

आयकर अपीलीय अधिकरण  
दिल्ली पीठ "डी", दिल्ली  
श्री विकास अवस्थी, न्यायिक सदस्य एवं  
श्री ब्रजेश कुमार सिंह, लेखाकार सदस्य के समक्ष  
IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "D", DELHI  
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &  
SHRI BRAJESH KUMAR SINGH, ACCOUNTANT MEMBER  
आअसं.2446/दिल्ली/2024(नि.व. 2017-18)  
ITA No.2446/DEL/2024 (A.Y.2017-18)

GSMA Ltd.,

1000 Abernathy Road, Suite 450, Atlanta,  
United State of America

PAN: AAECG-1610-K

..... अपीलार्थी/Appellant

बनाम Vs.

Assistant Commissioner of Income-Tax,  
International Taxation 1(3)(1), Civic Centre,  
Minto Road, New Delhi 110002

.....प्रतिवादी/Respondent

अपीलार्थी द्वारा/ Appellant by: Shri P.P Singh, Advocate  
प्रतिवादीद्वारा/ Respondent by: Shri M.S Nethrapal, CIT-DR  
सुनवाई की तिथि/ Date of hearing : 06/08/2025  
घोषणा की तिथि/ Date of pronouncement : 04/11/2025

आदेश/ORDER

**PER VIKAS AWASTHY, JM:**

This appeal by the assessee is directed against the Assessment Order dated 06.04.2021 passed u/s. 143(3) r.w.s 144C(13) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act'), for Assessment Year 2017-18.

2. The Registry has issued defect memo stating that the appeal is time barred by 1076 days. The assessee has filed an application supported by an affidavit citing reasons for delay in filing of appeal.

3. Shri P.P Singh, appearing on behalf of the assessee submitted that the appeal against the assessment order dated 06.04.2021 was filed online on the portal of the Tribunal on 07.03.2022, during Covid period. However, the physical copy of appeal inadvertently remained to be filed. The assessee filed physical copy of Form No. 36 along with grounds of appeal on 16.05.2024. Though, the appeal was filed in time there was delay in filing of appeal (Form No.36 and grounds of appeal) physically. He submitted that the delay in filing of physical copy of appeal was for the reason that there were change in the authorized signatory and thereafter there was change in tax consultants who were originally looking after tax matters of the assessee in India. Since, the assessee has no physical office in India, the assessee was constrained to coordinate/handle Income Tax matters remotely from the USA.

3.1. We have heard the submissions made by Id. Counsel for the assessee and have examined the application of condonation of delay. The impugned order was passed during Covid period on 06.04.2021. The Hon'ble Apex Court *suo moto* after taking cognizance of the hardship cause of the pandemic to the litigants extended the limitation for filing of any suite/appeal/application. [RE: Cognizance for extension of Limitation, In re:, 134 taxmann.com 307 (SC)]. The Hon'ble Supreme Court of India directed that the period from 15.03.2020 till 28.02.2022 shall stand excluded for the purpose of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi judicial proceedings. It was further directed that limitation shall start from 01.03.2022. A perusal of Form No. 36 shows that the same was generated on 07.03.2022, ostensibly on the same date it was filed online on the official website of the Tribunal. The assessee was also required to file physical copy of Form No. 36, however, the same was filed on

16.05.2024. We are satisfied that the delay in the filing of the physical copy of Form No.36 was for the reasons stated in the affidavit supporting the application for delay in condonation of appeal and the reasons appears to be *bonafide*. We, therefore, condone the delay and admit the appeal for adjudication.

4. The facts of the case in brief as emanating from records are: The assessee company was incorporated in the United State of America (USA) and is a tax resident of USA. The assessee has been appointed by Mobile Industry as a sole Global Decimal Administrator (GDA) and is responsible to coordinate allocation of 'International Mobile Equipment Identifier' (IMEI) to device manufactures in accordance with the specification developed by the Third Generation Partnership Project for mobile telecommunications (3GPP). In discharge of its GDA responsibilities, the assessee appointed AB Mobile Standards Alliance India Pvt. Ltd. (in short 'MSAI') as Regional Administrator also known as Reporting Body (RB). An agreement between the assessee and MSAI was executed for this purpose. As per the agreement MSAI was required to pay administration fee to the assessee @70% of the service fee received by MSAI from the third party i.e. Mobile Equipment Manufactures. The Assessing Officer (AO) and the Dispute Resolution Panel (DRP) held that the Administration Fee received by the assessee is in the nature of royalty as per Section 9(1)(vii) of the Act, as well as, India-USA DTAA.

5. The Id. Counsel for the assessee submitted that similar addition was made by the Revenue in AY 2013-14 and 2015-16 holding Administration Fee as royalty. The assessee carried the issue in appeal before the Tribunal in ITA No.1980/Del/2017 for AY 2013-14 and ITA No. 3035/Del/2019 for AY 2015-16.

The Tribunal vide common order dated 08.12.2023 deleted the addition holding Administration Fee is not royalty u/s.9(1)(vii) of the Act as well as under Article 12(3) of India-USA DTAA.

5.2 The Id. Counsel for the assessee submits that the second addition is with respect to subscription fee of Rs.21,33,459/- received during the year. He contended that the assessee does not have any Permanent Establishment (PE) in India in terms of Article 5 of India-US DTAA. The TDS was deducted on subscription fee, the assessee claimed refund of TDS deduction in the return of income as per Form No. 26AS, the same was denied by the Revenue. Narrating, facts he submitted that, the assessee had received subscription fee from two companies namely; Comviva Technologies Ltd. and Plintron Global Technology Solutions P. Ltd. in terms of the agreement entered into between the said entities in the year 2016. As per the GSMA Intelligence Master License Agreement between the assessee and Comviva Technologies Ltd. (at page 1 to 6 of the paper book), the assessee was to provide non transferable, non sub-licensable, non exclusive, limited license to access data of the assessee with respect to:

- Global Subscriber, Sim and Connection;
- MNO Financial and Operation Performance Data;
- MNO Network Data; &
- Qualitative Reports and Feed.

Similar agreement was entered into between the assessee and Plintron Global Technology Solutions P. Ltd.(the said agreement dated 20.10.2016 is at page 21 to 30 of the paper book)

6. The Id. Counsel for the assessee submitted that the AO has erred in holding that the subscription fee received by the assessee is taxable as royalty in terms

section 9(1)(vii) of the Act as well as India-US DTAA. The AO has lost site of the fact that the ownership of the subscription material remains with the assessee. The subscriber cannot copy, use, disclose, sell or use the content for commercial purpose. The subscriber was permitted to use the subscription material without any alteration of factual content of data. The Id. Counsel for the assessee placed reliance on the decision of Hon'ble Delhi High Court in the case of CIT vs. Relx Inc., 160 taxmann.com 109, to put forth his argument that the subscription fee received by the assessee is not in the nature of royalty.

7. Per contra, Shri M.S Nethrapal representing the department vehemently defended the impugned order. The Id. DR fairly admitted that in so far as issue relating to Administration Fee is concerned, the same has been considered by the Tribunal in assessee's own case in preceding assessment years. With regard to issue no. 2 relating to Subscription Fee in the nature of royalty, the Id. DR placed reliance on the findings of the AO and the DRP.

8. Both sides heard, orders of the authorities below examined and the case laws on which the Id. Counsel for the assessee has placed reliance considered. The assessee in ground no. 2 of appeal has assailed the assessment order in treating Administration Fee received by the assessee as royalty. We find that this issue is recurring. In AY 2013-14 and 2015-16 on identical set of facts, the AO had characterized Administration Fees received by the assessee as royalty u/s 9(1)(vi) of the Act as well as under Article 12(3) of India-US DTAA. The assessee carried the issue in appeal before the Tribunal in ITA No. 1980/Del/2017 and ITA No.3035/Del/2019 for the respective assessment years. The Co-ordinate Bench

vide order dated 08.12.2023, decided the issue in favour of the assessee, holding as under:-

*“9. We have considered rival submissions and perused materials on record. As discussed earlier, the assessee is a global decimal administrator appointed by mobile industry for providing unique identification number known as IMEI or TAC for tracking mobile devices. As submitted before us by learned counsel for the assessee, this is the only company in the world which allocates these numbers. As discussed earlier, the assessee is a non-profit organisation, hence, exempt from taxation in USA. The specific activity of the assessee is to provide a unique identification number, which can be incorporated/implanted in the mobile devices by device manufacturers in a combination with other numbers to be provided by the device manufacturer to create a 14 digit IMEI number, which is unique to each mobile device. As discussed earlier, in so far as India is concerned, the assessee has appointed MSAI as the reporting body (RB) through agreement dated 22.07.2011. As per the terms of the agreement, the assessee shall provide a database to MSAI through which TAC can be generated and allocated to the device manufacturer. As a RB, MSAI is required to assist GSMA in allocation of TAC to mobile device manufacturers, approve the representatives of mobile device manufacturers, and the brand owners distributing or offering the mobile equipments for sale. So the only service rendered by MSAI is, facilitation of allocation of TACs for mobile manufacturers.*

*10. As per terms of the agreement, MSAI will ensure in a timely, fair and impartial manner that the assessee will allocate manufacturer IDs and TACs only to eligible mobile equipment manufacturers maintaining a valid GSMA. As per TAC allocation agreement with GSMA. MSAI will be responsible for verifying, as part of its service, that no TAC numbers or number ranges have been already allocated to the same or any other mobile equipment manufacturer or are allocated to two or more mobile equipment manufacturers at the same time. The agreement further provides that any copyright or any other intellectual property rights that may subsist in the TAC allocation or within the GSMA hosted IMEI database and the GSMA owned any rights in any software, hardware or other materials provided to MSAI or having been generated by or on behalf of the GSMA, shall not operate as an assignment of such right by GSMA to MSAI. It further provides that any material made available by the GSMA or any third party on behalf of the GSMA under the agreement, may carry the GSMA's trademark and proprietary marks or such other logo or proprietary marks and MSAI will act in good faith and will not do anything to bring or threaten to bring the GSMA or the marks into disrepute, or to infringe upon, harm or contest the validity of the marks and MSAI agrees that it will not use any of the marks unless expressly and specifically permitted to do so in writing by the GSMA.*

*11. Thus, from the aforesaid facts, it is very much clear that the only service the assessee has provided to MSAI is, access to database maintained by it containing certain unique*

numbers, which in combination with some other numbers to be created by mobile equipment manufacturer would from the IMEI number to be implanted in the mobile device. For providing IMEI/TAC numbers, assessee and MSAI follow revenue sharing model of 70:30. The agreement makes it clear that MSAI will have no right or any right to use any copyright, intellectual property right, which may be associated with TAC allocation or in GSMA hosted IMEI database. Thus, the agreement itself makes it explicit that there is no transfer of right to use any patent, invention, model, design secret formula or process or trade mark or similar property. It also does not impart any information concerning technical, industrial commercial or scientific experience. What the assessee provides is a database containing unique numbers, which has to be provided to the mobile equipment manufacturers for implanting in the mobile devices so that the devices can be tracked and put in the black list in case of theft or misuse so as to prevent crime.

12. As per article 12(3) of India-USA DTAA, the amount received cannot fall within the ambit of royalty, as the consideration received cannot be construed to be for use or right to use any copyright of literary, artistic or scientific work including motion picture films and works on film or video tape for use in connection with television. Neither it can be a consideration for any patent, trade mark, design or model, plan, secret formula or process. It also cannot be for information concerning industrial, commercial or scientific experience. It also cannot be considered to be payment for use of or the right to use industrial, commercial or scientific equipment. Though, the Assessing Officer has observed that IMEI number is a unique invention to track the mobile equipment and information concerning industrial, commercial or scientific experience, however, we are not convinced. The fact of the matter is, the assessee, as a global administrator has created a database of unique numbers, which in combination with other numbers to be provided by mobile manufacturers can be implanted in the mobile devices to identify and keep track of the device. It is further to be noted that a particular IMEI number can be provided to only one mobile equipment manufacturer and has to be implanted in a single mobile equipment. This fact also proves that there is no transfer of use or right to use of any copyright of literary artistic or scientific work or use or right to use of any commercial or scientific experience or equipment. The database of IMEI number can be compared with the registration numbers granted to identify a particular vehicle, which is nothing but a number allocated by the registering authority from a database of numbers available with them. That does not amount to transfer of any right to use of any copyright etc. Thus, on overall consideration of facts and materials on record, we are of the view that the amount received by the assessee will not fall within the definition of royalty both under section 9(1)(vi) of the Act as well as under Article 12(3) of India-USA DTAA. Accordingly, we direct the Assessing Officer to delete the additions in both the assessment years under dispute."

[Emphasized by us]

9. From perusal of the order of Co-ordinate Bench above makes it explicit that the facts in impugned assessment year are identical and the reasoning given by the AO/DRP to make addition is also the same. No material is placed before us to controvert findings of the Tribunal in assessee's own case in preceding assessment years. Hence, we see no reason to deviate from the earlier view taken by the Co-ordinate Bench. Hence, the assessee's succeeds on ground no. 2. The AO is directed to delete the addition made in respect of Administration Fee treating it as royalty.

10. In ground no. 3 of appeal, assessee has assailed treating of Subscription Fee as royalty under provisions of the Act as well as India-US DTAA. The assessee has entered into Master License Agreement with Comviva Technologies Ltd. It is imperative to refer to para 2 of Master License Agreement which explains the conditions qua Ownership and License. The relevant extracts of para 2 are as under:-

**"2. OWNERSHIP AND LICENSE**

*2.1 The Deliverables and all rights, including, without limitation, title and all intellectual property rights contained therein, are owned by GMA and/or its licensors and their Affiliates and are protected by international treaty provisions and all other applicable national laws of the country in which they are being used.*

*2.2 GMA and its Affiliates' trademarks, service marks, trade names, logos or other words or symbols are and will remain the exclusive property of GMA and its Affiliates, as applicable. Any use by the Client of the trademarks and/or logos of GMA or its Affiliates shall be subject to a separate written agreement between GMA and the Client.*

*2.3 Subject to the terms and conditions set forth herein, GMA grants to the Client, and the Client accepts, a non-transferable, non-sub-licensable, non-exclusive, limited license for the Term (as defined below) to access the Deliverables solely for the Purpose. There are no implied licences granted under this Agreement.*



*2.4 Except as explicitly permitted under Clause 2.3 and to the extent it is permitted under applicable law, the Client shall have no other right to copy, use, disclose, sell, market, commercialise, bundle, license, sub-license, re- license, reverse engineer, reverse compile, modify, disassemble or otherwise distribute the Deliverables to any third party.*

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*2.5 Without GMA's prior written consent, the Client shall not use or disclose the Deliverables for any purpose other than the Purpose. In particular, the Client shall not incorporate or integrate the Deliverables or any part thereof in any products or services other than specified within the Purpose or Clause 2.3."*

11. A bare perusal of above terms and conditions agreement would show that the assessee has granted access to Comviva Technologies Ltd. for limited purpose and for its internal use only. Comviva Technologies Ltd. is not authorized to commercially exploit the data/information that is accessible to it by way of Subscription services. The facility provided by the assessee provides limited access to the subscriber to copy righted article and not to the copy rights of the article. There is no material available on record which would show that while allowing access of material and data, the assessee has transferred its right to use the copy right in any literary, artistic and scientific work to the subscribers or for information concerning industrial and commercial scientific experience. Further, the subscription is time based carried a restrictive covent. After the end of term of subscription and for two years after termination of the agreement, the subscriber is barred from offering the same and similar services as the syndicated research services covered by the agreement. Thus, in light of the facts available on record the payment made by the subscriber to the assessee referred to as Subscription Fee does not fall within the meaning of royalty under Article 12(3) of India-US DTAA.

12. The Hon'ble Delhi High Court in the case of CIT vs. Relx Ltd. (supra) had the occasion to deal with similar issue. In the said case, the assessee/respondent had

received Subscription Fee from Indian subscribers for the use of legal data base. The subscribers had the access to the judgments, articles, legislation and other research material relevant to the legal field. The assessee claimed Subscription Fee is in the nature of 'Business Income'. Since, the assessee was not having PE in India, the assessee claimed that subscription fee would not be subject to tax in India as per Article 7 of the India-US DTAA. Whereas, stand of the Revenue in the said case was that Subscription Fee is in the of nature of technical consultancy and would fall within the ambit of Article 12(4) i.e. Fee for Included Services. The Department also tried to make out a case to treat Subscription Fee as royalty within the meaning of Article 12(3) of India-US DTAA. The Hon'ble Delhi High Court held that the Subscription Fee received by the assessee for granting access to its data does not constitute fee for technical services nor does the Subscription Fee is in the nature of royalty. The relevant observations of the Hon'ble Delhi High Court holding Subscription Fee is not in the nature of 'royalty' are as under:-

*"11. We find that similar would be the position which would obtain when subscription fee is examined on the anvil of article 12 of the DTAA. If the Department were to describe subscription fee as 'royalty' they would necessarily have to establish that the payments so received by the assessee was consideration for the use of or the right to use any copyright or a literary, artistic or scientific work as defined by article 12(3) of the DTAA. Granting access to the database would clearly not amount to a transfer of a right to use a copyright. We must bear in mind the clear distinction that must be recognised to exist between the transfer of a copyright and the mere grant of the right to use and take advantage of copyrighted material. Neither the subscription agreement nor the advantages accorded to a subscriber can possibly be considered in law to be a transfer of a copyright. In fact, it was the categorical assertion of the assessee that the copyright remains with it at all times.*

*12. This issue in any case no longer appears to be res integra in light of the judgment of this Court in DIT v. Infrasoft Ltd. [2013] 39 taxmann.com 88/[2014] 220 Taxman 273 (Delhi)/2013 SCC OnLine Delhi 4694 We deem it apposite to extract the following passages from that decision:-*

*"89. There is a clear distinction between royalty paid on transfer of copyright rights and consideration for transfer of copyrighted articles. Right to use a copyrighted article or product with the owner retaining his copyright is not the same thing as transferring or assigning rights in relation to the copyright. The enjoyment of some or all the rights which the copyright owner has, is necessary to invoke the royalty definition. Viewed from this angle, a non-exclusive and non-transferable licence enabling the use of a copyrighted product cannot be construed as an authority to enjoy any or all of the enumerated rights ingrained in article 12 of DTAA. Where the purpose of the licence or the transaction is only to restrict use of the copyrighted product for internal business purpose, it would not be legally correct to state that the copyright itself or right to use copyright has been transferred to any extent. The parting of intellectual property rights inherent in and attached to the software product in favour of the licensee/customer is what is contemplated by the Treaty. Merely authorising or enabling a customer to have the benefit of data or instructions contained therein without any further right to deal with them independently does not, amount to transfer of rights in relation to copyright or conferment of the right of using the copyright. The transfer of rights in or over copyright or the conferment of the right of use of copyright implies that the transferee/licensee should acquire rights either in entirety or partially co-extensive with the owner/transferor who divests himself of the rights he possesses pro tanto.*

*90. The licence granted to the licensee permitting him to download the computer programme and storing it in the computer for his own use is only incidental to the facility extended to the licensee to make use of the copyrighted product for his internal business purpose. The said process is necessary to make the programme functional and to have access to it and is qualitatively different from the right contemplated by the said paragraph because it is only integral to the use of copyrighted product. Apart from such incidental facility, the licensee has no right to deal with the product just as the owner would be in a position to do.*

*91. There is no transfer of any right in respect of copyright by the Assessee and it is a case of mere transfer of a copyrighted article. The payment is for a copyrighted article and represents the purchase price of an article and cannot be considered as royalty either under the Income-tax Act or under the DTAA.*

*92. The licensees are not allowed to exploit the computer software commercially, they have acquired under licence agreement, only the copyrighted software which by itself is an article and they have not acquired any copyright in the software. In the case of the Assessee Company, the licensee to whom the Assessee Company has sold/licenced the software were allowed to make only one copy of the software and associated support information for backup purposes with a condition that such copyright shall include Infrasoftware copyright and all copies of the software shall be exclusive properties of Infrasoftware. Licensee*

*was allowed to use the software only for its own business as specifically identified and was not permitted to loan/rent/sale/sub-licence or transfer the copy of software to any third party without the consent of Infracsoft.*

*93. The licensee has been prohibited from copying, de-compiling, de-assembling, or reverse engineering the software without the written consent of Infracsoft. The licence agreement between the Assessee Company and its customers stipulates that all copyrights and intellectual property rights in the software and copies made by the licensee were owned by Infracsoft and only Infracsoft has the power to grant licence rights for use of the software. The licence agreement stipulates that upon termination of the agreement for any reason, the licensee shall return the software including supporting information and licence authorisation device to Infracsoft.*

*94. The incorporeal right to the software i.e. copyright remains with the owner and the same was not transferred by the Assessee. The right to use a copyright in a programme is totally different from the right to use a programme embedded in a cassette or a CD which may be a software and the payment made for the same cannot be said to be received as consideration for the use of or right to use of any copyright to bring it within the definition of royalty as given in the DTAA. What the licensee has acquired is only a copy of the copyright article whereas the copyright remains with the owner and the Licensees have acquired a computer programme for being used in their business and no right is granted to them to utilize the copyright of a computer programme and thus the payment for the same is not in the nature of royalty."*

*13. The distinction between the transfer of a copyright as distinct from a mere right to use copyrighted material was again highlighted by the Supreme Court in Engineering Analysis Centre of Excellence (P.) Ltd. v. CIT [2021] 125 taxmann.com 42/281 Taxman 19/432 ITR 471/(2022) 3 SCC 321 when it observed-*

*"179. The Revenue, therefore, when referring to "royalties" under the DTAA, makes a distinction between such royalties, no doubt in the context of technical services, and remittances for supply of computer software, which is then treated as business profits, taxable under the relevant DTAA depending upon whether there is a PE through which the assessee operates in India. This is one more circumstance to show that the Revenue has itself appreciated the difference between the payment of royalty and the supply/use of computer software in the form of goods, which is then treated as business income of the assessee taxable in India if it has a PE in India.*

#### *Conclusion*

*180. Given the definition of "royalties" contained in Article 12 of the DTAAs mentioned in para 46 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(1)(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.*

*181. 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 para 3 of this judgment."*

*14. The distinction between the right of access to copyrighted content as opposed to parting with the copyright itself was again explained by our Court in CIT, International Taxation v. Microsoft Corpn. [2022] 139 taxmann.com 554/288 Taxman 32/445 ITR 6 (Delhi)/2022 SCC OnLine Del 1514 where the following pertinent observations were made:-*

*"4. Having heard learned counsel for the appellant, this court finds that the issue raised in the present appeals is no longer res integra as the Supreme Court in Engineering Analysis Centre of Excellence Pvt. Ltd. v. CIT [2021] 432 ITR 471 (SC)/[2021] SCC OnLine SC 159 has held as under (page 488 of 432 ITR):*

*"The appeals before us may be grouped into four categories :*

*(i) The first category deals with cases in which computer software is purchased directly by an end-user, resident in India, from a foreign, non-resident supplier or manufacturer.*

*(ii) The second category of cases deals with resident Indian companies that act as distributors or resellers, by purchasing computer software from foreign, non-resident suppliers or manufacturers and then reselling the same to resident Indian end-users.*

*(iii) The third category concerns cases wherein the distributor happens to be a foreign, non-resident vendor, who, after purchasing software from a foreign, non-resident seller, resells the same to resident Indian distributors or end-users.*

(iv) *The fourth category includes cases wherein computer software is affixed onto hardware and is sold as an integrated unit/equipment by foreign, non-resident suppliers to resident Indian distributors or end-users.. ..*

*The Authority for Advance Rulings then reasoned that the fact that a licence had been granted would be sufficient to conclude that there was a transfer of copyright, and that there was no justification for the use of the doctrine of noscitur a sociis to confine the transfer by way of a licence to only include a licence which transferred rights in respect of copyright, by referring to Explanation 2 to section 9(1)(vi) of the Income-tax Act. It then held:*

*'Considerable arguments are raised on the so-called distinction between a copyright and copyrighted articles. What is a copyrighted article ? It is nothing but an article which incorporates the copyright of the owner, the assignee, the exclusive licensee or the licensee. So, when a copyrighted article is permitted or licensed to be used for a fee, the permission involves not only the physical or electronic manifestation of a programme, but also the use of or the right to use the copyright embedded therein. That apart, the Copyright Act or the Income-tax Act or the DTAA does not use the expression "copyrighted article", which could have been used if the intention was as claimed by the applicant. In the circumstances, the distinction sought to be made appears to be illusory.'*

*This ruling of the Authority for Advance Rulings flies in the face of certain principles. When, under a non-exclusive licence, an end-user gets the right to use computer software in the form of a CD, the end-user only receives a right to use the software and nothing more. The end-user does not get any of the rights that the owner continues to retain under section 14(b) of the Copyright Act read with sub-section (a)(i)-(vii) thereof. Thus, the conclusion that when computer software is licensed for use under an EULA, what is also licensed is the right to use the copyright embedded therein, is wholly incorrect. The licence for the use of a product under an EULA cannot be construed as the licence spoken of in section 30 of the Copyright Act, as such EULA only imposes restrictive conditions upon the end-user and does not part with any interest relatable to any rights mentioned in sections 14(a) and 14(b) of the Copyright Act.. ..*

*Also, any ruling on the more expansive language contained in the Explanations to section 9(1)(vi) of the Income-tax Act would have to be ignored if it is wider and less beneficial to the assessee than the definition contained in the DTAA, as per section 90(2) of the Income-tax Act read with Explanation 4 thereof, and article 3(2) of the DTAA. Further, the expression 'copyright' has to be understood in the context of the statute which deals with it, it being accepted that municipal laws which apply in the Contracting States must be applied unless there is any repugnancy to the terms of the DTAA. For all these reasons, the determination of the Authority for Advance Rulings in Citrix Systems (AAR) (supra) does not state the law correctly and is thus set aside.. .. 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.*

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

*5. Further, this court on similar facts has allowed writ petitions filed by the similarly placed assessee in EY Global Services Ltd. v. Asst. CIT W. P. (C) No. 11957 of 2016 and EYGBS (India) Pvt. Ltd. v. Joint CIT W. P. (C) No. 12003 of 2016 [2022] 441 ITR 54 (Delhi). The relevant portion of the said judgment is reproduced hereinbelow (page 69 of 441 ITR) :*

*"A reading of the above judgment would clearly show that for the payment received by EYGSL (UK) from EYGBS (India) to be taxed as 'royalty', it is essential to show a transfer of copyright in the software to do any of the acts mentioned in section 14 of the Copyright Act, 1957. A licence conferring no proprietary interest on the licensee, does not entail parting with the copyright. Where the core of a transaction is to authorise the end-user to have access to and make use of the licenced software over which the licensee has no exclusive rights, no copyright is parted with and therefore, the payment received cannot be termed as 'royalty'. In the present case, the EYGBS (India), in terms of the Service Agreement and the memorandum of understanding, merely receives the right to use the software procured by the EYGSL (UK) from third-party vendors. The consideration paid for the use of the same therefore, cannot be termed as 'royalty' as held by the Supreme Court in Engineering Analysis Centre (supra). In determining the same, the rights acquired by the EYGSL (UK) from the third-party software vendors are not relevant. What is relevant is the agreement between the EYGSL (UK) and the EYGBS (India). As the same does not create any right to transfer the copyright in the software, the same would not fall within the ambit of the term 'royalty' as held by the Supreme Court in Engineering Analysis Centre (supra). We may also note that the learned Authority for Advance Rulings in its impugned order has relied upon its earlier view in Citrix Systems Asia Pacific Pty. Ltd., In re [2012] 343 ITR 1 (AAR), which has been expressly stated to be bad law in Engineering Analysis Centre (supra). The submission of the learned counsel for the Revenue that the judgment of the Supreme Court in Engineering Analysis Centre (supra)*

*cannot be applied because it confines itself only to the four categories mentioned in paragraph 4, also cannot be accepted. Though the Supreme Court was on facts considering the four categories of cases that arose in the appeals before it, it has laid down the law for general application. The law, as laid down by the Supreme Court, when applied to facts of the present case, squarely covers the same in favour of the petitioners.*

*The submission made by the learned counsel for the Revenue relying upon the amendment to section 9(1)(vi) of the Income-tax Act, 1961 has also been specifically considered and rejected by the Supreme Court.*

*In view of the above, the impugned rulings dated August 10, 2016 passed by the learned Authority for Advance Rulings are set aside and it is held that the payment received by EYGSL (UK) for providing access to computer software to its member firms of EY Network located in India, that is, EYGBS (India), does not amount to 'royalty' liable to be taxed in India under the provisions of the Income-tax Act, 1961 and the India-UK DTAA."*

*6. Since, the issue of law raised in the present appeals has been conclusively decided in favour of the assessee by the Supreme Court, no substantial question of law arises for consideration in the present appeals. It is also pertinent to mention that the appellant had admitted before the Income-tax Appellate Tribunal that the dispute in question had been decided in favour of the assessee by the Tribunal in the earlier years. Accordingly, the present appeals are dismissed."*

*15. Similarly, in order for that income to fall within the ambit of 'fees for included services', it was imperative for the Department to establish that the assessee was rendering technical or consultancy services and which included making available technical knowledge, experience, skill, know-how or processes. As has been found by the Tribunal, the access to the database did not constitute the rendering of any technical or consultancy services and in any case did not amount to technical knowledge, experience, skill, know-how or processes being made available.*

*16. We note that while explaining the meaning liable to be ascribed to the expression 'make available', the Court in CIT (International Taxation) v. Bio-Rad Laboratories (Singapore) Pte. Ltd. [2023] 155 taxmann.com 646/[2024] 296 Taxman 167/[2023] 459 ITR 5 (Delhi)/[2023] SCC OnLine Del 6770 had affirmed the following opinion as expressed by the Tribunal. This is evident from a reading of paras 14, 14.1 and 15, which is extracted below:*

*"14. According to the Tribunal, the agreement between the respondent-assessee and its Indian affiliate had been effective from January 1, 2010, and if, as contended by the appellant-Revenue, technical knowledge, experience, skill, and*



*other processes had been made available to the Indian affiliate, the agreement would not have run its course for such a long period.*

*14.1 Notably, this aspect is adverted to in paragraphs 17 to 23 of the impugned order. For convenience, the relevant paragraphs are extracted hereafter (page 463 of 33 ITR (Trib)-OL) :*

*"A perusal of the aforementioned provision shows that in order to qualify as fees for technical services, the services rendered ought to satisfy the 'make available' test. Therefore, in our considered opinion, in order to bring the alleged managerial services within the ambit of fees for technical services under the India-Singapore Double Taxation Avoidance Agreement, the services would have to satisfy the 'make available' test and such services should enable the person acquiring the services to apply the technology contained therein.. ..*

*.. . agreement is effective from January 1, 2010 and we are in the assessment years 2018-19 and 2019-20. In our considered opinion, if the assessee had enabled the service recipient to apply the technology on its own, then why would the service recipient require such service year after year every year since 2009 ?*

*This undisputed fact in itself demolishes the action of the Assessing Officer/Dispute Resolution Panel. The facts on record show that the recipient of the services is not enabled to provide the same service without recourse to the service provider, i.e, the assessee.*

*In our humble opinion, mere incidental advantage to the recipient of services is not enough. The real test is the transfer of technology and on the given facts of the case, there is no transfer of technology and what has been appreciated by the Assessing Officer/learned Commissioner of Income-tax (Appeals) is the incidental benefit to the assessee which has been considered to be of enduring advantage.*

*In our understanding, in order to invoke make available clauses, technical knowledge and skill must remain with the person receiving the services even after the particular contract comes to an end and the technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that the receiver can deploy similar technology or techniques in the future without depending upon the provider."*

*(emphasis is ours)*

*15. We tend to agree with the analysis and conclusion arrived at by the Tribunal."*

*17. As we examine the nature of the transaction between an Indian subscriber and the assessee, it becomes manifest and apparent that it neither comprises of a transfer of*

copyright nor does it include a transfer of a right to apply technology and other related aspects which are spoken of in article 12(4)(b) of the DTAA."

13. The AO while coming to the conclusion that the Subscription Fee is in the nature of royalty has placed reliance on the decision in the case of ONGC Videsh Ltd. vs. ITO (IT) 31 taxmann.com 119 (Delhi Trib.). We find that it is an old decision much water has flown, thereafter. The Hon'ble Supreme Court of India in the case of Engineering Analyses Centre for Excellence vs. CIT (supra) has given a conclusive finding that where any agreement creates interest or right for use of copy righted article the payments for such use does not constitutes royalty. Thus, in light of the facts of the case and above mentioned decisions, we hold that the Subscription Fee received by the assessee for providing access to copyrighted article is not in the nature of royalty. Thus, the assessee succeeds on ground no. 3 of appeal as well.

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

Order pronounced in the open court on Tuesday the 04<sup>th</sup> day of November, 2025.

Sd/-

(BRAJESH KUMAR SINGH)

लेखाकार सदस्य/ACCOUNTANT MEMBER

दिल्ली / Delhi, दिनांक/Dated 04/11/2025

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य/JUDICIAL MEMBER

NV/-

**प्रतिलिपि अग्रेषितCopy of the Order forwarded to :**

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. The PCIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि., दिल्ली /DR, ITAT, दिल्ली
5. गार्ड फाइल/Guard file.

BY ORDER,

//True Copy//

(Asstt. Registrar) ITAT, DELHI

1.	Date of dictation of Tribunal order	30.10.2025
2.	Date on which typed draft order is placed before the dictating Member	30.10.2025
3	Date on which typed draft order is placed before the other Member (in the case of DB)	
4.	Date on which the approved draft order comes to P.S./Sr.P.S	
5.	Date on which the fair Order is placed before the dictating Member for sign	
6.	Date on which the fair Order is placed before the other Member for sign ( in the case of DB)	
7.	Date on which the Order comes back to P.S./Sr.P.S for uploading on ITAT website	
8.	Date of uploading, if not, reason for not uploading	
9.	Date on which the file goes to the Bench Clerk	
<b>10.</b>	Date on which order goes for xerox	
11.	Date on which order goes for endorsement	
12.	Date on which the file goes to the Superintendent/O.S. for checking	
13.	Date on which the file goes to the Assistant Registrar for signature on the order	
14.	Date on which the file goes to dispatch section for dispatch the Tribunal Order	
15.	Date of dispatch of order	
16.	Date on which file goes to Record Room after dispatch the order	