IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'D' : NEW DELHI)

SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER
and
SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER

ITA No.6018/Del./2017
(ASSESSMENT YEAR : 2014-15)

Kony Inc., 9225, BEE Cave Road, Suite 300, Austin, TX 78733, United States of America.	vs.	ACIT, Circle 2(1)(2), International Taxation, New Delhi.

(PAN : AAECK4771D)

(APPELLANT) (RESPONDENT)

ASSESSEE BY : Shri R. Sivaraman, Advocate
REVENUE BY : Ms. Meenakshi Singh, CIT DR

Date of Hearing : 12.05.2022
Date of Order : 01.06.2022

ORDER

PER SHAMIM YAHYA, ACCOUNTANT MEMBER :

This appeal filed by the assessee is against the order of Assessing Officer (AO) passed pursuant to the directions of the Dispute Resolution Panel (DRP).

2. The grounds of appeal taken by the assessee read as under :-

> **"1. On the facts and circumstances of the case and in law, the Learned Assistant Commissioner of Income-tax, Circle – 2(l)(2)(International Taxation), New Delhi ('Ld. AO') has erred in characterizing, and the Learned Dispute Resolution Panel ('Ld. DRP) has further erred in confirming that, the nature of receipts amounting to INR 3,30,00,000 from sale of perpetual licence to State Bank of India ('SBI') as 'royalty' income liable for taxation in India within the**

> **meaning of Article 12(3) of the India-USA Double Taxation Avoidance Agreement ('DTAA') stating that payment received by the Appellant is towards use of secret process as well as grant of licence to use the software.**
>
> **2. On the facts and in the circumstances of the case and in law, the Ld. AO / Ld. DRP erred in adopting the amended definition of 'royalty' as per the Income-tax Act, 1961 while interpreting taxability under the India-USA DT AA by invoking provisions of sub-section (3) of section 90 of the Income-tax Act, 1961 read with Article 3 of India-USA DTAA.**
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> **3. On the facts and in the circumstances of the case and in law, the Ld. AO / Ld. DRP erred in not considering the OECD Commentary on the contention that the Government of India has expressed reservations on the issue of taxation of royalty.**
>
> **4. On the facts and in the circumstances of the case and in law, the Ld. AO / Ld. DRP erred by not following the decisions of jurisdictional High Court, which is binding in nature, merely on the ground that the said decisions has been challenged by the department.**
>
> **5. On the facts and in the circumstances of the case and in law, the Ld. AO / Ld. DRP erred by not adopting the well settled principle, that if two views are possible then the view favourable to the assessee has to be considered.**
>
> **6. On the facts and circumstances of the case and in law, the Ld. AO erred in initiating penalty proceedings under section 271 (1)(c) of the Act."**

2. Brief facts of the case are that M/s. Kony Inc. US (hereinafter referred to the 'assessee') was in the business of multichannel application development platform provider with over 350 customers in 45 countries in the year under consideration. The assessee was a developer of Kony Mobile Application Platform ('KMAP') and held the right to license the KMAP to its customers. KMAP is a standard application platform which enables the development of mobile applications. It. provided an end-to end integrated, cloud-based platform that enables enterprises to quickly

design, build, test, deploy and manage multi-channel app experiences. It also provides a suite of customizable, ready-to-run apps that lower costs, ensure faster time to market, and provide enterprises the flexibility to evolve at the speed of mobile technology. The assessee company employed a specialized staff of professionals globally dedicated to development, delivery, and support of mobile solutions and technologies. It provided software and support services to meet the demands of the ever changing mobile landscape and provided customers with innovative solutions.

3. During the Financial Year (FY) 2013-14, the assessee entered into an agreement with State Bank of India ('SBI') for sale of KMAP and received Rs.3,30,00,000 from such sale. As per the said agreement, the perpetual license was described as a standard software. Also, the end user of the license does not have any access to the source code i.e. the user is not allowed to disassemble, decompile, reverse engineer, or otherwise attempt to derive the structure, sequence or organization of source code but only has a right to use the software for business purpose.

4. The Assessing Officer (AO) in the draft assessment order held that on the basis of the above, it is clear that the assessee’s receipt from supply of software are taxable in India as royalty income both under section 9(1)(vi) of the Act and under Article 12(3) of India USA DTAA

as well. In view of the above, the tax rate applicable in the assessee's case will be 15% as in the India USA DTAA on gross basis and including applicable surcharge and education cess (being more beneficial in comparison to the rate under the Income Tax Act, 1961 applicable for AY 2014-15 – being 25% plus applicable surcharge and education cess). The ld. DRP rejected the assessee's objections. Against the above order, the assessee is in appeal before us.

5. We have carefully considered the submissions of both the parties and gone through the record.

6. Ld. counsel of the assessee submitted that the issue is now squarely covered by the decision of **Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Private Ltd. vs. The Commission of Income-tax in Civil Appeal Nos.8733-8734 of 2018**. In this case, Hon'ble Apex Court expounded that consideration for the resale of the computer software through End User License Agreement (EULA)/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. Ld. counsel submitted that the facts in the assessee's case are identical. He further submitted that ITAT in assessee's own case earlier also has decided the issue in favour of the assessee.

7. Ld. DR for the Revenue could not dispute the above proposition.

8. Accordingly, respectfully following the precedent from Hon'ble Apex Court and duly taking note that Revenue has not disputed that the facts in this care are not identical, we set aside the order of the Revenue authorities and decide the issue in favour of the assessee.

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

Order pronounced in the open court on this day of 1st June, 2022.

Sd/-	**sd/-**
(CHANDRA MOHAN GARG)	**(SHAMIM YAHYA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated the 1st day of June, 2022
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Copy forwarded to:

1.Appellant
2.Respondent
3.CIT
4.DRP
5.CIT(ITAT), New Delhi.

AR, ITAT
NEW DELHI.