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

+ ITA 278/2024

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

Through: Mr. Puneet Rai, SSC along with
Mr. Ashvini Kumar, Mr.
Rishabh Nangia, SCs and Mr.
Nikhil Jain, Adv.

versus

EY GLOBAL SERVICES LTD. Respondent

Through: Mr. Kamal Sawhney, Mr.
Nishank Vashistha, Mr. Nikhil
Garwal and Mr. Puru Medhira,
Adv.

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+ ITA 279/2024

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

Through: Mr. Puneet Rai, SSC along with
Mr. Ashvini Kumar, Mr.
Rishabh Nangia, SCs and Mr.
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versus

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Through: Mr. Kamal Sawhney, Mr.
Nishank Vashistha, Mr. Nikhil
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+ ITA 280/2024

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

Through: Mr. Puneet Rai, SSC along with



Mr. Ashvini Kumar, Mr.
Rishabh Nangia, SCs and Mr.
Nikhil Jain, Adv.

versus

EY GLOBAL SERVICES LTD.

..... Respondent

Through: Mr. Kamal Sawhney, Mr.
Nishank Vashistha, Mr. Nikhil
Garwal and Mr. Puru Medhira,
Advs.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR

KAURAV

ORDER

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14.05.2024

CM APPL. 28671/2024 (Ex.) in ITA 278/2024

CM APPL. 28673/2024 (Ex.) in ITA 279/2024

CM APPL. 28754/2024 (Ex.) in ITA 280/2024

Allowed, subject to all just exceptions.

Applications are disposed of.

CM APPL. 28672/2024 (63 Days Delay in Refiling) in ITA 278/2024

CM APPL. 28674/2024 (63 Days Delay in Refiling) in ITA 279/2024

CM APPL. 28755/2024 (63 Days Delay in Refiling) in ITA 280/2024

1. Bearing in mind the disclosures made, the delay of 63 days' in re-filing the appeals is condoned.

2. Applications shall stand disposed of.

ITA 278/2024, ITA 279/2024 & ITA 280/2024

3. The Principal Commissioner assails the validity of the order dated 25 September 2023 passed by the Income Tax Appellate Tribunal ['ITAT'] and posits the following questions for our



consideration:-

“i. Whether, in the facts and circumstances of the case and in law Hon'ble ITAT is correct in holding that the amounts received by EYGBS(UK) for providing bundle of software hosted on Common platform to its associate group Entities is covered under the law laid down by SC in Engineering Analysis Centre of Excellence Private Limited vs CIT 432 ITR 471 (SC)?

ii. Whether, in the facts and circumstances of the case and in law Hon'ble ITAT is correct in holding that for taxing the amount received by EYGBS(UK) from EYGBS(India) as Royalty, transfer of copyright in software is essential without considering the fact that transactions of the Respondent does not fall in the four categories as mentioned in Para 4 of the decision of Engineering Analysis(supra)?

iii. Whether, in the facts and circumstances of the case and in law Hon'ble ITAT is correct in holding that for taxing the amount received by EYGBS(UK) from its member firms is squarely covered by the judgement of Supreme Court in case of Engineering Analysis(supra) even though there is no direct transfer of off the shelf software from the third party vendor to end user in the present case?

iv. Whether on the facts and in the circumstances of the case, and in law, the Hon'ble ITAT is correct in not considering the special provisions of section 14(b)(ii) of Indian Copyright Act- 1957 applicable for computer programme ignoring the established law that special provisions override the general provision?

v. Whether on the facts and circumstances of the case, and in law, the Hon'ble ITAT erred in interpreting the law on royalty after the judgement of Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Private Limited vs Union of India in such a way that leads to a situation where owner of intellectual property rights in software ('EYGSL') is able to fully, commercially exploit the IPR without earning any remuneration in the form of royalty from the concerned market ('India')?

vi. Whether on the facts and circumstances of the case, and in law, the Hon'ble ITAT has erred in not appreciating the new digital reality wherein an IPR in software or any digital product can be exploited commercially at its fullest without impinging upon the old-world rules based on traditional copyright that recognized royalty only when modification or reproduction rights were transferred?

vii. Whether on the facts and circumstances of the case and in law, amounts received by EYGBS(UK) for providing Bundle of software hosted on common platform to its Associated Group Entities is also taxable as equipment royalty under the provisions of the Act and DTAA?”



4. We take note of the following findings which have come to be rendered by the ITAT and which are in essence based on the judgment rendered in **Engineering Analysis Centre for Excellence Private Limited vs. CIT & Anr** [(2022) 3 SCC 321]:-

“3. We also further find that the Ld. CIT(A) following the decision of the Delhi High Court in assessee's own case and also the decision of the Tribunal for the assessment years 2012-13 to 2015-16 in ITA No.7017 to 7020/2010 held that software license fees and maintenance charges are not royalty. It was also held that global technology charges and GWAN connectivity charges are not royalty under India UK DTAA observing as under:

“8. Ground no. 2 is against the taxation of receipts towards Software license and maintenance charges amounting to Rs. 12,32,61,326/- as Royalty under the Act as well as treaty.

8.1 The AO's order is based on the ruling of Hon'ble AAR treated software license and maintenance charges received by the appellant of Rs. 12,32,61,326/- for giving right to use of computer software in the nature of royalty under the Act as well as India-UK DTAA.

8.2 It has been submitted that the appellant, being a central service provider, has entered into master license agreement with third party vendors like Microsoft, IBM Corp, Kontiki, etc. Pursuant to the said agreements, the appellant is permitted to enable access for use of software's to its Affiliates as well (tie, each, Affiliate does not own the licence but is granted access to use it). It has been informed such software's are bundled together and loaded on servers located at places outside India and thereby a 'standard facility' is created by the appellant so that all EY Member Firms use common 'software applications' loaded on appellant's servers for easy integration and compatibility. It is contended that the payments received by the appellant are pursuant to right to access a bundle of software applications and not for any right to reproduce or make copies of these applications or make commercial use of the same; the appellant neither gets nor does it provide the member firms the source code or object code pertaining to the software applications and it merely grants right to use the computer software product i.e., copyrighted product and not right to use of copyright of the computer software. Relying upon various case laws and in particular Hon'ble Supreme Court Judgment in Engineering Analysis Centre



of Excellence Private Limited [TS-106- SC-2021], it is contended that the impugned receipt does not amount to Royalty. It is further argued relying upon various case laws that the nature of payment was pure reimbursement and the same was not taxable on this ground as well.

8.3 The appellant has drawn attention to the Hon'ble Delhi High Court's order dated 09.12.2021 in WP(C) 11957/2016 & CM 27602/2021 wherein the High Court has allowed the writ filed by the appellant against the ruling of Hon'ble AAR by setting aside the ruling of the AAR and the Hon'ble Court held that the payment received by appellant for providing access to computer software to its members firms in India does not amount to Royalty liable to be taxed in India under the Act and India UK DTAA. A copy of the order has been filed.

8.4 My attention has also been drawn to the fact that the Hon'ble ITAT has also allowed the appeal of the appellant for AYS 2012-13 to AY 2015-16 In ITA nos. 7017-7018-7019-7020/Del/2019 and directed the AO to follow the order passed by Hon'ble Delhi HC in favour of the assessee. A copy of the order has been filed. It is further informed that the Hon'ble HC has dismissed the appeal filed by department against the said ITAT order. A copy of order of Hon'ble Delhi High Court dated 09.01.2023 has been filed.

8.5. It has been shown that following the order of Hon'ble Supreme Court in Engineering Analysis Centre of Excellence Pvt. Ltd. [TS-106-SC-2021] and Hon'ble Delhi High Court in appellant's own case, the AO in AY 2020-21 and AY 2021-22 has not taxed Software and Maintenance charges as income. Copy of assessment order dated 26.09.2022 for AY 2020-21 & 26.12.2022 for AY 2021-22 has been filed.

8.6 Respectfully following the order of Hon'ble Supreme Court in Engineering Analysis Centre of Excellence Pvt. Ltd. [TS-106-SC-2021] and Hon'ble Delhi High Court in appellant's own case in WP(C) 11957/2016 & CM 27602/2021 and considering the fact that the AO has himself, in AY 2020-21 and AY 2021-22, not taxed Software and Maintenance charges as income, the addition of Rs. 12,32,61,326/- is deleted. This ground is allowed.

9. Ground no. 4 is against treatment of Global technology charges and GWAN connectivity charges amounting to Rs. 9,61,53,543/- and Rs. 14,45,41,444/- respectively as



"royalty" under the Act and the treaty.

9.1 It has been explained that Global technology charges include manpower support charges for development and maintenance of IT application and other related infrastructure cost including hardware cost and cost of servers etc. The GWAN Connectivity charge is about network connectivity; the office site gets connected to the network and the charges for the connectivity are based on bandwidth required by the office.

9.2 Relying upon the ruling of AAR, the AO taxed these charges as Royalty under the Act and India-UK DTAA.

9.3 As already discussed, the Hon'ble Delhi High Court's in its order dated 09.12.2021 in WP(C) 11957/2016 & CM 27602/2021 set aside the ruling of the AAR and the Hon'ble Court held that the payment received by appellant for providing access to computer software to its members firms in India does not amount to Royalty liable to be taxed in India under the Act and India-UK DTAA.

9.4 Further, the Hon'ble ITAT has also allowed the appeal of the appellant for AYs 2012-13 to AY 2015-16 in ITA nos. 7017-7018-7019-7020/Del/2019 and directed the AO to follow the order passed by Hon'ble Delhi HC in favour of the assessee. Furthermore, the Hon'ble HC has dismissed the appeal filed by department against the said ITAT order.

9.5 It is observed that following the order of Hon'ble Supreme Court in Engineering Analysis Centre of Excellence Pvt. Ltd. [TS-106-SC-2021] and Hon'ble Delhi High Court in appellant's own case, the AO in AY 2020-21 and AY 2021-22 has not taxed Global technology charges and GWAN connectivity charges as income.

9.6 Respectfully following the order of Hon'ble Supreme Court in Engineering Analysis Centre of Excellence Pvt. Ltd. [TS-106-SC-2021] and Hon'ble Delhi High Court in appellant's own case in WP(C) 11957/2016 CM 27602/2021 and considering the fact that the AO has himself, in AY 2020-21 and AY 2021-22, not taxed Global technology charges and GWAN connectivity charges as income, the addition of Rs. 9,61,53,543/-and Rs. 14,45,41,444/-respectively is deleted. This ground is allowed.

4. On careful perusal of the order of the Ld. CIT(Appeals), we observe that the issues have been decided by Ld. CIT(A) in favour of the assessee following the decision of the Hon'ble Delhi High Court



in assessee's own case and also the decision of the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Pvt. Ltd. Vs. CIT (supra) and, therefore, we see no infirmity in the order passed by the Ld.CIT(A) in holding that receipts towards software license and maintenance charges, global technology charges and GWAN connectivity charges are not royalty under the IT Act and also under India UK DTAA. Thus, we sustain the order of the Ld. CIT(A) and reject the grounds raised by the Revenue.”

5. We also take note of the orders passed by this Court in ITA Nos. 444/2022 and 447/2022 [**CIT(International Taxation) – 1, New Delhi vs. EY Global Services Ltd.**], and in which we had taken an identical view.

6. In view of the above, we find that the appeals fail to raise any substantial of question of law. They shall consequently stand dismissed.

YASHWANT VARMA, J.

PURUSHAINDRA KUMAR KAURAV, J.

MAY 14, 2024/RW