IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCH " B "

BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER AND
SHRI JASON P. BOAZ, ACCOUNTANT MEMBER

I.T. (T.P.) A. No.1286/Bang/2011
(Assessment Year : 2008-09)

M/s. Synopsys International Limited,
C/o Synopsis (India) Pvt. Ltd.,
RMZ Infinity, Tower A,
4th & 5th Floors, 3, Old Madras Road,
Benniganahalli, Bangalore-16. .... Appellant
PAN AAKCS2663N

Vs.

Dy. Director of Income Tax (International Taxation),
Range II, Bangalore. ..... Respondent.

Appellant By : Shri T. Suryanarayana, Advocate.
Respondent By : Shri Farhat Hussain Qureshi, CIT (D.R)

Date of Hearing : 22.1.2015.
Date of Pronouncement : 6.2.2015.

O R D E R

Per Shri Jason P. Boaz :

This appeal by the assessee is directed against the final order of assessment for Asst. Year 2008-09 passed u/s. 143(3) r.w.s. 144C(5) & 144C(13) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') vide order dt.13.10.2011 in pursuance of and in conformity with the directions issued by the Dispute Resolution Panel, Bangalore ('DRP') u/s.144C(5) r.w.s. 144C(8) of the Act vide order dt.21.9.2011.

2. The facts of the case, briefly, are as under :-

2.1 The assessee is a foreign company, incorporated under the laws of Ireland. For Asst. Year 2008-09, the assessee filed its return of income on 29.8.2008 declaring NIL income. In the period under consideration, the assessee was involved in the sales and marketing of software licenses to the customers especially to software companies in India. The assessee considered the licensed software as Shrink Wrapped software and treating the software like any other goods, was of the view that, since the assessee did not have a Permanent Establishment ('P.E') in India, income arising on account of sale of such software is not exigible to tax in India. According to the A.O., the consideration received by the assessee on sale of shrink wrapped software in India was not akin to sale of goods, but was only a right to use computer software and the consideration received by giving such a right to use, partakes the character of 'royalty' within the meaning of section 9(1)(v)(a) of the Act as well as Article 12 of the DTAA between India and Ireland. In this view of the matter, the A.O. completed the draft assessment order u/s.143(3) r.w.s. 144C of the Act vide order dt.24.12.2010 bringing to tax the total value of software supplied amounting to Rs.16,91,33,482, holding it to be chargeable to tax as income from royalty

2.2 Aggrieved with the draft order of assessment dt.24.12.2010 for A.Y. 2007-08, the assessee filed objections thereto before the Dispute Resolution Panel, Bangalore (DRP). The DRP after considering the assessee's objections, disposed them off by issuing its directions u/s.144C(5) r.w.s. 144C(8) of the Act vide order dt.21.9.2011. The impugned order of

assessment passed u/s.143(3) r.w.s. 144C(5) and 144C(13) of the Act vide order dt.13.10.2011 was passed in pursuance of and in conformity with the aforesaid directions of the DRP.

3. Aggrieved by the order of assessment passed u/s.143(3) r.w.s. 144C(5) and 144C(13) of the Act for Asst. Year 2008-09 dt.13.10.2011, the assessee has raised the following grounds of appeal :-

*" 1. **Assessment bad on facts,***

The assessment order, dt.13 Oct., 2011, passed by the Joint Director of Income Tax (International Taxation), Range II, Bangalore under Section 143(3) read with section 144C(4) and section 144C(13) of the the Income Tax Act, 1961 (in short 'the Act') is bad on facts.

2. Erroneous demands

The Assessing Officer has erred in :

a) Determining the total income of the appellant at Rs.169,133,480;

b) Levying income tax of Rs.16,913,350;

c) Levying interest under Section 234B of the Act of Rs.4,311,352; and

d) Raising a demand of Rs.14,337,820.

3. Erroneous treatment of the receipts from Indian customers as 'royalty'

3.1 The Assessing Officer and the Dispute Resolution Panel (DRP) have erred in holding that the payments received by the appellant from the Indian customers are in the nature of 'royalty' income taxable under Section 9(1)(vi) of the Act.

3.2 The Assessing Officer and the DRP have erred in not holding that the payments received from its Indian customers would not qualify as 'royalty' under the Double Taxation Avoidance Agreement between India and Ireland ('the DTAA')

3.3 The A.O. and the DRP have erred in not holding that whether the payment received by the appellant form Indian customers was in the nature of royalty had most appropriately to be judged under clause (v) of Explanation 2 to section 9(1)(vi) of the Act.

3.4 The A.O. and the DRP erred in not holding that, as the appellant did not give the right to Indian parties was not to be measured by reference to the productivity or use of the software, it could not be construed as 'royalty.'

3.5 The A.O, and the DRP erred in not following certain decisions rendered by the Delhi High Court, the Authority for Advance Rulings and various benches of the Income Tax Appellate Tribunal.

3.6 The A.O. and the DRP have erred in holding that since software is classified as 'goods' under the Karnataka Sales Tax Act, 1957, payments received form the sale of software could not be construed as 'royalty'.

*4. **Erroneous levy of interest under section 234B of the Act.***

The A.O. and the DRP have erred in levying interest under section 234B of the Act.

*5. **Initiation of penalty.***

The A.O. has erred in initiating penalty proceedings under Section 271(1)(c) of the Act.

*6. **Relief***

The appellant prays that the JDIT be directed to grant all such relief arising form the preceding grounds as also all relief consequential thereto."

4. The grounds raised at S.Nos.1, 2, and 6, being general in nature, and not being urged before us, are dismissed as infructuous.

5. **Treatment of receipts from Indian customers as Royalty.**

5.1 The Ground No.3 (3.1 to 3.6) raised by the assessee is with regard to the issue, as to whether the payments received by the assessee on sale and marketing of software license to the customers is 'royalty' within the meaning of section 9(1)(v) of the Act as well as Article 12 of the DTAA between India and Ireland. The assessee, a non-resident incorporated under the laws of Ireland, is engaged in the business of sale and marketing of software licenses to customers who are mostly software companies in India. According to the assessee, the software sold in India were Shrink – Wrapped software and were like any other goods, the sale

of which will give rise to income from business and since the assessee did not have a PE in India, such business income will not be taxable.

5.2 The ld. D.R. submitted that the consideration received by the assessee on sale of shrink-wrapped software in India were not akin to the sale of goods, but rather was only a right to use computer software and the consideration received for giving such a right to use partake the character of 'royalty' as per section 9(1)(v)(a) of the Act as well as Article 12 of the DTAA between India and Ireland. In support of this proposition, the ld. D.R. placed reliance on the decisions of the co-ordinate benches of this Tribunal in the assessee's own case in ITA No.550/Bang/2011 dt. 31.10.2012; for Assessment Year 2006-07 in IT(TP)A No.1518/Bang/2010 dt.5.12.2014 and the decision of the Hon'ble Karnataka Court in the case of CIT V Samsung Electronics Co. Ltd. & Others reported in 245 CTR (Kar) 481 wherein it was held that the payments to non-resident foreign software suppliers for purchase of shrink-wrapped software was in the nature of royalty. The ld. D.R. prayed that in view of the above cited decisions of the co-ordinate benches of this Tribunal (supra) and of the Hon'ble Karnataka High Court, the assessee's appeal on this issue was liable to be dismissed.

5.3.1 We have heard both parties and perused and carefully considered the material on record, including the judicial decisions cited and placed reliance on by the ld. D.R. for revenue. As submitted by the ld. D.R. we find that the identical issue, before us in this appeal, has been considered by the Hon'ble Karnataka High Court in the case of Samsung Electronics Co. Ltd. & Others (supra) and its decision therein, that payments to non-resident software supplies for

purchase of shrink-wrapped software was in the nature of royalty, was followed by the co-ordinate bench of this Tribunal in the assessee's own case for A.Y 2006-07 in ITA No.550/Bang/2011 wherein at paras 6 and 7 of its order has held as under :-

"6.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. 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 licence is only a licence to use the software for internal business without having any right for making any alteration or reverse engineering or creating sub-licences 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 licence agreement, except as expressly set forth in the agreement, the distributor cannot rent, lease, loan, sell or otherwise distribute the software, documentation or any derivative works based upon the software or documentation in whole or in part. Thus, licence 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 no 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 licence 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 of shrink wrapped software or off-the shelf software is not the price of CD alone or software alone or the licence 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 s. 9(1)(vi) as the definition of 'royalty' under s. 9(1)(vi) is broader than that under the DTAA. Consequently, assessee was under obligation to deduct tax at source under s. 195 from the amount paid to the foreign software suppliers.

7. In view of the aforesaid decision of the Hon'ble High Court of Karnataka, we are of the view that the grievance projected by the assessee in ground No.3 cannot be accepted. Ground No.3 is therefore dismissed."

The same finding was rendered by a co-ordinate bench of this Tribunal while dismissing the assessee's appeal for Assessment Year 2007-08 in IT(TP)A No.1518/Bang/2011 dt.5.12.2014.

5.3.2 Respectfully following the decision of the Hon'ble Karnataka High Court in the case of Samsung Electronics Co. Ltd. & Others reported in 245 CTR (Kar) 481 and of the co-ordinate benches of this Tribunal in the assessee's own case for Assessment Year 2006-07 in ITA No.550/Bang/2011 dt.31.10.2012, and Assessment Year 2007-08 in IT(TP)A No.1518/Bang/2010 dt.5.12.2014 we hold that the payments received by the non-resident assessee as consideration for sale of shrink-wrapped software constitute 'royalty' within the meaning of Article 12(3) of the Indo Ireland DTAA and also as per the provisions of section 9(1)(vi) of the Act. Consequently, the assessee was under obligation to deduct tax at source under section 195 of the Act form the amount paid to foreign software suppliers. Consequently, the ground raised at S.No.3 (3.1 to 3.7) is dismissed.

6. **Charging of interest under section 234B of the Act.**

6.1 The ground raised at S.No.4 relates to the charging of interest u/s.234B of the Act. It is the assessee's submission that it is a non-resident under section 195 of the Act, there is an obligation placed upon the payer; i.e. any person responsible for making payment to a non-resident has to deduct tax at source at the rates in force from such payments. It is contended by the assessee that interest under section 234B of the Act can be charged only if there is any default in making payment of advance tax. The method of determining the advance tax payable is laid down in section 209 of the Act. Under section 209(1)(d) of the Act, income

tax has to be calculated after reducing the amount of income tax which would be deductible or collectible at source. Since under section 195 of the Act, on payment to the assessee tax is deductible at source by the payer, income tax so deductible will have to be reduced while computing advance tax payable under section 209 of the Act. If so reduced, there would be no liability on the part of the assessee to pay any advance tax and consequently there would be no charge of interest under section 234B of the Act. In support of its contentions, the learned Authorised Representative relied on a number of judicial pronouncements. The learned Authorised Representative further submitted that the issue of charging of interest under section 234B of the Act in the case on hand was the subject matter of appeal before this Tribunal in the assessee's own case for Assessment Year 2006-07 in ITA No.550/Bang/2011 dt.31.10.2012 wherein the co-ordinate bench following the decision of the Hon'ble High Court of Delhi in the case of Jacobs Civil Inc. (2011) 330 ITR 578, held that the chargeability of interest under section 234B cannot be sustained.

6.2 Per contra, the learned Departmental Representative submitted that the charging of interest under section 234B of the Act is mandatory and supported the order of the DRP.

6.3.1 We have heard both parties and perused and carefully considered the material on record. We find that the same issue of chargeability of interest under section 234B of the Act was considered by the co-ordinate bench of this Tribunal in the assessee's own case for Assessment Year 2006-07 in ITA No.550/Bang/2011 dt.31.10.2012 wherein at paras 10 and 11 of its order, it was held as under :-

ñ 10. We have considered the rival submissions. In view of the clear judicial pronouncements by the various High Courts on the issue, levy of interest u/s. 234A cannot be sustained. We may, in this regard, refer to the decision of the Hon'ble Delhi High Court in the case of Jacabs Civil Inc. (2011) 330 ITR 578, wherein the Hon'ble Delhi High Court has explained the legal position as follows:-

"The liability to deduct or collect the tax at source is that of the payer. Therefore, for the purposes of s. 234B, the question would be as to whether the payee, i.e. the assessee in this case, had any role in deducting or collecting the tax. Once that is in the negative, and it was not duty of the payee/assessee, the question of payment of any interest would not arise as it cannot be said, in such circumstances, that the assessee is in default for the purposes of s. 234B. No doubt, if there is a default in making the payment of advance tax, the consequence which is to follow is that the interest becomes payable under s. 234B. But in the instant case, the provisions of s. 234B would not be attracted at all. The scheme of the Act in respect of non-residents is clear. Sec. 195 puts an obligation on the payer, i.e. any person responsible for paying to a non-resident, to deduct income-tax at source at the rates in force from such payments excluding those incomes which are chargeable under the head 'Salaries'. Therefore, the entire tax is to be deducted at source which is payable on such payments made by the payer to the non-resident. Sec. 201 lays down the consequences of failure to deduct or pay. These consequences include not only the liability to pay the amount which such a person was required to deduct at source from the payments made to a non-resident but also penalties etc. Once it is found that the liability was that of the payer and the said payer has defaulted in deducting the tax at source, the Department is not remediless and therefore can take action against the payer under the provisions of s. 201 and compute the amount accordingly. No doubt, if the person (payer) who had to make payments to the non-resident had defaulted in deducting the tax at source from such payments, the non-resident is not absolved from payment of taxes thereupon. However, in such a case, the non-resident is liable to pay tax and the question of payment of advance tax would not arise. This would be clear from the reading of s. 191 along with s. 209(1)(d). For this reason, it would not be permissible for the Revenue to charge any interest under s. 234B. The Tribunal has rightly held that the assessee was not liable to pay any interest under s. 234B."

11. In view of the above, we hold that levy of interest u/s. 234B of the Act cannot be sustained. Ground No.4 raised by the assessee is accordingly allowed."

The aforesaid decision of the co-ordinate bench was followed by another co-ordinate bench of this Tribunal in the assessee's own case for Assessment Year 2007-08 in IT(TP)A No.1518/Bang/2010 dt.5.12.2014.

6.3.2 Following the decisions of the co-ordinate bench of the Tribunal in the assessee's own case for Assessment Year 2006-07 in ITA No.550/Bang/2011 dt.31.10.2012 and for Assessment Year 2007-08 in IT(TP)A No.1518/Bang/2010 dt.5.12.2014, we hold that the

chargeability of interest under section 234B of the Act in the facts of the case on hand cannot be sustained. We, consequently, allow ground No.4 raised by the assessee.

7. In Ground No.5, the assessee has challenged the action of the Assessing Officer in initiating penalty proceedings under Section 271(1)(c) of the Act. Since no penalty under the aforesaid section has been levied in the case on hand for Assessment Year 2008-09, no cause of grievance arises to the assessee to agitate this issue before us for adjudication. The ground raised being premature, is non-maintainable in this appeal before us and is therefore dismissed.

8. In the result, the assessee's appeal for Assessment Year 2008-09 is partly allowed.

Order pronounced in the open court on 6th Feb., 2015.

Sd/-	Sd/-
(RAJPAL YADAV)	**(JASON P BOAZ)**
Judicial Member	Accountant Member

*Reddy gp

Copy to :

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2. Respondent
3. C.I.T.
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard File.

(True copy) By Order

Asst. Registrar, ITAT, Bangalore