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

BEFORE SHRI JASON P BOAZ, ACCOUNTANT MEMBER
AND SHRI LALIET KUMAR, JUDICIAL MEMBER

IT(TP)A No.1812 & 1813/Bang/2016
(Asst. Year 2010-11)

Technicolor India Pvt. Ltd.,
Bangalore. . Appellant

Vs.

The Income-tax Officer,
International Taxation,
Bangalore. . Respondent

Appellant by : Ms. Tanmayee, Advocate
Respondent by : Shri Satyasai Rath, Addl. CIT

Date of Hearing : 21-11-2017
Date of Pronouncement : 6-12-2017

O R D E R

PER SHRI JASON P BOAZ, ACCOUNTANT MEMBER :

These appeals are directed against the order of the CIT(A)-12, Bangalore dated 4/8/2016 in respect of the orders of the Assessing Officer u/s 201(1) and 201(1A) of the Income-tax Act, 1961 (in short ótheActô).

2. The grounds raised by the assessee in these appeals are as under:-

2.1 **IT(TP)A No.1812/Bang/2016**

"1. The order passed by the learned Commissioner of Income Tax (Appeals) - 12 ["CIT(A)"] is bad in law and on facts

2. The learned CIT(A) has erred in law and on facts by partly upholding the order of the Income-tax Officer, International Taxation, Ward 1(3), Bangalore;

3. The learned CIT(A) and the Income-tax Officer ("ITO") have erred in law and on facts in concluding that the Appellant ought to have deducted taxes at source under section 195 of the Income-tax Act, 1961 ("the Act") on purchase of shrink-wrapped computer software;

4. The learned CIT(A) and ITO, have erred in concluding that purchase or of a licence in a shrink wrapped software product amounts to transfer of rights in the copyright and consequently the provisions of section 9(1)(vi) of the Act would become applicable, based on the law as it stood at the relevant point in time when such payments were made;

5. The learned CIT(A) and the ITO, have erred in law and on facts in holding that the payments of Rs 6,283,486 made by the Appellant to non-resident companies, are in the nature of 'royalty' as defined under Article 12/13 under the Double Taxation Avoidance Agreement

between India and the respective non-resident countries ("DTAA") of the vendors;

6. The learned CIT(A) and ITO have erred in law and on facts in holding that with regard to the payments in context, there is a transfer of the underlying copyright in the software itself, between the Non-resident vendors and the appellant, notwithstanding the fact that the Appellant had made the subject payments merely for the purchase of shrink-wrapped computer software, being a copyrighted article;

7. The learned CIT(A) has erred in law and on facts by rejecting the appellant's claim that the subject payments made represent purchase price of the computer software and are not in the nature of royalty payments and in doing so, has not appreciated the fact that it would result in business income in the hands of the recipient and not taxable in India in the absence of a Permanent Establishment in Business Connection of the non-resident companies in India;

8. The learned CIT(A) has erred in law by passing an order, relying entirely on the ruling of the Karnataka High Court ("KHC") in the case of CIT Vs Samsung Electronics Company Limited ("Samsung") (ITA No 2808 of 2006) regardless of the fact that a Special Leave

Petition ("SLP") has been accepted by the Supreme Court for adjudication;

9. The learned CIT(A) has erred in law by rejecting the reliance placed by the Appellant on the decisions passed by non-jurisdictional Courts, merely based on the absence of binding force of such judgments in the Appellant's case without appreciating the applicability of the rationale laid out in such judgments.

10. Having taken cognizance of the retrospective amendment made to section 9(1)(vi) of the Act by way of insertion of Explanation 4 and 5, the learned CIT(A) thereafter erred in law in not appreciating that the amendment has been carried out only in the Act and the definition of royalty in the DTAA continues unchanged and consequently, this in itself would demonstrate that the definition of the word royalty under the DTAA is narrower than the Act;"

2.2 **IT(TP)A No.1813/Bang/2016**

"1. The order passed by the learned Commissioner of Income Tax (Appeals) - 12 ["CIT(A)"] is bad in law and on facts;

2. The learned CIT(A) has erred in law and on facts by upholding the order of the Income-tax Officer, International Taxation, Ward 1(3), Bangalore;

3. The learned CIT(A) and the Income-tax Officer ("ITO") have erred in law and on facts in concluding that the Appellant ought to have deducted taxes at source under section 195 of the Income-tax Act, 1961 ('the Act') on purchase of shrink-wrapped computer software;

4. The learned CIT(A) and ITO, have erred in concluding that purchase or a license in a shrink wrapped software product amounts to transfer of rights in the copyright and consequently the provisions of section 9(1)(vi) of the Act would become applicable, based on the law as it stood at the relevant point in time when such payments were made;

5. The learned CIT(A) and the ITO, have erred in law and on facts in holding that the payments of Rs 6,283,486 made by the Appellant to non-resident companies, are in the nature of 'royalty' as defined under Article 12/13 under the Double Taxation Avoidance Agreement between India and the respective non-resident countries ("DTAA") of the vendors;

6. The learned CIT(A) and ITO have erred in law and on facts in holding that with regard to the payments in context, there is a transfer of the underlying copyright in

the software itself, between the Non-resident vendors and the appellant, notwithstanding the fact that the Appellant had made the subject payments merely for the purchase of shrink- wrapped computer software, being a copyrighted article;

7. The learned CIT(A) has erred in law and on facts by rejecting the appellant's claim that the subject payments made represent purchase price of the computer software and are not in the nature of royalty payments and in doing so, has not appreciated the fact that it would result in business income in the hands of the recipient and not taxable in India in the absence of a Permanent Establishment! Business Connection of the non-resident companies in India;

8. The learned CIT(A) has erred in law by passing an order, relying entirely on the ruling of the Karnataka High Court ("KHC") in the case of CIT Vs Samsung Electronics Company Limited ("Samsung") (ITA No 2808 of 2006) regardless of the fact that a Special Leave Petition ("SLP") has been accepted by the Supreme Court for adjudication;

9. The learned CIT(A) has erred in law by rejecting the reliance placed by the Appellant on the decisions passed by non-jurisdictional Courts, merely based on the absence of binding force of such judgments in the

Appellant's case without appreciating the applicability of the rationale laid out in such judgments.

10. Having taken cognizance of the retrospective amendment made to section 9(1)(vi) of the Act by way of insertion of Explanation 4 and 5, the learned CIT(A) thereafter erred in law in not appreciating that the amendment has been carried out only in the Act and the definition of royalty in the DTAA continues unchanged and consequently, this in itself would demonstrate that the definition of the word royalty under the DTAA is narrower than the Act;.

11. The CIT(A) has erred in law and on facts in confirming levy of interest of Rs 104,532 under section 201(1A) of Act."

3. From a perusal of the grounds raised in these appeals (Supra) we find the main grievance is in respect of the demand raised u/s 201(1) and interest charged u/s 201(1A) of the Act.

4. At the outset, the ld DR for Revenue submitted that the issue for consideration is squarely covered against the assessee by the decision of the co-ordinate bench of this Tribunal in the assesseeôs own case for asst. years 2008-09 and 2009-10 in ITA Nos.949 to 952/Bang/2012 dated 7/10/2016, in which the co-ordinate bench followed the decisions of the Honôble Karnataka High Court in the cases of CIT Vs. Synopsis International Old Ltd., 28 taxmann.com

162 (Kar) and CIT Vs. Samsung Electronics Co. Ltd., 345 ITR 494 (Kar).

5. Per contra, the ld AR for the assessee contended that as per a later judgment of the Hon'ble Karnataka High Court in the case of Wipro Ltd., Vs. CIT, 62 taxmann.com 26 (Kar), the issue for consideration has been held in favour of the assessee and since this is a later judgment, the same should be followed.

6.1 We have heard the rival contentions and perused and carefully considered the material on record; including the judgments cited. We find that a co-ordinate bench of this Tribunal in the assessee's own case for asst. years 2008-09 and 2009-10 in its order in ITA Nos.649 to 652/Bang/2012 dated 7/20/2016, following the decisions of the Hon'ble Karnataka High Court in the cases of Synopsis International Old Ltd., (Supra) and Samsung Electronics Co. Ltd., (Supra), in preference to the decision in the case of Wipro Ltd., Vs. CIT (Supra) had decided this issue against the assessee, holding as under at paras 3 and 4 thereof:-

> *"At the very outset, learned DR of the revenue submitted that this issue is squarely covered against the assessee by the judgment of Hon'ble Karnataka High Court rendered in the case of CIT vs. Synopsis International Old Ltd., 28 Taxman.com 162 (Kar.) and in the case of CIT vs. Samsung Electronics Co. Ltd., 345 ITR 494. He filed a copy of both these judgments. In reply, learned AR of the assessee submitted that as per a later judgment of*

Hon'ble Karnataka High Court rendered in the case of Wipro Ltd. vs. CIT, 62 Taxman.com 26 (Kar.), this issue is covered in favour of the assessee arid since, this is a later judgment, this should be followed. At this juncture, it was pointed out by the bench that in this judgment, Hon'ble Karnataka High Court has simply followed the earlier judgment in assessee's own case dated 25.08.20 10 and the judgment in the case of CIT vs. Samsung Electronics Co. Ltd. (Supra) is dated 15.10.2011 and this judgment dated 15.10.2011 was not brought to the notice of Hon'ble Karnataka High Court in the case of Wipro Ltd. (Supra) then the judgment dated 15.10.2011 is the later detailed Judgment and the judgment dated 25 03 2015 in case of Wipro Ltd (Supra) is not a detailed judgment then we have to follow the Judgment rendered in the case of Samsung Ltd (Supra) The bench asked the learned AR of the assessee that whether he can cite any authority in support of his contention that in the present facts, the judgment in case of Wipro Ltd. (Supra) has to be followed. In reply, he could not cite any such authority.

4. In view of above discussion, we decide these issues against the assessee and in favour of the revenue by following the judgment of Hon'ble Karnataka High Court rendered in the case of CIT vs. Samsung Electronics Co.

Ltd. (Supra) in preference to the judgment of Hon'ble Karnataka High Court rendered in the case of Wipro Ltd. vs. CIT (Supra) and accordingly, we decline to interfere in the order of CIT (A)."

6.2 Respectfully following the decision of the Hon'ble Karnataka High Court in the case of CIT Vs. Samsung Electronics Co. Ltd., (Supra) and of the co-ordinate bench of this Tribunal in the assessee's own case for asst. year 2008-09 and 2009-10 (Supra), we find no reason to interfere with or deviate from the finding rendered by the ld CIT(A) in the impugned order. Consequently, the grounds raised by the assessee in these appeals are dismissed.

7. In the result, both the assessee's appeals for asst. year 2010-11 are dismissed.

Order pronounced in the open court on 6th Dec., 2017.

Sd/-	**Sd/-**
(LALIET KUMAR)	**(JASON P BOAZ)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Bangalore
Dated : 6/12/2017
* Reddy gp/Vms
Copy to :1. The Assessee
2. The Revenue
3. The CIT concerned.
4. The CIT(A) concerned.
5. DR
6. GF

By order

Sr. Private Secretary, ITAT, Bangalore.