideration before the Tribunal was whether consideration received by the respondent/assessee, i.e., the company incorporated and based in Israel, was royalty under the provisions of the Indian Income Tax Act, 1961 [in short, “the Act”].

11. The Assessing Officer (AO), *via* the draft assessment order, proposed to tax the consideration received by the respondent/assessee as Royalty, by invoking Article 12(3) of the India-Israel Double Tax Avoidance Agreement (DTAA) and Section 9(1)(vi) of the Act.

12. Mr Puneet Rai, learned senior standing counsel, who appears on behalf of appellant/revenue, says that the total amount received by the respondent/assessee for the sale of software was Rs.48,86,72,586/-, a figure which is reflected in the impugned order.



13. Furthermore, out of the said sum, Rs.29,26,883/- was received by the respondent/assessee from an Indian entity, i.e., Wipro Ltd. (India).

14. The Tribunal has taken the view that there was no transfer or use of copyright in the sale of 'off the shelf' software that could come within the ambit of Royalty and hence was not taxable.

15. Although the Tribunal noticed the decision *qua* the respondent/assessee concerning AY 2010-11, passed in ITA No. 7111/Del/2019, the Tribunal, following its decision for AY 2010-11, ruled in favour of the respondent/assessee.

16. Mr Puneet Rai, learned senior standing counsel for the appellant/revenue, informs us that the appellant/revenue had not preferred an appeal before this Court, as the tax effect was below the prescribed threshold limit.

17. However, the extract of the order passed by the Tribunal for AY 2010-11 shows that the Tribunal at that stage had noticed the judgment of the Supreme Court on the very same issue rendered in ***Engineering Analysis Centre of Excellence Private Limited vs CIT*** (2021) 432 ITR 471 (SC).

18. Faced with this, the representative of the appellant/revenue could not dispute the principle of law enunciated in the aforementioned judgment of the Hon'ble Supreme Court. This aspect is noted in paragraph 7 of the impugned order.

19. Although Mr Rai sought to contend that the software was custom-built, he was unable to show us as to whether such was the case set up by the appellant/revenue before the statutory authorities.



20. As a matter of fact, the assertions made in the appeal seem to clearly indicate that even the appellant/revenue accepted the fact that what was sold by the respondent/assessee was ‘off the shelf’ software.
21. Mr Rai also attempted to draw our attention to the agreement entered into by the respondent/assessee with Wipro Ltd.
22. It appears that, firstly, this agreement has not been placed before us. In ground ‘B,’ there is a short extract of the agreement which adverts to the fact that the respondent/assessee also extends services of training the employees of Wipro Ltd. at their own facility which is presumably located in Israel or through the virtual mode.
23. These are the aspects, which even according to Mr Rai, were neither raised nor discussed by the statutory authorities.
24. The appellant/revenue, for the first time, seeks to engage the Court *qua* aspects which do not emerge from the impugned orders.
25. According to us, the Tribunal was right in concluding both in ITA No. 341/DEL/2021 and in ITA No. 342/DEL/2021 that the consideration received by respondent/assessee did not constitute royalty as per the principle enunciated by the Hon’ble Supreme Court in ***Engineering Analysis***.
26. Thus, in our opinion, no substantial question of law arises for our consideration.
27. Accordingly, the pending appeal and applications are closed.
28. The Registry will dispatch a copy of the order to the respondent/assessee at the address given in the memo of parties and if possible, *via* email.



29. At this stage, Mr Rai says that a review petition has been preferred against the decision of the Supreme Court rendered in *Engineering Analysis*.

30. As far as this Court is concerned, the pendency of the review petition cannot impact the instant proceedings. Surely, parties will have to abide by the decision rendered by the Supreme Court in *Engineering Analysis*.

31. Parties will act based on the digitally signed copy of the order.

RAJIV SHAKDHER
JUDGE

GIRISH KATHPALIA
JUDGE

AUGUST 8, 2023/RV

Click here to check corrigendum, if any