IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCH 'C', BANGALORE

BEFORE SHRI PRAMOD KUMAR, ACCOUNTANT MEMBER
AND
SHRI VIJAY PAL RAO, JUDICIAL MEMBER

ITA Nos.1401 to 1403(B)/2013
(Assessment years : 2009-10,2010-11 & 2011-12)

M/s Kalki Communication Technologies Ltd
No.147, 2nd Floor, 5th Main Road,
HSR Layout, Sector-7,
Bangalore-560 012 Appellant

Vs

The Income-tax Officer, International Taxation,
Ward-1(2),
Bangalore Respondent

Assessee by : Shri Narendra Jain, CA
Revenue by : Shri Dr. Shankar Prasad, JCIT

Date of hearing : 08-04-2015
Date of pronouncement : 15-04-2015

O R D E R

PER SHRI VIJAY PAL RAO, JM:

These three appeals by the assessee are directed against three separate orders of the CIT(A) passed u/s 201(1) and 201(1A) of the IT Act, 1961 for the assessment years 2009-10, 2010-11 & 201-12.

2. The assessee has raised common grounds in all the three appeals. The grounds raised for the AY: 2009-10 are as under;

"1.The order of the ld.CIT(A)-IV to the extent prejudicial to the assessee is bad in law.

2. The ld.AO has erred in passing the order without considering all the submissions and/or without appreciating properly the facts and circumstances of the case and the law applicable. The ld. CIT(A)-IV has erred in confirming the action of the AO.

3. The ld.AO and CIT(A)-IV have erred in not appreciating that;

i) The qppellant was distributor of computer software licenses and the impugned payments constituting payments for the purpose of 'copyrighted article or product' were not liable for deduction of tax at source under the provisions of the Act as well as under India- USA DTAA or India-Singapore DTAA.

ii) Even in cases were purchase is for self use or for installation in hardware, the appellant has only purchased copyrighted article', which were not liable for deduction of tax at source under the provisions of the a/Ct as well as under India –USA DTAA or India-Singapore DTAA; and

iii) the payment for computer software licenses was not liable for deduction of tax at source u/s 195 of the Act, as the said payments do not comprise of income chargeable to tax in India.

4. The ld.AO and CIT(A)-IV have erred in concluding that;-

i) The payment made by the appellant is taxable 'Royalty' both under the Act ad India-USA DTAA or India-Singapore DTAA.

ii) The payment made by the appellant is towards copyright in the software license;

iii) The payment made for transferable right to use end-user license and therefore, is royalty;

iv) The payment is chargeable top tax in India and therefore, the appellant was liable for deduction of tax at source; and

v) The appellant is assessee in default within the meaning of section 201(1).

5. The ld. AO has erred in levying a sum of Rs.1,80,190/- as interest u/s 201(1A). On the facts and circumstances of case interest is not leviable. The appellant denies its liability to pay interest.

6. On an overall consideration of the facts of the case, and the law applicable, the demand determined by the AO and as confirmed by the CIT(A) being not correct is to be deleted.

7. The interest levied u/s 201(1A) of the Act to be deleted.

The appellant submits that each of the above grounds/sub-grounds are independent and without prejudice to one another.

3. The assessee is a company engaged in the business of providing computing communication and control-solutions to the energy and automation industry. The solutions are stated to be offered in the form of sale of traded software and in-house developed products/software. The assessee purchases shrink-wrap software from various non-resident vendors for the purpose of distribution and trading of software to end users. The computer software comes with shrink-wrap license which is transferred to end users. The end users download the software from various website links. The assessee also develops hardware product and sell then with embedded shrink-wrap software to various customers. During the year the assessee made various payments to oversee vendors without deduction of tax at source u/s 195 of the Act and claimed that these payments were towards purchase of copyright articles and therefore, there was no income chargeable to tax in the hands of the recipient. The AO while passing the order u/s 201(1) and 201!A) of the IT Act dated 20-03-2012 held that the assessee is in default for non-deduction of tax u/s 195 of the IT Act, 1961 because the payment made by the assessee is a royalty payment and therefore, the same is taxable in India. The assessee challenges the action of the AO before the CIT(A), but could not succeed. The CIT(A) has confirmed the action of the AO by following the judgment of

the jurisdictional High Court in the case of CIT Vs M/s Samsung Electronics Co. Ltd & Others 245 CTR (Kar.) 481 as well as the decision of this Tribunal in the case of M/s Synopsis International Ltd.

4. Before us, learned AR of the assessee submitted that the payment in question is not a royalty and therefore, the same is not taxable in India and consequential, no TDS was required to be deducted as per the provisions of the IT Act, 1961. In support of his contention he has relied on the judgment of the jurisdictional High Court in the case of CIT Vs M/s Wipro Ltd dated 25-08-2010 in ITA No.507(Bang.)/2002 and submitted that in an identical case, the Hon'ble High Court has held that the payments were not royalty. Thus, the learned AR submitted that the Division Bench of the Hon'ble High Court has differed from the view taken in the case of M/s Samsung Electronics Co. Ltd (Supra) and therefore, same view has to be taken in favour of the assessee by this Tribunal.

5. On the other hand, learned DR has relied on the order of the authorities below and submitted that the Hon'ble High Court has repeatedly taken this view in the case of M/s Samsung Electronics Co. Ltd (Supra) as well as in the case of /s Synopsis International Ltd. (Supra) vide order dated 03-08-2010. This he has relied upon the order of the authorities below as well as the decision of H'ble High Court in the case of

M/s Samsung Electronics Co. Ltd.(Supra) and CIT Vs M/s Synopsis International Ltd (Supra) 28 Taxman.com.62.

6. We have considered the rival submission as well as the relevant material on record. At the outset, we find that the issue of payment of royalty in the case of M/s Samsung Electronics Ltd. (Supra) has been decided by the Hon'ble High Court against the assessee and in favour of the revenue the learned AR has submitted that a different view has been taken by the jurisdictional High Court in the case of M/s Wipro Ltd and therefore, the judgment in the case of M/s Samsung Electronics Co.Ltd (Supra) should be treated as per in curiam, because the earlier decision of the Division Bench was not followed while deciding the case of M/s Samsung Electronics Co. Ltd (Supra). There is no dispute that the Tribunal is bound by the decision of the jurisdictional High Court and in case of different views of the Hon'ble High Court the latest judgment of the Hon'ble High Court is binding. Therefore, the Tribunal is not a forum to go into the issue of doctoring of per in curiam to be applied by the Hon'ble High Court. This aspect is only for the consideration of the Hon'ble High Court and not for this Tribunal. The Tribunal has to apply the doctoring of per in curiam only in respect of the decision of the Tribunal having different views, without taking into consideration the earlier decision of the Tribunal. Even otherwise, we note that the judgment in case of M/s Synopsis International Ltd (Supra) is a

prior judgment of the Hon'ble jurisdictional High Court on this issue, then the judgment in case of M/s Wipro Ltd (Supra). Further, the issue before the Hon'ble jurisdictional High Court in the case of M/s Wipro Ltd (Supra) being the last substantial question as reproduced in para-37 of the judgment is as under;

> *" 37. The last substantial Question of law famed is as under;*
>
> *"Whether the Tribunal is correct in allowing expenditure on imported software when the expenditure per se is capital in nature and is not allowable?."*

Thus, the issue before the Hon'ble jurisdictional High Court in case of M/s Wipro Ltd (Supra) was regarding allowability of expenditure of imported software whether capital in nature or revenue. There was no issue before the Hon'ble High Court whether the said expenditure was in the nature of royalty and only a passing reference was made by the Hon'ble High Court that the Commissioner rightly pointed out that it is not a royalty. In any case, when the prior decision in case of CIT Vs M/s Synopsis International Ltd (Supra) and in the latest decision in the case of M/s Samsung Electronics Co. Ltd. (Supra) on the issue of payment being royalty then the contention raised by the learned AR is devoid of any merits. The Tribunal in case of M/s Synopsis International Ltd. (Supra) for the assessment year : 2006-07, has decided an identical issue against the assessee by following the judgment of the

Hon'ble High Court in case of M/s Samsung Electronics Co. Ltd (Supra). The CIT(A) has reproduced the relevant finding of this Tribunal in the case of M/s Synopsis International Ltd. in para 4.3 of the impugned order, as under;

> *" 4.3 A similar issue on identical fact was examined by the Bangalore Bench of the Hon'ble Tribunal in Synopsis International Ltd. for Assessment year 2006-07 wherein it observed on the facts;*
>
> *The assessee is foreign company incorporated under the laws of Ireland ad is engaged in the business of sale and marketing of software licences to customers who are mainly software companies in India. According to the assessee, the software sold in India was shrink-wrapped software and were like any other goods. The sale of such goods should give rise to income from business but, however, since the assessee did not have any Permanent Establishment (PE) in India such business income was not taxable. As per the AO, the consideration received by the assessee on sale of shrink-wrapped software in India was not akin to sale of goods, but only right to use Computer Software and the consideration so received for giving such a ' right to use' partakes the character of 'royalty' within the meaning of India and Ireland. Thereafter, the AO after analyzing the provisions of the Act, DTAA, meaning of the term 'royalty' vis-à-vis the transaction, came to the conclusion that an amount of Rs.15,83,59,398/- & Rs.17,11,22,166/- respectively, received y the assessee, from its India customers in respect of licences granted by*

the assessee company to its India customers, to use its computer software, was to be brought to tax as 'royalty' within the meaning of section 9(1)(vi) of the Act as well as Article-12 of the DTAA between India and Ireland.

Held;

"It is not in dispute before us that an identical issue has been considered by the Hon'ble Karnataka High Court in the case of CIT Vs M/s Samsung Electronics Co. Ltd & Others 245 CTR (Kar.) 481 has held that payment to non-resident foreign software suppliers for purchase of shrink wrapped software was in the nature of royalty. The Hon'ble Court held that what is granted under the license is only a license to use the software for internal business without having any right for making any alteration or reverse engineering or creating sub-license while the copyright continues to be with the non-resident as per the agreement. That even as per the agreements entered into with other distributors as also the end user license agreement, except as expressly set forth in the agreement, the distributor cannot rent, lease, loan, sell or otherwise distribute the software, documentation in whole or in part. Thus, license is granted for making use of the copyright in respect of shrink-wrapped software/off-the shelf software under the respective agreements which authorizes the end-user i.e customer to make use of the copyright in the said software. Hence, the contention of the assessee that there is on transfer of copyright or any part thereof under

the agreements entered into by the assessee with the non-resident was held to be not acceptable. The Hon'ble Court further held that for the license granted to the assessee to make copy of the software into the hard disk of the designated computer and to take a copy for back up purposes, the end user has no other right and the said back up would have constituted an infringement of copyright. That right to make copy of the software itself is a part of copyright. It was further held that what is transferred is the right to use the software, an exclusive right which the owner of the copyright i.e the supplier owns. Thus, the amount paid to the non-resident supplier towards the supply to shrink-wrapped software or off the shelf software is not the price of CD alone or software alone for the license but a combination of all. Therefore, the payments constitute 'royalty' within the meaning of art.12(3) of the Indo-US DTAA and also as per the provisions of Sec.9(1)(vi) as the definition of 'royalty' under seec.9(1)(vi) is broader than that under the DTAA. Consequently, assessee was under obligation to deduct tax at source under sec.195 from the amount paid to the foreign software suppliers".

7. In view of the above facts and circumstances of the case and the judgment of the Hon'ble High Court in the case of M/s Samsung Electronics Co. Ltd. (Supra) as well as in the case of M/s Synopsis

International Ltd. (Supra), we do not find any reason to interfere with the impugned order of the learned CIT(A).

8. In the result, the appeals of the assessee are dismissed.

Order pronounced in the open Court on the 15th April, 2015.

Sd/-	**Sd/-**
(PRAMOD KUMAR)	**(VIJAY PAL RAO)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

D a t e d : 15-04-2015
Place: Bangalore
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Copy to :

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

By order

AR, ITAT, Bangalore