

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

INCOME TAX APPEAL NO. 85 OF 2020

Principal commissioner of Income Tax-12,
Mumbai

.. Appellant

Versus

Jas Trading Pvt. Ltd.

.. Respondent

Adv. Akhileshwar Sharma for the Appellant.

Adv. Rahul Hakani for the Respondent.

**CORAM: B. P. COLABAWALLA &
FIRDOSH P. POONIWALLA, JJ.**

DATE: JUNE 17, 2026

P. C.

1. The above Appeal is filed by the Revenue challenging the Order dated 6th July, 2018 passed by the ITAT. According to the Revenue, the above Appeal gives rise to the following questions of law :-

“A. Whether on the facts and in the circumstances of the case and in law, the Hon'ble Tribunal was correct in holding that since the Assessee has made the payment for use of software and not for use of copyright in software, payments made by the Assessee cannot be treated as Royalty under the provisions of Section 9(1) (vi) of the Income Tax Act, 1961, without appreciating that the payment made by the Assessee are on account of Royalty in view of Explanation 2 and Explanation 4 of Section 9(1)(vi) of the Act and decisions of Hon'ble Karnataka High Courts in the case of Synopsis International Old Ltd. (2012) 28 Taxmann.com 162 and Samsung Electronics Company Ltd. (2011) 16 Taxmann.com 141?”

B. Whether on the facts and in the circumstances of the case and in law, the Hon'ble Tribunal was correct in holding that the consideration paid by the respondent Assessee on grant of licenses for use of software is not Royalty within the meaning of Article 12 of the Double Taxation Avoidance Agreement (DTAA) between India and the United States of America?

C. Whether on the facts and in the circumstances of the case and in law, the Hon'ble Tribunal was correct in holding that the IT support charges i.e. internet charges, use of email facility, backup support services etc. cannot be treated as Royalty/ Fee for Included Services under the provisions of Section 9(1)(vi)/ 9(1)(vii) of the Income Tax Act, 1961, without appreciating that the payment made by the Assessee are on account of Royalty/ fees for included services in view of Explanation 2 and Explanation 4 to Section 9(1)(vi)/ 9(1)(vii) of the Act?"

2. We have heard Mr. Sharma, the learned Advocate appearing on behalf of the Revenue, and Mr. Hakani, the learned Advocate appearing on behalf of the Assessee. The findings of the ITAT can be found from paragraph 9 of the impugned order. The main crux of the argument of the Assessee, before the ITAT, was that the reopening of the Assessment for Assessment Year 2004-05 was bad because the reasons for re-opening the Assessment were not supplied to the Assessee and only the gist of the reasons were supplied. This ground found favour with the ITAT and hence the Appeal of the Assessee was allowed.

3. Having carefully gone through the impugned order, we find that the reasons initially supplied to the Assessee were that a director of the Assessee, namely Shri Shailesh Shah, had admitted to the Income Tax Authorities that

the Assessee had engaged in certain paper entries and transactions for which the Assessee company earned a commission. It is relying upon this admission that the Assessing Officer held that he had reason to believe that income of the Assessee has escaped Assessment to the tune of 1,85,453/- for Assessment year 2004-05.

4. After the matter travelled to the Tribunal, the entire reasons were brought on record by the Revenue. The entire reasons have been set out in paragraph 5 of the impugned order. It is thus clear that the entire reasons were never supplied to the Assessee and only a gist of the reasons were supplied. Once these are the facts, the Assessee's Appeal being allowed by the ITAT cannot be faulted.

5. We find yet another reason why we feel that the above Appeal raises no substantial question of law and ought not to be entertained. Even if we were to treat the gist of the reasons as the actual reasons supplied to the Assessee, the reason itself records that the Assessing Officer has reason to believe because of the admission made by Shri Shailesh Shah, a director of the Assessee company. Hence as per the reasons supplied to the Assessee this is the only reason why the Assessing Officer believed that income had escaped Assessment. However, what the Assessing Officer has lost sight of is

that this very admission by Mr. Shailesh Shah was retracted long before the notice was issued under Section 148. Though this fact was brought to the notice of the Assessing Officer and he notes the same in the Assessment Order, and still proceeds on the basis that he is justified in not only issuing the notice but passing the Assessment Order.

6. This approach of the Assessing Officer appears to be erroneous. The *sine qua non* for the Assessing Officer to issue a notice under Section 148 is the fact that he has reason to believe that the income of the Assessee for that particular Assessment Year has escaped Assessment. The only reason to believe given by the Revenue to the Assessee was the statement of Shri Shailesh Shah, and which the Assessing Officer treated as an admission. That statement, as mentioned earlier, was retracted long before the notice was issued under Section 148 and even before the Assessment Order was passed.

7. Further, that retraction has been upheld by CIT (Appeals) in an Appeal filed by one Mr. Anil Gupta and which forms part of the Order of the CIT Appeals dated 15th October, 2010. Hence, not only was there a retraction of the so-called admission, but that retraction was upheld by the Appellate Authority and that too long before the issuance of the Notice under Section 148. Once this was the case, we fail to understand how the Assessing Officer could have had reason to believe that the income of the Assessee had escaped

Assessment by virtue of the fact that Shri Shailesh Shah had admitted to certain things. For this reason also, we are clearly of the view that the ITAT's Order requires no interference.

8. In these circumstances, we find that in the facts of the present case, the impugned Order of the ITAT does not give rise to any substantial question of law. The Appeal is accordingly dismissed.

9. However, there shall be no order as to costs.

10. This order will be digitally signed by the Private Secretary/ Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

[FIRDOSH P. POONIWALLA, J.]

[B. P. COLABAWALLA, J.]