

**IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH: BANGALORE**

**BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER**

IT(IT)A No.2542/Bang/2018 IT(TP)A No.2812/Bang/2017
Assessment Year: 2014-15 & 2015-16

CICSO Systems International B.V, C/o SRBE & Associates LLP (Authorized Representative) 'Divyashree Chambers, Ground & First Floor, 'A' Wing, #11, O'Shaughnessy Road, Langfor Gardens, Bengaluru-560 025.	Vs.	The Dy. Commissioner of Income Tax, (International Taxation) Circle-1(1) Bangalore.
PAN NO : AADCC 9201 D		
APPELLANT		RESPONDENT

Appellant by	:	Shri Nageshwar Rao, Advocate.
Respondent by	:	Ms. Neera Malhotra, CIT. DR.

Date of Hearing	:	17.06.2021
Date of Pronouncement	:	02.07.2021

O R D E R

PER BEENA PILLAI, JUDICIAL MEMBER:

Present appeals have been filed by assessee against the final assessment order is dated 27/10/2017 and 10/07/2018 passed by Ld.DCIT (International Taxation) Circle-1 (1), Bangalore. It has been submitted that the only issue raised by assessee in both

these appeals relate to treating the receipts of assessee's on account of sale of software to the Indian customers, as royalty.

2. It was submitted that during the relevant years under consideration assessee was also engaged in sale of tangible hardware is like routers, switches, optical network, storage area networking and home networking hardware. Assessee has also submitted that it has provided necessary support services to its customers in relation to the products supplied.

3. The Ld.AO treated the amount received by assessee as under section 9(1)(vi) of the Act, and under the DTAA between India and Netherlands as royalty on which TDs is liable to be deducted section 195 of the Act. The Ld.AO relied on the decision of *Hon'ble Karnataka High Court* in case of *CIT vs Samsung Electronics Co Ltd.*, reported in (2011) 16 *Taxmann.com* 141, decision of AAR in case of *Millennium ITA Software Ltd.*, *Citrix Systems Asia Pacific Ltd.*, to come to the conclusion that the said receipts are taxable as royalty under the provisions of IT Act and India-Netherlands treaty.

4. At the outset both sides submitted that the issue raised on merits in the present appeal now stands squarely covered by the decision of *Hon'ble Supreme Court* in case of *Engineering Analysis Centre for Excellent Pvt.Ltd vs CIT* reported in (2021) 125 *Taxmann.com* 42.

5. The Ld.AR submitted that, following the decision of *Hon'ble Supreme Court*, *Hon'ble Karnataka High Court* in assessee's own case for assessment year 2011-12, in *ITA No. 7/2019* by order dated 26/03/2021 decided the issue in favour of assessee.

6. We have perused submissions advanced by both sides in light of records placed before us.

7. We note that *Hon'ble Supreme Court* in case of *Engineering Analysis Centre for Excellent Pvt. Ltd. vs CIT (supra)* while considering the issue had looked into the ratio is laid down by the jurisdictional High Court, and the other decisions that was relied on by the Ld.AO. *Hon'ble Supreme Court* in paragraph 27,47,52,168 & 169 observed as under:

24. 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 (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 105(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 the 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, the law declared by this Court in the context of 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 manufacture/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.

8. In the light of the aforesaid judgment delivered by the Hon'ble Supreme Court, the question of law framed in the present appeal is decided in favour of the assessee and against the revenue.

8. In the light of the above observations, and respectfully following the decision of *Hon'ble Supreme Court*, we are of the view that Ld.CIT(A) erred in treating the receipts from sale of software with the support services as royalty.

Accordingly grounds raised by assessee stands allowed for assessment years 2014-15 and 2015-16.

9. The assessee has filed additional grounds vide application dated 22/04/2021 in the assessment years under consideration, is stated to be not pressed at the time of hearing. Accordingly we do not consider the admission of additional grounds raised by assessee.

In the result appeal filed by assessee stands allowed.

Order pronounced in open court on 2nd July, 2021

Sd/-

(Chandra Poojari)
Accountant Member

Sd/-

(Beena Pillai)
Judicial Member

Bangalore,
Dated 2nd July, 2021.
Vms

Copy to:

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

By order

**Asst. Registrar,
ITAT, Bangalore.**

		Date	Initial	
1.	Draft dictated on	On Dragon		Sr.PS
2.	Draft placed before author	-7-2021		Sr.PS
3.	Draft proposed & placed before the second member	-7-2021		JM/AM
4.	Draft discussed/approved by Second Member.	-7-2021		JM/AM
5.	Approved Draft comes to the Sr.PS/PS	-7-2021		Sr.PS/PS
6.	Kept for pronouncement on	-7-2021		Sr.PS
7.	Date of uploading the order on Website	-7-2021		Sr.PS
8.	If not uploaded, furnish the reason	--		Sr.PS
9.	File sent to the Bench Clerk	-7-2021		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