Payment made for grant of access to software without its copyright can't be held as royalty

Summary – The Mumbai ITAT in a recent case of Shell Information Technology International BV., (the Assessee) held that where assessee had entered into service agreement (MSA) with WIPRO/IBM to provide IT services and provided restricted software/network access and access to software was not for use of any copyright albeit for a copyrighted articles during course of providing service, it, payments received by assessee from WIPRO/IBM could not be treated as 'royalty' under article 12(4) of the India-Netherland DTAA

Facts

- The assessee-company was a tax resident of Netherlands. It was engaged in the business of providing information technology support services to Shell Group Companies. It had entered into 'Master Service Agreement' (MSA) with certain IT service providers' *viz.*, WIPRO & IBM to provide IT services to Shell Group entities. In order to provide such IT services by WIPRO & IBM, they were required to have access to network and software of the assessee-company. According to the assessee, amount received could not be considered as 'royalty' and in absence of any PE, no business income could be taxed in India.
- The Assessing Officer referred to certain clauses of the MSA and held that the amount received from these IT service providers' for access/use of software were in the nature of 'royalty' not only within the meaning of the Act but also under the treaty. Accordingly, he taxed the entire payment as 'royalty'.
- The Commissioner (Appeals) observed that the agreement for supply of software provided to WIPRO/IBM was for mere use and access the copyrighted software of the assessee. The assessee did not provide them the right to use the copyright embedded in the software; WIPRO/IBM were not either making copies or selling the software, except for the limited right to access the copyrighted software for its own business purpose. He came to the conclusion that payment received for allowing mere use of copyrighted article could not be held as payment for royalty.
- On appeal:

Held

- From the relevant terms of 'Master Service Agreement' between the assessee and the IT Services providers, *i.e.*, WIPRO/IBM, it is quite ostensible that any kind of right granted to WIPRO/IBM cannot be passed on or transferred to any other person and only WIPRO/IBM is legally permissible to exercise this right. Secondly, the right to access/use of software is again subject to various terms and conditions, which has been highlighted under article 4. The right which has been given to WIPRO/IBM is not unfettered but has a very limited use for the own business purpose and not otherwise.

Thus, only limited right to access/use the software has been provided to the IT service provider for its own business purpose and they do not get any right in the said software. The access to software is not for use of any copyright *albeit* for a copyrighted articles during the course of providing service.

- The agreement clearly envisages that WIPRO/IBM shall use the software only for providing services to Shell entities and cannot alter or modify the software. Since the assessee is a resident of Netherland such a payment has to be seen in terms of article 12(4) of DTAA.
- From the plain reading of the article 12, it can be inferred that, it refers to payments of any kind received as a consideration for the use of, or the right to use any 'copyright' of literary, artistic or scientific work including cinematograph films, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience. Thus, in order to tax the payment in question as "royalty", it is *sine qua non* that the said payment must fall within the ambit and scope of Para 4 of article 12.The main emphasis on the payment constituting 'royalty' in Para 4 is for a consideration for the 'use of' or the 'right to use' any copyright…….. If the payment doesn't fit within these parameters then it doesn't fall within terms of "royalty" under article 12(4). The computer software does not fall under most of the terms used in the article barring "use of process" or "use of or right to use of copyrights." Here first of all, the limited use of software cannot be held to be covered under the word "use of process", because the assessee had not allowed the end user to use the process by using the software, as the customer did not have any access to the source code. What was available for their use is software product as such and not the process embedded in it. Several processes may be involved in making computer software but what the customer uses is the software product as such and not the process, which are involved into it. What is required to be examined in the impugned case as to whether there is any use or right to use of copyright? The definition of copyright, though has not been explained or defined in the treaty, however, the various Courts have consistently opined that the definition of "copyright "as given in the 'Copyright Act, 1957' has to be taken into account for understanding the concept.
- To fall within the realm and ambit of right to use copyright in the computer software programme, the aforesaid rights must be given and if the said rights are not given then, there is no copyright in the computer programme or software. Here in this case, none of the conditions mentioned in section 14 of the 'Copyright Act' is applicable as held by the Commissioner (Appeals); and it is also evident from the terms of MSA, because no such rights has been given by the assessee to the IT service providers.
- Further by making use or having access to the computer programs embedded in the software, it cannot be held that either WIPRO/IBM are using the process that has gone into the software or that they have acquired any rights in relation to the process as such.
- The software continued to be owned by the assessee and what WIPRO/IBM was getting is mere access to the software and the source code embedded in the software has not been imparted to

them. Hence, there is no use or right to use any process as held by the Assessing Officer. Hence, the finding of the Commissioner (Appeals) that the payment in question cannot be reckoned as "royalty", is factually and legally correct and the same is upheld.

- Thus, payments received by the assessee from WIPRO/IBM in pursuance to the MSA could not be treated as 'royalty' under article 12(4) of the India-Netherland DTAA.