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

% *Date of Decision : 12.08.2025*

\+ **ITA 299/2025**

THE COMMISSIONER OF INCOME
TAX - INTERNATIONAL TAXATION -3 .....Appellant

Through: Mr. Ruchir Bhatia, SSC with Mr. Anant Mann, JSC & Ms.Aditi Sabharwal, Advocate.

versus

XIOCOM (NZ) LTD .....Respondent

Through: Appearance not given.

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO
HON'BLE MR. JUSTICE VINOD KUMAR

V. KAMESWAR RAO, J. (*ORAL*)

CM APPL. 49562/2025(Condonation of delay)

1. For the reasons stated in the application, the delay of 1080 days in re-filing the appeal is condoned.

2. The application stands disposed of.

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3. The challenge in this appeal filed under Section 260A of the Income Tax Act, 1961(**the Act**) is to an order passed by the Income Tax Appellate Tribunal (**ITAT**) dated 17.02.2022, whereby the ITAT has dismissed the appeal filed by the Revenue by stating in paragraph 11 onwards as under:

"11. We find that impugned quarrel has now been well settled by the judgment of the Hon'ble Supreme court in the case of Engineering Analysis Centre of Excellence Private Limited 432 ITR 471 wherein the Hon'ble Supreme Court has also considered the Judgment of Hon'ble Delhi High Court. The relevant finding of the Hon'ble Supreme Court read as under :-

168. Given the definition of royalties contained in Article 12 of the DTAAs mentioned in paragraph 41 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 assessees, have no application in the facts of these cases.

169. 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.

170. 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 AAR in Citrix Systems (AAR) (supra) is set aside. The appeals from the impugned judgments of the High Court of Delhi are dismissed.

12. Respectfully following the decision of the Hon'ble Supreme

Court (supra.) we decline to interfere with the findings of the CIT(A) .
13, Ground No.1,2 and 3 are allowed and ground No.4 becomes infructuous.
14. In the result, the appeal filed by the Revenue is dismissed.
15. Decision announced in the open court in the presence of both representatives on 17.02.2022."

4. Some of the facts to be noted for the purpose of this order are: the appeal pertains to Assessment Year (**AY**) 2010-11. The assessee respondent company is involved in designing and providing fully tailored, off the shelf wireless broadband solutions throughout the USA and a few other countries in Africa. During the year under consideration, the assessee company sold "off the shelf" software through a non-exclusive license rights to Zylog Systems (India) Ltd. to utilize the technology in certain areas in India.

5. During the course of scrutiny assessment proceedings the assessee was asked to show cause as to why receipt from granting of license should not be treated as Royalty. The assessee filed a detailed submission explaining the nature of the transaction.

6. The Assessing Officer (**AO**) came to the conclusion that income of ₹19,24,80,000/- from licensed IMS software to Zylog Systems India Ltd. was taxable under Section 9 (1) (vi) of the Act under Article 12 of Indo-NZ-Double Taxation Avoidance Agreement.

7. The Commissioner of Income Tax (Appeals) [**CIT(A)**] has relied upon the judgment of this Court in the case of ***Director of Income Tax v. Infrasoft Limited*** : ***Neutral Citation:2013:DHC:6018*** and has in paragraph

2.3, 2.4, 2.5 and 2.6 held as under:

> *"2.3 In the light of the above discussion, it is apparent that the jurisdictional High Court of Delhi which has a binding force has held unequivocal terms that the right to use granted through licensing of a software does not fall within the meaning of "Royalty" as provided for in the domestic law or the DTAA. Any consideration for the same is not taxable as Royalty under Section 9(1)(vi) or the relevant DTAA. Thus what has been transferred by the appellant is neither the copyright in the software nor the use of the copyright in the software, but what is transferred is the right to use the copyrighted material or article which is clearly distinct from the rights in a copyright. The right that is transferred is not a right to use the copyright but is only limited to the right to use the copyrighted material and the same does not give rise to any royalty income.*
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> *2.4 The effect of the amendments brought about by the Finance Act of 2012 with retrospective effect has also been examined by the Hon'ble High Court of Delhi, a jurisdictional High Court, in the case of Nokia Networks (Supra) and it has been held again in unequivocal terms that the amendments cannot be read into the Treaty. The Hon'ble High Court followed the decision of Bombay High Court in the case of Siemens Aktiongesellschaft (310 ITR 320) in this regard and their own observations in the case of Ericsson (Supra). Thus, despite the amendments, the consideration cannot be regarded as "Royalty" in the absence of corresponding amendments in India-New Zealand DTAA.*
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> *2.5 The AO has also sought to raise the proposition that software can also be regarded as a process or patent. In the first place, the Copyright Act of India recognizes software as a literary work and the law having been so laid, it would not be correct to regard software as a scientific work as the AO is seeking to do. Moreover, the jurisdictional High Court in all the three decisions referred to above, vis-a-vis Ericsson (Supra), Nokia Network (Supra) and Infrasoft (Supra) has held software to be a copyrighted article. In view of this finding which is binding on all authorities falling within the jurisdiction, it is not open to hold otherwise.*
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> *2.6 In view of the above, I hold that the consideration received*

by the appellant for granting the license in respect of software cannot be taxable as Royalty."

8. The only plea before the ITAT was that the judgment of ***Infrasoft*** (*supra*) as relied upon by the CIT(A) is not applicable in facts of this case. The ITAT disagreed by relying upon the judgment of the Supreme Court in the case of ***Engineering Analysis Centre of Excellence Pvt. Ltd. v. The Commissioner of Incometax & Another : Neutral Citation : 2021 INSC 137*** wherein the Supreme Court has given the following findings:

> *"168. Given the definition of royalties contained in Article 12 of the DTAAs mentioned in paragraph 41 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 assessees, have no application in the facts of these cases.*
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> *169. 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.*
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> *170. 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 AAR in Citrix Systems (AAR)*

(supra) is set aside. The appeals from the impugned judgments of the High Court of Delhi are dismissed."

9. From a perusal of paragraph 169 of the judgment, it is clear that the consideration for the resale/use of computer software through EULAs/distribution agreement is not Royalty for the use of copyright of the software and the same does not give rise to any taxable income in India and as a result, the persons referred to under Section 195 of the Act were not liable to be deduct any TDS under Section 195 of the Act.

10. Mr. Ruchir Bhatia does not contest the applicability of the judgment of the Supreme Court in ***Engineering Analysis Centre of Excellence Pvt. Ltd.****(supra)* in the facts of this case.

11. If that be so, no substantial question of law as proposed arises for consideration in this appeal.

12. The appeal is dismissed against the appellant/the Revenue and in favour of the respondent.

V. KAMESWAR RAO, J

VINOD KUMAR, J

AUGUST 12, 2025
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