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

% *Date of decision: 29.08.2023*

+ **ITA 487/2023**

COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION)-

2 Appellant

Through: Mr Sanjay Kumar, Sr. Standing Counsel.

versus

M/S CSG INTERNATIONAL LTD. Respondent

Through: Mr Sumit Lalchandani, Advocate.

CORAM:

HON'BLE MR JUSTICE RAJIV SHAKDHER

HON'BLE MR JUSTICE GIRISH KATHPALIA

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

RAJIV SHAKDHER, J.: (ORAL)

**CM No. 44429/2023 [Application filed on behalf of the appellant seeking
condonation of delay of 160 days in re-filing the appeal]**

1. This is an application filed by the appellant/revenue seeking condonation of delay in re-filing the appeal.
2. According to the appellant/revenue, there is a delay of 160 days in re-filing the appeal.
3. Counsel for the respondent/assessee says that he would have no objection if the delay is condoned.
4. For the reasons given in the application and the stand taken by the counsel for the respondent/assessee, the delay in re-filing the appeal is condoned.



5. The application is disposed of, in the aforesaid terms.

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6. This appeal concerns Assessment Year (AY) 2003-04.

7. *Via* this appeal, the appellant/revenue seeks to assail the order dated 01.08.2022 passed by the Income Tax Appellate Tribunal [in short, “Tribunal”].

8. The Tribunal, having examined the facts on record, proceeded to allow the appeal filed by the respondent/assessee by applying the ratio of the judgment in *Engineering Analysis Centre of Excellence Pvt. Ltd. v. CIT*, [2021] 432 ITR 471 of the Supreme Court.

9. The findings of the fact returned by the Tribunal were in the background of the following facts:

“4. Facts relevant to the adjudication of the case are that the assessee was incorporated under the laws of United Kingdom ('UK') on June 29, 1992 with the primary objective of carrying on the business of specialists, engineers and dealers in computer systems. AY 2003-04, the Appellant filed its return of income on March 22, 2005 wherein revenue classified as fees for technical services amounting to Rs. 741,538,511 was offered to tax.

5. The Appellant has contracts with Indian customers such as Bharti, Ericsson and Motorola for licensing of software products and is rendering specified services in relation to its billing software. It is submitted that the Appellant has entered into the following two types of agreements with its customers:

6. License agreements with Ericsson and Motorola provide a limited right i.e. a non-exclusive, personal and non-transferable right to the said customers to use the software product solely for the purpose of meeting the latter's obligations to their own customer i.e. BSNL ('sub-licensee'); and a one-time right to sub-license the software product to the 'sub-licensee' is given with further restrictions on the extent and manner of the use of software. The sub-license in such a case is also the



ultimate user of the software. The 'sub-licensee' is identified in the license agreement between the Appellant and its customers and the customers cannot sub-license such software product to any other sub-licensee.

7. License agreements with Bharti that provide the license to the Appellant's customers to use the software product in its own business without any further sub-licensing rights to any third party. The customers in such a case are the ultimate user of the software.

8. The Assessing Officer held that the payments amounting to Rs.365,090,258/- received by the assessee for supply of software is taxable as "royalty" on account of being a payment for grant of a copyright as well as payment received for allowing the use of the process inherent in the software."

10. The Tribunal, having regard to the aforesaid facts, returned the following findings having regard to law enunciated in the judgment of the Supreme Court rendered in the ***Engineering Analysis***:

"18, The Hon'ble Apex Court held that a non-exclusive, non-transferable license, merely enabling the use of a copyrighted product, is in the nature of restrictive conditions which are ancillary to such use, and cannot be construed as a licence to enjoy all or any of the enumerated rights mentioned in section 14 of the Copyright Act, or create any interest in any such rights so as to attract section 30 of the Copyright Act.

19. The right to reproduce and the right to use computer software are distinct and separate rights, the former amounting to parting with copyright and the latter, in the context of nonexclusive EULAs, not being so. At this juncture, we have examined the written submission of the Id. DR and find that it would not make any material difference to the fact that the buyer of the software in the instant case also has the user right only, The buyer has no right to re-sale the product and it still remained a copyrighted article which the buyer cannot alter modified, reproduced i.e. own will unless authorized. And such authorization has been



given to re-supply to BSNL for their use, at the same time, keeping the all other rights with the assessee,

20. Holding thus, the Hon'ble Supreme Court decided the issue in favour of the taxpayer and laid down that the payments made by resident Indian end-users/distributors to non-resident computer software manufacture/suppliers as consideration for use/resale of shrink-wrapped software does not amount to payment for royalty for the use of copyright in the computer software considering the definition of royalty under the DTAA's. Hence, keeping in view the judgment of Hon'ble Apex Court, we hereby allow the appeal of the assessee on merits."

11. It is not disputed before us by Mr Sanjay Kumar, learned senior standing counsel, who appears on behalf of the appellant/revenue, that what is sold is the copyrighted software which is shrink-wrapped.

12. To our minds, the consideration received on the sale of off-the-shelf, shrink-wrapped software to Indian distributors and resellers would not constitute royalty in terms of the India-UK Double Taxation Avoidance Agreement.

13. Thus, in our opinion, no substantial question of law arises for our consideration.

14. The appeal is, accordingly, closed.

RAJIV SHAKDHER, J

GIRISH KATHPALIA, J

AUGUST 29, 2023 / tr