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

+ ITA 144/2023

THE COMMISSIONER OF INCOME TAX -
INTERNATIONAL TAXATION -3 Appellant

Through: Mr. Ruchir Bhatia, Sr. Standing
Counsel.

Versus

SALESFORCE.COM SINGAPORE PTE. LTD.

..... Respondent

Through: Mr. Ajay Vohra, Sr. Adv. with
Mr. Vishal Kalra, Adv.

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CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

**HON'BLE MR. JUSTICE PURUSHAINDR KUMAR
KAURAV**

ORDER

14.02.2024

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1. This batch of appeals pertain to **Assessment Year¹** 2017-18 [ITA No. 144/2023], AY 2015-16 [ITA No. 145/2023], AY 2016-17 [ITA No. 146/2023], AY 2012-13 [ITA No. 147/2023], AY 2011-12 [ITA No. 148/2023], AY 2014-15 [ITA No. 149/2023], and AY 2013-14 [ITA No. 150/2023] and are proposed to be disposed of by this judgment since they raise common questions.

2. The Revenue impugns the judgment rendered by the **Income Tax Appellate Tribunal²** dated 25 March 2022 and proposes the following questions for our consideration: -

¹ AYs

² ITAT



a) Whether on the facts and in the circumstances of the case, the ITAT has erred in holding that the consideration received by the assessee from various customers on account of licensing of **Customer Relationship Management**³ software is not royalty income within the meaning of Article 12(3) of the India-Singapore **Double Taxation Avoidance Agreements**⁴?

b) Whether on the facts and in the circumstances of the case, the order of ITAT is erroneous as the **Assessing Officer**⁵ has held that receipt from CRM software as royalty income under Clause (iv-a) and clause (v) of Explanation 2 to Section 9(1)(vi) of the **Income Tax Act, 1961**⁶ whereas the ITAT has dealt the issue under clause (iv) of the Explanation 2 to Section 9(1)(vi) of the Act?

c) Whether on the facts and in the circumstances of the case, the ITAT has erred in holding that the consideration received by the assessee from various customer on account of licensing of CRM software is not royalty income without appreciating the fact that CRM platform provided by the assessee to its customers in India is a scientific equipment and income arising from use or right to use of such platform is royalty income both under clause (iv-a) to Explanation 2 of

³ CRM
⁴ DTAA
⁵ AO
⁶ Act



Section 9(1)(vi) of the Act as well as Article 12(3)(b) of the India- Singapore DTAA?

d) Whether on the facts and in the circumstances of the case, the ITAT has erred in holding that the consideration received by the assessee from various customers on account of licensing of CRM Software is not royalty income without appreciating the fact that in terms of Explanation below sub-section (2) of Section 9 of the Act service leading to royalty income is chargeable to tax in India being sourced and utilized in India irrespective of the place of rendering services?

e) Whether on the facts and in the customers of the case, the order of the ITAT is erroneous as the ITAT has restricted the scope of taxation of service income because of non-fulfilment of 'make available clause' which deals with service income in the nature of FTS whereas the issue under consideration is of royalty income?

f) Whether on the facts and in the customers of the case, the ITAT has erred in holding that the consideration received by the assessee from various customers on account of licensing of CRM software is not royalty income without considering the fact that even if an argument is made that the assessee receives service income, then also it would be treated as royalty income as per Article 12(4)(a) of the India-Singapore DTAA

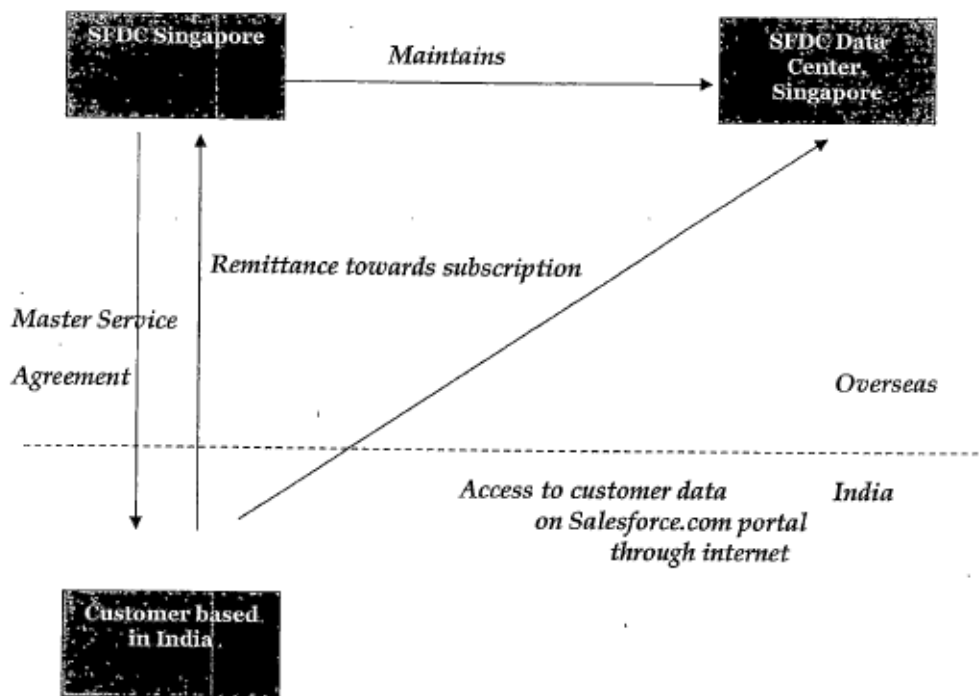


being ancillary and subsidiary to the application or enjoyment of the right, property or information in the form of a online CRM platform for which it is entitled to royalty?

3. The issue itself arises in the context of the CRM services provided by the assessee to businesses and industries. The assessee is a tax resident of Singapore and is stated to provide CRM services which is stated to be an “enterprise business application” enabling customers and subscribers to record, store and act upon business data, formulate business strategies and enables businesses to manage customer accounts, track sales positions, evaluate marketing campaigns as well as bettering post sales services. The income in question is derived from the subscription fee which the assessee receives from customers in India for providing CRM related services.

4. As would be manifest from a reading of the questions which are raised by the appellant, they take the position that the subscription fee is liable to be treated as royalty under Section 9(1)(vi) of the Act. Additionally, they rely upon Article 12 of the India-Singapore DTAA to contend that subscription fee is liable to be placed in that particular Article and thus be treated as royalty under the DTAA. The appellant additionally asserts that if it not be royalty, it would clearly fall within the ambit of fee for technical services.

5. The business module of the assessee has been duly recorded by the AO in the following terms: -



Transaction flow:

1. SFDC Singapore would enter into a Master Subscription Agreement with the Indian Customer for provision of CRM services.
2. Indian customer to make payment to SFDC Singapore for the subscription fee for CRM services which is directly remitted by the customer in India to SFDC Singapore's bank account outside India.
3. The customer shall input, store and retrieve his proprietary data on the Salesforce.com portal through the CRM application software of SFDC Singapore.
4. SFDC Singapore shall provide access for customer's own use to generate reports etc. in the desired format and thereby use such data for own business purpose.
5. The access is for a limited duration upto the period validity of the subscription paid by the customer and such is denied automatically after this period.

The key features of the transaction relating to the provision of services by SFDC Singapore are as follows:

- SFDC Singapore shall provide access to customers based in India to their (customers) data located on the Salesforce.com portal, through its remote internet browser/server situated in Singapore i.e., outside India upon payment of the applicable subscription.
- Payments for such subscription is remitted directly by customer based in India to SFDC Singapore's bank account outside India.



- The customer shall input, store and retrieve his proprietary data on the Salesforce.com portal through the CRM application software SFDC Singapore using the user name and password provided to them.
- The access shall be provided for customer's own use to generate reports etc. in the desired format for a limited duration upto the period validity of the subscription paid by the customer and such access is denied automatically after this period.
- SFDC Singapore reserves all the rights, title and interest in and to the services, including all related intellectual property rights.
- The customer exclusively owns all rights, title and interest in and to all the customer data.

SFDC Singapore does not have data centre or business premises of its own in India. SFDC Singapore merely provides the customer with the means to automate and manage its marketing function.”

6. It is the submission of the assessee that the subscription receipts constitute business profits and in the absence of a Permanent Establishment [“PE”], the same would not be taxable under Article 7 of the DTAA. It was additionally asserted that Article 12 of the DTAA and which deals with the subject of royalties would have been attracted, provided subscription fee could be said to have been received as a consideration for the ‘use’ or the ‘right to use’ of any copyright of a literary, artistic or scientific work.

7. It was in this connection submitted by the assessee that there is no transfer of the copyright that exists in the application and that customers in India are only provided web based online access to the data hosted on the server of the assessee situated in Singapore. The assessee also submitted that the customers are accorded access to the application whereafter they are free to input, store and retrieve their proprietary data through the software. It was the categorical case of the assessee that customers are not accorded the right to either copy or download the CRM application software or to use the same other than on the server of the assessee.



8. It becomes pertinent to note that while dealing with a similar issue of whether subscription fee to a software could be viewed as royalty under Article 12 of the Indo-US DTAA, this Court in **The Commissioner of Income Tax-International Taxation-3 vs. Relx Inc.** [ITA 630/2023] on 07 February 2024 had held as under:-

“11. We find that similar would be the position which would obtain when subscription fee is examined on the anvil of Article 12 of the DTAA. If the Department were to describe subscription fee as ‘royalty’, they would necessarily have to establish that the payments so received by the assessee was consideration for the use of or the right to use any copyright or a literary, artistic or scientific work as defined by Article 12(3) of the DTAA. Granting access to the database would clearly not amount to a transfer of a right to use a copyright. We must bear in mind the clear distinction that must be recognised to exist between the transfer of a copyright and the mere grant of the right to use and take advantage of copyrighted material. Neither the subscription agreement nor the advantages accorded to a subscriber can possibly be considered in law to be a transfer of a copyright. In fact, it was the categorical assertion of the assessee that the copyright remains with it at all times.

12. This issue in any case no longer appears to be res integra in light of the judgment of this Court in **Director of Income Tax Vs. Infrasoftware**. We deem it apposite to extract the following passages from that decision:-

“89. There is a clear distinction between royalty paid on transfer of copyright rights and consideration for transfer of copyrighted articles. Right to use a copyrighted article or product with the owner retaining his copyright, is not the same thing as transferring or assigning rights in relation to the copyright. The enjoyment of some or all the rights which the copyright owner has, is necessary to invoke the royalty definition. Viewed from this angle, a non-exclusive and non-transferable licence enabling the use of a copyrighted product cannot be construed as an authority to enjoy any or all of the enumerated rights ingrained in Article 12 of DTAA. Where the purpose of the licence or the transaction is only to restrict use of the copyrighted product for internal business purpose, it would not be legally correct to state that the copyright itself or right to use copyright has been transferred to any extent. The parting of intellectual property rights inherent in and attached to the software product in favour of the licensee/customer is what is contemplated by the Treaty. Merely authorising or enabling a customer to have the



benefit of data or instructions contained therein without any further right to deal with them independently does not, amount to transfer of rights in relation to copyright or conferment of the right of using the copyright. The transfer of rights in or over copyright or the conferment of the right of use of copyright implies that the transferee/licencee should acquire rights either in entirety or partially co-extensive with the owner/transferor who divests himself of the rights he possesses pro tanto.

90. The licence granted to the licensee permitting him to download the computer programme and storing it in the computer for his own use is only incidental to the facility extended to the licensee to make use of the copyrighted product for his internal business purpose. The said process is necessary to make the programme functional and to have access to it and is qualitatively different from the right contemplated by the said paragraph because it is only integral to the use of copyrighted product. Apart from such incidental facility, the licensee has no right to deal with the product just as the owner would be in a position to do.

91. There is no transfer of any right in respect of copyright by the Assessee and it is a case of mere transfer of a copyrighted article. The payment is for a copyrighted article and represents the purchase price of an article and cannot be considered as royalty either under the Income Tax Act or under the DTAA.

92. The licensees are not allowed to exploit the computer software commercially, they have acquired under licence agreement, only the copyrighted software which by itself is an article and they have not acquired any copyright in the software. In the case of the Assessee Company, the licensee to whom the Assessee Company has sold/licenced the software were allowed to make only one copy of the software and associated support information for backup purposes with a condition that such copyright shall include Infrasoftware copyright and all copies of the software shall be exclusive properties of Infrasoftware. Licensee was allowed to use the software only for its own business as specifically identified and was not permitted to loan/rent/sale/sub-licence or transfer the copy of software to any third party without the consent of Infrasoftware.

93. The licensee has been prohibited from copying, de-compiling, de-assembling, or reverse engineering the software without the written consent of Infrasoftware. The



licence agreement between the Assessee Company and its customers stipulates that all copyrights and intellectual property rights in the software and copies made by the licensee were owned by Infracsoft and only Infracsoft has the power to grant licence rights for use of the software. The licence agreement stipulates that upon termination of the agreement for any reason, the licensee shall return the software including supporting information and licence authorisation device to Infracsoft.

94. The incorporeal right to the software i.e. copyright remains with the owner and the same was not transferred by the Assessee. The right to use a copyright in a programme is totally different from the right to use a programme embedded in a cassette or a CD which may be a software and the payment made for the same cannot be said to be received as consideration for the use of or right to use of any copyright to bring it within the definition of royalty as given in the DTAA. What the licensee has acquired is only a copy of the copyright article whereas the copyright remains with the owner and the Licensees have acquired a computer programme for being used in their business and no right is granted to them to utilize the copyright of a computer programme and thus the payment for the same is not in the nature of royalty.”

13. The distinction between the transfer of a copyright as distinct from a mere right to use copyrighted material was again highlighted by the Supreme Court in **Engineering Analysis Centre for Excellence Vs. CIT**⁷ when it observed:-

“179. The Revenue, therefore, when referring to “royalties” under the DTAA, makes a distinction between such royalties, no doubt in the context of technical services, and remittances for supply of computer software, which is then treated as business profits, taxable under the relevant DTAA depending upon whether there is a PE through which the assessee operates in India. This is one more circumstance to show that the Revenue has itself appreciated the difference between the payment of royalty and the supply/use of computer software in the form of goods, which is then treated as business income of the assessee taxable in India if it has a PE in India.

Conclusion

180. Given the definition of “royalties” contained in

⁷ (2022) 3 SCC 321



Article 12 of the DTAAAs mentioned in para 46 of this judgment, it is clear that there is no obligation on the persons mentioned in Section 195 of 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 assesseees, have no application in the facts of these cases.

181. 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 para 3 of this judgment.”

14. The distinction between the right of access to copyrighted content as opposed to parting with the copyright itself was again explained by our Court in **CIT Vs. Microsoft Corporation**⁸ where the following pertinent observations were made:-

“4. Having heard learned counsel for the appellant, this court finds that the issue raised in the present appeals is no longer res integra as the Supreme Court in Engineering Analysis Centre of Excellence Pvt. Ltd. v. CIT [2021] 432 ITR 471 (SC) ; [2021] SCC OnLine SC 159 has held as under (page 488 of 432 ITR):

"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

⁸ 2022 SCC OnLine Del 1514



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.

(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.

(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.. ..

The Authority for Advance Rulings then reasoned that the fact that a licence had been granted would be sufficient to conclude that there was a transfer of copyright, and that there was no justification for the use of the doctrine of noscitur a sociis to confine the transfer by way of a licence to only include a licence which transferred rights in respect of copyright, by referring to Explanation 2 to section 9(1)(vi) of the Income-tax Act. It then held:

'Considerable arguments are raised on the so-called distinction between a copyright and copyrighted articles. What is a copyrighted article ? It is nothing but an article which incorporates the copyright of the owner, the assignee, the exclusive licensee or the licensee. So, when a copyrighted article is permitted or licensed to be used for a fee, the permission involves not only the physical or electronic manifestation of a programme, but also the use of or the right to use the copyright embedded therein. That apart, the Copyright Act or the Income-tax Act or the DTAC does not use the expression "copyrighted article", which could have been used if the intention was as claimed by the applicant. In the circumstances, the distinction sought to be made appears to be illusory.'

This ruling of the Authority for Advance Rulings flies in the face of certain principles. When, under a non-exclusive licence, an end-user gets the right to use computer software in the form of a CD, the end-user only receives a right to use the software and nothing more. The end-user does not get any of the rights that the owner continues to retain under section 14(b) of the Copyright Act read with sub-section (a)(i)-(vii) thereof. Thus, the conclusion that when computer software is licensed for use under an EULA, what is also licensed is the right to use the copyright embedded therein, is wholly incorrect. The licence for the use of a product under an EULA cannot be construed as the licence spoken of in section 30 of the



Copyright Act, as such EULA only imposes restrictive conditions upon the end-user and does not part with any interest relating to any rights mentioned in sections 14(a) and 14(b) of the Copyright Act.

Also, any ruling on the more expansive language contained in the Explanations to section 9(1)(vi) of the Income-tax Act would have to be ignored if it is wider and less beneficial to the assessee than the definition contained in the DTAA, as per section 90(2) of the Income-tax Act read with Explanation 4 thereof, and article 3(2) of the DTAA. Further, the expression 'copyright' has to be understood in the context of the statute which deals with it, it being accepted that municipal laws which apply in the Contracting States must be applied unless there is any repugnancy to the terms of the DTAA. For all these reasons, the determination of the Authority for Advance Rulings in Citrix Systems (AAR) (supra) does not state the law correctly and is thus set aside.. ..

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.

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 Authority for Advance Rulings in Citrix Systems (AAR) (supra) is set aside. The appeals from the impugned judgments of the High Court of Delhi are dismissed."

5. Further, this court on similar facts has allowed writ petitions filed by the similarly placed assessee in EY Global Services Ltd. v. Asst. CIT W. P. (C) No. 11957 of 2016 and EYGBS (India) Pvt. Ltd. v. Joint CIT W. P. (C) No. 12003 of 2016 [2022] 441 ITR 54 (Delhi). The relevant portion of the said judgment is reproduced hereinbelow (page 69 of 441 ITR) :

"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'. In the present case, the EYGBS (India), in terms of the Service Agreement and the memorandum of understanding, 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). We may also note that the learned Authority for Advance Rulings 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). 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.

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.

In view of the above, the impugned rulings dated August 10, 2016 passed by the learned Authority for Advance Rulings 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."

6. Since, the issue of law raised in the present appeals has been conclusively decided in favour of the assessee by the Supreme Court, no substantial question of law arises for consideration in the present appeals. It is also pertinent to mention that the appellant had admitted before the Income-tax Appellate Tribunal that the dispute in question had been decided in favour of the assessee by the Tribunal in the earlier years. Accordingly, the present appeals are dismissed."

9. Insofar as the question relating to the aspect of “*make available*” is concerned, we had in *Relx* observed as follows: -

“15. Similarly, in order for that income to fall within the ambit of ‘*fees for included services*’, it was imperative for the Department to establish that the assessee was rendering technical or consultancy services and which included making available technical knowledge, experience, skill, know-how or processes. As has been found by the Tribunal, the access to the database did not constitute the rendering of any technical or consultancy services and in any case did not amount to technical knowledge, experience, skill, know-how or processes being made available.

16. We note that while explaining the meaning liable to be ascribed to the expression ‘*make available*’, the Court in **Commissioner of Income Tax (International Taxation) v. Bio-Rad Lab (Singapore) Pte. Ltd.** had affirmed the following opinion as expressed by the Tribunal. This is evident from a reading of paras 14, 14.1 and 15, which is extracted below:

“14. According to the Tribunal, the agreement between the respondent-assessee and its Indian affiliate had been effective from January 1, 2010, and if, as contended by the appellant-Revenue, technical knowledge, experience, skill, and other processes had been made available to the Indian affiliate, the agreement would not have run its course for such a long period.

14.1 Notably, this aspect is adverted to in paragraphs 17 to 23 of the impugned order. For convenience, the relevant paragraphs are extracted hereafter (page 463 of 33 ITR (Trib)-OL):

"A perusal of the aforementioned provision shows that in order to qualify as fees for technical services, the services rendered ought to satisfy the 'make



available' test. Therefore, in our considered opinion, in order to bring the alleged managerial services within the ambit of fees for technical services under the India-Singapore Double Taxation Avoidance Agreement, the services would have to satisfy the 'make available' test and such services should enable the person acquiring the services to apply the technology contained therein.. ..

.. . agreement is effective from January 1, 2010 and we are in the assessment years 2018-19 and 2019-20. In our considered opinion, if the assessee had enabled the service recipient to apply the technology on its own, then why would the service recipient require such service year after year every year since 2009 ?

This undisputed fact in itself demolishes the action of the Assessing Officer/Dispute Resolution Panel. The facts on record show that the recipient of the services is not enabled to provide the same service without recourse to the service provider, i.e, the assessee.

In our humble opinion, mere incidental advantage to the recipient of services is not enough. The real test is the transfer of technology and on the given facts of the case, there is no transfer of technology and what has been appreciated by the Assessing Officer/learned Commissioner of Income-tax (Appeals) is the incidental benefit to the assessee which has been considered to be of enduring advantage.

In our understanding, in order to invoke make available clauses, technical knowledge and skill must remain with the person receiving the services even after the particular contract comes to an end and the technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that the receiver can deploy similar technology or techniques in the future without depending upon the provider." (emphasis is ours)

15. We tend to agree with the analysis and conclusion arrived at by the Tribunal.”

10. The view taken by us in *Relx* thus clearly merits the questions proposed being answered in favour of the assessee. The submission



addressed by Mr. Bhatia, learned counsel for the appellant, additionally on Section 9(1)(vi) of the Act must also meet a similar fate and for the following reasons. It becomes pertinent to observe that the provision under Section 9 of the Act would have been attracted, provided they were more beneficial to the assessee. Notwithstanding the above, we find that Section 9 and more particularly Explanation 2 thereof defines the word “royalty” as follows: -

“9. Income deemed to accrue or arise in India.—(1) The following incomes shall be deemed to accrue or arise in India—

(vi) income by way of royalty payable by—

(a) the Government; or

(b) a person who is a resident, except where the royalty is payable in respect of any right, property or information used or services utilised for the purposes of a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India; or

(c) a person who is non-resident, where the royalty is payable in respect of any right, property or information used or services utilised for the purposes of a business or profession carried on by such person in India, or for the purposes of making or earning any income from any source in India;

Provided that nothing contained in this clause shall apply in relation to so much of the income by way of royalty as consists of lump sum consideration for the transfer outside India of, or the imparting of information outside India in respect of, any data, documentation, drawing or specification relating to any patent, invention, model, design, secret formula or process or trade mark or similar property, if such income is payable in pursuance of an agreement made before the 1st day of April, 1976, and the agreement is approved by the Central Government:

Provided further that nothing contained in this clause shall apply in relation to so much of the income by way of royalty as consists of lump sum payment made by a person, who is a resident, for the transfer of all or any rights (including the granting of a licence) in respect of computer software supplied by a non-resident manufacturer along with a computer or computer-based equipment under any scheme approved under the Policy on Computer Software Export, Software Development and Training, 1986 of the Government of India.



Explanation 1.—For the purposes of the first proviso, an agreement made on or after the 1st day of April, 1976, shall be deemed to have been made before that date if the agreement is made in accordance with proposals approved by the Central Government before that date; so, however, that, where the recipient of the income by way of royalty is a foreign company, the agreement shall not be deemed to have been made before that date unless, before the expiry of the time allowed under sub-section (1) or sub-section (2) of Section 139 (whether fixed originally or on extension) for furnishing the return of income for the assessment year commencing on the 1st day of April, 1977, or the assessment year in respect of which such income first becomes chargeable to tax under this Act, whichever assessment year is later, the company exercises an option by furnishing a declaration in writing to the Assessing Officer (such option being final for that assessment year and for every subsequent assessment year) that the agreement may be regarded as an agreement made before the 1st day of April, 1976.

Explanation 2.—For the purposes of this clause, “royalty” means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head “Capital gains”) for—

(i) the transfer of all or any rights (including the granting of a licence) in respect of a patent, invention, model, design, secret formula or process or trade mark or similar property;

(ii) the imparting of any information concerning the working of, or the use of, a patent, invention, model, design, secret formula or process or trade mark or similar property;

(iii) the use of any patent, invention, model, design, secret formula or process or trade mark or similar property;

(iv) the imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill;

(iv-a) the use or right to use any industrial, commercial or scientific equipment but not including the amounts referred to in Section 44-BB;

(v) the transfer of all or any rights (including the granting of a licence) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting; or

(vi) the rendering of any services in connection with the activities referred to in sub-clauses (i) to (iv), (iv-a) and (v);

[*Explanation 3.*—For the purposes of this clause, ‘computer software’ means any computer programme recorded on any disc, tape, perforated media or other information storage device and



includes any such programme or any customized electronic data;].

[*Explanation 4.*—For the removal of doubts, it is hereby clarified that the transfer of all or any rights in respect of any right, property or information includes and has always included transfer of all or any right for use or right to use a computer software (including granting of a licence) irrespective of the medium through which such right is transferred.

Explanation 5.—For the removal of doubts, it is hereby clarified that the royalty includes and has always included consideration in respect of any right, property or information, whether or not—

(a) the possession or control of such right, property or information is with the payer;

(b) such right, property or information is used directly by the payer;

(c) the location of such right, property or information is in India.

Explanation 6.—For the removal of doubts, it is hereby clarified that the expression “process” includes and shall be deemed to have always included transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal), cable, optic fibre or by any other similar technology, whether or not such process is secret”

11. Since the copyright in the application was never transferred or came to vest in a subscriber, we fail to appreciate the contentions which are addressed on the anvil of Section 9 of the Act. This issue, in any case, stands conclusively settled bearing in mind the pertinent observations which were rendered by the Supreme Court in **Engineering Analysis Centre for Excellence vs. CIT**⁹ and have been noticed in *Relx* and have been reproduced hereinabove.

12. We deem it appropriate to additionally observe that the right of subscription to a cloud-based software cannot possibly be said to be equivalent to the ‘use’ or ‘right to use’ any industrial, commercial or scientific equipment. This more so since the respondents sought to place the consideration received under Article 12 (4)(b) and which is specifically excluded from sub-article (3)(b).

⁹ (2022) 3 SCC 321



13. The argument based upon Article 12(4)(a) also cannot sustain since the same pertains to payments received as consideration for managerial, technical or consultancy services and which are ancillary or subsidiary to enjoyment of the right, property or information referable to paragraph 3. This again would be founded upon the payment foundationally falling within the ambit of royalty as defined therein.

14. Similar would be the position which would obtain bearing in mind the unambiguous language in which Article 12(4)(b) of the DTAA is couched. Article 12(4)(b) would have been applicable provided the appellants had been able to establish that the assessee had provided technical knowledge, experience, skill, knowhow or processes enabling the subscriber acquiring the services to apply the technology contained therein. The explanation of the assessee, and which has gone unrefuted even before us, was that the customer is merely accorded access to the application and it is the subscriber which thereafter inputs the requisite data and takes advantage of the analytical attributes of the software. This would clearly not fall within the ambit of Article 12(4)(b) of the DTAA.

15. In any event, clauses (a), (b) and (c) are factors which must be found to exist in addition to the consideration for service being relatable to the provision of managerial, technical or consultancy services. This is clearly evident from Article 12 (4) using the expression “*if such services....*”. However, once we have found that the principal conditions spelt out in Article 12(4) are themselves not satisfied, this issue would pale into insignificance.

16. Before parting, we deem it expedient to notice Explanation 4 to Section 9(1)(vi) of the Act which reads as follows:-



“Explanation 4.—For the removal of doubts, it is hereby clarified that the transfer of all or any rights in respect of any right, property or information includes and has always included transfer of all or any right for use or right to use a computer software (including granting of a licence) irrespective of the medium through which such right is transferred.”

17. It becomes pertinent to observe that Explanation 4 in essence introduces a deeming fiction and includes transfer of all or any rights “for use” or “to use” a computer software including by way of a license irrespective of the medium through which such right is transferred. Significantly, the DTAA does not bring within its sweep a right for use or a right of use of a computer software.

18. We, accordingly, find that the view taken by the ITAT merits no interference. We find that the appeals raise no substantial question of law. The appeals shall consequently stand dismissed.

YASHWANT VARMA, J.

PURUSHAINDR KUMAR KAURAV, J.
FEBRUARY 14, 2024/RW