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

+ **ITA 165/2024**

**THE COMMISSIONER OF INCOME TAX -
INTERNATIONAL TAXATION -3**

.....Appellant

Through: Mr. Ruchir Bhatia, SSC along
with Mr. Anant Mann, JSC and
Mr. Pratyaksh Gupta, JSC.

versus

TSYS CARD TECH LTD.

.....Respondent

Through: Mr. Kamal Sawhney, Mr. Arun
Bhadauria, Mr. Puru Medhira
and Mr. Nishank Vashistha,
Advs.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

HON'BLE MR. JUSTICE RAVINDER DUDEJA

ORDER

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16.07.2024

CM APPL.14250/2024 (204 Days Delay in refiling)

Bearing in the mind the disclosures made, the delay of 204 days' in re-filing the appeal is condoned.

The application shall stand disposed of.

ITA 165/2024

1. This appeal is directed against the order of the Income Tax Appellant Tribunal ['Tribunal'] dated 07 November 2022 and posits the following questions of law for our consideration:-

“2.1 Whether on facts and circumstances of the case, ld. ITAT has erred in holding that revenue earned by the Assessee from the Indian Customers on account of provision of software (PRIME) related services including implementation enhancement, annual



maintenance, consultancy service, training and other related activities are not taxable as FTS being related to software (PRIME) which is itself not taxable, without appreciating the fact that these services involve human intervention and skill entail application of the technology contained therein to enable the end users to independently use the products and considering the technical expertise involved in such service in respect of specialize products, these service duly make the technical knowledge, experience and know how available to the user?

2.2 Whether on the facts and circumstances of the case, Ld. ITAT has erred in clubbing the software and related service like training and related activities without appreciating the fact that the nature of both the receipt are different and their treatment for the tax purpose has to be decided according to their nature only?

2.3 Whether on the facts and circumstances of the case, Ld. ITAT has erred in holding that revenue earned by the Assessee from the Indian Customer on account of provisions of software (PRIME) related service including implantation, Enhancement, annual maintenance, consultancy service, training and other related services are not taxable as FTS being related to software (PRIME) which is itself not taxable without appreciating the fact that as per the Agreements the Licensor (the Assessee) shall provide various implementation, enhancement, maintenance and consultancy service to the user for its products and shall train the nominated personnel of the licensee on all PRIME related system and solutions under agreements which depicts clearly that the Assessee has made available the technical knowledge, experience and know how to its customers so as to enable them independently use the products thereby satisfying the 'make available' threshold as envisaged under Article 13 of the India U.K. DTAA?

2.4 Whether on the facts and circumstances of the case, the Ld. ITAT erred in deleting the addition on account of reimbursement of expense made by the AO without appreciating the fact that during the verification by the AO at the time of finalization of assessment proceedings the Assessee failed to provide the underlying documents/invoices in support of its claim?"

2. For the purposes of disposal of this appeal, we deem it appropriate to notice the following salient facts. The respondent-assessee is stated to be a company engaged in the business of providing information technology related services to the financial payments industry. It had purportedly earned revenue from rendition of software licenses and provision of software related services, including implementation, enhancement, maintenance and annual



consultancy services.

3. The respondent-assessee had filed its Return of Income on 29 September 2020 declaring 'nil' income, subsequent to which the case was selected for scrutiny assessment and notice had been issued under Section 143(2) of the Act.

4. Thereafter, the Assessing Officer ['AO'] in its Draft Assessment Order proposed additions of (i) INR 5,21,17,082/- for software license fee, (ii) INR 12,01,30,877/- on account of fee for provision for other related parties and (iii) INR 7,24,821/- on account of receipt in the nature of reimbursement as income from Fees for Technical Services ['FTS'] as per the provisions of the Income Tax Act, 1961 ['Act'] as well as the Double Taxation Avoidance Agreement ['DTAA'] between India and the United Kingdom.

5. The addition of INR 5,21,17,082/- came to be deleted by the Dispute Resolution Panel ['DRP'], pursuant to which a final rectified assessment order was framed by the AO on 19 December 2022 which gave effect to the directions of the DRP and assessed the total income at INR 12,08,55,698/-.

6. The impugned order of the Tribunal deleted the additions made by the AO and allowed the appeal of the respondent-assessee, observing that training and related activities concerned with utilisation and installation of software cannot be held to be FTS when the software itself is not taxable. It was additionally held that the sum of INR 7,24,821/- was incorrectly taxed as FTS despite the said issue being remanded to the AO for verification of reimbursement of the aforementioned amount as travelling and lodging expenses.

7. The pertinent observations of the Tribunal are being reproduced hereinbelow:-



“8. Having gone through the agreement since the user has no right to make copies or commercially exploit the right in the copyright of such software the Id DRP following the ratio 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) directed to 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. The Id DRP held that 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.

9. However, the Id DRP held that the second set of receipts of Rs. 12,01,30,877 on account of provision of other related services, it is well settled that such services from a distinct set of receipts which need to be examined independently in terms of their taxability or otherwise under specific Article 13 (Royalty/FTS) and cannot be clubbed as business income under Article 7 of the DTAA. The Id DRP held that taxable under Article 13 India-UK DTAA under the head 'FTS'. The Id DRP held that the make available clause under Article 13 are also stand satisfied. The main argument taken before us is that the other related services provided are in connection with utilization of the software (PRIME) which are intricately and extricably associated. The services are in respect of training programme and updations in-connection with utilization of the software PRIME. Hence, we hold that when software itself is not taxable, the training and the related activities concerned with utilization and installation cannot be held to be FTS. Further, simply latching on to use of words "Make Available" in the agreement, it cannot be said that conditions of Article 13(4)(c) are satisfied. Burden is on the Revenue to demonstrate that make available condition is satisfied. Appeal of the assessee on Ground Nos. 4 and 5 are allowed.

10. With regard to the ground No. 6 pertaining to reimbursement of Rs. 7,24,821/- we find that the Id DRP has remanded the matter to the AO to examine travelling and lodging expenses reimbursed. However, the AO has wrongly taxed the same under FTS. Hence, the action of the AO cannot be supported. The addition made is hereby directed to be deleted.”

8. Having heard learned counsel for the appellant, we find that insofar as Question 2.1 is concerned, it is conceded that the same would have to be answered in favour of the respondent-assessee bearing in mind the judgment rendered by the Supreme Court in



Engineering Analysis Centre of Excellence (P) Ltd. v. CIT [(2022) 3 SCC 321].

9. We deem it apposite to extract the following pertinent observations rendered in *Engineering Analysis*:

“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 Article 12 of the DTAAs 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 assessee, 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.”

10. Insofar as Question 2.3 is concerned, we find that the issue stands concluded bearing in mind the judgment rendered by the Court in **The Commissioner Of Income Tax - International Taxation -3**



v. Salesforce.com Singapore PTE LTD. [ITA 144/2023] where the following observations were rendered:

“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/licensee 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. Licencee 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 Infrasoftware and only Infrasoftware 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 Infrasoftware.

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** when it



observed:-

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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).

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.”

11. Consequently, we find that no substantial question of law arises. The appeal fails and shall stand dismissed.

YASHWANT VARMA, J.

RAVINDER DUDEJA, J.

JULY 16, 2024/RW