

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D" NEW DELHI

BEFORE SHRI G.S. PANNU, HON'BLE VICE PRESIDENT
AND
SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER

आ.अ.सं./I.T.A No.1992/Del/2022
निर्धारणवर्ष/Assessment Year:2012-13

ACIT, Circle 2(2), International Taxation, New Delhi.	बनाम Vs.	Newspage Pvt. Ltd., C/o Accenture Solutions P. Ltd., Godrej and Boyce Complex, LBS Marg, Vikhrali West, Mumbai, Maharashtra. PAN No.AADCN2660H
अपीलार्थी Appellant		प्रत्यर्थी/Respondent

Revenue by	Shri Sanjay Kumar, Sr. DR
Assessee by	Shri Nikhil Tiwari, CA

सुनवाईकीतारीख/ Date of hearing:	13.09.2023
उद्घोषणाकीतारीख/Pronouncement on	08.12.2023

आदेश /O R D E R

PER C.N. PRASAD, J.M.

This appeal is filed by the Revenue against the order of the Ld.CIT(Appeals)-43, Delhi dated 06.06.2022 for the AY 2012-13. It is observed from the record that the assessee initially filed appeal with the following grounds of appeal which are mentioned in Form No. 36:

1. *“Whether, on the facts and in the circumstances of the case and in law, the Ld.CIT(A) has justified in holding that the consideration receipts by the assessee from Pepsico India Holdings Ltd. and ITC Limited on account of sale of software licenses is not royalty within the meaning of Article 12(3) of the India-Singapore DTAA.*
 2. *Whether, on the facts and in the circumstances of the case and in law, the Ld.CIT(A) has justified in holding that the support and maintenance services and customization services is not royalty/FTS within the meaning of Article 12(3) of the India-Singapore DTAA.*
 3. *The appellant craves to add, amend, modify or alter any grounds of appeal at any time or before the hearing of the appeal.”*
2. Subsequently, the Revenue filed revised grounds which are as under:

- “ (i) Whether on facts and in the circumstances of the case and in law, the Ld. CIT(A) was justified in holding that the consideration receipts by the assessee from Pepsico India Holding Ltd and ITC Limited on account of sale of software license is not royalty within the meaning of Article 12(3) of the India-Singapore DTAA.*
- (ii) Whether on facts and in the circumstances of the case and in law, the Ld. CIT(A) was justified in holding that the support and maintenance services and customization services is not Royalty/FTS within the meaning of Article 12(3) of the india-Singapore DTAA.*
- (iii) Whether on facts and in the circumstances of the case and in law, the Ld. CIT(A) was justified in admitting the appeal of the assessee on the issue of taxability of the receipts which have been shown as chargeable to tax in India by the assessee in the*

return of income filed in response to the Notice u/s 148 of the Income Tax Act.

- (iv) *Whether on facts and in the circumstances of the case and in law the Ld. CIT(A) was justified in accepting and allowing a claim which has resulted into reducing the income below the returned income and also in the eligibility to refund of the amount in respect of which assessee has never filed a claim in accordance with the provisions of the Income Tax Act.*
- (v) *Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) was justified in admitting and allowing the appeal on non maintainable grounds and thereby rendering the proceedings u/s 148 of the Income Tax Act to the benefit of the assessee and prejudicial to the Revenue which contravenes the observations of the Hon'ble Supreme Court in the case of CIT Vs Sun Engineering Works (198 ITR 297 SC).*
- (vi) *Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) was justified in accepting and allowing the claim in an appeal u/s 246 of the Income Tax Act, which claim is not allowable under any provisions of the Income Tax Act, including the provisions of section 139(5) of the Income Tax Act as held by the Hon'ble Supreme Court in the case of Pr CIT-III Bangalore Vs Wipro (CA No 1449 of 2022)."*

3. On perusal of the authorization dated 11.08.2022 of the Ld.CIT (International Taxation)-2, the Ld.CIT authorized the AO to file appeal on the following grounds:

- 1. *"Whether on facts and in the circumstances of the case and in law, the Ld.CIT(A) has justified in holding that the consideration receipts by the assessee from Pepsico India Holdings Ltd. and LTC Limited on account of sale*

of software licenses is not royalty within the meaning of Article 12(3) of the India-Singapore DTAA.

2. *Whether on facts and in the circumstances of the case and in law, the Ld.CIT(A) has justified in holding that the support and maintenance services and customization services is not royalty/FTS within the meanings of Article 12(3) of the India-Singapore DTAA.*
3. *The appellant craves to add, amend, modify or alter any grounds of appeal at any time or before the hearing of the appeal.”*
4. On perusal of the record, we noticed that though the Revenue has filed revised grounds vide letter dated 04.07.2023, there was no authorization of the Ld. Commissioner to file the revised grounds at Sl. Nos. (iii) to (vi). Thus, ground nos. (iii) to (vi) of revised grounds which have been filed without any authorization of the Ld.CIT are not maintainable and the same are dismissed.
5. We confine our decision only to ground no.(i) and (ii) of the original as well as the revised grounds in which the Revenue challenged the order of the Ld.CIT(A) in holding that the receipts by the assessee from Pepsico India Holding Ltd. and ITC Limited on account of sale of software license is not royalty within the meaning of Article 12(3) of India Singapore DTAA and also in holding that the support and maintenance services and customization services are not royalty/FTS within the meaning of Article 12(3) of the India Singapore DTAA.

6. The Ld. Counsel for the assessee, at the outset, submits that the issue in ground nos. 1 and 2 is squarely covered by the decision of the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Pvt. Ltd. Vs. CIT (125 taxmann.com 42). The Ld. Counsel submits that the Hon'ble Supreme Court held that the payments made towards sale of software whether stand alone or embedded not resulting in use of copyright in the software by the payer does not amount to royalty in the hands of foreign software supplies in view of beneficial provisions of the applicable tax treaty and consequently such payments are not taxable in the hands of non-resident payee in India. Ld. Counsel submits that the Ld.CIT(A) following the decision of the Supreme Court allowed the claim of the assessee and, therefore, the same may be sustained.

7. Ld. DR strongly placed reliance on the orders of the authorities below.

8. Heard rival submissions, perused the orders of the authorities below.

9. On perusal of the order of the Ld.CIT(A), we find that the Ld.CIT(Appeals) following the decision of the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Pvt.

Ltd. Vs. CIT (supra) held that the receipts by way of sale of copyrighted software license are not taxable as royalty. Ld.CIT(A) also held that receipts by way of sale of software license and receipts from provisions of services cannot be assessed as royalty/FTS income in the hands of the assessee observing as under:

“5.5.2 I have carefully perused the materials on record, the contention of the AO and the submissions of the Appellant. On reading of customer agreement and invoices submitted, it is observed that appellant has earned income from sale of copyrighted software license and customization and support services. The terms of agreement of the appellant are similar to End User License Agreement in the case of Engineering Analysis (supra).¹¹ find that no copyright is transferred by the appellant the relevant extract of customer agreement evidencing the same is as under:

“All rights, title and interest in and to the software including without limitation any patent, copyright, registered design, trade mark, goodwill or other Industrial or intellectual property rights in connection therewith (‘Newspage IP’) shall vest solely and absolutely in Newspage or its licensors and no additional right or license shall be tinted to customer by implication, estoppel or otherwise.

In particular, but without limitation, save as expressly provided hereunder, Customer shall not without Newspage’s prior consent (i) translate any portion of the software into any other format or language or otherwise modify, adapt, alter, translate, or create derivative work from the software; (ii) rent, lease, timeshare or otherwise grant access to the software or its results or sublicense, distribute or otherwise transfer the software to any third party or (iii) alter, modify, reproduce or create derivative works or adaptations

of the software, or any part thereof, or merge the software with other software; (iv) reverse engineer, decompile, disassemble or otherwise attempt to derive the source code for the software, except and only to the extent that such activity is expressly permitted by applicable law notwithstanding this limitation (but in such instance only upon prior notification to Newspaper)

5.5.3 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 license 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 license 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 DTAA. Merely authorizing 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. Accordingly, in my view, receipts on account of sale of software license, is squarely covered by the decision of Hon'ble Apex Court in the case of Engineering Analysis (supra). Hence, I hold t receipts by way of sale of copyrighted software license are not taxable as royalty.

5.5.4 Further, with respect receipts on account of provision of services i.e. customization and support services, I find that these are standardizes

services provided remotely over calls and emails. As per the customer agreements, Appellant is not responsible for correcting errors caused by modification, revision, variation or alteration of software which is not performed by Appellant. The relevant extract of customer agreement evidencing the same is as under:

“The Support Services, however, do not include the following items:

(a) Support call., or emails with the end users directly, NewsPage shall support the ITC's appointed IT coordinator,

(b) Corrections of Errors caused by the operation of the Software in the manner o than as specified in its Documentation,

(c) Corrections of Errors caused by modification, revision, variation, translation alteration of the Software no performed by Newspage;

(d) Training of end users

(e) Correction of Error caused by fault in the in the hardware on which the Software is installed, or my telecommunication failure, degradation or disruptions, or in any other infrastructure;

(f) Diagnosis or corrections of fault not associated with the Software,

(g) Furnishing, supplies, consumables or associated items to be used hardware on which the software is installed; and/or

5.5.5 Further, in order to tax such services as FTS, it needs to make available technical knowledge, experience, skill, know how or process which enables the person acquiring the services to apply the technology contained therein. I find that these services are standardised and are not making available any technical knowledge. Further, the same are ancillary and inextricably to sale of software license. As the software

license itself is not royalty, accordingly the same should not be taxable as royalty /FTS.

5.5.6 By respectfully following the decisions of decision of Mumbai ITAT in the case of NetCracker Technology Solutions Inc (supra) Jurisdictional ITAT in the case of Halliburton Export (supra) and Soregam SA (supra) hold that receipts by way of sale of software license and receipts from provision of services cannot be assessed as royalty/FTS income in the hands of Appellant. Accordingly, the Ground No. 5 of Appeal is decided in appellant's favour."

10. On careful perusal of the Ld.CIT(Appeals) order, we do not see any infirmity in the order of the Ld.CIT(A) who has followed the decision of the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Pvt. Ltd. Vs. CIT (supra) in holding that software license and receipts from provisions of services cannot be assessed as royalty/FTS in the hands of the assessee. Thus, the order of the Ld.CIT(A) is sustained and ground nos. 1 & 2 of the Revenue are rejected.

11. In the result, appeal of the Revenue is dismissed.

Order pronounced in the open court on 08/12/2023

Sd/-
(G.S. PANNU)
VICE PRESIDENT

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER

Dated: 08/12/2023

*Kavita Arora, Sr. P.S.

Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT
(DR)/Guard file of ITAT.

By order

Assistant Registrar, ITAT: Delhi Benches-Delhi