

IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "C", PUNE – VIRTUAL COURT

BEFORE SHRI R.S. SYAL, VICE PRESIDENT AND
SHRI PARTHA SARATHI CHAUDHURY, JUDICIAL MEMBER

ITA No.175 & 1755/PUN/2018

निर्धारण वर्ष / Assessment Years: 2009-10 & 2014-15

M/s. Ansys Inc., C/o. Fluent India Pvt. Ltd., Plot No.34/1, Rajiv Gandhi Infotech Park, MIDC,Hinjewadi, Pune 411 057 PAN : AAJCA1637K	Vs.	ACIT(IT), Circle-1, Pune
Appellant		Respondent

Assessee by
Revenue by

Shri V. Narendra Sharma
Shri Mahadevan A.M. Krishnan

Date of hearing 15-06-2021
Date of pronouncement 15-06-2021

आदेश / ORDER

PER R.S.SYAL, VP :

These two appeals by the assessee are directed against the final assessment orders dated 20-11-2017 and 14-09-2018 passed by the Assessing Officer (AO) u/s. 147 r.w.s. 144(1)(b) r.w.s. 144C(13) in relation to the assessment year 2009-10 and u/s.144C(13) r.w.s.143(3) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') in relation to the assessment year 2014-15. Since a common issue is raised in these appeals, we are,

therefore, proceeding to dispose them off by this consolidated order for the sake of convenience.

A.Y. 2009-10 :

2. The only issue raised on merits is against the taxability of Rs.2,42,02,485/- as income from 'Royalty' within the meaning of section 9(1)(vi) of the Act r.w. Article 12 of the Double Taxation Avoidance Agreement between India and USA (hereinafter also called as 'DTAA'). Briefly, the facts of the case are that the assessee is a company registered in, and a tax resident of the United States of America. No return of income was filed for the year under consideration. The AO initiated the re-assessment proceedings by recording that a receipt of Rs.2.42 crore as a consideration for sale of Software/License relating to Development of Software from M/s. Honeywell Technology Solutions Lab Pvt. Ltd. escaped assessment as it was in the nature of Royalty chargeable to tax in India. Apart from raising objections against and challenging the initiation of re-assessment proceedings, the assessee, on merits, relied on Article 12 of the DTAA to contend that the amount received from M/s. Honeywell Technology Solutions Lab Pvt. Ltd. was not in the nature of Royalty. Taking

cognizance of Explanation 4 to section 9(1)(vi), the AO held that the receipt was in the nature of income, chargeable to tax in India not only under the Act but also under the DTAA. In reaching this conclusion, the AO relied on certain judgments upholding his point of view. It is this taxability of Rs.2.42 crore as income from Royalty by the AO in the final assessment order that has been assailed before the Tribunal.

3. We have heard both the sides through Virtual Court and gone through the relevant material on record. Whereas the case of the assessee is that the receipt from M/s. Honeywell Technology Solutions Lab Pvt. Ltd. is 'Business Profits' covered under Article 7 of the DTAA, the Revenue has set up a case that it is in the nature of Royalties under the Article 12. The assessee is an American company and hence governed by the DTAA. Article 12 of the DTAA defines the term 'Royalties' in para 3 as under:

The term 'royalties' as used in this Article means :

(a) payments of any kind received as a consideration for *the use of, or the right to use, any copyright of a literary, artistic, or scientific work, including cinematograph films or work on film, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trademark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience, including gains derived from the alienation of any such right or*

property which are contingent on the productivity, use, or disposition thereof; and

(b) payment of any kind received as consideration for the use of, or the right to use, the industrial, commercial, or scientific equipment, other than payments derived by an enterprise described in paragraph 1 of Article 8 (Shipping and Air Transport) from activities described in paragraph 2(c) or 3 or Article 8.

4. The above paragraph clearly indicates that the Royalty means consideration for use or right to use any copyright of a literary, artistic or scientific work etc. The question whether the sale of computer software would partake of the character of Royalties or Business Profits, recently came up for consideration before the Hon'ble Supreme Court in *Engineering Analysis Centre of Excellence Pvt. Ltd. Vs. CIT (2021) 432 ITR 472 (SC)*. After analyzing the identical issue in the backdrop of similar expression as used in Article 12(3), it came to hold that ownership of copyright in a work is different from the ownership of the physical material in which the copyrighted work may happen to be embodied. Parting with copyright entails parting with the right to do any of the acts mentioned in section 14 of the Copyright Act. Where the core of a transaction is to authorize the end-user to have access to and make use of the "licensed" computer software

product over which the licensee has no exclusive rights, no copyright is parted with.

5. It is discernible from the impugned order that the AO invoked Explanation 4 to section 9(1)(vi) of the Act to hold the receipt as royalty under the Act. In this regard, the Hon'ble Supreme Court in the aforementioned case further held that Explanation 4 to section 9(1)(vi) inserted vide the Finance Act 2012 is not clarificatory as it expands the scope and hence prospective. The assessment year under consideration is 2009-10.

6. Adverting to the facts of the extant case, it is seen that the disputed receipt of Rs.2.42 crore from M/s. Honeywell Technology Solutions Lab Pvt. Ltd. is on account of sale of Software/license and not for parting with the copyright of the software. Since facts of the present case are similar to those considered and decided by the Hon'ble Supreme Court in the case of *Engineering Analysis Centre of Excellence Pvt. Ltd. (supra)*, respectfully following the precedent, we hold that the amount cannot be brought within the ambit of 'Royalties' under Article 12 of the DTAA.

7. *Au contraire*, the case of the assessee before the authorities below has been that the receipt is not in the nature of 'Royalty', but

'Business Profits'. In order to bring 'Business profits' of a resident of the other country to tax in India within the ambit of Article 7, it is *sine qua non* that the foreign enterprise must have a Permanent Establishment (PE) in India in terms of Article 5 of the DTAA. In the absence of a PE, the taxability under Article 7 does not trigger. The assessee categorically submitted before the DRP that it did not have any PE in India. The Dispute Resolution Panel (DRP) in para 6.6. of its Direction has unequivocally noted that: "*We find that there seems no dispute on the fact that the Appellant does not have a PE in India.*" As the assessee did not have a PE in India during the relevant year, the mandate of Article 7 cannot activate. *A fortiori*, the receipt cannot be charged to tax in India as 'Business profits' either. In view of the foregoing discussion, we are satisfied that the amount of Rs.2.42 crore received by the assessee from sale of software/license to M/s. Honeywell Technology Solutions Lab Pvt. Ltd. ceases to be chargeable to tax in India. This issue is, therefore, decided in assessee's favour.

8. In view of our decision on merits about the non-taxability of Rs.2.42 crore, which is the only addition made by the AO in the

assessment order, there is no need to deal with the ground challenging the re-assessment.

A.Y. 2014-15 :

9. The only issue espoused by the ld. AR in this appeal is about the chargeability of Rs.86,05,13,407/-, being, income from sale of software license which was held by the AO to be an income in the nature of 'Royalty'. In fact, the ld. AR simply adopted the arguments made for the A.Y. 2009-10 without going into details for the year under consideration. The ld. DR also candidly admitted the position that the issue is similar to the earlier year.

10. In view of the rival but common submissions and following the view taken hereinabove on this issue, we hold that receipt of Software license amounting to Rs.86,05,13,407/- cannot be charged to tax as 'Royalties' under the DTAA. In the same manner, the amount will escape taxation as 'Business profits' under Article 7 also because of it not having any PE in India. Albeit Explanation 4 to section 9(1)(vi) is applicable to the year under consideration, but section 90(2) of Act states that where the Central Government has entered into an agreement with the Government of any country outside India under sub-section (1),

then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee. In other words, the provisions of the Act or the DTAA, whichever are more beneficial to the assessee would apply. Coming back to the factual panorama, we find that the provision of the DTAA, being more beneficial than that of the Act would apply making the receipt from sale of software license as not chargeable to tax in India.

11. The other grounds relating to chargeability of interest etc., are consequential and allowed *pro tanto*.

12. In the result, the appeal for the A.Y. 2009-10 is partly allowed and that for the A.Y. 2014-15 is allowed.

Order pronounced in the Open Court on 15th June, 2021.

Sd/-
(PARTHA SARATHI CHAUDHURY)
JUDICIAL MEMBER

Sd/-
(R.S.SYAL)
VICE PRESIDENT

पुणे Pune; दिनांक Dated : 15th June , 2021
Satish

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to:

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. The CIT(A)-13, Pune
4. The Pr.CIT-5, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे
“C” / DR ‘C’, ITAT, Pune
6. गार्ड फाईल / Guard file

आदेशानुसार/ BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune

		Date	
1.	Draft dictated on	15-06-2021	Sr.PS
2.	Draft placed before author	15-06-2021	Sr.PS
3.	Draft proposed & placed before the second member		JM
4.	Draft discussed/approved by Second Member.		JM
5.	Approved Draft comes to the Sr.PS/PS		Sr.PS
6.	Kept for pronouncement on		Sr.PS
7.	Date of uploading order		Sr.PS
8.	File sent to the Bench Clerk		Sr.PS
9.	Date on which file goes to the Head Clerk		
10.	Date on which file goes to the A.R.		
11.	Date of dispatch of Order.		

*