IN THE INCOME TAX APPELLATE TRIBUNAL

'C' BENCH : BANGALORE

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER

AND

SMT. BEENA PILLAI, JUDICIAL MEMBER

IT(IT)A No.27/Bang/2021
Assessment Year : 2017-18

M/s Autodesk Asia Pvt. Ltd., 3, Fusionopolis Way, #10-21 Symiosis Singapore – 138 633. PAN – AAFCA 6398 D	**Vs.**	The Asst. Commissioner of Income-Tax, (Intl. Taxation), Circle-1(1), Bengaluru.
APPELLANT		**RESPONDENT**

Revenue by	**:**	Shri Shishir Srivastava, CIT
Assessee by	**:**	Smt. Tanmayee Rajkumar, Advocate

Date of Hearing	**:**	06-04-2021
Date of Pronouncement	**:**	14-06-2021

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present appeal has filed by assessee against order dated 31/11/2020 passed by the ITO (Intl. Taxation), Circle-1, Bangalore for assessment years 2017-18 on following grounds of appeal:-

Sl. No.	***Grounds of Appeal***	***Tax effect (in INR)***
1	***Assessment bad in law and on facts*** *The assessment order dated 30 November 2020 passed by the Assistant Commissioner of Income-tax (International Taxation), Circle-1(1) ['the AO'] under section 143(3) read with section 144C(5) of the Income-tax Act, 1961 (the Act), is bad in law and on facts.*	
2	***Erroneous demands*** *The AO has erred in:* *a) Determining the total income of the Appellant at INR 22478,83,221;* *b) Determining a tax payable of INR 24,31,08,570 as per computation received along with the Order of the subject assessment year;* *c) Levying interest under section 234B of the Act of INR 61,67,876; and* *d) Raising a demand of INR 2,01,85,811 upon the Appellant.*	
3	***Erroneous treatment of the consideration received for sale of software as 'royalty'***	*INR 24,31,08,570*
3.1	*The AO and the Dispute Resolution Panel ('DRP') have erred in not holding that consideration received by the Appellant would not qualify as 'royalty' under Article 12 of the Double Taxation Avoidance Agreement between India and Singapore ('the DTAA') and under the provisions of the Act.*	
3.2	*The AO and the DRP have erred in not holding that the definition of 'royalty' under the DTAA has not undergone any change despite the retrospective amendment made vide Finance Act, 2012, to section 9(1)(vi) of the Act.*	
3.3	*The AO and the DRP have erred in holding that the definition of 'royalty' under the Act and the DTAA are pari-materia.*	
3.4	*The AO and the DRP erred in not holding that the consideration received by the Appellant was not for transfer of copyright to the distributors or end-users but for sale of software product/ copyrighted product.*	
3.5	*The AO and the DRP erred in not holding that the Appellant does not hold copyright in the software, despite the fact that it had only distribution/ limited rights of the copyrighted product.*	
3.6	*The AO and the DRP failed to appreciate that access to software wherein a subject matter of copyright is embedded, without the right to exploit the copyright, does not amount to use or right to use the copyright in the copyrighted work.*	
3.7	*The AO and the DRP have erred in holding that the Appellant had effectively sold the software to end-users, even where the Appellant had entered into agreement with the distributors/ resellers who in turn had sold the software to the end users.*	

3.8	*The AO and the DRP have erred in not following certain decisions rendered by the Delhi High Court, the Authority for Advance Ruling and various benches of the Tribunal*	
4	***Erroneous conclusion on applicability of Article 24 of the DTAA***	
4.1	*The 40 have erred in concluding that the provisions of Article 24 of the DTAA are applicable to the facts of the Appellant.*	
4.2	*Without prejudice to the ground 4.1 above, the 40 erred in computing tax on an incorrect consideration and by applying an incorrect rate.*	
5	***Short grant of credit for tax deducted at source (TDS)***	*INR 30,17,582*
5.1	*The AO has erred in restricting the TOS credit to the extent of INR 229,090,635 thereby resulting to short grant of TDS credit of INR 3,017,582.*	
6	***Interest under section 234B of the Act***	
6.1	*Consequentially, the AO has erred in levying interest under section 234B of Act amounting to INR 6,167,876.*	*INR 61,67,876*
7	***Initiation of penalty***	
7.1	*The AU has erred in initiating penalty proceedings under section 270A of the I Act*	
8	***Relief***	
8.1	*The Appellant prays that the AU be directed to grant all such relief arising from the preceding grounds as also all relief consequential thereto.*	
Total tax effect		***INR 25,22,94,028***

Brief facts of the case are as under:-

2. The assessee is a Singapore based company. It was submitted that assessee is engaged in the business of distribution of Computer Software and providing ancillary services to its Indian distributors/customers. In certain cases assessee also sold hardware to Indian parties. It is submitted that the sale of software/hardware was made outside India, and the sale proceeds of the sale/ancillary services from the Indian distributors/customers were received by assessee outside India.

2.1 For year under consideration, the assessee filed return of Income declaring Nil taxable income. The return was selected for scrutiny. The Ld.AO observed that assessee received Rs.232,34,01,380/- as consideration towards distribution of computer software/hardware and ancillary services to Indian distributors/customers. The Ld.AO while passing Draft Assessment order held that the consideration so received amounts to Royalty u/s 9(1)(vi) of the Act and Art 12 of India-Singapore DTAA.

2.2 The Ld.AO also proposed to tax the consideration received from Indian distributors/customers for sale of hardware as royalty on the basis that hardware and software are inseparable and that the software cannot function in the obscene of hardware.

2.3. On filing objection before the DRP, it was held as under:-

2.1.16 The assessee has not been able to prove so before this panel too and hence, we reject this ground of the assessee as well. The assessee filed additional evidence in the form of a Letter issued by the Singapore Tax Authorities. On perusal of this letter, we note that it merely states that the assessee declared its income on accrual basis. There is no information or evidence before us to indicate that the impugned receipts were remitted into Singapore and subjected to tax. The assessee also failed to furnish any information to indicate that the impugned receipts from India are included in its return for the relevant year. Therefore, we do not find any merit in the pleas raised. Accordingly, these are rejected. The assessee also raised a plea that it should be allowed relief as in the DRP order for the last year. But, we note, that issue in regard to which relief was allowed by DRP in the earlier year, is not present in the draft assessment order for the subject year. In the earlier year, the Assessing Officer had adopted differential rate of tax for the remittances made. Such an issue is not present for this year, as seen from the draft assessment order. Accordingly, this plea is also rejected."

2.4. The DRP relied decision of *Hon'ble Karnataka High Court in cse of M/s Synopsis International Pvt. Ltd. in ITA No.11-15/2008 by order dated 3/8/2010 and Samsung Electronics Ltd. reported in 2011-TIL-43-HC-KAR-INTLI.* The Ld.AO on receipt of DRP direction passed final assessment orders in all years under consideration.

3. Aggrieved by the order of Ld.AO assessee is in appeal.

4. Admittedly, the issue involved in present appeals has been set at rest by the decision of *Hon'ble Supreme Court* in a recent case of *Engineering Analysis Centre of Excellence Pvt. Ltd. vs CIT* reported in *2021 SCC online SC 159. Hon'ble Supreme Court* while considering the issue of royalty on sale of software have considered the decision of *Hon'ble Karnataka High Court* in case of *CIT vs Samsung Electronics Co Ltd. (supra)* and various other decisions.

5. We have perused the submissions advanced by both sides in light of records placed before us. We note that *Hon'ble Supreme Court* considered the issue by observing as under:-

> *"3. One group of appeals arises from a common judgment of the High Court of Karnataka dated 15.10.2011 reported as CIT v. Samsung Electronics Co. Ltd., (2012) 345 ITR 494, by which the question which was posed before the High Court, was answered stating that the amounts paid by the concerned persons resident in India to non-resident, foreign software suppliers, amounted to royalty and as this was .so, the same constituted taxable income deemed to accrue in India under section 9(1)(vi) of the Income Tax Act, 1961 ["Income Tax Act"], thereby making it incumbent upon all such persons to deduct tax at source and pay such tax deductible at source ['TDS"] under section 195 of the Income Tax Act. This judgment dated 15.10.2011 has been relied upon by the subsequent*

impugned judgments passed by the High Court of Karnataka to decide the same question in favour of the Revenue.

The appeals before us may be grouped into four categories:

i) The first category deals with cases in which computer software is purchased directly by an end-user, resident in India, from a foreign, non-resident supplier or manufacturer.

ii) The second category of cases deals with resident Indian companies that act as distributors or resellers, by purchasing computer software from foreign, non-resident suppliers or manufacturers and then reselling the same to resident Indian end-users.

iii) The third category concerns cases wherein the distributor happens to be a foreign, non-resident vendor, who, after purchasing software from a foreign, non-resident seller, resells the same to resident Indian distributors or end-users.

iv) The fourth category includes cases wherein computer software is affixed onto hardware and is sold as an integrated unit/ equipment."

Hon'ble Supreme Court, considered various arguments advanced by the Revenue as well as the assessee's and came to the conclusion as under:

CONCLUSION

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 Ta 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 (AJAR) (supra) is set aside. The

appeals from the impugned judgments of the High Court of Delhi are dismissed."

6. We note that cse of present assessee falls within the second and forth category analysed by *Hon'ble Supreme Court*. Respectfully following the above view by *Hon'ble Supreme Court in case of Engineering Analysis Centre of Excellence Pvt. Ltd. Vs. CIT (Supra).* We hold that purchase of software in the present facts does not amount to give rise to any taxable income in India as a result of which provisions of sec.195 of the Act are not attracted. The assessee does not have any obligation to deduct tax at source. Therefore, provisions of sec.9(1)(vi) along with Explant6ion 2 is not applicable to present assessee's.

Accordingly we allow the appeal in terms of Ground No.3 along with its sub-ground. All other grounds becomes academic.

In the result all appeals filed by assessee stands allowed.

Order pronounced in the open court on 14th June, 2021

Sd/-	Sd/-
(CHANDRA POOJARI)	(BEENA PILLAI)
Accountant Member	Judicial Member

Bangalore,
Dated, the 14th June, 2021.
/Vms/

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore
6. Guard file

By order

Assistant Registrar, ITAT, Bangalore

		Date	**Initial**	
1.	Draft dictated on	On Dragon		Sr.PS
2.	Draft placed before author	-6-2021		Sr.PS
3.	Draft proposed & placed before the second member	-6-2021		JM/AM
4.	Draft discussed/approved by Second Member.	-6-2021		JM/AM
5.	Approved Draft comes to the Sr.PS/PS	-6-2021		Sr.PS/PS
6.	Kept for pronouncement on	-6-2021		Sr.PS
7.	Date of uploading the order on Website	-6-2021		Sr.PS
8.	If not uploaded, furnish the reason	--		Sr.PS
9.	File sent to the Bench Clerk	-6-2021		Sr.PS
10.	Date on which file goes to the AR			
11.	Date on which file goes to the Head Clerk.			
12.	Date of dispatch of Order.			
13.	Draft dictation sheets are attached	No		Sr.PS