Sum received by Canadian Co. for grant of licence to use technology for internal purpose only wasn't royalty

Summary – The ONGC ITAT in a recent case of Raj Jain., (the Assessee) held that where payment was made for CMG's membership by ONGC for non-exclusive and non-transferable licence to use technology only for internal business purpose, since there was neither sale nor licence of copyright in any kind of software or technology, such payment could not be held to be reckoned as royalty

Facts

- The assessee (CMG Canada) was a non-resident company which received licence fees in terms of 'Membership and Technology Transfer Agreement from ONGC for acquisition of certain specified licences relating to Reservoirs Synch Technology. Said receipt was claimed by the assessee as non-taxable.
- The Assessing Officer held that the aforesaid amount was covered within the definition of 'Royalty' as envisaged under clauses (iii) or (iv) of Explanation 2 to section 9(1)(vi) and was taxable in India under section 115A. However, considering the fact that the assessee was resident of Canada, the Assessing Officer applied the tax rate of royalty at the rate of 15 per cent prescribed in the DTAA.
- The Commissioner (Appeals) had upheld the order of the Assessing Officer holding that licence fees receivable was taxable as royalty under section 9(1)(vi).
- On appeal:

Held

- Clause (4) (iii) of the agreement between CMG and ONGC provides that CMG will grant to the member a non-transferrable and non-exclusive licence to use the CMG technology.
- From the clauses, of the agreement it is seen that; firstly, under the membership agreement, the member is granted a non-transferrable, non-exclusive licence to use the CMG technology. The title and ownership of the technology always remained with the CMG and member is prohibited from selling, sub-licencing or transfering any technology in any form or in any manner to any third party at any time; secondly, the membership is only for a period of five years which though may be extended; thirdly, the agreement is only for the members' internal operation and benefit; and lastly, members will not, at any time, assign its interest or rights under the Membership Agreement. Thus, there is no transfer of any 'right' or 'right to use' any copyright in the software of CMG's technology. The members are only given the right to use only for their internal purpose. Since the assessee is a tax resident of Canada, benefit of India-Canada DTAA in terms of section 90 of the Act has to be given.
- The main emphasis is on payment for 'the use of or right to use any copyright' of various nature which is not an exclusive right to use any copyright in an article and is in the nature of terms defined

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therein and the said use of copyright has to be given to the end user. Here, as can be seen from the terms of the agreement, no use or right to use any copy right of any nature has been given to the ONGC.

- Thus, if one goes by the definition as enshrined in the Treaty read with relevant provisions of Indian Copyright Act, 1957 and also the relevant Agreement amongst the parties, it is seen that the payment for CMG's membership by the ONGC is purely for non-exclusive, non-transferable licence to use the technology only for the internal purpose. There is neither sale nor licence of the copyright in any kind of software or technology. Thus, under the treaty, such a payment cannot be held to be reckoned as royalty.
- Thus, in view of the binding judicial precedents and discussion made above, nature of payment as received by the assessee through ONGC in terms of the aforesaid agreement cannot be characterized as 'royalty' and, therefore, the same is outside the purview of taxation in view of India-Canada DTAA.
- Accordingly, this issue is decided in favour of the assessee.

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