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

INCOME TAX APPEAL NO. 171 OF 2018

Commissioner of Income Tax (IT)-2	]		
17th Floor, AIR India Building,	]		
Nariman Point, Mumbai 400 021	]	..	Appellant
V/s			
M/s. Colgate Palmolive Marketing SDN BHD	]		
C/o S.R. Batliboi & Co.,	]		
14th Floor, The Ruby, Senapati Bapat Marg,	]		
Dadar (W), Mumbai 400 028.	]	..	Respondent

Mr. Suresh Kumar, for Appellant.
Mr. Percy Pardiwalla, Sr. Advocate with Mr. Madhur Agrawal, Mr. Jay Zaveri, Ms.Rhea Prakash and Ms. Tavleen Saini i/b. Crawford Bayley & Co., for Respondent.

CORAM: K. R. SHRIRAM &
FIRDOSH P. POONIWALLA,JJ.
DATED : 21st JUNE 2023

<u>JUDGEMENT (Per FIRDOSH P. POONIWALLA J.)</u> :-

The present Appeal is filed by the Revenue challenging the Order dated 25th January 2017 passed by the Income Tax Appellate Tribunal (ITAT). Respondent is the Assessee under the provisions of the Income Tax Act, 1961 (the Act) and the relevant Assessment Year is 1999-2000.

2 The Assessee, i.e. Colgate Palmolive Marketing SDN BHD, is an entity incorporated in Malaysia and is engaged in the business of marketing, distribution and sale of household products, fabrics and personal care. Colgate Palmolive (India) Limited (CPI) entered into an

Agreement dated 14th May, 1998 with the Assessee for use of the Assessee's SAP system (the said Agreement). As per the said Agreement, the Assessee was to charge CPI for the use of the SAP system. CPI was required to make payments towards consideration for the use of the system, consideration towards rendering services comprising of costs of maintenance, up-gradation of the system to keep it functional and fees for training personnel for using the SAP system. For the Financial Year 1998-99 (A. Y. 1999-2000), as per the said Agreement, CPI paid to the Assessee a sum of USD 11,80,500/- for the use of the SAP system and a further sum of USD 3,85,000/- towards rendering services as mentioned above.

3 The Assessee filed its Return of Income for Assessment Year 1999-2000, on 29th December, 1999, declaring *'Nil'* income. During the course of assessment proceedings, the Assessing Officer (AO), on verifying the Return of Income and financial statements, found that the Assessee had received an amount of USD 3,85,000/- on account of rendering services to CPI and further a sum of USD 11,80,500/- on account of use of the SAP system. The AO observed that the payments received on account of the use of the SAP system were covered under the definition of *'Royalty'* as defined under Explanation 2 (iii) to Section 9 (1) (vi), and accordingly taxed the same. Furthermore, the AO also observed that the payments received on account of rendering services were in the nature of *'fees for technical services'*. Accordingly, by an Order dated 22nd March 2002, passed under Section 143(3) of the Act, the AO completed the assessment by taxing the said payments.

4 Aggrieved by the said Order dated 22nd March 2002 of the AO, the Assessee filed an Appeal before the Commissioner of Income Tax

(Appeals), Mumbai [CIT(A)]. The CIT(A), dismissed the Assessee's Appeal by an Order dated 16th December 2003.

5 Aggrieved by the said Order dated 16th December 2003, the Assessee filed an Appeal before the Income Tax Appellate Tribunal (ITAT), being ITA No. 2129 of 2004. The grounds raised by the Assessee in the said Appeal, read as under:-

> *"Ground 1*
> *The Learned Commissioner of Income Tax (Appeals), XXXI, Mumbai [CIT(A)] erred in holding that the consideration received by the Appellant for the use of the SAP system is subject to tax as royalty under the Income Tax Act,1961 ('Act'), at the rate of 20 percent on a gross basis.*
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> *Ground 2*
> *The Learned CIT(A) erred in holding that the consideration received by the Appellant in respect of the services is subject to tax as 'fees for technical services' under the Act, at the rate of 20 percent on a gross basis.*
>
> *Ground 3*
> *The Learned CIT(A) erred in denying the option granted to the Appellant under Section 90 of the Act, to be taxed under provisions of the Act or the Double Tax Avoidance Agreement, as the case may be, to the extent whichever is more beneficial to the Appellant.*
>
> *Ground 4*
> *The Learned CIT(A) has erred in holding that the payments received by the Appellant for the use of the system and for the rendering of services are not in the nature of reimbursement of expenses."*

6 By an Order dated 25th January 2017, the ITAT allowed the Appeal of the Assessee. The said Order dated 25th January 2017 of the

ITAT has been impugned by the Department in the present Appeal. The following questions of law were proposed in the Memo of Appeal:-

> *"(a) Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT erred in deleting the order of Ld. CIT(A) and holding that payment made to the assessee by the Indian Company CPI for the use of software owned by the assessee is not "Royalty" by making an illusory distinction between copyright and copyrighted articles as when a copyright article is permitted or licensed to be used for a fee it involves not only the physical or electronic manifestation of a programme but also the use of or the right to use the copyright and moreover the Copyright Act or the IT Act or the DTAA does not use the expression 'copyright article' which could have been used if the intention was as claimed, a view upheld by AAR, New Delhi in the cases of Citrix & in EY Global Services Ltd., UK?*
>
> *(b) Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT erred in not upholding the order of Ld. CIT(A) and stating that the payment received from CPI is not equipment royalty, when the AO as well as the Ld CIT(A) has used the word "System" as entailing the process specifically customized for Colgate and its affiliates-as is in the agreement between CPM & CPI – and not mere physical equipment as argued by Hon'ble ITAT?*
>
> *(c) Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT erred in granting India-Malaysia treaty benefits to Assessee when in its own order and assessee's submission it is a clear fact that the customized SAP software is in possession of it US parent M/s. Colgate Palmolive, Piscataway, New Jersey and thus the Assessee not being the beneficial owner is clearly not entitled to claim treaty benefits?"*

7 However, during the course of the hearing before us, Mr. Suresh Kumar, the learned Counsel for the Revenue, stated that, in the present Appeal, the Department was only proposing the following question of law:-

> *“ Whether the ITAT erred in holding that consideration received by the Assessee from CPI for the use of the SAP system was not subject to tax as ‘Royalty’ under the provisions of the Act?”.*

8 In the impugned Order dated 25th January 2017, the ITAT has given various reasons for coming to the conclusion that the payment of USD 11,80,500/- made by CPI to the Assessee was not royalty under the provisions of the Act and hence was not liable to be taxed.

On Clause (iv a) of Explanation 2 to Section 9 (1)(vi)

9 The first reason given by the ITAT is that the said payment would not amount to equipment royalty and therefore cannot be taxed as royalty under the Act.

10 Mr. Suresh Kumar challenged the said finding of the ITAT on various grounds. He submitted that, though, in view of the provisions of Section 90(2) of the Act, the Assessee had an option to opt for taxation either under the Act, or the DTAA, whichever is beneficial to him, however it was imperative to look into the meaning of royalty given in the Act and in the DTAA. Relying upon the provisions of Sections 5 and 9 of the Act, and the amendments made in Section 9 from time to time, he submitted that, as far as taxation of income arising out of royalty is concerned, the source rule would apply. In other words, the country where the actual economic nexus of the income lies has the right to tax income irrespective of the place of residence of the entity deriving the income. He further submitted the definition of royalty provided in the explanations to Section 9(1)(vi) is wide enough to cover industrial royalty as well as copyright royalty. He submitted that the DTAAs entered into by the Government

with foreign countries, which are worded in similar manner as Explanation 2 to Section 9(1)(vi), encompass both industrial royalty and copyright royalty. He further submitted that Finance Act 2000 substituted the old Explanation 3 with a new one and Finance Act 2001 inserted Clause (iv a) to Explanation 2 to Section 9(1)(vi). He submitted that these amendments have widened the meaning of royalty. He submitted that Explanations 4, 5 and 6 to Section 9(1)(vi) were brought into the statute to clarify the meaning of royalty. He further submitted that the definition of royalty under the DTAA is more or less in pari materia with the definition provided in the Act. For these reasons, he submitted that the payment made by CPI to the Assessee would amount to equipment royalty and therefore was liable to be taxed under the Act.

11 In response, Mr. Pardiwalla submitted that the definition of royalty in Explanation 2 to Section 9(1)(vi) of the Act, as applicable during the Assessment Year 1999-2000, did not contain the equipment royalty clause. He submitted that Clause (iv a) of Explanation 2 to Section 9(1)(vi) was inserted by the Finance Act 2001 with effect from the Assessment Year 2002-2003. Therefore, there was no question of applying the equipment royalty clause under the Act in the present case. He further submitted that, in the light of the provisions of Section 90 (2) of the Act, the Assessee was entitled to take the benefit of the more beneficial provisions of the Act, instead of the DTAA, and therefore the said payment would never be considered as equipment royalty as contended by the Department. Mr. Pardiwalla further submitted that therefore the conclusions arrived at by the ITAT in this regard were correct.

12 The ITAT held that it was undisputed that the meaning of royalty, as provided under Explanation 2 to Section 9(1)(vi) of the Act, initially did not include equipment royalty. Only by way of an amendment made to the said Explanation 2 by Finance Act 2001, Clause (iv a) providing for equipment royalty was inserted into the Act with effect from 1st April 2002. Thus, till Assessment Year 2001-2002, Section 9(1)(vi) did not provide for equipment royalty. The ITAT held that, since equipment royalty was not coming within the meaning of royalty as provided under Section 9(1)(vi) read with Explanation 2, the said payment could not have been brought to tax under the Act for Assessment Year 1999-2000. The ITAT further referred to Section 90(2) of the Act which provides that where the Central Government has entered into an agreement with the Government of any country outside India or specified territory outside India, as the case may be, for granting relief of tax or avoidance of double taxation, then, in relation to the assessee to whom such an agreement applies, the provisions of the Act would apply to the extent that they are more beneficial to that assessee. Relying upon Section 90(2), the ITAT held that, since under the Act, for Assessment Year 1999-2000, equipment royalty was not provided for, the Assessee could take advantage of this provision which was more beneficial to it, instead of the terms of the Indo Malaysian Double Taxation Avoidance Agreement (DTAA), and therefore the question, of the payment made by CPI to the Assessee being equipment royalty, did not arise at all.

13 In our view, the provisions of Section 90(2) of the Act are very clear. By virtue of the provisions of Section 90(2), if between the provisions of the DTAA and the Act, the provisions of the Act are more beneficial to the Assessee, then the Assessee can opt for taxation under

the Act, instead of the DTAA. In the present case, since, for the Assessment Year 1999-2000, the definition of royalty given in Explanation 2 to Section 9(1)(vi) did not include equipment royalty as Clause (iv a) was inserted into the said Section by the Finance Act 2001 only with effect from 1st April 2002, the Assessee was entitled to opt for taxation under the provisions of the Act. It is undisputed that the provisions of the Act, as far as they are applicable to Assessment Year 1999-2000, did not provide for equipment royalty. In these circumstances, in our view, the ITAT was correct in holding that the said payment of USD 11,80,500/- made by CPI to the Assessee could not have been brought to tax under the Act as equipment royalty. Further, in our view, for the aforesaid reasons, the submissions made by Mr. Suresh Kumar in the context of equipment royalty are totally devoid of merit.

On Clauses (i), (ii) and (iii) of Explanation 2 to Section 9(1)(vi) and Explanation 6 to Section 9(1)(vi)

14 The next reason given by the ITAT is that the payment made by CPI to the Assessee was not process royalty under Clause (iii) to Explanation 2 to Section 9(1)(vi).

15 Mr. Suresh Kumar challenged the said finding of the ITAT by submitting that CPI had paid the amount to the Assessee for the transfer of certain rights in respect of a process and for the use of a process. He submitted that, for the definition of "process", Explanation 6 is relevant. He submitted that the process as defined in Explanation 6 included transmission by satellite, cable or optic fibre or any other technology, which are applicable to the Assessee's case. Mr. Suresh Kumar submitted that, since payments made by CPI to the Assessee are in relation to transfer of certain rights in respect of a process or for use of any process,

the same are taxable under the provisions of Section 9 (1) (vi) of the Act.

16 Mr. Pardiwalla supported the findings of the ITAT. He submitted that Clause (iii) of Explanation 2 to Section 9(1)(vi) provides that royalty means consideration for use of any patent, invention, model, design, secret formula or process or trademark or similar property. He submitted that the payment made by CPI to the Assessee is for the purpose of provision of standard facility which is accessed by the CPI for the purpose of its business requirements and which is enabled by use of the SAP system. Therefore, such a payment cannot be regarded as payment for use of a process or any other term used in Clause (iii) of Explanation 2 to Section 9(1)(vi). Therefore, the payments made by CPI to the Assessee cannot be characterized as royalty under the Act.

17 Further, Mr. Pardiwalla submitted that Explanation 6 to Section 9(1)(vi), inserted by the Finance Act 2012, with retrospective effect from 1st June 1976, provides that the expression *"process"* includes transmission by satellite (including uplinking, amplification, conversion for downlinking of any signal), cable, optic fibre or by any other similar technology, whether or not such process is secret. He submitted that this Explanation had no bearing on the Assessee's case since payment made by CPI to the Assessee was not for transmission by satellite, but for access to the SAP system. He submitted that merely because communication channels were used for input of data and generation of report would not mean that there is transmission by satellite. He submitted that what the explanation seems to bring in is live transmission of programmes such as channel feed and not SAP system, which is a standard facility provided by the Assessee.

18 The ITAT held that, if the language employed in Clause (iii) of Explanation 2 to Section 9 (1) (vi) is properly analyzed, it can be seen that there must a right to use of some of the categories of items as mentioned therein. The ITAT held that, in the present case, there was nothing to suggest that CPI had obtained the right to use any of the things as mentioned in Clause (iii) for which it had made payment to the Assessee. On the contrary, it was evident that the payment made by CPI was for the purpose of accessing the SAP system hosted by the Assessee at its facilities for exchange of information/data.

19 The ITAT has also considered what is the SAP system. It recorded that SAP is an Enterprise Resource Planning (ERP) system developed by SAP A. G., Germany. The expression SAP stands for *"Systems Applications and Products"* in data processing. It provides end to end solutions for financial, logistics, distributions, inventories etc. All business processes are executed in one SAP system and sharing common information with everyone.

20 The ITAT further recorded that Colgate Palmolive, USA, on 28th March 1994, entered into an End User Software License Agreement with SAP America Inc., which was owning the rights over the software in USA, and was competent to grant licenses of such software. Under the Agreement, SAP America Inc. granted license to Colgate Palmolive, USA. As per Clause 2 of the said License Agreement, the license to use the software granted to Colgate Palmolive USA and its affiliates was non exclusive, perpetual and non-transferable. It also provided that the license granted did not include the right for Colgate to distribute the software to third parties or other legal entities other than Colgate

affiliates. Colgate Palmolive, USA, in turn entered into an Agency Agreement with the Assessee for providing services relating to information technology (including costs of managing the data centre in Tiscataway USA, communication line and development costs for new applications) to its subsidiary companies in Asia and South Pacific. The said Agency Agreement provided that the agent would have no authority to act on behalf of the principal for any purpose other than the purpose of invoicing and collecting from the subsidiaries for the services to be provided in terms of the agreement. The Agency Agreement strictly prohibited the agent to represent, obligate, do business or enter into contract on behalf of the principal.

21 The ITAT further recorded that, as far as the Assessee is concerned, the role of the SAP system in its business is for material procurement, production, sales order processing and payroll processing. On the basis of the data fed into the system, stake holders at the divisions level can have visibility to the stock position across the countries in the division. With global manufacturing facilities supplying to many countries, online data available in SAP is very crucial in placing orders for procurement. Financial records are consolidated using the reporting modules and are made available within few days of the close of the period. The group companies in different countries can only process transactions and have no access to modify any of the configurations.

22 Based on the aforesaid, the ITAT came to the conclusion that the payment made by CPI is for the purpose of accessing the SAP system hosted by the Assessee at its facilities for exchange of information / data.

23 Further, in the context of process royalty, the ITAT further

held that Explanation 6 to Section 9(1)(vi) would have no bearing on the issue at hand as what is meant by the said Explanation is live transmission of programmes such as channel feed and not SAP, which is used for input of data and generation of outputs. Accordingly, the ITAT concluded, on facts, that the payment received by the Assessee from CPI towards the use of the SAP system could not be treated as process royalty under the provisions of the Act.

24 Clause (i) of Explanation 2 to Section 9(1)(vi) provides that royalty means consideration for the transfer of all or any rights (including the granting of a license) in respect of a patent, invention, model, design, secret formula or process or trademark or similar property. Therefore, for the payment by CPI to the Assessee to amount to royalty it would be necessary that there should be transfer of any right in respect of a process or in any of the other things mentioned in clause (i). In the present case, as set out hereinabove, and as recorded by the ITAT, the Assessee only provided access to the SAP system to CPI. There is no transfer of any right in any process or in any of the other things mentioned in Clause (i) by the Assessee to CPI. Therefore, the present case does not fall within the said Clause (i).

25 As far as Clause (ii) of Explanation 2 to Section (9)(1)(vi) is concerned, the same would apply if there is imparting of any information concerning the working of, or the use of, a patent, invention, model, design, secret formula or process or trademark or similar property. Again, in the present case, the Assessee has not imparted any information to CPI concerning the working of, or the use of, any process or any of the other things mentioned in Clause (ii). In these circumstances, Clause (ii) is also not applicable.

26 Clause (iii) of Explanation 2 to Section 9(1)(vi) applies if there is any use of any patent, invention, model, design, secret formula or process or trademark or similar property. Again, in the present case, CPI is only accessing the SAP system of the Assessee and is not using any process of the Assessee or any of the other things mentioned in Clause (iii). In these circumstances, Clause (iii) is also not applicable.

27 Further, Explanation 6 to Section 9(1)(vi) clarifies that the expression *"process"* includes and shall be deemed to have always included transmission by satellite, cable, optic fibre or by any other similar technology, whether or not such process is secret. As rightly submitted by Mr. Pardiwalla, and as rightly held by the ITAT, Explanation 6 includes within the definition of process live transmission of programmes such as channel feed and not access of the SAP system of the Assessee as done by CPI, which is a standard facility provided by the Assessee to CPI, and is used for input of data and generation of reports. In these circumstances, in our view, Explanation 6 also does not take the case of the Revenue any further.

28 For the aforesaid reasons, we are of the view that the ITAT is correct in holding, on facts, that the payment made by CPI to the Assessee for accessing the SAP system does not amount to process royalty under Section 9(1)(vi) of the Act.

On Explanation 5 to Section 9(1)(vi)

29 The ITAT has also held that the payment made by CPI to the Assessee would also not be covered by Explanation 5 to Section 9(1)(vi).

30 Mr. Suresh Kumar has challenged the said finding of the ITAT and has submitted that the payment made by CPI to the Assessee amounts to consideration in respect of any right, property or information.

31 Mr. Pardiwalla submitted that, as the SAP system was resident in Malaysia and USA, CPI merely accessed the system, and did not have any control or possession thereof. Hence, payment made by CPI cannot be regarded as payment for use of the system. He further submitted that, as the said amount was not taxable under the Act, there was no need to examine the position under the DTAA.

32 Explanation 5 reads as under :

> *"Explanation 5 – For the removal of doubts, it is hereby clarified that the royalty includes and has always included consideration in respect of any right, property or information, whether or not –*
> *(a) the possession or control of such right, property or information is with the payer.*
> *(b) such right, property or information is used directly by the payer,*
> *(c) the location of such right, property or information is in India".*

33 The ITAT has concluded, on the basis of the facts on record, that, since CPI had been granted a limited access to the SAP system by establishing a communication line at its own cost for use of data available in the SAP system, the payment made by CPI to the Assessee was not consideration in respect of any right, property or information.

34 In our view, the amount paid by CPI to the Assessee cannot be considered as royalty under Explanation 5. In the present case, as correctly held by the ITAT, the facts on record show that CPI had been

granted a limited access to the SAP system by establishing a communication line at its own cost for use of data available in the SAP system. Hence, payment made by CPI cannot be regarded as payment for use of the system and therefore cannot amount to royalty under the said Explanation 5.

On Clause (v) of Explanation 2 to section 9(1)(vi) and Explanation 4 to Section 9(1)(vi)

35 The ITAT has also come to the conclusion that the said payment made by CPI to the Assessee cannot be considered as royalty under clause (v) to Explanation 2 to Section 9(1)(vi).

36 Challenging the said finding of the ITAT, Mr. Suresh Kumar, relying upon Explanation 4, submitted that the software used can be embedded in the hardware, it can be shrink wrapped or it can be accessed electronically. He submitted that, in the Assessee's case, the software was accessed electronically and therefore the payment made towards user of the software is royalty.

37 Further, Mr. Suresh Kumar submitted that neither the Act nor the treaties have defined *"copyright"*. He submitted that Section 9 nowhere mentions that the meaning of copyright would be as defined in the Indian Copyright Act, 1957. It was further submitted that even Section 14 of the Indian Copyright Act says that the meaning of copyright given therein is only for the purpose of that Act. He submitted that, where the meaning of a particular word is to be taken from another Act, the legislature expressly indicates the same. He submitted that the claim of the Assessee has to be tested in the light of the definitions of *'royalty'* in the Act and DTAA without referring to the definition under the Copyright Act, 1957. He further submitted that the test to find out whether payment

made for use of software is 'royalty' is whether the person making the payment is able to commercially exploit the software just like the owner of the software and earn profit by using the software. He submitted that CPI, by making use of data and information obtained from SAP, had used it in its business to make profit, hence, the payment was in the nature of *'royalty'* under clause (v) of Explanation 2.

38 On the other hand, Mr. Pardiwalla referred to the judgment of the Hon'ble Supreme Court in the case of **Engineering Analysis Centre of Excellence Private Limited Vs. Commissioner of Income Tax and Anr.** reported in **(2022) 3 Supreme Court Cases 321.** He submitted that the said judgment makes it very clear that for clause (v) to Explanation 2 to apply there has to be a transfer of all or any rights in relation to a copyright. That is a *sine qua non* for Explanation 2 to become applicable. The Hon'ble Supreme Court held that there must be transfer by way of license or otherwise of all or any of the rights mentioned in Section 14(b), read with Section 14 (a), of the Copyright Act, 1957. He submitted that, applying the ratio of the said judgment to the facts of the present case, there was no transfer of any right in respect of any copyright by the Assessee to CPI, and therefore clause (v) to Explanation 2 was not applicable.

39 Whilst considering the challenge on this ground, the ITAT first noted that this was a completely new facet introduced by the Revenue before it and therefore the ITAT could not adjudicate this issue as it required examination of fresh facts. However, since the Revenue had raised the issue before the ITAT, for the sake of completeness, the ITAT dealt with the same.

40 The ITAT held that the Assessee had merely given access of the SAP system to CPI for a certain specific purpose. By allowing such access, the Assessee had not transferred any right or license in respect of any copyright nor was there any supply of or right to use of computer software. The ITAT recorded that nothing has been brought on record by the Revenue to suggest that the Assessee had transferred any right or license in respect of any copyright or computer software. The ITAT further held that there was no merit in the submission of the Revenue that there is any transfer of right in respect of any copyright by the Assessee to CPI. In this regard, the ITAT noted that it was accepted by the CIT(A) that the Assessee had acquired computer hardware along with the customized software system for integrated computerized recording, summation and generation of reports of business transaction in supply chain. CPI was permitted only to access the system by input of data and the report generated was supplied to CPI. The ITAT held that thus the provisions of clause (v) of Explanation 2 to Section 9(1)(vi) could not be applied to such a transaction. Further, the ITAT held that the right obtained by CPI is in respect of a copyrighted article and not a copyright because said rights obtained by CPI is only for its own use and it cannot commercially exploit such rights.

41 Clause (v) to Explanation 2 reads as under :

> *"(v) the transfer of all or any rights (including the granting of a licence) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting."*

42 This clause has been interpreted by the Hon'ble Supreme Court in the case of **Engineering Analysis Centre of Excellence Private**

Limited (supra). Paragraphs 75, 83 and 84 of the said judgment read as under:-

> *"75. However, even where such transfer is "in respect of" copyright, the transfer of all or any rights in relation to copyright is a sine qua non under Explanation 2 to Section 9(1)(vi) of the Income Tax Act. In short, there must be transfer by way of licence or otherwise, of all or any of the rights mentioned in Section 14(b) read with Section 14(a) of the Copyright Act.*
>
> *83. However, when it comes to the expression "use of, or the right to use", the same position would obtain under Explanation 2(v) of Section 9(1)(vi) of the Income Tax Act, inasmuch as, there must, under the licence granted or sale made, be a transfer of any of the rights contained in Sections 14(a) or 14(b) of the Copyright Act, for Explanation 2(v) to apply. To this extent, there will be no difference in the position between the definition of "royalties" in the DTAAs and the definition of "royalty" in explanation 2(v) of Section 9(1)(vi) of the Income Tax Act.*
>
> *84. Even if we were to consider the ambit of "royalty" only under the Income Tax Act on the footing that none of the DTAAs apply to the facts of these cases, the definition of "royalty" that is contained in Explanation 2 to Section 9(1)(vi) of the Income Tax Act would make it clear that there has to be a transfer of "all or any rights" which includes the grant of a licence in respect of any copyright in a literary work. The expression "including the granting of a licence" in clause (v) of Explanation 2 to Section 9(1)(vi) of the Income Tax Act, would necessarily mean a licence in which transfer is made of an interest in rights "in respect of" copyright, namely, that there is a parting with an interest in any of the rights mentioned in Section 14(b) read with Section 14(a) of the Copyright Act. To this extent, there will be no difference between the position under the DTAA and Explanation 2 to Section 9(1)(vi) of the Income Tax Act."*

43 From the said judgment of the Hon'ble Supreme Court it is very clear that, for clause (v) to Explanation 2 to apply, it is necessary that there must be a transfer of a right in respect of a copyright as

mentioned in Section 14(b), read Section 14(a), of the Copyright Act, 1957. If there is no transfer of any right in respect of any copyright of any literary or artistic or scientific work, then clause (v) to Explanation 2 would not be applicable. In the present case, the facts on record clearly show that the Assessee has not transferred any right in respect of any copyright of any literary or artistic or scientific work to CPI. As stated earlier, the Assessee has only given access of the SAP system to CPI.

44 Further, even if Explanation 4 to Section 9(1)(vi) is taken into consideration, the same provides that the transfer of all or any rights in respect of any right, property or information includes, and has always included, transfer of all or any right for use or right to use a computer software (including granting of a licence) irrespective of the medium through which such right is transferred. For Explanation 4 to apply again there has to be transfer of right to use a computer software. In the present case, the Assessee has not transferred to CPI the right to use any computer software. It has only allowed CPI to access the SAP system. For this reason, on facts, even Explanation 4 is not applicable.

45 For the aforesaid reasons, we are of the view that, on facts,the ITAT has correctly come to conclusion that clause (v) to Explanation 2 is not applicable in the present case.

On Article 7 of the DTAA

46 The last question that the ITAT considered is whether the consideration received by the Assessee could at all be taxed in India. The ITAT concluded that, since the consideration received by the Assessee from CPI towards the use of SAP system is not royalty in terms of DTAA, it would a business profit under Article 7 of DTAA.

47 Mr. Suresh Kumar submitted that the payment received by the Assessee from CPI towards use of the SAP system was royalty and not a business profit and therefore taxable in India. We have already concluded, for the reasons given herein above, that the same is not royalty.

48 Mr. Pardiwalla supported the finding of the ITAT and submitted that, since the Assessee does not have a Permanent Establishment in India, its business profit would not be taxable in India by virtue of the provisions of Article 7 of the DTAA.

49 The ITAT held that, under the terms of Article 7 of the DTAA, unless the enterprise of a Contracting State has a Permanent Establishment in the other Contracting State, the business profit cannot be brought to tax in the other Contracting State. Since the Assessee does not have a Permanent Establishment in India, payment received by the Assessee from CPI towards use of the SAP system was not taxable in India.

50 The ITAT is correct in its finding that, since the Assessee does not have a Permanent Establishment in India, income earned by it as business profit would not be taxable in India by virtue of the provisions of Article 7 of the DTAA. Article 7 of the DTAA states that a tax resident of Malaysia would be taxable in India if it carries on business through a Permanent Establishment in India. Further, the enterprises would be taxable only to the extent the profits are attributable to the Permanent Establishment in India. Article 5 of the DTAA defines the Permanent Establishment as *inter alia a* place of management, a branch, an office, a factory, a warehouse, a workshop etc. Based on this definition, the ITAT

has come to the conclusion that the Assessee does not have a Permanent Establishment in India. As the Assessee does not have a Permanent Establishment in India, by virtue of the provisions of Article 7 of the DTAA, the payment received by it from CPI, which would be business profit, is not taxable in India.

51 In these circumstances, the entire subject matter of the Appeal is fact based, and, in our view, no substantial question of law arises and the Order dated 25th January 2017 of the ITAT requires no interference.

52 For all the aforesaid reasons, the present Appeal is dismissed.

(FIRDOSH P. POONIWALLA, J) **(K.R.SHRIRAM, J)**