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

% *Decision delivered on: 30.11.2023*

\+ **ITA 669/2023 & CM No.61599/2023**

COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION)-2 ..... Appellant

Through: Mr Sanjay Kumar, Sr Standing Counsel.

versus

KONY INC ..... Respondent

Through: None.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER
HON'BLE MR. JUSTICE GIRISH KATHPALIA

[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J. (ORAL):

ITA 669/2023

1. This appeal concerns Assessment Year (AY) 2015-16.

2. *Via* the instant appeal, the appellant/revenue seeks to assail the order dated 11.01.2023 passed by the Income Tax Appellate Tribunal [in short, "Tribunal"].

2.1 The two issues which arose for consideration before the Tribunal are reflected in the questions of law put forward in the instant appeal. For convenience, the proposed questions of law are set forth hereafter:

(First issue)

(i) Whether on the facts and circumstances of the case, the Ld. ITAT erred in holding that consideration received for granting rights to the customers under EULA to use the software is not table as Royalty both under Section 9(1)(vi) of the Act and under Article 12 of India-USA

DTAA?

(Second issue)

(ii) Whether on the facts and circumstances of the case, the Ld. ITAT erred in holding that amount received towards annual maintenance charges of the software are not ancillary or subsidiary to enjoyment of right to use software and thus not taxable as FTS/FIS under the Section 9(1)(vii) of the Act and under Article 12 of the India-US DTAA?

3. The record shows that the respondent/assessee had, under an End User Licence Agreement with its customers *qua* the period in issue, received Rs.8,50,54,160/-, which included Rs.7,27,33,773/- towards the sale of the End User Licence and Rs.1,23,20,383/- on account of Annual Maintenance Charges (AMC).

4. The Assessing Officer (AO) treated the End User Licence fee received by the respondent/assessee as royalty and sought to tax the same under Section 9(1)(vi) of the Income Tax Act, 1961 [in short, "Act"] read with Article 12(3) of the India-USA Double Taxation Avoidance Agreement [in short, "DTAA"].

4.1 Insofar as the AMC charges were concerned, the AO taxed the said amount as Fee for Technical Services (FTS) and in this regard invoked Section 9(1)(vii) of the Act and Article 12(4)(a) of the DTAA.

5. The Tribunal, however, deleted both additions by holding that insofar as the End User Licence fee was concerned, the same could not be treated as royalty as no copyright in the product was transferred to the customers.

5.1 This view was founded on the decision of the Supreme Court rendered in ***Engineering Analysis Centre of Excellence Pvt. Ltd. v. CIT***, (2021) 432 ITR 471 (SC).

5.2 We may also note that the Tribunal has returned a finding of fact that End User Licences issued by the respondent/assessee to its customers were non-exclusive and non-transferable and that the users were not given access to the source code.

6. As regards the amount which the AO treated as FTS is concerned, the Tribunal concluded that Fee for Included Services (FIS) under the said Article would only mean payment made in consideration for rendering technical or consultancy services, if such services were ancillary and subsidiary to the enjoyment of right in the property.

7. It was the Tribunal's view that since it had concluded that no right in the property had been transferred, Article 12(4)(a) of the DTAA had no applicability.

8. It may also be noticed that the Tribunal had also examined the applicability of Article 12(4)(b) of the DTAA.

8.1 Having examined the same, the Tribunal concluded that the respondent/assessee had not ***"made available"*** any technical knowledge, experience, skill, know-how etc, to the recipients of such services. A finding of fact was returned in that behalf. For convenience, the relevant observations made by the Tribunal are extracted hereafter :

> *"9. In ground no. 6, the assessee has challenged the addition of Rs.1,23,20,383/- by treating it as Fee for Included Services (FIS) under Article 12(4)(a) of Indian - USA DTAA. As discussed earlier, while completing the assessment, the Assessing Officer held that the amount received by the assessee towards granting licence under EULA is in the nature of royalty, hence, taxable in India. In the context of the said reasoning, the Assessing Officer held the view that the receipts from annual maintenance charges of the software are in the nature of FIS/FTS, both under the tax treaty as well as under section 9(1)(vii) of the Act. Accordingly, he brought to tax the amount of Rs.1,23,20,383/-. Learned DRP, while deciding the objections of the assessee, upheld the decision of the Assessing Officer.*

> *10. We have considered rival submissions and perused the materials on record. It is evident, being of the view that annual maintenance charges are ancillary and subsidiary to the grant of licence for right to use software, which is treated as royalty, the Assessing Officer concluded that receipt from annual maintenance charges is in the nature of FIS under Article 12(4)(a) of India - USA DTAA as well as under section 9(1)(vii) of the Act.*
> *However, while deciding the issue of taxability of receipts from granting of licence, we have held that they are not in the nature of royalty under the treaty provisions. That being the case, the receipt from annual maintenance charges being not ancillary or subsidiary to any royalty income cannot be brought to tax under Article 12(4)(a) of the tax treaty. Therefore, it has to be seen, whether it can come Within the purview of Article 12(4)(b) of the tax treaty. As could be seen, to be considered as FIS under Article 12(4)(b) under the tax treaty, the make available condition has to be satisfied. In the facts of the present appeal, the Departmental Authorities have failed to demonstrate that while rendering the services, the assessee had made available technical knowledge, experience, skills, knowhow etc. to the recipient of such services. That being the case, the amount received cannot be treated as FIS under Article 12(4)(b) of the tax treaty."*

9. Having examined the impugned order and heard Mr Sanjay Kumar, learned senior standing counsel, who appears on behalf of the appellant/revenue, we find that the first issue is covered by the judgment of the Supreme Court rendered in ***Engineering Analysis Centre of Excellence Pvt. Ltd.*** and the second issue, in any case, is connected, as rightly held by the Tribunal, with the first issue.

10. We are not inclined to interfere with the impugned order passed by the Tribunal. According to us, no substantial question of law arises for our consideration.

11. The appeal is, accordingly, closed.

CM No.61599/2023

12. In view of the order passed in the appeal, the above-captioned application has been rendered infructuous.

13. The application is, accordingly, closed.

14. Parties will act based on the digitally signed copy of the order.

RAJIV SHAKDHER, J

GIRISH KATHPALIA, J

NOVEMBER 30, 2023
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