

IN THE INCOME TAX APPELLATE TRIBUNAL  
“C” BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT  
AND SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER

ITA Nos.2431 & 2432/Bang/2018
Assessment years : 2013-14 & 2014-15

Citrix Systems Asia Pacific Proprietary Limited, [Level 5, 66 Waterloo Road, Macquarie Park, NSW – 2113, Australia] <b>C/o. Citrix R&amp;D India Pvt. Ltd.,</b> 2 <sup>nd</sup> & 3 <sup>rd</sup> Floor, Cherry Hills, 8/2B-9, Intermediate Ring Road, Embassy Golf Links Business Park, Domlur, Bangalore – 560 071. <b>PAN: AADCC 8874E</b>	Vs.	The Income Tax Officer, Ward 1(1), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri T. Suryanarayana, Advocate
Respondent by	:	Shri Pradeep Kumar, CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	05.07.2021
Date of Pronouncement	:	12.07 .2021

**ORDER**

*Per Chandra Poojari, Accountant Member*

These appeals are directed against the separate orders dated 15.6.2018 of the CIT(Appeals)-12, Bengaluru for the assessment years 2013-14 & 2014-15.

2. The common grounds of appeal raised by the assessee in these appeals are as follows:-

- “1. That the impugned order passed by the CIT(A), to the extent questioned herein, is bad in law and on facts and is, therefore, liable to be set aside by this Hon'ble Tribunal.
2. That the CIT(A) failed to appreciate that the payments received by the Appellant do not qualify as 'royalty' under the India-Australia Double Taxation Avoidance Agreement ('the DTAA').
3. That the CIT(A) erred in failing to appreciate that notwithstanding the retrospective amendment made to section 9(1)(vi) of the Act vide the Finance Act, 2012, the definition of 'royalty' under the DTAA has not undergone any change.
4. That the CIT(A) erred in dismissing the Appellant's appeal by merely following the judgment dated 15 October 2011 passed by the Hon'ble High Court of Karnataka in the case of Samsung Electronics Co. Limited, despite the said judgment being under challenge before the Hon'ble Supreme Court in C.A. No. 10109/2013.
5. That the CIT(A) erred in dismissing the Appellant's appeal by merely following the ruling dated February 2012 passed by the Authority for Advance Rulings in the Appellant's own case, despite the said ruling being under challenge before the Hon'ble Supreme Court in SLP(C) No. 1-8115/2012.
6. That the CIT(A) ought to have instead followed certain decisions delivered by the Hon'ble High Courts, the Authority for Advance Rulings and various benches of the Hon'ble Tribunal on the same issue that arises in the Appellant's case.
7. That the CIT(A) failed to appreciate that the Appellant sold software to distributors who, in turn, sold the software to end-users and that, therefore, there was no grant of any right in respect of the copyright in the software from the Appellant to its distributors in India.
8. That the CIT(A) failed to appreciate that the consideration received by the Appellant was not transfer of copyright in the software to the distributors/ end users but for sale of copyrighted software.

9. That, in doing so, the CIT(A) overlooked the difference between the right to use a copyrighted article as against the transfer of copyright itself and that in the case of the Appellant, it is the former that has taken place.

10. That the CIT(A) 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.

11. That the CIT(A) failed to appreciate that since the payment received by the Appellant from its customers was not to be measured with reference to the productivity or use of the software, it could, therefore, not be construed as 'royalty'.

12. That, without prejudice and in any event, the CIT(A) erred in affirming the interest charged under Section 234A & 234B of the Act.

13. The Appellant prays that directions be given to grant all such relief arising from the above grounds and also all relief consequential thereto.

The Appellant desires leave to add to or alter, by deletion, substitution or otherwise, any or all of the above grounds, at any time before or during the hearing of the Appeal.

The Appellant submits that the above grounds are independent of, and without prejudice, to one another.”

3. The assessee company is incorporated in Australia and engaged in the distribution and sale of its software and hardware products to its customers in India. The assessee filed NIL return of income, but in the computation of total income the assessee had offered to tax the total consideration received from the Indian distributors on sale of software amounting to Rs.69,25,84,009. The AO treated this income as royalty. The CIT(Appeals) confirmed the order of AO.

4. At the time of hearing, the argument of the Id. AR is that the AO has not examined the agreement entered into by the assessee and hence the issue may be remitted back to the AO for fresh examination. In our opinion, this issue is squarely covered by the judgment of Hon'ble Supreme Court in the case of ENGINEERING ANALYSIS CENTRE FOR EXCELLENCE PRIVATE LIMITED VS COMMISSIONER OF INCOME TAX & ANOTHER – AIR 2021 SC 124 / 432 ITR 471 (SC). The Apex Court in the aforesaid case has held in paragraphs 27, 47, 52, 168 & 169 as under:

“27. The machinery provision contained in Section 195 of the Income Tax Act is inextricably linked with the charging provision contained in Section 9 read with Section 4 of the Income Tax Act, as a result of which, a person resident in India, responsible for paying a sum of money, “chargeable under the provisions of [the] Act”, to a non-resident, shall at the time of credit of such amount to the account of the payee in any mode, deduct tax at source at the rate in force which, under Section 2(37A)(iii) of the Income Tax Act, is the rate in force prescribed by the DTAA. Importantly, such deduction is only to be made if the non-resident is liable to pay tax under the charging provision contained in Section 9 read with Section 4 of the Income Tax Act, read with the DTAA. Thus, it is only when the non-resident is liable to pay income tax in India on income deemed to arise in India and no deduction of TDS is made under Section 195(1) of the Income Tax Act, or such person has, after applying Section 195(2) of the Income Tax Act, not deducted such proportion of tax as is required, that the consequences of a failure to deduct and pay, reflected in Section 201 of the Income Tax Act, follow, by virtue of which the resident-payee is deemed an “assessee in default”, and thus, is made liable to pay tax, interest and penalty thereon. This position is also made amply clear by the referral order in the concerned appeals from the High Court of Karnataka, namely, the judgment of this Court in GE Technology (supra).

47. In all these cases, the “licence” that is granted vide the EULA, is not a licence in terms of Section 30 of the Copyright Act, which transfers an interest in all or any of the rights contained in Sections 14(a) and 14(b) of the

Copyright Act, but is a “licence” which imposes restrictions or conditions for the use of computer software. Thus, it cannot be said that any of the EULAs that we are concerned with are referred to Section 30 of the Copyright Act, inasmuch as Section 30 of the Copyright Act speaks of granting an interest in any of the rights mentioned in Sections 14(a) and 14(b) of the Copyright Act. The EULAs in all the appeals before us do not grant any such right or interest, least of all, a right or interest to reproduce the computer software. In point of fact, such reproduction is expressly interdicted, and it is also expressly stated that no vestige of copyright is at all transferred, either to the distributor or to the end-user. A simple illustration to explain the aforesaid position will suffice. If an English publisher sells 2000 copies of a particular book to an Indian distributor, who then resells the same at a profit, no copyright in the aforesaid book is transferred to the Indian distributor, either by way of licence or otherwise, inasmuch as the Indian distributor only makes a profit on the sale of each book. Importantly, there is no right in the Indian distributor to reproduce the aforesaid book and then sell copies of the same. On the other hand, if an English publisher were to sell the same book to an Indian publisher, this time with the right to reproduce and make copies of the aforesaid book with the permission of the author it can be said that copyright in the book has been transferred by way of licence or otherwise, and what the Indian publisher will pay for, is the right to reproduce the book, which can then be characterized as royalty for the exclusive right to reproduce the book in the territory mentioned by the licence.

52. There can be no doubt as to the real nature of the transactions in the appeals before us. What is “licensed” by the foreign, non-resident supplier to the distributor and resold to the resident end-user, or directly supplied to the resident end-user, is in fact the sale of a physical object which contains an embedded computer programme, and is therefore, a sale of goods, which, as has been correctly pointed out by the learned counsel for the assessee, is the law declared by this Court in the context of a sales tax statute in *Tata Consultancy Services v. State of A.P.*, 2005(1) SCC 308 (see paragraph 27).

168. Given the definition of royalties contained in Article 12 of the DTAA's mentioned in paragraph 41 of this judgment, it is clear that there is no obligation on the persons mentioned in S.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 Tax Act (S. 9(1) (vi), along with explanations 2 and 4 thereof), which deal with royalty, not being more beneficial to the assessee, 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 manufacturer/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 (AAR) (supra) is set aside. The appeals from the impugned judgments of the High Court of Delhi are dismissed.”

5. Being so, the issue is squarely covered by the above judgment of Hon'ble Supreme Court and does not require any further adjudication since the ancillary support services are also covered in the software services.

6. In the result, the appeals of the assessee are allowed.

Pronounced in the open court on this 12<sup>th</sup> day of July, 2021.

Sd/-  
( N V VASUDEVAN )  
VICE PRESIDENT

Sd/-  
( CHANDRA POOJARI )  
ACCOUNTANT MEMBER

Bangalore,

Dated, the 12<sup>th</sup> July, 2021.

*/Desai S Murthy /*

Copy to:

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

By order

Assistant Registrar  
ITAT, Bangalore.