

**IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'D' BENCH,
NEW DELHI**

**BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
MS. ASTHA CHANDRA, JUDICIAL MEMBER**

ITA No. 8769/DEL/2019 [A.Y 2016-17]

**GSX SARL
Flat No. 16, Nehru Apartments,
Outer Ring Road, Kalkaji
Near Chittaranjan Park,
New Delhi**

Vs.

**The A.C.I.T.
Circle, International
Taxation 1(3)(1)
New Delhi**

PAN: AAECG 4668 D

(Applicant)

(Respondent)

**Assessee By : Shri Anshul Kumar, CA
Shri Satish Kumar, CA**

Department By : Ssanjay Kumar, Sr. DR

**Date of Hearing : 02.06.2022
Date of Pronouncement : 02.06.2022**

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:-

This appeal by the assessee is preferred against the order of the
Id. CIT(A) - 42 New Delhi dated 30.08.2019 pertaining to Assessment
Year 2016-17.

2. The sum and substance of the grievance of the assessee is that the Id. CIT(A) erred in confirming the action of the Assessing Officer in making addition of Rs. 86,01,802/- considering the same to be in the nature of royalty.

3. Briefly stated, the facts of the case are that the assessee is a company incorporated in Switzerland and is engaged in the business of providing solutions for Microsoft Office 365 users.

4. During the year under consideration, the assessee derived Rs. 4,30,552/- as technical fee of Rs. 86,01,802/- as software user fee from India. The technical fee of Rs. 4,30,552/- was offered to tax in India @ 10% which is the applicable rate for FTS under the India - Switzerland DTAA. However, the software user fee has not been treated as taxable in India.

5. During the course of scrutiny assessment proceedings, the assessee was asked to explain as to why software user fee should not be treated as royalty.

6. The assessee explained that what is being provided by it is the outcome of that knowledge and expertise in the form of software product rather than providing knowledge and expertise itself to the customers. It was explained that the assessee sells standard software to its customers. However, at the same time, the assessee has not provided any license to reproduce or make copies of the assessee's standard software. The assessee only gives right to use software by transfer of such licenses to its customers i.e. use of copy righted article and no rights in the copy of software were granted by the assessee.

7. This contention of the assessee that it is the case of copy righted article and that no rights in the copy right of the software were granted by the assessee was not accepted by the Assessing Officer who was of the firm belief that the impugned receipts are royalty in lieu of supply of software and treated the amount of Rs. 86,01,802/- as royalty.

8. The assessee carried the matter before the Id. CIT(A) and reiterated its contentions that it a case of copy righted article and that no right in the copy right of the software were granted by the assessee.

9. Though the Id. CIT(A) accepted the contention of the assessee that software is a copy righted article, but still held that payments were received by the assessee for use of its software products are in the nature of royalty basis the following:

- (i) Payment for use of software is for use or right to use secret formula or process; and
- (ii) Payment for use of software is for industrial/commercial knowledge of the assessee.

10. Before us, the Id. AR reiterated what has been stated before the lower authorities.

11. On the other hand, the Id. DR strongly supported the findings of the Assessing Officer.

12. We have carefully considered the orders of the authorities below. We are of the considered view that this entire quarrel has now been settled by the decision of the Hon'ble Supreme Court in the case of Engineering Analysis Center of Excellence Pvt Ltd. [2021] 432 ITR 471 wherein the Hon'ble Supreme Court, in a bunch of appeals, conclusively held as under:

"168. Given the definition of royalties contained in Article 12 of the DTAAAs mentioned in paragraph 41 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(l)(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.

169 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.

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

13. Respectfully following the aforesaid decision of the Hon'ble Apex Court [supra], we direct the Assessing Officer to delete the impugned addition.

14. In the result, the appeal of the assessee in ITA No. 8769/DEL/2019 is allowed.

The order is pronounced in the open court on 02.06.2022.

Sd/-

[ASTHA CHANDRA]
JUDICIAL MEMBER

Sd/-

[N.K. BILLAIYA]
ACCOUNTANT MEMBER

Dated: 02nd June, 2022.

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

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Date on which the typed draft is placed before the dictating Member	
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Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
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