IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND SHRI JASON P. BOAZ, ACCOUNTANT MEMBER

ITA No.2199/Bang/2018
Assessment year : 2012-13

The Deputy Commissioner of Income Tax, Circle 1(1)(1), Bangalore.	Vs.	M/s. Allegis Services India Pvt. Ltd., Commerce @ Mantri, Level-3, Bannerghatta Road, Bangalore – 560 076. **PAN: AAFCA 0825M**
APPELLANT		RESPONDENT

CO No.129/Bang/2018 [in ITA No.2199/Bang/2018]
Assessment year : 2012-13

M/s. Allegis Services India Pvt. Ltd., Commerce @ Mantri, Level-3, Bannerghatta Road, Bangalore – 560 076. **PAN: AAFCA 0825M**	Vs.	The Deputy Commissioner of Income Tax, Circle 1(1)(1), Bangalore.
CROSS OBJECTOR		RESPONDENT

Revenue by	:	Shri C.H. Sundar Rao, CIT(DR-I)(ITAT), Bengaluru.
Assessee by	:	Shri Chavali Narayan, CA

Date of hearing	:	27.03.2019
Date of Pronouncement	:	05.04.2019

O R D E R

Per N V Vasudevan, Vice President

The appeal by the revenue and cross objection by the assessee is against the order dated 27.04.2018 of the CIT(Appeals)-I, Bengaluru relating to assessment year 2012-13. They were heard together and disposed of by this common order.

2. The grounds of appeal raised by the revenue reads as follows:-

> "1. The order of the Learned CIT (Appeals), in so far as it is prejudicial to the interest of revenue, is opposed to law and the facts and circumstances of the case.
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> 2. The Ld. CIT (A) erred in deleting the disallowance of Rs.6,16,99,639 made u/s 40(a)(i) of the Act by holding that the payment for purchase of software (prior to the judgment of Karnataka High Court in the case of CIT Vs Samsung Electronics Company Ltd., 320 ITR 209) would not be taxable as royalty.
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> 3. For these and such other grounds that may be urged at the time of hearing, it is humbly prayed that the order of the Ld. CIT (A) be reversed and that of the Assessing Officer be restored.
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> 4. The appellant craves leave to add, to alter, to amend or delete any of the grounds that may be urged at the time of hearing of appeal."

3. The assessee purchased shrinked wrapped software from non-resident parties for the purpose of resale and for internal usage. Payments were made to non-residents without deduction of tax at source. A sum of Rs.19,50,43,544 was paid to the non-residents for the above purpose. Since according to the AO, the assessee ought to have deducted tax at source on the aforesaid payments made to non-residents and failed to do so, the AO invoking the provisions of section 40(a)(i) of the Income-Tax

Act, 1961 ["the Act"] disallowed a sum of Rs.19,50,43544, which was claimed as deduction by the assessee while computing income from business. According to the AO, the payment in question was in the nature of 'royalty' and in coming to the aforesaid conclusion, the AO relied on the decision of the Hon'ble High Court of Karnataka in the case of *Samsung Electronics Co. Ltd., 345 ITR 494 (Kar)*.

4. Before the CIT(Appeals), the assessee submitted that out of the sum of Rs. 19,50,43,544 paid to non-residents for purchase of shrink wrapped software, payments were made upto 15.10.2011 amounting to Rs. 6,16,99,639 and payments made after 15.10.2011 upto the end of the financial year i.e., up to 31.03.2012, were a sum of Rs. 13,33,43,906. The Assessee submitted that in respect of payments made upto 15.10.2011, the date on which the Hon'ble High Court of Karnataka pronounced decision in the case of *Samsun Electronics Co.Ltd. (supra)*, clarifying the legal position overruling several contradictory decisions of jurisdictional ITAT, there can be no default of non deduction of tax at source and therefore to that extent, no disallowance can be made u/s.40(a)(ia) of the Act.

5. The CIT(Appeals) upheld the said stand taken by the Assessee and held as under:-

> "B. The submissions of the appellant and the precedents relied on by the appellant in this regard get superseded by the ruling of the jurisdictional High court of Karnataka in CIT v. Samsung Electronics Co. Ltd (16 taxmann.com.141) was passed on October 2011 and also based on the retrospective amendment to the Act (Finance Act 2012 amendment the definition of royalty with retrospective effect from 01.04.1976).
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> C . However, in this regard, the appellant has relied on the decision of the Income Tax Appellate Tribunal, Bangalore

Bench, in its own case 'or the Asst. year 2009-10 in ITA No. 1470/Bang/2014 dated 15.09.2017 wherein in para 7 of the order it has been held as under:

> "7. We have considered the rival submissions as well as the relevant material on record There is no dispute that the transaction in question regarding payment: of purchase of software completed in the F.Y 2008¬09 whereas the decision of the Hon'ble High Court in the case of CIT vs. Samsung Electronics Co. Ltd. (supra) was passed on 15.10.2011 much later than the time of transaction carried out by the assessee. It is also not in dispute that this issue of considering the payment for purchase of software as royalty is a highly debatable issue and various High Courts have taken divergent views on this issue. The co-ordinate Bench of this Tribunal in the case of ACIT vs. Aurigene Discovery Technologies (P) Ltd, supra) has considered an identical issue in paras 3 to 5 as under:
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> > ""03. We heard the rival submissions and gone through the relevant orders. The assessee resubmitted the plea taken before the lower authorities and placed on the ruling of the Hon'ble Bangalore ITAT in Sonata Information Technology Ltd v. ACTT (103 ITD 324) which had held that payments for software licences do not constitute royalty under the provisions of the Act and hence disallowance under Section 40(a)(ia) of the Act would not be applicable. The change in the legal position on taxation of computer software was on account of the ruling of the Karnataka High Court in CIT v. Samsung Electronics Co. Ltd. (320 ITR 209), which was pronounced on 15.10.20181 that is much later than the closure of the FY 2010-11. Subsequently, the Finance Act 2012 also introduced, retrospectively, Explanation 4 to Section 9(1)(vi) of the Act to clarify that payments for, inter alia, license to use computer software would qualify as royalty. During the FY 10-11, the assessee did not have the benefit of clarification brought by the respective amendment. As such, for the FY 2010-11, in light of the provisions

> of Section 9(1)(vi) of the Act read with judicial guidance on the taxation of computer software payments, tax was not required to be deducted at source. Given the practice in prior assessment years, the assessee was of the bona fide view that: the payment of software license fee was not subject to tax deduction at: source under Section 194/195 of the Act. It is submitted that liability to deduct tax at source cannot be fastened on the assessee on the basis of retrospective amendment to the Act (Finance Act 2012 amendment the definition of royalty with retrospective effect from 01.04.1976) or a subsequent ruling of a court (the Karnataka HC in CIT v. Samsung Electronics Co. Ltd (16 taxmann.com.141) was passed on October 2011)."
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> Having considered the submissions, respectfully following the jurisdictional ITAT decision in appellant's own case, wherein the Hon'ble Tribunal has held that payments for purchase of software (prior to Samsung judgment supra) would not be taxable as royalty considering the ground of impossibility of performance, 1 allow the payments made upto 15.10.2011 to the extent of Rs. 6,16,99,639 out of the total amount of Rs.19,50,43,544."

6. Aggrieved by the aforesaid direction of the CIT(Appeals), the revenue has preferred the present appeal before the Tribunal.

7. After hearing the rival submissions, we are of the view that there is no merit in this appeal by the revenue. In fact, the Tribunal in assessee's own case for the AY 2009-10, after noticing that the decision of the Hon'ble High Court of Karnataka in the case of *Samsung Electronics Co. Ltd., 345 ITR 494 (Kar)* was rendered only on 15.10.2011 came to the conclusion that upto 15.10.2011 as per law laid down in several decisions of the Tribunal, there was no obligation to deduct tax at source on payment of a similar nature. It is only after 15.10.2011, the Hon'ble High Court of Karnataka held that similar payments made by the assessee were to be

regarded as payment of royalty on which tax ought to have been deducted at source. Therefore, in respect of payments made after 15.10.2011, the assessee ought to have deducted tax at source. The CIT(Appeals) has therefore held that payments made upto 15.10.2011 amounting to Rs.6,16,99,639 should not be disallowed u/s. 40(a)(i) of the Act. We are of the view that the reliance of the CIT(Appeals) on the decision of the Tribunal for AY 2009-10 in assessee's own case will equally apply to the present assessment year and the CIT(Appeals) was right in following the said decision and deleting the addition to the extent of Rs.6,16,99,639. We therefore dismiss the appeal of the revenue.

8. As far as CO by the assessee is concerned, the assessee has sought to raise a plea in the CO that the payment in question cannot be regarded as in the nature of royalty. The grounds in the CO in this regard reads as follows:-

> "Based on the facts and circumstances of the case, Allegis Services (India) Private Limited ("Allegis India" or "the Respondent" or "the Company") respectfully craves leave to prefer against the order passed by the Deputy Commissioner of Income-tax, Circle 1(1)(1), Bangalore (hereinafter referred to as the "Learned AO") dated 29 February 2016 under Section 143(3) read with Section 92CA of the Income-tax Act, 1961 ("the Act") and the order of the Commissioner of Income Tax (Appeals) ("CIT(A)") dated 27 April 2018 on the following grounds —
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> 1. Based on the facts and circumstances of the case, the Respondent respectfully submits that the Commissioner of Income Tax (Appeals) ("CIT(A)") and the Learned AO erred, in law, and in facts, by holding that entire payments amounting to INR 19,50,43,544 made during the year for software amounts is taxable as Royalty under the provisions of the Act and under relevant Double Taxation Avoidance Agreements.

2. Based on the facts and circumstances of the case, the Respondent respectfully submits that the t earned CIT(A) erred in law and in facts by upholding the contention of the Learned AO that the payments made for purchase of software is in the Nature of 'Royalty' under the provisions of the Act.

3. Based on the facts and circumstances of the case, the Respondent respectfully submits that the Learned CIT(A) erred in law and in facts by upholding the contention of the Learned AO that the payments made for purchase of software is in the Nature of 'Royalty' under the Double Taxation Avoidance Agreement.

4. Based on the facts arid circumstances of the case, the Respondent respectfully submits that the Learned CIT(A) erred in facts and in law by upholding the disallowance under Section 40(a)(i). The Respondent also submits that the software payments made by the Company to non-residents is not subject to withholding tax and accordingly, no disallowance can be made under Section 40(a)(i) of the Act.

5. Based on the facts and the circumstances of the case, the CIT(A) and the Learned AO has erred, in law and, in facts, by not considering various judicial pronouncements relied upon by the Appellant wherein it is held that payments for sale of software from a non-resident do no constitute royalty and accordingly not taxable in India.

6. Based on the facts and circumstances of the case, the Respondent, respectfully submits that the Learned AO has failed to appreciate that the retrospective amendments to Section 9(1)(vi) of the Act inserted vide Finance Act, 2012 does not affect the provisions of relevant Double Taxation Avoidance Agreements.

7. Notwithstanding the above, the Learned AO has failed to appreciate the fact that the Assessee could not have deducted tax in the payments made during the year based on a retrospective amendment brought by Finance Act, 2012.

> The Respondent craves leave to add, alter, vary, omit, amend or delete the above ground of cross-objections at any time before, or at the time of, hearing of the appeal, so as to enable the Income Tax Appellate Tribunal to decide this response according to law."

9. We are of the view that in the light of the decision of Hon'ble High Court of Karnataka in the case of *Samsung Electronics Co. Ltd. (supra)*, the arguments raised in the CO are without any merit and are liable to be dismissed as such.

10. In the result, the appeal by the revenue as well as CO by the assessee is dismissed.

Pronounced in the open court on this 5th day of April, 2019.

Sd/-	Sd/-
(JASON P. BOAZ) Accountant Member	(N.V. VASUDEVAN) VICE PRESIDENT

Bangalore,
Dated, the 5th April, 2019.

/ Desai Smurthy /

Copy to:

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

By order

Assistant Registrar,
ITAT, Bangalore.