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

Before Shri Challa Nagendra Prasad, Judicial Member
&
Dr. B. R. R. Kumar, Accountant Member

ITA No. 915/Del/2023 : Asstt. Year: 2020-21

Finastra International Financial Systems PTE Ltd., 5, Shenton Way, 12-01/04, UIC Building, Singapore 068808	Vs	The ACIT(International Taxation), Circle-1(3)(1), Delhi
(APPELLANT)		(RESPONDENT)
PAN No. AAICM 2959 D		

Assessee by : Sh. Suryanarayan, Sr. Adv.
Ms. Mansa, Adv.
Revenue by : Sh. Vizay B. Vasanta, CIT-DR

Date of Hearing: 01.01.2024		**Date of Pronouncement: 02.01.2024**

ORDER

Per Dr. B. R. R. Kumar:-

The present appeal has been filed by the assessee against the order of Assessing Officer dated 30.01.2023 for the A.Y. 2020-21.

2. The assessee has raised the following grounds of appeal are as under:-

> *"1. That the order of the Respondent/Assessing Officer ('AO' for short) dated 30.01.2023, passed under section 143(3) read with Section 144C of the Income Tax Act, 1961 (the Act), pursuant to the directions of the learned Dispute Resolution Panel ('the DRP' for short), is bad in law, contrary to the facts and circumstances of the case, provisions of the Act and the India-Singapore Double Taxation Avoidance Agreement ("the DTAA"), and is liable to be set aside.*
>
> *2. That the AO, contrary to the facts of the case and material on record, erred in assessing the income of the Appellant at Rs.*

23,21,52,964/-, by treating the receipts to be in the nature of 'royalty' under Section 9(1) (vi) of the Act as well as Article 12(3) of the DAA.

3. That the AO erred on facts and in law in treating the receipts from sale/distribution of software in the hands of the Appellant as 'royalty' without appreciating the settled principles laid down by the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Private Limited v. CIT and another, (2021) 125 taxmann.com 42 (SC), which is squarely applicable to the present case

4. That the AO failed to appreciate that the Appellant is a mere distributor of the software and that ownership of the copyright continues to remain with the original owner of the software, throughout the term of the agreement. Therefore, the Appellant grants only the use of the software with limited, non-exclusive and non-transferable right to third party and thus, involves only the sale of the copyrighted article.

5. That the AO, contrary to the facts of the case and material on record, grossly erred in holding that the Indian Associated Enterprise ('AE' for short) has the authority to reproduce the software and has therefore received the source code, when in fact, no right in the software, much less the source code was parted with the Indian distributor.

6. That the AO ought to have appreciated that the right to "reproduce" merely pertains to duplication of software and does not lead to the conclusion that source code in the software is parted with.

7. That the AO ought to have appreciated that the Appellant is merely the sub-licensor of the software and does confer the AE/third party any rights on the source code.

8.That in any event, the AO erred in misinterpreting the agreement between the Appellant and its AE by misconstruing the AE to be a sub-licensor, when in fact, the Appellant is the sub-licensor and AE is the distributor.

9. That therefore, proceeding on the above erroneous footing, the AO erred in holding that (i) the AE is permitted development on the software for further sale, thereby excluding it from the definition of shrink wrapped software; (ii) the AE is rendering reverse training and associated services, and consequently arrived at incorrect conclusions.

10. That the AO grossly erred in misinterpreting clause 12 of the agreement between the Appellant and its AE and alleging that the

clause mentions the copies of the software for onward sale, without appreciating that the clause does not confer any right to make copies and explicitly states that the ownership remains with the licensor.
11. That the AO grossly erred in misinterpreting the facts of this case and concluding that the Appellant's case is not covered by the decision of the Hon'ble Supreme Court in the case of Engineering Analysis (supra).

12. That the AO, by referring to the features of the software, grossly erred in concluding that the software distributed by the Appellant is not a shrink-wrapped software, without appreciating that the features or applications of the software have no bearing on whether the receipts are in the nature of 'royalty'.

13. That the AO grossly erred in misinterpreting clauses of the agreement between the Appellant and third parties, by stating that it allows decompiling, deciphering, disassembly, reverse assembly, modification, translation, reverse engineering, and derivation of the source code of the software as per Article 6 of the Council Derivative 91/250/EEC, without appreciating that such rights of the users, in terms of Article 5 of the above Council, are restricted to only correct errors that affects the operation of the software, and does not grant rights to modify the source code.

14. That the AO failed to appreciate that the permission granted to the affiliates of the sub-licensee to use the software does not result in the receipts being in the nature of
"royalty".

15. That the AO failed to appreciate that the modifications as specified in the agreements with third parties merely pertains to modifications to suit the third party's business operations and does not involve/permit modifications to the source code.

16. That the AO ought to have appreciated that the copies of the software as stated in the agreements with third parties refers to creation of duplicates for the purpose of back up and not for commercial use.

17. That the Dispute Resolution Panel, contrary to the provisions of Section 144C of the Act, grossly erred in remanding the matter to the AO for verification.

18. That without prejudice and in any event, the AO erred in not conducting proper verification in line with the directions of the DRP, and therefore the impugned order passed by the AO is without jurisdiction and liable to be set aside.
19. That in any event, the AO erred in treating the receipts as being in the nature of FTS under Section 9(1)(vii) of the Act and under Article 12(3)(b) of the India- Ireland DTAA.

20. That the AO erred in initiating penalty proceedings under Section 270A of the Act."

3. The Assessee is an entity incorporated under the local laws of Singapore and the Company receives income from sale/ distribution of computer software in India, from its subsidiary, Misys Trade & Risk Management (India) Private Limited (formerly known as Turaz Trade & Risk Management India Private Limited) ["MTRM"] and other third parties.

4. The software products sold are generally used by the Banking and Financial Services Industry ["BFSI"] like banks and financial institutions. For the current AY, the Assessee received income amounting to INR 23,21,52,964 by way of sale of software to entities domiciled in India. For the AY under consideration, the Assessee filed its original return of income ["Rol'] on 12 February 2021 and filed its revised return of income on 23 March 2021, declaring total income as 'Nil' and claiming a tax refund of INR 2,34,03,813 due to TDS credits. The income was declared 'Nil' due to the position adopted by the Assessee in light of the Hon'ble SC judgment in the case of Engineering Analysis Centre of Excellence Pvt. Ltd. vs CIT in CA Nos. 8735-8736 of 2018. The Assessing Officer treated the receipts earned by the assessee through sale of software as taxable u/s 9(1)(vi) of the Act as well as under Article 12(3) of India-Singapore DTAA and accordingly proposed to charge amount of Rs. 23,21,52,964/- as FTS taxable @ 10%. In this connection the AO made the following observations in the contract of the assessee with its AE and tried to differentiate

the judgment of the Hon'ble Apex Court in the case of Analysis Centre of Excellence Pvt. Ltd. (supra).

a. As per the clause 5, the AE "undertakes to develop and extend or to procure the development and extension of its SYSTEMS so far as it is commercially reasonable to do so and so far as it is able to do so using all reasonable endeavor, [..." thereby allowing development on the software for further sale, excluding it from the definition of shrink-wrapped software.

b. Clause 6(a) and 6(b) also include components of reverse-training (sub-licensee training the personnel of the licensor) and associated services for the end user to be provided by the AE.

c. Clause 12 itself mentions the copies of the software made by the AB for onward sale

d. As per Schedule 2 of the contract with the AE, the actual software being talked about is: The Kondor software suite, including Kondor Global Risk which includes the following components:

Core Components:

Real Time Date Aggregation Platform
Asset Class Agnostic Date Model
Integration Api
Distributed Architecture

Credit Risk And Limit Management Components

Credit Risk Analysis Engine
Limits Rules Engine
API For Real Time Limit Management In The From Office
Collateral Management
Credit Line Management

Advanced Simulation Credit Risk Management

Credit Value at Risk

Market Risk Management Components

Dynamic Risk Dashboard and Visualization Tools

Integration API Dedicated To Market Risk

Rate Management Module

Thus, it is a real time credit and market risk evaluation dashboard and engine that converts billions of data points into insightful information using APIs for integration with third party and in house developed libraries. Therefore, it is clear not a shrink-wrapped software.

e. Clause 16.4 allows decompiling deciphering disassembly, reverse assembly modification, translation, reverse engineering, and derivation of the source code of the software as per Article 6 of Council Directive 91/250/EEC which is a statutory provision legislated by the Council of the European Union.

f. As per clause 7.2, the sub licensee can modify the software and retain a license to use that modification to its advantage

g. As per clause 1.27 multiple copies of the software can be installed, on theoretically infinite partitions (logical computers') from a single license.

5. Aggrieved, the assessee filed objections before the ld. DRP.

6. The ld. DRP held that, the AO after analyzing the nature of and characteristics of the software under consideration as well

as the contractual terms of agreement between the assessee and its AEs/ distributors has concluded that the facts of the instant case are differentiable on multiple accounts from the judgment of the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Exellence Pvt. Ltd.

7. Before the ld. DRP, the assessee has submitted that the facts of his case are squarely covered by the judgment of the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Exellence Pvt. Ltd. It was submitted that as per the agreement between the assessee and the Indian entity (distributor, MTRM) there is only transfer of right to use software which is being granted. It is submitted that the assessee is merely licensee the software products to Indian end users without removing the name of the ultimate end user. It is further submitted that what is sold to the Indian customers is only a software product along with the non-exclusive, non-transferable license to merely enable the use of the product. The assessee has reiterated that the assessee is purchasing the software from its non-resident supplier/owner and selling/ distributing to Indian end users either for their own business or for onward selling and in the entire chain of event there is no transfer of copyright, rather only copyrighted article is getting transferred. It was accordingly submitted that the ruling in the aforementioned Supreme Court judgment is squarely applicable in its case.

8. With reference to the AO's observations on the various clauses of the agreement between the assessee and Indian AEs, the assessee has submitted before the DRP the following rebuttal. This submission as extracted from the order of the ld. DRP.

"(A). Agreement between the Assessee and MTRM

1. W.r.t. clause 5 of the agreement:
It is stated that the learned AO has grossly misinterpreted clause 5 of the agreement by concluding that the subsidiary i.e., MTRM is the sub-licensor, whereas the agreement clearly defines that the assessee company is the sub-licensor. Further, the Assessee states that there are no development/ update rights passed on to MTRM by is the Assessee who shall undertake to develop or procure development to software including update to MTRM.

2. W.r.t clause 1 of the agreement:
With respect to clause 1 of the agreement, the term 'reproduce' included in the definition of the term "USE" commonly refers to the right to make copies of the work, which generally includes storage of such work, for its own business purpose. Hence, it is not a case that MTRM (i.e., distributor) has access to the source code and is reproducing the same for commercial use.

3. W.r.t clause 6 of the agreement:
Assessee submits that clause 6(a) and (b) is again misinterpreted by the learned AO by considering MTRM as the sub-licensor instead of the Assessee and stating that training is given by MTRM to Finastra Singapore. The sub-licensor as clearly defined under the agreement is the Assessee (i.e., Finastra Singapore) and not MTRM (which the distributor). Hence, on a reading of the said clauses, it is clear that,

Assessee is the one liable to provide training to MTRM in order to enable it to solve the problems of the end users.

4. W.r.t clause 12 of the agreement:

The Assessee submits that clause 12 of the agreement talks about "copyright" and does not mention about "making copies". Further, the ultimate ownership lies with the original owner of the software and MTRM does not have any right to remove, alter, amend or obliterate such notices attached with each software.

5. W.r.t feature of software:

Assessee puts forward the explanation that features/ applications of the software do not have a direct nexus with whether the same is shrink wrapped software or not. It is stated that the features as noted by the learned AO merely indicates that the software performs the function of converting data points into information which clearly depicts that this is a standard software which can be used by various third parties.

(B). Agreement between the assessee and IndusInd Bank Limited:

1. W.r.t clause 16.4 of the agreement:

Assessee submits, that the actual terms of the agreement clearly restricts actions such as decompiling, disassembling etc. except to the extent permissible under the aforesaid Article.A lawful purchaser/acquirer of a computer program is entitled to copy, translate and, ultimately, decompile that program without fear of liability for copyright infringement where the same is in accordance with the Article 6 read with Article 5 of Directive 91/250.In the instant case, Indusind bank can be allowed to decompile the software but only within the statutory guidelines and hence, if can be said

that there is no transfer of source code by the Assessee so as to make it vulnerable to any copyright Infringements. The assessee has place reliance on the extracts of clauses 16.4, 1.9, 1.33 and 21.5 of the agreement.

2. W.r.t clause 16.1 of the agreement:

Assessee disagrees with learned AO's understanding and submits that as per clause 16.1.8, the term "named affiliate" is defined under clause 1.24 and under clause 1.3 of the agreement wherein it states that name affiliate would include holding/subsidiary company of the sub-licensee. Hence, it is only for internal use (by the group companies of Indusind Bank)

against the contention of the Learned AO that the sub-licensee can allow use by any third party. The assessee has also made reference to clauses 17.1 and 17.4 in this regard.

3. W.r.t clause 7 of the agreement:

The Assessee submits that the term Modification used in the above mentioned clause of the agreement merely means that Indusind Bank Limited can modify the configurations implemented through use of Finastra application toolkit or approved toolkit, and not through a source code change. As per clause 7, Indusind Bank Limited can only hold license to use such Modifications for as long original software license term.

4. W.r.t clause 1.27 of the agreement:

Assessee submits that clause 16.1 of the agreement clearly provides that Indusind Bank Limited has rights to make Copies of the software, only for the limited purpose of keeping back-ups. Owing to above explanations, it can be seen that there is no source code access given to Indusind Bank Limited by Finastra Singapore and hence, there is no parting with the copyrights on the software. It is

further submitted that there is no access to source code being given up by Finastra Singapore to Indusind Bank Ltd.

(C). Agreement between the Assessee and ING Vysya Bank Ltd/ Kotak Mahindra Bank Ltd "end user"]

This agreement is entered between the Assessee and ING Vysya Bank Ltd/ Kotak Mahindra Bank Ltd, which is the end user of the software product. The Assessee is not only distributing the product but also earning receipts by directly selling the software product to Indian end users. The end user only acquires the right to use' the software product and shall retain a non-exclusive license to use the software as long as the license agreement is in force. The assessee has placed reliance upon the extracts of Para 7.2, 7.4 and para 16 as well as the definition of terms Computer software, License matrix and License term contained in paras 1.9, 1.19 and 1.21 of the agreement in this regard.

(D). Agreement between the Assessee and IDFC Limited ['end user]

The assessee submits that this agreement is entered between the Assessee and IDFC United, which is the end user of the software product. The Assessee is not only distributing the product but also earning receipts by directly selling the software product to Indian end users. The end user only acquires the right to use the software product for its own business and cannot use the licensed software product for third parties.The end user has a personal non-exclusive and non-transferable right. The end user does not have any right on the source code of the software product. The end user does not own any right on the copyrights of the software.

9. Following the above, the assessee submitted that the Hon'ble SC Judgment squarely applicable , since the assessee is merely selling the software product to Indian end users for the purpose of its business for a determined period of time which is agreed upon as per the agreements. After going through the submissions of the assessee, the ld. DRP directed the AO to verify the factual contentions of the assessee with reference to clauses of the contract between the assessee and distributors/ end user and ascertain if the terms of the contracts meet the criteria laid down in the case of Engineering Analysis Centre of Excellence (supra) and pass a speaking order in this regard. The Assessing Officer restated the contents of draft Assessment Order in the final Assessment Order.

10. Aggrieved, the assessee filed appeal before the ITAT.

11. Before us, the ld. AR relied on the arguments taken up before the ld. DRP whereas the ld. DR supported the order of the Assessing Officer.

12. Heard the arguments of both the parties and perused the material available on record.

13. We find that the AO has read and interpreted the clauses of the agreement wrongly and selectively. While the AO has concluded that the agreements between the assessee and the end user/ distributor give credence to the fact that the terms of software sales by the assessee to its distributor/ end users in India are clearly distinguishable from the case of Engineering

Analysis Centre of Exellence Pvt. Ltd., the assessee has contended that the AO has not read/ interpreted the agreements between the assessee and the distributor/ end user in the proper context. Having gone through the various clauses of the distributor agreement, we hereby hold that the subject matter is squarely covered by the judgment of Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Private Limited vs. CIT 125 taxmann.com 42 (SC).

14. In the result, the appeal of the assessee is allowed.

Order Pronounced in the Open Court on 02/01/2024.

Sd/-	**Sd/-**
(C.N Prasad)	**(Dr. B. R. R. Kumar)**
Judicial Member	**Accountant Member**

Dated: 02/01/2024

NV, Sr. PS

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, DELHI