आयकर अपीलीय अधिकरण पुणे न्यायपीठ "ए" पुणे में
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "A", PUNE

सुश्री सुषमा चावला, न्यायिक सदस्य एवं, श्री डी. करुणाकरा राव, लेखा सदस्य के समक्ष
BEFORE MS. SUSHMA CHOWLA, JM AND SHRI D. KARUNAKARA RAO, AM

आयकर अपील सं. / ITA No.2011/PUN/2014

निर्धारण वर्ष / Assessment Year : 2007-08

Capgemini Technology Services India Ltd.,
(In the matter of iGATE Computer Systems Ltd.
formerly known as Patni Computer Systems Ltd.
and since amalgamated)
Level I, II, IV, VI, Tower-3,
Cybercity, Magarpatta City,
Hadapsar, Pune – 411013 …. अपीलार्थी/Appellant

PAN:

Vs.

The Dy. Director of Income Tax
(International Taxation)-II, Pune …. प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA No.2182/PUN/2014

निर्धारण वर्ष / Assessment Year : 2007-08

The Dy. Director of Income Tax
(International Taxation)-II, Pune …. अपीलार्थी/Appellant

PAN:

Vs.

IGATE Computer Systems Ltd.
(formerly known as Patni Computer Systems Ltd.)
Level I, II, IV, VI, Tower-3,
Cybercity, Magarpatta City,
Hadapsar, Pune – 411013 …. प्रत्यर्थी / Respondent

PAN: AABCP6219N

Assessee by	:	Shri C.H. Naniwadekar
Revenue by	:	S/Shri Abhishek Meshram and Sanjeev Ghei

सुनवाई की तारीख / **Date of Hearing : 03.12.2018**		घोषणा की तारीख / **Date of Pronouncement: 28.02.2019**

आदेश / ORDER

PER SUSHMA CHOWLA, JM:

The cross appeals filed by assessee and Revenue are against order of CIT(A)-IT/TP, Pune, dated 30.09.2014 relating to assessment year 2007-08 against order passed under section 201(1) & 201(1A) of the Income-tax Act, 1961 (in short 'the Act').

2. The cross appeals filed by assessee and Revenue were heard together and are being disposed of by this consolidated order for the sake of convenience.

3. The assessee in ITA No.2011/PUN/2014 has raised the following grounds of appeal:-

> *In the fact and the circumstances of case, and in law, the learned Commissioner of Income-tax (Appeals)-IT/TP, Pune, erred:*
>
> *1. In confirming the assessee as assessee in default for certain remittances outside India and confirming the observations of the AO in this regard.*
>
> *2. In holding that order u/s 201 and 201(1A) was passed in time when the notice was issued after the expiry of the four years from the end of the relevant financial year.*
>
> *3. In holding that payments made for the use of software are taxable as royalty both under Income-tax Act and the respective DTAA.*
>
> *4. In confirming the demand of tax and interest raised by the learned AO in respect of payments towards use of software of ₹ 2,07,27,052/- and ₹ 80,66,684/-.*
>
> *5. In confirming that data base access charges are taxable as royalty and appellant ought to have deducted TDS thereon and confirming that charge of tax and interest on the payments of ₹ 53,00,934/-.*

6. *In confirming that payment of ₹ 57,03,584/- as consultancy fees as fees for technical services under Income-tax Act and under DTAA and hence liable to tax and interest.*

4. The Revenue in ITA No.2182/PUN/2014 has raised the following grounds of appeal:-

1. *On the facts and circumstances of this case, the Ld. CIT(A) was not correct in deleting the additions made on account of grossing up u/s 195A of the IT Act, 1961 on account of amounts paid to foreign companies under the head of Royalties / FTS within the meaning of section 9(1)(vi)/9(1)(vii) of the Act as well as Article 12 of the DTAA between India and USA/UAE/SPAIN/SINGAPORE/ MALAYSIA/ GERMANY/THAILAND/CANADA/IRELAND/UK as such.*
2. *On the facts and circumstances of this case, the Ld. CIT(A) was not correct in holding that since the assessee did not produce any agreement regarding to grossing up / non grossing up of the amounts liable for deduction u/s 195 the AO was wrong in grossing up the amount paid.*
3. *The Ld CIT(A) erred in not considering the fact that the assessee had not deducted TDS u/s 195 from the payment of royalty which clearly shows that the entire payment was made to the AE and no recovery on account of TDS liability u/s 195 has been made by the assessee from the AE and hence it transpires that the TDS liability is borne by the assessee.*

5. Briefly, in the facts of the case, the Assessing Officer on the basis of information available noted that the assessee had failed to deduct tax at source while making payment to non-resident / foreign company for purchase of software, consultancy services, AMC charges. The Assessing Officer thus, issued notice dated 01.10.2012 and asked the assessee to furnish reasons for non-deduction of tax at source under section 195 of the Act, in case of all foreign payments including software purchases debited during the year. The Assessing Officer thus, decided the issue against the assessee and held the assessee liable to deduct tax at source under the Income-tax Act and also under the provisions of DTAA and raised demand under section 201(1) and interest under section 201(1A) of the Act. The said order is dated 30.03.2013.

6. Before the CIT(A), the assessee raised the issue of said order being bad in law since notice was issued after expiry of four years from the end of relevant financial year. The assessee also raised issue on merits. The CIT(A) held that where no period of limitation was prescribed in the Statute, then it cannot be concluded that the order passed by Assessing Officer under section 201(1) and 201(1A) of the Act was to be annulled. He also decided the issue on merits against the assessee.

7. The assessee is in appeal against the order of CIT(A).

8. The ground of appeal No.1 raised by the assessee is general in nature and hence, the same does not require any adjudication. The second issue raised by the assessee is against maintainability of the order passed under section 201(1) and 201(1A) of the Act after expiry of four years from the end of the relevant financial year. The issue in grounds of appeal No.3 and 4 is against orders of authorities below in holding that the payments made for use of software were taxable as royalty both under the Income Tax Act and respective DTAA and consequently, raising demand under section 201(1) and interest under section 201(1A) of the Act. In grounds of appeal No.5 and 6, the assessee has raised the issue against finding of authorities below in holding that data base access charges were taxable as royalty and the assessee should have deducted tax at source and further holding the payment of consultancy fees as 'Fees for Technical Services' under the Income Tax Act and under DTAA.

9. The learned Authorized Representative for the assessee pointed out that the issue of payment of software whether royalty or not, is covered by the order of Tribunal in assessee's own case in earlier years for assessment years 2008-09 and 2010-11. He also pointed out that Explanation 4 to section 9(1)(vi) of the Act was amended by the Finance Act, 2012 and was prospective in nature. The learned Authorized Representative for the assessee also pointed out that order passed by the Assessing Officer was beyond the period of four years from the end of financial year was also time barred in view of different orders of various High Courts.

10. The learned Departmental Representative for the Revenue on the other hand, placed strong reliance on the order of CIT(A).

11. We have heard the rival contentions and perused the record. The issue on merits raised in the present appeal is against demand raised under section 201(1) of the Act and interest under section 201(1A) of the Act with regard to payments towards use of software. The assessee had made payments to the tune of ₹ 2.60 crores to third party for use of software. The case of assessee was that it had made the aforesaid payments for use of copyrighted article and had not received the copyright of software and hence, the payments could not be taxed as royalty under section 9(1)(vi) of the Act. The case of Revenue authorities on the other hand, was that the payments made for use of software was taxable as royalty under Explanation 4 to section 9(1)(vi) of the Act. The said issue was decided in view of retrospective amendment to section 9 of the Act. The authorities below also decided that the right to use copyright was to

be taxed as royalty under the relevant Article of DTAA. The CIT(A) had relied on the decision of Pune Bench of Tribunal in Cummins Inc Vs. DDIT in ITA Nos.73 & 74/PN/2011, relating to assessment years 2004-05 and 2006-07 vide order dated 08.08.2013, wherein it was held that use of software was taxable as royalty under DTAA. The assessee on the other hand, had placed reliance on the ratio laid down by Pune Bench of Tribunal in Allianz SE Vs. ADIT in ITA No.1569/PN/2008, relating to assessment year 2005-06, order dated 14.03.2012 and also on the decision of Director of Income Tax Vs. Nokia Networks OY in ITA No.512/2007. However, all the above said decisions were held to be not applicable because of the decision in Cummins Inc Vs. DDIT (supra), which was passed after the decision in Allianz SE Vs. ADIT (supra). Regarding the argument of retrospective amendment overriding the treaty, the CIT(A) relied on the ratio laid down by the Hon'ble High Court of Karnataka in Vodafone South Ltd. Vs. DDIT (TS-173-HC-2014)(Kar). Hence, the CIT(A) held that payments made for software licenses were taxable both under the Income Tax Act as well as under DTAA. As far as taxability of payments made for use of third party software was concerned, wherein the case of assessee was that it was reimbursement and hence, not taxable, wherein the payment was not made to software license supplier but to the intermediary who in turn, had made the payments to software supplier. The CIT(A) held that the situation does not affect the TDS liability and it was held that for non deduction of tax at source out of such payments made for reimbursement of software expenses, order of Assessing Officer was upheld with respect to payments totaling ₹ 2.07 crores.

12. On different aspects, we find that we have already decided the said issue with elaborate deliberations in John Deere India Pvt. Ltd. Vs DDIT (International Taxation) in ITA Nos.905 to 908/PUN/2015, relating to assessment years 2007-08 and 2008-09, order dated 23.01.2019 and have held that there is no merit in holding the payments for software as royalty, which in turn, attracts the provisions of section 201(1) and 201(1A) of the Act, in case tax at source is not deducted out of such payments. The Tribunal had taken note of the fact that the decision of Pune Bench of Tribunal in Cummins Inc Vs. DDIT (supra) has been recalled vide order passed in Miscellaneous Application and thereafter, relying on different decisions of various Hon'ble High Courts, the Tribunal had decided the issue in holding that there is no amendment to the definition of 'royalty' in DTAA and hence, the payment made for software is not royalty. The Tribunal also noted the amendment to provisions of section 9(1)(vi) of the Act by the Finance Act, 2012, under which the definition of 'software' has been amended and held that where purchase of software was purchase of copyrighted article, then it was not covered by the term 'royalty' under the provisions of section 9(1)(vi) of the Act. The Tribunal also held that since the provisions of DTAA overrides the provisions of Income Tax Act and are more beneficial, then there was no liability to deduct tax. The relevant findings of the Tribunal are in paras 45 to 89 and the Tribunal in final analysis it was held as under:-

> *"90. In conclusion, we hold that purchase of software by the assessee being copyrighted article is not covered by the term 'royalty' under section 9(1)(vi) of the Act. Where the assessee did not acquire any copyright in the software, is not covered under Explanation 2 to section 9(1)(vi) of the Act. We further hold that amended definition of 'royalty' under the domestic law cannot be extended to the definition of 'royalty' under DTAA, where the term 'royalty' originally defined has not been amended. As per definition of 'royalty' under DTAA, it is*

payment received in consideration for use or right to use any copyright of literary, artistic or scientific work, etc.; thus, purchase of copyrighted article does not fall in realm of 'royalty'. We also hold that since the provisions of DTAA overrides the provisions of Income Tax Act and are more beneficial and the definition of 'royalty' having not undergone any amendment in DTAA, the assessee was not liable to deduct tax for payments made for purchase of software. In such scenario, the assessee cannot be held to be in default and the demand created under section 201(1) and interest charged under section 201(1A) of the Act is thus, cancelled."

13. Applying the said proposition to the facts of present case, we hold that the payments made by assessee for use of software were not taxable as royalty and hence, the assessee has not defaulted in not deducting tax at source out of such payments. Consequently, there is no merit in raising the demand under section 201(1) of the Act and charging interest under section 201(1A) of the Act.

14. Coming to the next issue raised i.e. payments towards subscription charges / fees for use or access to database or portal also do not fall within the definition of 'royalty' on the same *simile* that the definition of 'royalty' under DTAA had not undergone any change. Hence, there is no merit in holding the aforesaid payments as liable to deduct tax under section 201(1) of the Act and consequently, the assessee has not defaulted in not deducting the tax out of such payments. Hence, the demand created under section 201(1) of the Act and interest charged under section 201(1A) of the Act is cancelled. Similarly, the payments made for purchase of hardware totaling ₹ 80,66,684/- cannot be held to be royalty. The said amount was held to be liable to tax as royalty by the authorities below on the ground that software was held to be royalty. We find no merit in the orders of authorities below in this regard. The CIT(A) however, in the later paras have directed the Assessing Officer to verify the stand of purchase of hardware raised by the assessee. However, since we

have already decided the issue in turn, relying on the order of Tribunal in John Deere India Pvt. Ltd. Vs DDIT (supra), we find no merit in the stand of authorities below in this regard and the same is dismissed.

15. Before parting, it may be pointed out that since the issue has been decided in favour of assessee on merits, we are not addressing the issue raised vis-à-vis vide ground of appeal No.2 i.e. order passed under section 201(1)/201(1A) of the Act was time barred.

16. Now, coming to the second aspect of the said issue, where consultancy fees have been paid by the assessee which were held to be 'Fees for Technical Services' under the Income Tax Act and DTAA. The said issue has also been decided by the Tribunal in para 103 and held that there was no requirement to deduct tax at source out of such payments for services and hence, following the same parity of reasoning, we hold that there was no requirement to deduct tax at source out of such payments. The grounds of appeal raised by assessee are thus, allowed.

17. Now, coming to the appeal of Revenue, wherein the Revenue has raised the issue against grossing up under section 195A of the Act, which was allowed by the CIT(A).

18. Both the learned Authorized Representatives fairly admitted that the tax effect involved in the appeal of Revenue is below the monetary limit prescribed by the CBDT vide Circular No.3/2018, dated 11.07.2018. In view of the said Circular prescribing the limits for filing the appeals before the Tribunal by the

Revenue and since the tax effect in the present appeal filed by the Revenue is below the said limit, then the appeal of Revenue is not maintainable and the same is dismissed.

19. In the result, appeal of assessee is allowed and the appeal of Revenue is dismissed.

Order pronounced on this 28th day of February, 2019.

Sd/-	**Sd/-**
(D.KARUNAKARA RAO)	**(SUSHMA CHOWLA)**
लेखा सदस्य / ACCOUNTANT MEMBER	**न्यायिक सदस्य / JUDICIAL MEMBER**

पुणे / Pune; दिनांक Dated : 28th February, 2019.

GCVSR

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

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. आयकर आयुक्त(अपील) / The CIT(A)-IT/TP, Pune;
4. The DIT(TP/IT), Pune;
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "ए" / DR 'A', ITAT, Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune