

ITAT directs DRP to follow its latest judgment to decide taxability of supply of software on limited use basis

Summary – The Delhi ITAT in a recent case of Cast Software Inc., (the Assessee) held that Matter of taxability of payment for licensing of software remanded to file of DRP with a direction to re-decide issue in light of latest decision of Tribunal on same subject

Facts

- The assessee, a US Company, had entered into an agreement with IBM India for supply of software products to IBM India Pvt. Ltd. on limited use basis and claimed same to be sale of software product. The assessee claimed that sale value was not taxable as the said receipt was not royalty in nature under article 12 of India-USA DTAA.
- The Assessing Officer had held that the receipts in the hands of assessee were in the nature of royalty taxable under clauses (i), (iii), (iva) and (v) *Explanation 2* to section 9(1)(iv).
- The assessee further claimed before the DRP that assessee had sold software license without giving right of reproduction and commercial exploitation and it was a case of sale and therefore, in the absence of a PE, the income emanating from the software license sale was not taxable in India and that the Assessing Officer had erred in placing reliance upon the retrospective amendment to section 9(1)(vi) read with *Explanation 4* thereof without appreciating the fact that no retrospective amendment in domestic law can be read into treaty. The assessee, therefore, prayed that sale consideration should not be treated as royalty and as such, its income was not taxable in India.
- However, the DRP *ex parte* declined to interfere with assessment order.
- The assessee submitted that recently the Tribunal in the case of *Black Duck Software Inc v. Dy. CIT, International Taxation*, [\[2017\] 86 taxmann.com 62 \(Delhi - Trib.\)](#) considering the similar issue decided the issue in favour of the assessee.
- On appeal:

Held

- The Tribunal in *Black Duck Software Inc. v. Dy. CIT, International Taxation*, (supra) on similar facts had held that assessee had provided to its customers a non-exclusive, non-transferable license within applicable subscription period. It was also found that the customers were not permitted any access or use of programmes for any users other than the user's license paid for by them. It was, in these circumstances held by the Tribunal that the amount received by the assessee was not liable to tax as royalty in India.
- The revenue, suggested that the matter may be remanded to the file of DRP with a direction to re-decide the issue in the light of latest decision of the Tribunal. It might also be noted that assessee did not raise any objection before the Assessing Officer because it was an *ex parte* order. Considering the above discussion, the orders of the authorities below are set aside and the matter in

issue is restored to the file of the DRP with a direction to re-decide the above issue by re-examining the agreement in question.