

आयकर अपीलिय अधिकरण, मुंबई न्यायपीठ , मुंबई ।

IN THE INCOME TAX APPELLATE TRIBUNAL "E" BENCH, MUMBAI

BEFORE SHRI C.N. PRASAD, JUDICIAL MEMBER AND

SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER

आयकर अपील सं /I.TA No. 6468/Mum/2012

(निर्धारण वर्ष / Assessment Year: 2009-10

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|--|---------------------|----------------------------------|
| M/s. Systematics Infotech Pvt. Ltd., 249, Kirpa Niwas, Next To Premier High School, Sion East, Mumbai-400 022 | बनाम/ Vs. | The ITO -7(2)(4), Mumbai |
| स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAFCS 2583Q | | |
| (अपीलार्थी /Appellant) | .. | (प्रत्यर्थी / Respondent) |
| अपीलार्थी ओर से/ Appellant by: | | Shri Keral S. Shah |
| प्रत्यर्थी की ओर से/ Respondent by: | | Shri Vishwas Jadhav |
| | | |

सुनवाई की तारीख / Date of Hearing :14.03.2016

घोषणा की तारीख /Date of Pronouncement :18.05.2016

आदेश / O R D E R

PER C.N. PRASAD, JM:

This appeal is filed by the assessee against the order of the Ld. CIT(A)-13, Mumbai dated 18.7.2012 pertaining to assessment year 2007-08.

2. The only issue in the appeal of the assessee is that whether the payment made to purchase of software is royalty or towards purchase of goods.

3. Brief facts are that the assessee company is engaged in the business of dealers in computer peripherals filed its return of income on 28.10.2007 declaring income of Rs. 13,03,680/-. The assessment was completed u/s. 143(3) on 12.12.2009 determining income at Rs. 30,99,610/-. While computing the income, the Assessing Officer made disallowance of Rs. 17,95,687/- u/s. 40(a)(i) on account of purchase of software. The Assessing Officer was of the view that the purchase of software is essentially purchase of copy right , therefore payment made against the purchases is in the nature of Royalty and this will attract TDS u/s. 194J of the Act.

4. The assessee preferred an appeal before the Ld. CIT(A) and the CIT(A) held that software purchase is not a real product but only a licence/right given to the assessee to use the said software. He has held that assessee has no right to re-sell the said software to any other person in the open market. Therefore, he concluded that it is only a licence to use the software for the business of the assessee and hence the purchase of software amounts to acquisition of intangible assets in the form of rights/licences.

5. The Ld. Counsel for the assessee appearing before us submits that the findings of the Ld. CIT(A) that assessee is not selling the software and using them in its business is factually wrong. The Ld. Counsel for the assessee referring to page-1 of the assessment order submits that it is the finding of the Assessing Officer that during the year under consideration assessee Company has traded the purchased software. Therefore, he submits that it is an undisputed fact that the assessee is into trading of software. The Ld. Counsel for

the assessee submits that the assessee purchases branded software in the open market and sells them to its customers alongwith computer peripherals. The Ld. Counsel for the assessee submits that since the assessee is purchasing the branded software and selling the same to its customers, the purchase cost paid on such software is not Royalty. Therefore, he submits that since the payment does not fall within the definition of Royalty, the question of TDS u/s. 194J does not arise consequently no disallowance u/s. 40(a)(i) is warranted.

6. The Ld. Counsel for the assessee placing reliance on the decision of Delhi High Court in the case of Principal Commissioner of Income Tax Vs M.Tech India Pvt. Ltd. (2016) 95 CCH 0013 submits that if the payments were made for purchase of software as product, the consideration paid could not be considered as royalty. The Ld. Counsel for the assessee further submits that even if it is assumed that the payment amounts to royalty, the provisions of Sec. 40(a)(ia) have no application since the definition of Royalty as referred to in Sec. 40(a)(i) read with Explanation 2 to clause (vi) of sub-section (1) of Sec. 9 is not applicable since this Explanation is not referred to in the provisions of Sec. 40(a)(i) of the Act. For this proposition, he places reliance on the decision of Mumbai Bench in the case of Sonata Information Technology Ltd., Vs DCIT in ITA No. 1507/M/2012 dated 7.9.2012 reported in (2012-TIOL-721-ITAT-Mum).

7. The Ld. Departmental Representative vehemently supports the orders of the authorities below.

8. We have heard the rival contentions and perused the orders of the Assessing Officer and Ld. CIT(A) and the case laws relied on by the Ld. Counsel for the assessee. The Assessing Officer while completing the assessment disallowed cost for purchase of software amounting to Rs. 17,95,687/- u/s. 40(a)(i) of the Act for the reason that assessee did not deduct TDS on such payments. The Assessing Officer was of the view that the provisions of Sec. 194J are attracted to such payments since the payments according to him are nothing but royalty since purchase of software essentially purchase of copy right and therefore the payments would fall under the definition of Royalty and the provisions of Sec. 194J are attracted. We find from the assessment order that the Assessing Officer is not disputing the fact that assessee is engaged in the business of trading i.e. buying and selling of computer related products. He also observed in the assessment order that during the year under consideration, the assessee company has traded the purchased software. Therefore nothing has been brought on record to suggest that the assessee has purchased software for its own use or there is no finding of the Assessing Officer that assessee has acquired any right to use software by the assessee itself and it cannot be resold. Rather he has accepted that the assessee is into trading of software. The Ld. CIT(A)'s finding that assessee purchased software for its own business is also not correct and it is not born out from record and therefore we are at loss to understand as to how the purchase and sale of branded software by the assessee would fall under the definition of Royalty. The Delhi High Court in the case of M.Tech India Pvt. Ltd (supra) considered more or less similar situation where the assessee purchased and sold software. In other words, assessee has traded in

software products. The Hon'ble High Court after considering the decision of the Hon'ble Supreme Court in the case of Tata Consultancy Services Vs State of Andhra Pradesh (271 ITR 401) held that payments made for purchase of software as a product in the Indian market cannot be considered as Royalty observing as under:

*“In the cases where an Assessee acquires the right to use a software, the payment so made would amount to royalty. However, in the cases where the payments are made for purchase of software as a product, the consideration paid cannot be considered to be for use or the right to use the software. It is well settled that where software is sold as a product it would amount to sale of goods. In the case of **Tata Consultancy Services v. State of Andhra Pradesh: (2004) 271 ITR 401(SC)**, the Supreme Court examined the transaction relating to the purchase and sale of software recorded on a CD in the context of the Andhra Pradesh General Sales Tax Act. The court held the same to be goods within the meaning of Section 2(b) of the said Act and consequently exigible to sales tax under the said Act. Clearly, the consideration paid for purchase of goods cannot be considered as ‘royalty’. Thus, it is necessary to make a distinction between the cases where consideration is paid to acquire the right to use a patent or a copyright and cases where payment is made to acquire patented or a copyrighted, the consideration paid would have to be treated as payment for purchase of the product rather than consideration for use of the patent or copyright.*

*A Coordinate Bench of this Court has also expressed a similar view in the case of **Infrasoft(supra)**. In that case, the Revenue sought to tax the receipts on sale of licensing of certain software on royalty. The Tribunal held that there was no transfer of rights in respect of the copyright held by the Assessee in the software and it was a case of mere transfer of copyrighted article. This Court concurred with the Tribunal and held that what was transferred was not copyright or the right to use a copyrighted material and that did not give rise to any royalty income.*

Insofar as the reliance placed by the Revenue on the decision of the Karnataka High Court in Samsung Electronics Co.(supra) is concerned, a Coordinate Bench of this Court in

Infrasoft (supra) has unequivocally expressed its view that it was not in agreement with that decision. Thus, the said decision is of no assistance to the Revenue in this case.

In other case, Dynamic vertical Software India P. Ltd.(supra), this Court had reiterated the view that payment made by a reseller for the purchase of software for sale in the India market could by no stretch be considered as royalty”.

Respectfully following the said decision, we allow the grounds of appeal of the assessee and hold that the payments made for purchase of software by the assessee does not fall under Royalty so as to attract provisions of Sec. 194J r.w. Sec. 40(a)(i) of the Act, since assessee purchased software as a product and sold in the market but did not acquire any right to use such software for itself. Thus, we delete the disallowance made u/s. 40(a)(i) of the Act.

9. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 18th May, 2016.

Sd/-

Sd/-

(RAMIT KOCHAR)

(C.N. PRASAD)

लेखा सदस्य / ACCOUNTANT MEMBER

न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 18th May, 2016

व.नि.स./ Rj , Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण,
मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार

(Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai