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

Decision delivered on: 09.01.2023

+ **W.P.(C) 13659/2022**

OPENWAVE MOBILITY INC

.....Petitioner

Through: Mr Gajendra Maheshwari, Ms Perna
Chopra and Ms Shreya Khunteta,
Advocates

versus

DEPUTY COMMISSIONER OF INCOME TAX & ANR

.....Respondents

Through: Mr Zoheb Hossain, Sr. Standing
Counsel with Mr Vipul Agrawal and
Mr Path Semwal, Jr. Standing
Counsel

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

HON'BLE MS. JUSTICE TARA VITASTA GANJU

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

RAJIV SHAKDHER, J. (ORAL)

1. The record shows, that the above-captioned writ petition came up before a coordinate Bench of this Court for the first time on 21.09.2022, when on behalf of the respondents/revenue, time was sought to obtain instructions.
2. Thereafter, the matter was listed on 18.10.2022, when the Court granted four weeks to the respondents/revenue to file a counter-affidavit in the matter, with liberty to the petitioner to file a rejoinder in the matter.
3. It is in these circumstances, that the matter is listed today.
4. We may note, that while passing the order dated 18.10.2022, a formal

notice was not issued in the matter.

4.1 To our minds, this would not absolve the respondents/revenue from the obligation to file a counter-affidavit in the matter, as time in that behalf was specially granted.

5. Since the counter-affidavit is not on record, we have heard the counsel for the parties, based on record presently available to us.

6. The principal grievance of the petitioner is, that it had sought the issuance of a certificate under Section 197 of the Income Tax Act 1961 [in short “the Act”] *abeit* at “nil” rate.

7. The petitioner claims that it is a tax resident of the United States of America (USA).

8. The petitioner also states, that it has no business connection or a permanent establishment in India.

8.1 Furthermore, the petitioner asserts, that it is a non-resident for the purpose of the Act.

9. It appears, that the petitioner entered into a Software License Agreement on 20.02.2017 with Reliance Jio Infocomm Limited [“RJIL”].

10. The petitioner’s case is, that in terms of the aforementioned Software Licensing Agreement, it granted a non-exclusive and non-transferable license to RJIL, to use and operate the software concerning Transmission Control Protocol and Video Optimisation Solution in the territory of India.

10.1 As consideration, the petitioner receives licensing fees from RJIL.

11. *Inter-alia*, the petitioner’s claim is, that RJIL has only been allowed to use the licence software and that the rights *qua* the same have not been transferred. It is, thus, the petitioner’s submission, that it is not liable to tax *qua* the license fee received from RJIL.

12. In support of its submission, the petitioner relies upon the order dated 17.05.2022 passed by the Dispute Resolution Panel-2 [“DRP”] with regard to Financial Year (FY) 2018-2019 [AY 2019-2020].

13. In particular, our attention has been drawn to the following observations made by the DRP: -

“2.4 The submissions have been examined along with the materials on record. It is seen that the Software License Agreement dated 20.02.2017 captures two distinct transactions namely (a) supply and license of certain software and (b) providing of AMC services to the licensee. Given the same, the assessee's contention that both the transactions are inextricably and integrated with each other under Article 12 of the OT AA is rejected.

2.5 As regards the first set of transactions namely supply and license of software, the licensor grants the licenses to use and operate the software in India as follows – Non-exclusive, nontransferable and sub licensable to licensee's affiliates; unlimited; perpetual; unlimited use and irrevocable etc. As per clause 3 (License Restrictions) of the Agreement, though licensee will not (a) sell, rent, lease, distribute or sub-license the software or documentation; (b) host the software for third party services; (c) modify, alter, reverse engineer, decompile, translate or disassemble any source code of the software; (d) disclose, make available or allow any third party to use the software without licensor's prior written consent; or (e) develop any programs using licensor's source code. ***As per the said clause, the source code and underlying algorithm of the software are the assessee's proprietary trade secrets. On such terms and conditions of sale of the said software licenses, there is no finding in the draft assessment order that the user has a right to make copies or commercially exploit the right in the copyright of such software as laid down by Hon'ble Supreme Court in the context of Business Income/Royalty in Engineering Analysis Centre of Excellence Private Ltd. Vs. CIT (Civil Appeal Nos. 8733-8734 of 2018). In view of the same, the AO shall exclude receipts relating to sale of software licenses in accordance with and to the extent covered under the applicable categories contained in Hon'ble Supreme Court decision above. There is no dispute regarding the fact that the assessee does not have a permanent establishment in India. Accordingly, such receipts will constitute business income under Article 7 of the DTAA in line with the above-mentioned decision of Hon'ble Supreme Court and will not***

be taxable in India in the absence of PE.” [Emphasis is ours]

14. Furthermore, Mr Gajendra Maheshwari, who appears on behalf of the petitioner, has also placed reliance on the judgment of the Hon’ble Supreme Court rendered in *Engineering Analysis Centre of Excellence Private Limited v. CIT* (2022) 3 SCC 321.

15. Mr Zoheb Hossain, who appears on behalf of the respondents/revenue cannot but accept, that the concerned officer who passed the impugned order would have to take into account, the observations made by DRP in its order dated 17.05.2022, as also consider the impact of the judgment rendered by the Supreme Court in *Engineering Analysis*.

16. In our view, the aforementioned aspects will require consideration.

17. Accordingly, the impugned order dated 29.04.2022 is set aside, with the direction that the application filed by the petitioner will be decided afresh.

17.1 The concerned authority will hear the Authorized Representative (AR) of the petitioner.

17.2 For this purpose, the AR of the petitioner will appear before the concerned authority on 16.01.2023, at 11:00 AM.

17.3 The concerned authority will be at liberty to hear the AR of the petitioner *via* video-conferencing.

18. While disposing of the application, the concerned authority will bear in mind, the order dated 17.05.2022 passed by the DRP, and the ratio of the judgment rendered by the Supreme Court in *Engineering Analysis*.

19. The concerned authority will render a decision as expeditiously as possible, though not later than 27.01.2023.

20. In order to prevent further complication, the petitioner will receive

remittances, if any, at the prevailing rate of tax.

21. Needless to add, if the decision rendered by the concerned authority is adverse to the interests of the petitioner, the petitioner will be at liberty to take recourse to an appropriate remedy, *albeit*, as per law.

22. The writ petition is disposed of in the aforesaid terms.

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

RAJIV SHAKDHER, J

TARA VITASTA GANJU, J

JANUARY 9, 2023

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Click here to check corrigendum, if any