IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 28 OF 2018
AND
INCOME TAX APPEAL NO. 50 OF 2018
AND
INCOME TAX APPEAL NO. 66 OF 2018
AND
INCOME TAX APPEAL NO. 90 OF 2018
WITH
INCOME TAX APPEAL NO. 174 OF 2018
WITH
INCOME TAX APPEAL NO. 92 OF 2018
AND
INCOME TAX APPEAL NO. 700 OF 2018
AND
INCOME TAX APPEAL NO. 1114 OF 2018
AND
INCOME TAX APPEAL NO. 1116 OF 2018
AND
INCOME TAX APPEAL NO. 1191 OF 2018
AND
INCOME TAX APPEAL NO. 1208 OF 2018
AND
INCOME TAX APPEAL NO. 1305 OF 2018
AND
INCOME TAX APPEAL NO. 1310 OF 2018
AND
INCOME TAX APPEAL NO. 1311 OF 2018
AND
INCOME TAX APPEAL NO. 1313 OF 2018
AND
INCOME TAX APPEAL NO. 1315 OF 2018
AND
INCOME TAX APPEAL NO. 1316 OF 2018
AND
INCOME TAX APPEAL NO. 1321 OF 2018
AND
INCOME TAX APPEAL NO. 1326 OF 2018

AND
INCOME TAX APPEAL NO. 1622 OF 2018
AND
INCOME TAX APPEAL NO. 1623 OF 2018
AND
INCOME TAX APPEAL NO. 1624 OF 2018
AND
INCOME TAX APPEAL NO. 1626 OF 2018
AND
INCOME TAX APPEAL NO. 1627 OF 2018
AND
INCOME TAX APPEAL NO. 1633 OF 2018
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INCOME TAX APPEAL NO. 1634 OF 2018
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INCOME TAX APPEAL NO. 1635 OF 2018
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INCOME TAX APPEAL NO. 1636 OF 2018
AND
INCOME TAX APPEAL NO. 1652 OF 2018
AND
INCOME TAX APPEAL NO. 1654 OF 2018
AND
INCOME TAX APPEAL NO. 1800 OF 2018
AND
INCOME TAX APPEAL NO. 1808 OF 2018
AND
INCOME TAX APPEAL NO. 1827 OF 2018
AND
INCOME TAX APPEAL NO. 1828 OF 2018
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INCOME TAX APPEAL NO. 1829 OF 2018
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INCOME TAX APPEAL NO. 1834 OF 2018
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INCOME TAX APPEAL NO. 1836 OF 2018
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INCOME TAX APPEAL NO. 1845 OF 2018
AND
INCOME TAX APPEAL NO. 1846 OF 2018

AND
INCOME TAX APPEAL NO. 1851 OF 2018
AND
INCOME TAX APPEAL NO. 1852 OF 2018
AND
INCOME TAX APPEAL NO. 2144 OF 2018
AND
INCOME TAX APPEAL NO. 2150 OF 2018

Commissioner of Income Tax (LTU) ..Appellant
Versus
Reliance Industries Ltd. ..Respondent

AND
INCOME TAX APPEAL NO. 1119 OF 2018

Commissioner Industries Ltd. ..Appellant
Versus
Reliance Industries Ltd. ..Respondent

Mr. Suresh Kumar for Appellant.
Mr. Madhur Agarwal with Mr. P. C. Tripathi and Mr. Ketan Dave i/b. Mr. Raj Darak for Respondent.
Mr. Madhur Agarwal with Mr. P. C. Tripathi and Mr. Ketan Dave i/b. A. S. Dayal & Associates for Respondent in ITXA 1827/18, 1828/18 and 1851/18.

CORAM: G. S. KULKARNI &
SOMASEKHAR SUNDARESAN, JJ.
DATE: 24 JUNE, 2024.

<u>Oral Judgment (Per G. S. Kulkarni, J.):</u>

1. We have heard learned counsel for the parties.

2. These appeals involve common question of law as raised by the revenue. Learned counsel for the parties are *ad idem* that the issue of law as raised, namely whether the payments made by the assessee to a foreign resident, for obtaining computer software are liable to be taxed in India as "royalties" under the provisions of Section 9(1)(vi) of the Income Tax Act, 1961, would stand answered in view of the decision of the Supreme Court in ***Engineering Analysis Centre of Excellence (P.) Ltd. vs. Commissioner of Income Tax***[1].

3. Learned counsel for the parties have also drawn our attention to the order dated 21 June, 2024 passed by us on similar issue of law which had arisen before this Court in the case of **Commissioner of Income Tax-(LTU) Vs. Reliance Industries Ltd.** (Income Tax Appeal No. 1655 of 2018), wherein this Court, considering the position in law as laid down in **Engineering Analysis Centre of Excellence (P.) Ltd.** (supra) and other decisions, dismissed the revenue's appeals *inter alia* observing that the question of law would stand squarely covered by such decision of the Supreme Court. The said order is required to be noted which read thus:-

> "1. We have heard Mr. Suresh Kumar, Learned Counsel for the Appellant-Revenue and Mr. M. Agarwal, Learned Counsel for the Respondent.
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> 2. At the outset, Mr. Suresh Kumar has stated that the Revenue would not have any objection for this Bench taking up the proceedings.
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> 3. This Appeal of the Revenue assails an order dated 14th July, 2017 passed by Income Tax Appellate Tribunal ("Tribunal"), whereby a batch of appeals filed by the Revenue against the orders

1 [2021] 125 taxmann.com 42 (SC)

passed by the Commissioner of Income-Tax (Appeals) (for short "CIT(A)) stand dismissed. The primary issue which had arisen for consideration of the Tribunal was as to whether the remittance made by the assessee to foreign parties on account of purchase of certain computer software, required for the business of the assessee, would be liable to tax in India as "royalty" under the provisions of Section 9(1) (vi) of the Income Tax Act, 1961 ("the Act") or would it be a business income of the recipient companies.

4. In its application as filed under Section 195(2) of the Act the assessee raised contentions as to why remittance made to such foreign parties was not liable to be taxed as "royalty", under the provisions of Section 9(1)(vi) of the Act. Such application of the assessee was rejected by an order dated 14th September, 2003 passed by the Deputy Director of Income Tax (International Tax). The assessee carried the matter in appeal before the CIT(A). The appeals filed by the assessee were allowed by the CIT(A), against which at the behest of the Revenue the proceedings reached the Tribunal.

5. In assailing the orders passed by the Tribunal the Revenue has urged the following substantial question of law which we have reframed:-

> "Whether the payments made by the assessee for obtaining computer software were liable to be to taxed in India as royalties under the provisions of Section 9(1)(vi) of the Act?"

6. We have heard the Learned Counsel for the parties. We have been taken through the impugned orders passed by the Tribunal.

7. The Tribunal considering the provisions of the IT Act, as also the position in law as laid down in various decisions has observed that the assessee had made purchases of computer software from the residents of Denmark and Finland. It was observed that such purchases would fall within the provisions of the Double Taxation Avoidance Agreement ("DTAA") entered between India and these countries. The Tribunal also observed that a co-ordinate Bench of the Tribunal in the assessee's own case in ITAS No.2529/Mum/2008 and ITAS No.4587/Mum/ 2010 had held that in such cases similar remittances made to the residents of Germany and France, were held to be not liable for deduction of tax at source. The Tribunal, following the decision of its co-ordinate Bench, in assessee's own case, dismissed the appeal filed by the Revenue by the impugned order.

8. At the outset, Learned Counsel for the parties would fairly state that the question of law as raised in the present appeals, is no more res integra in view of the authoritative pronouncement of the Supreme Court in the case of Engineering Analysis Centre of Excellence (P.) Ltd. vs. Commissioner of Income Tax1 . In the said case the Assessing Officer, applying Article 12(3) of the DTAA entered between India and U.S.A. as also the provisions of Section 9(1)(vi) of the IT Act ,to the transaction between the parties, held that the transaction involved copyright, which attracted the payment of royalty and accordingly, tax was required to be deducted at source by the Indian importer. Since this was not done, it was held that the assessee was liable to make good the payment of TDS which it had not deducted. Also interest under Section 201(1)(A) of the Act was levied. The Appeal before the Commissioner was also dismissed.

9. In these circumstances, the proceedings had reached the Tribunal at the instance of the assessee. The assessee succeeded in these proceedings, with the ITAT setting aside the concurrent findings of both the authorities below. On such backdrop, the proceedings reached the High Court.

10. The High Court of Karnataka, in similar proceedings, on examination of the End User Licence Agreement ("EULA") involved in such transactions found that what was sold by way of computer software, including the right or interest in copyright, which gave rise to the payment of royalty, would be an income deemed to have accrued in India under Section 9(1)(vi) requiring deduction of tax at source. The orders passed by the High Court were assailed before the Supreme Court. It is also required to be noted that similar issues had arisen before the Delhi High Court interalia in the case of DIT vs. Ericson A.B. and DIT vs. Nokia Network. The Delhi High Court however took a view contrary to the view taken by the High Court of Karnataka. The Supreme Court examined the issues as arising from the decisions of both the High Courts in the case of Engineering Analysis Centre of Excellence (P.) Ltd (supra). The Supreme Court in its decision rendered in the said case upheld the view taken by the Delhi High Court in interpreting such transactions in the context of Section 9(1)(vi) of the Act. The Supreme Court held that considering the provisions of DTAA, there was no obligation on the persons mentioned in Section 195(1) of the Act to deduct tax at source as the distribution agreements, in the facts of the case did not create any interest or right in such distributors/end users, which amounted to the use or right to use any copyright. It was held that

the provisions of Section 9(1)(vi) of the Act along with Explanation 2 and 4 thereof which dealt with royalty, not being more beneficial to the assessee, had no application in the facts of the case. It would be appropriate to extract the conclusion as rendered by the Supreme Court in which reads thus:- "168. Given the definition of royalties contained in Article 12 of the DTAAs 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/endusers, 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 assessees, 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." (emphasis supplied)

11. It is not in dispute that transactions in the present case are similar to what had fell for consideration of the Supreme Court in Engineering Analysis Centre of Excellence (P.) Ltd (supra). Also there is no dispute that there is a DTAA entered with the countries in question, with whose residents the transactions were entered into by the assessee.

12. In the aforesaid circumstances, it is clear that the approach of the Assessing Officer in the present case was against the correct position in law as held by the Tribunal, and now also endorsed by the Supreme Court in Engineering Analysis Centre of Excellence (P.) Ltd (supra). In this view of the matter, we are in agreement with Mr. Madhur Agarwal that these four Appeals would not give rise to the question of law as noted by us hereinabove.

> 13. As fairly pointed out by the learned Counsel for the parties, as the facts are not in dispute as also the DTAA in question applicable we are not discussing the facts involved in each of these Appeals.
>
> 14. The Appeals are accordingly dismissed as they do not give rise to any question of law. No costs."

4. In the light of the above discussion, all these appeals do not give rise to the question of law as raised by the Revenue.

5. The appeals are accordingly dismissed. No costs.

(SOMASEKHAR SUNDARESAN, J.) (G. S. KULKARNI , J.)

24 June, 2024