IN THE INCOME TAX APPELLATE TRIBUNAL "I", BENCH MUMBAI

BEFORE SHRI C.N.PRASAD, JUDICIAL MEMBER
&
SHRI G. MANJUNATHA, ACCOUNTANT MEMBER
ITA No.6921/Mum/2018
(**Assessment Year: 2015-16**)

Agfa Healthcare NV Septestraat 27 Mortsel,Belgium-2640 C/o Deloitte Haskins & Sells LLP, 28th Floor Indiabulls Finance Centre Tower 3, Senapati Bapat Marg Elphinstone (W), Mumbai-400 013	Vs.	DCIT, International Taxation-1(1)(1) 5th Floor Room No.517 Air India Building Nariman Point Mumbai-400 021
PAN/GIR No.AAICA8105D		
(Appellant)	..	**(Respondent)**

Revenue by	Shri. V.Sreekar, DR
Assessee by	Shri. Anil Kadam, AR
Date of Hearing	**25/11/2019**
Date of Pronouncement	**25/11/2019**

आदेश / O R D E R

PER G.MANJUNATHA (A.M):

This appeal filed by the assesee is directed against final assessment order passed by the Ld. Assessing Officer (AO) consequent to directions of the Dispute Resolution Panel (DRP)-1(WZ), u/s 144C(5) of the I.T.Act, 1961, dated 24/10/2018 and it pertains to Assessment Year (AY) 2015-16.

2. The assessee has raised the following grounds of appeal:-

1. Taxability of receipts for provision of Information and Communication Services / cross-charges

1.1 The learned DRP / DCIT erred In taxing an amount of Rs. 2,23,73,781 received by the appellant from Agfa Healthcare India Pvt. Ltd. [AHIPL] for provision of Information and Communication Services [ICS] as royalty under section 9(1)(vi) of the Act as well as India-Belgium tax treaty.
1.2 The learned DCIT erred in holding that the payments received by the appellant are in relation to use of computer software and/or for the use of process or for rendering services In relation to those items.
1.3 The learned DRP erred fn relying on its directions issued on Identical grounds for assessment year 2014-15 and holding that the system developed by the appellant constitutes a design or model or a plan or a process for which an access has been given to AHIPL.

2 Taxability of receipts from safe of software

2.1 The learned DRP / DCIT erred in taxing an amount of Rs. 13,84,64,513 received by the appellant from AHIPL in relation to sale of software as royalty under section 9(1)(vi) of the Act as well as India-Belgium tax treaty.
2.2 The learned DRP / DCIT erred m not following the order of the Hon'ble Pune Tribunal wherein this issue is already decided In favour of the payer (I.e. AHIPL) and It is held that the payments to the appellant Is not nature of royalty and thus not subject to withholding tax in India.
2.3 The learned DRP erred In observing that the appellant is merely storing the software in the equipment and hence, the software cannot be held to be an Integral part of the equipment.

3 Levy of Interest under section 234B

The learned DCIT erred in levying Interest under section 234B of the Act.
4. Initiation of penalty proceedings.

The learned DCIT erred in initiating penalty proceedings under section 271(1)(c) of the Act.
5. Each one of the above grounds of appeal is without prejudice to the other
6. The appellant reserves the right to amend, alter or add to the grounds of appeal.

3. The brief facts of the case are that the assesee is a Belgium incorporated and is a tax resident of Belgium in terms of the India – Belgium tax treaty. The assesee company is engaged in the business of production and distribution of extensive portfolio of

solutions, healthcare, imaging equipment and consumables. The assesee company does not undertake any activities in India. The assessee company provides services/ support to Agfa Healthcare India Pvt.Ltd. (AHIPL), an associate enterprise in India in terms of section 92A of the act, in respect of SAP system, remote access services and mail and calendaring services etc. On basis of request by specific users of the various applications, the assesee company has received cross charges for such Information and Communication Services [ICS] rendered to AHIPL. Further, the assessee company is also selling imaging equipment to AHIPL. The software required to run this equipment are also made available to the clients. The company has not offered the receipts from ICS services rendered to AHILP and the consideration received from sale of software in India to taxation, claiming that these are business receipts of the company and in absence of any PE in India, the same is not liable to tax in India. The Ld. AO has not accepted the contentions of the assessee and held that receipts from cross charges and from sale of software are in the nature of royalty u/s 9(1)(vi) of the Act, as well as the India-Belgium tax treaty and hence, liable to tax in India irrespective of the location from where, the services are rendered. The assesee filed objections before the DRP against the findings of the Ld. AO, however could not succeed. The DRP- 1,(WZ), Mumbai vide its directions u/s 144C (5) of the I.T.Act, 1961,dated 06/08/2018 confirmed the findings of the Ld. AO, in respect of cross charges and receipts from sale of software from AHIPL are in the nature of royalty under the India -Belgium tax treaty. Aggrieved by the DRP directions, the assessee in the appeal before us.

4. The first issue that came up for our consideration from ground No.1 of assesee appeal is taxability of receipts for provision of Information and Communication Services/cross charges u/s 9(1)(vi) of the I.T.Act, 1961, as well as the India-Belgium tax treaty. The Ld. AR for the assesee, at the time of hearing, submitted that this issue is covered in favor of the assesee by the decision of ITAT, Mumbai 'L' bench in assessee's own case for AY 2014-15 in ITA No. 6740/Mum/2017, where under identical set of facts and also, on the basis of same agreement between the parties, held that the assessee contention that expanded definition of royalty after introduction of Explanation (4) to section 9(1)(vi) would not apply to assesee case, in absence of corresponding amendment in Article 12(3)(a) of the India-Belgium tax treaty should have been considered by the AO and the DRP and accordingly, set aside the issue to the file of the AO for denovo adjudication, after due opportunity of being heard to the assesee. Therefore, for this year, facts being similar and accordingly, the issue may be set aside to the file of the Ld.AO for denovo adjudication.

5. The Ld. DR, on the other hand, fairly accepted that the issue has been set aside to the file of the AO for denovo adjudication and accordingly, this year also, the issue may be set aside to the file of the Ld.AO.

6. We have heard both the parties, perused the material available on record and gone through orders of the authorities below. We find that an identical issue has been considered by the co-ordinate bench, in light of provision of section 9(1)(vi) and newly inserted Explanation (4) along with Article 12(3) (a) of the India-Belgium tax

treaty and after considering relevant facts has set aside the issue to the file of the Ld.AO for denovo adjudication. The relevant findings of the Tribunal are as under:-

> *"10. We have considered rival submissions and perused materials on record. It is evident from material on record, both the assessee and the Department are in agreement that the receipts from ICS is not in the nature of FTS as per Article–12(3)(b) of the India–Belgium DTAA as well as section 9(1)(vii) of the Act. Therefore, there is no need to deliberate on the issue as to whether the payment received by the assessee from ICS is in the nature of FTS. The only issue which requires examination is, whether the payment received by the assessee towards ICS from AHIPL can be treated as royalty under Article–12(3)(a) of India–Belgium DTAA. In case such payment does not come within the ambit of royalty as defined under Article– 12(3)(a), it cannot be brought to tax by treating it as royalty under section 9(1)(vii) of the Act, since, as per section 90(2) of the Act, the treaty provisions being more beneficial will prevail over the provisions of the Act. The term royalty has been defined under Article–12(3)(a) of the India–Belgium DTAA as under:–*
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> > *"3(a) The term —royalties‖ as used in this article means payments of any kind received as a consideration for the use of or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience.*
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> *11. A reading of the aforesaid provision makes it clear that the payment received for use of or right to use of any copyright of literary artistic or scientific work including cinematograph films, patent, trademark, design or model, plan, secret formula or process or information concerning industrial, commercial or scientific experience is to be treated as royalty. As could be seen, the aforesaid definition does not refer to transfer of any right for use or right to use computer software. As per section 9 of the Act certain categories of would be deemed to accrue or arise in India. One such income as per section 9(1)(6) is "royalty". In case of a non resident if the royalty is payable in respect of any right, property or information used or services utilized for the purpose of a business or profession carried out in India or for the purpose of making or earning any income from any source in India, it will be taxable. Explanation–2 to section 9(1)(vi) of the Act defines royalty as under:–*
>
> > *"Explanation 2.—For the purposes of this clause, "royalty" means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head "Capital gains") for— (i) the transfer of all or any rights (including the granting of a licence) in respect of a*

patent, invention, model, design, secret formula or process or trade mark or similar property;

(ii) the imparting of any information concerning the working of, or the use of, a patent, invention, model, design, secret formula or process or trade mark or similar property;
(iii) the use of any patent, invention, model, design, secret formula or process or trade mark or similar property;
(iv) the imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill ;
[(iva) the use or right to use any industrial, commercial or scientific equipment but not including the amounts referred to in section 44BB;]
(v) the transfer of all or any rights (including the granting of a licence) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, but not including consideration for the sale, distribution or exhibition of cinematographic films; or
(vi) the rendering of any services in connection with the activities referred to in sub-clauses (i) to 25[(iv), (iva) and](v).

12. A reading of the definition of royalty in Explanation–2 to section 9(1)(vi) makes it clear that, though, the definition of royalty is wider than the definition provided under Article 12(3)(a) of the DTAA, however, it does not specifically refer to computer software. However, subsequently, by finance Act, 2012, Explanation–4 was introduced to section 9(1)(vi) with retrospective effect from 1st June 1976 which reads as under:–

"Explanation 4.—For the removal of doubts, it is hereby clarified that the transfer of all or any rights in respect of any right, property or information includes and has always included transfer of all or any right for use or right to use a computer software (including granting of a licence) irrespective of the medium through which such right is transferred.

13. Thus, by virtue of above Explanation, the scope and ambit of the term royalty was further expanded to also include transfer of all or any right for use or right to use computer software irrespective of the medium through which such right is transferred. It is relevant to observe, by referring to Explanation–4 of section 9(1)(vi) of the Act the Assessing Officer has concluded that the amount received by the assessee from ICS is in the nature of royalty, since, such services are in relation to computer software and / or for the use of process or for rendering services in relation to those items. Notably, the aforesaid Explanation–4, though, was introduced to section 9(1)(vi) of the Act with retrospective effect from 1st June 1976, however, there is no such corresponding amendment made to the definition of royalty in India– Belgium DTAA through introduction of a similar Explanation like Explanation–4 to section 9(1)(vi) of the Act. Therefore, assessee's contention that in the absence of a

provision similar to Explanation–4 to section 9(1)(vi) of the Act in the India–Belgium DTAA, payment made for use or right to use of computer software cannot be treated as royalty under the tax treaty, requires to be considered objectively and with all seriousness as it has a crucial bearing on the ultimate taxability of the amount received towards ICS. Though, the aforesaid contention was raised by the assessee before the Departmental Authorities, however, they have completely ignored such contentions made by the assessee. Decisions relied upon by assessee and their applicability to the disputed issue has not been considered. This, in our view, is improper and against the principles of natural justice. Further, on a careful scrutiny of the order of the DRP we find its finding on the issue of royalty vis–a–vis Article–13(1)(a) of India–Belgium DTAA to be contradictory. While dealing with the taxability of amount received towards ICS, though, the DRP has observed that the nature of payment is royalty even under Article–12(3)(a) of the Tax Treaty, however, while dealing with the issue relating to taxability of amount received towards sale of software along with equipment, the DRP in Para–5.10 of the order has observed that the definition of royalty under the India–Belgium DTAA will not be applicable and the definition of royalty under the Act, after the amendment brought through Finance Act, 2012, would be applicable. Thus, as per the DRP's own finding, there is a distinction between the definition of royalty under the Act and the India–Belgium DTAA. In such circumstances, assessee's contention that the expanded definition of royalty after introduction of Explanation–4 to section 9(1)(vi) would not apply to assessee's case in absence of corresponding amendment in Article– 12(3)(a) should have been considered by the Assessing Officer and the DRP keeping in view the relevant case laws on the issue. However, neither the Assessing Officer nor the DRP have done such exercise. In view of the aforesaid, we restore the issue to the file of the Assessing Officer for denovo adjudication after due opportunity of being heard to the assessee keeping in view our observations herein above. This ground is allowed for statistical purposes."

7. In this view of the matter and consistent with view taken by the coordinate bench, we are of the considered view that the issue need to be reconsidered by the Ld. AO, in light of the findings given by Tribunal for earlier assessment years and hence, we set aside the issue to the file of the Ld. AO for denovo adjudication, after due opportunity of being heard to the assesee.

8. The next issue that came up for our consideration from ground No.2 of assesee appeal is taxability of receipts from sale of software as royalty u/s 9(1)(vi) of the I.T.Act, 1961, as well as the India-

Belgium tax treaty. The Ld. Counsel for the assessee, at the time of hearing, submitted that this issue is also covered in favor of the assessee by the decision of ITAT, Mumbai 'L' bench in assessee's own case for AY 2014-15 in ITA No. 6740/Mum/2017, for which the Ld. DR fairly accepted that the issue is squarely covered in favor of the assesee.

9. We have heard both the parties, perused the material available on record and gone through order of the authorities below. We find that an identical issue has been considered by the Tribunal in assessee's own case for AY 2014-15 in ITA.No.6740/Mum/2017 and after considering relevant facts, held that payment received by the assessee from AHIPL towards sale of software is not in the nature of royalty u/s 9(1)(vi),as well as the India-Belgium tax treaty and hence, not exigble to tax in India. The relevant findings of the Tribunal are as under:-

> *19. We have considered rival submissions and perused materials on record. Undisputedly, the amount of ` 11,28,51,401, brought to tax as royalty was received by the assessee from AHIPL towards sale of software embedded with the imaging equipment / MRI machines for operating them. It is evident, the Departmental Authorities have treated the amount received from sale of software as royalty primarily for the reason that the amount for sale of software has been charged separately in the invoices raised. Notably, while examining the nature of the aforesaid payment in case of AHIPL, the distributor of the assessee, in assessment year 2008–09 to 2012–13, the Assessing Officer was of the view that the payment made is in the nature of royalty, hence, required deduction of tax at source under section 195 of the Act. The assessee having not deducted tax at source the Assessing Officer passed orders under section 201 of the Act raising demand against AHIPL. The reasoning on which the Assessing Officer concluded that the payment made by AHIPL to the assessee is in the nature of royalty are identical to the reasoning on which the Assessing Officer and the DRP held the payment made as royalty in case of the present assessee. When the dispute ultimately came up for consideration before the Tribunal in ITA no.216 to 218/Pun./2014, etc., the Tribunal, after taking into consideration*

all material facts and provisions of Act as well as the provisions of India–Belgium DTAA vide order dated 31st May 2017 ultimately concluded that the amount paid by the AHIPL to the assessee cannot be treated as royalty. The observations of the Tribunal, Pune Bench, in this regard are as under:–

> *18. Now, the next question which arises for consideration is, Whether the part of payments made for purchase of equipment would also include payment for ‗Royalty' in respect of software received along with the equipment. In the instant case, the authorities below have fasten the tax liability on the assessee on the presumption that the payment towards the acquisition of software is in the nature of ‗Royalty'. Since, the assessee has failed to deduct tax at source on such payment the assessee has violated the provisions of section 195 of the Act. The term ‗Royalty' has been defined in Explanation 2 to section 9(1)(vi) of the Act. The same is reproduced here-in-below : —Explanation 2.—For the purposes of this clause, —royalty‖ means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head —Capital gains‖) for— (i) the transfer of all or any rights (including the granting of a licence) in respect of a patent, invention, model, design, secret formula or process or trade mark or similar property ; (ii) the imparting of any information concerning the working of, or the use of, a patent, invention, model, design, secret formula or process or trade mark or similar property ; (iii) the use of any patent, invention, model, design, secret formula or process or trade mark or similar property ; (iv) the imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill ; (v) the use or right to use any industrial, commercial or scientific equipment but not including the amounts referred to in section 44BB; (vi) the transfer of all or any rights (including the granting of a licence) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, but not including consideration for the sale, distribution or exhibition of cinematographic films ; or (vii) (vi) the rendering of any services in connection with the activities referred to in sub-clauses (i) to 76[(iv), (iva) and] (v).‖ 19. The assessee during the period relevant to the assessment year under appeal had transaction with vendors of AGFA equipments from Australia, Canada and Belgium. The provisions of ‗Royalty' and fee for technical service in DTAA between India and above said countries is concerned is on same lines. The term ‗Royalty' has been defined in Article 12(3)(a) of DTAA between India and Belgium. The same is reproduced here-in-under : —3. 1[(a) The term "royalties" as used in this article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, any patent, trade mark, design or model, plant, secret formula or process, or for*

information concerning industrial, commercial or scientific experience.]‖ A perusal of the definition of Royalty as defined under the Act is exhaustive as compared to the definition of ‗royalties' under Article 12(3)(a) of the DTAA. It is a well settled law that where the provisions of DTAA favour the assessee, the provisions of DTAA would override the provisions of the Act. 20. The case of the Revenue is that the assessee has made payment for acquiring the right to use software. The authorities below have also made observations in their respective orders about the source code of the software and have further stretched the softwares to equate it with secret formula or secret process, so as to bring the transaction with respect to purchase of software in the present case within the ambit of ‗royalty'. We have already held that the software is embedded in the equipment and is inextricable linked to the working of imaging equipment, therefore, payment for software cannot be separated from consolidated payment of equipment. Nevertheless, to put this issue in clear prospective we would take to refer to the decision of Mumbai Bench of the Tribunal in the case of Galatea Ltd. Vs. Deputy Commissioner of Income Tax (supra) wherein similar issue was raised. The Tribunal after considering the facts of the case and catena of judgments held that where software is part of equipment there is no question for segregating the payment for software. And such payments do not fall within the ambit of Royalty. The relevant extract of the decision of Tribunal is reproduced here-in-under : —16. The first part of the argument made by the Ld. Counsel for the assessee is that the impugned consideration was received on account of sale of machine along with requisite software which formed integral part of machines sold by it to the customers. The whole dispute arose merely because value of software was separately mentioned. But, there was no separate transaction of sale of software and, therefore, it was predominantly transaction of sale of machine and, therefore, it could not have been brought within the definition of —Royalty‖ as envisaged in section 9(1)(vi) of the Act and, therefore, in the absence of there being any P.E. of the assessee in India, the income arising from sale of machine could not have been taxed in its hands in India. 17. We have carefully analyzed the facts of the case and arguments made by the Ld. Counsel for the assessee as well as counter arguments made by the Ld. Departmental Representative. The undisputed facts before us are that none of the customers have purchased only machine or only software. There was no customer who purchased only software. Ld. Counsel for the assessee drew our attention on various pages of the paper book to establish that the machine sold by the assessee could not be made operational or functional in the absence of operating software along with the application software. These facts were not controverted by the Ld. Departmental Representative during the course of hearing in response to a specific query put to him by the Bench. It is noted that complete details have been given by the assessee in the paper book at

Page–222 and 224. Our attention was also drawn on certificate from the assessee enclosed at Page–225 of the paper book certifying that software supplied by the assessee to end user was for integration with the machine supplied by the assessee and that this software had no other independent use as such, except to enable such machine to function. We have also gone through the End User License Agreement (EULA) entered into by the assessee with the customers wherein there are various clauses which indicate that the software supplied by the assessee was meant only and exclusively for the purpose of making the said machine functional. Clause 2.1 of the agreement provides that customer is granted non–exclusive, non–transferable limited license to use the software and related knowhow on the machine for the sole purpose of scanning the internal / external feature of rough diamond and creating a three dimensional image of these features of rough diamond. Clause 2.2 of the agreement puts certain restrictions upon the customers for any other use of the software in any other machine. This clause restrains the customer from duplicating the software or making any copies, modifications, isolating the software and making it available as a standalone data base or product, removing any product identification, copyright or other proprietary notice from the software or decompiling, disassembling, reverse engineering, or making any other attempt to reconstruct or discover the source code, etc. This clause clearly lays down that customer shall not reproduce the software or any of the documentation provided in connection with the software or related knowhow. It is further noted that clause 6.2 of the said agreement lays down that the assessee is and shall remain sole and exclusive owner of the right, title and interest in the software and related know. This software cannot be used by the customer except for the operation of the machine. It is further noted by us that the machine was equipped with requisite security controls and hardware locks to stop any type of misuse of software. Clause 10.2 of one of the agreement available at Page–49 is reproduced hereunder for the sake of ready reference:– —10.2 SARIN INDIA acknowledges that GALATEA may use software and/or hardware locks or other protective mechanisms to regulate the use of software. SARIN INDIA shall not evade or override such software/hardware locks or protective devices and shall immediately inform GALATEA upon learning that any user has defeated such devices. SARIN INDIA agrees to cooperate fully with GALATEA in its efforts to protect Software from unlawful or unauthorized use.‖ 18. From the aforesaid facts and features of the transactions analysed by us, it could be concluded that the customer was not interested in the hardware alone or in the software alone. He was interested in the system as a whole and functioning of the machine. Operating software enable the machine to run and the application of software made functioning of the machine possible. It is an undisputed fact that the software which was loaded onto the hardware did not have any

independent existence as such. The software supplied was ostensibly and undisputedly an integral part of the hardware. Now, since the hardware and software constituted one integrated system, part of the payment thereof cannot be earmarked towards sale of hardware and the other part towards —Royalty‖ for use of software as such. Thus, in our considered view, the dominant character and essence of the transaction was sale of machine by the assessee. The software, independently, had no value for the customer. He was concerned with as only the functioning of the machine and benefits of use provided by machine.

19. The only argument given by the Ld. Departmental Representative to counter the submissions of the Ld. Counsel for the assessee was that in this case, payment was made separately for the software at the time of sale of machine as well as subsequently and that software was provided by e–mail and, therefore, separate treatment should be given to the software. In our considered opinion, argument of the Ld. Departmental Representative would not be sustainable under the law. The dominant and fundamental character of the transaction shall not be altered because of these two features only. The break–up of invoice value of hardware and software may be as a result of some other legal requirement or as a matter of convenience or an agreement between buyer and seller. It has been submitted that separate values were given for the purpose of proper assessment of custom duty to be levied at the time of imports of the machines. Further, software has been supplied separately by e– mail for various security reasons and to enable the customer to have the benefits of updated technologies. Similarly, separate payments have been made at the time of sale and subsequently by customer as a matter of terms between both the parties keeping in view various factors such as financial and administrative convenience and commercial expediency. The dominant and essential character of the transaction was sale of machine by the assessee and purchase of the same by the customer, and it shall remain the same with or without these two features.

21. The Kolkata Bench of the Tribunal in the case of HITT Holland Institute of Traffic Technology B.V. Vs. Deputy Director of Income Tax (supra) while dealing with somewhat similar issue has held that where software is imbedded in equipment supplied for mere purpose of operating equipment, it is not a case giving independent right to use software, amount paid for supply of software is not taxable in India as ‗Royalty' u/s. 9(1)(vi) of the Act.

22. Thus, in view of the facts of the case, documents on record and the various decisions discussed above, we are of the considered view that the software is imbedded in the imaging equipment and inseparable part of hardware. The software without the equipment and the equipment without the software cannot put to use independently. The software and the machine is customer specific and is licensed to the end user. Under such circumstances there is no question of segregating any part of consideration paid

> *for equipment and the software. Accordingly, the grounds raised by the assessee in appeals are allowed. Our view is further fortified by the decision of the Hon'ble Delhi High Court in the case of Commissioner of Income Tax Vs. ZTE Corporation (supra) has held :*
> *'"22. …….The supplies made (of the software) enabled the use of the hardware sold. It was not disputed that without the software, hardware use was not possible. The mere fact that separate invoicing was done for purchase and other transactions did not imply that it was royalty payment. In such cases, the nomenclature (of license or some other fee) is indeterminate of the true nature. Nor is the circumstance that updates of the software are routinely given to the assessee's customers. These facts do not detract from the nature of the transaction, which was supply of software, in the nature of articles or goods. This court is also not persuaded with the submission that the payments, if not royalty, amounted to payments for the use of machinery or equipment. Such a submission was never advanced before any of the lower tax authorities; moreover, even in Ericson (supra), a similar provision existed in the DTAA between India and Sweden.*
> *23. Thus, in view of the facts of the case and the case laws discussed above we hold that in the payment made for purchase of imaging equipment there is no element of payment of Royalty. Since, there was no payment of Royalty, there is no question of deducting withholding tax by the assessee under the provisions of section 195 of the Act. As a corollary to our above findings the proceedings u/s. 201(1) and (1A) are liable to be quashed.*

> *20. Following the aforesaid decision, the Tribunal, while deciding the identical issue in case of payer AHIPL for assessment year 2013–14 and 2014–15 in ITA no.2465 & 2466/Pun./2016, held that the amount paid by AHIPL to the assessee for sale of software is not in the nature of royalty. Once it was held by the Tribunal in case of the payer that the payment made to the assessee towards sale of software is not in the nature of royalty, that too, for the very same assessment year, it cannot be treated as royalty in case of the assessee, as the payment relates to the very same transaction. Therefore, in our considered opinion, the decision of the Tribunal in case of AHIPL (supra) covers the issue in favour of the assessee. Respectfully following the aforesaid decision of the Tribunal, Pune Bench, we hold that the payment received by the assessee from AHIPL towards sale of software is not in the nature of royalty, hence, not taxable. This ground is allowed.*

10. In this view of the matter and consistent with view taken by the co-ordinate bench in assessee's own case in earlier year,we are of the considered view that amount received from sale of software is not in the nature of royalty within the meaning of defination of royalty

as defined section 9(1)(vi) of the I.T.Act, 1961, as well as the India-Belgium tax treaty and hence, not exigble to tax in India. Hence, we direct the Ld.AO to delete additions made towards amount received from sale of software.

11. In the result, appeal filed by the assessee is treated as partly allowed for statistical purpose.

Order pronounced in the open court on this 25 /11/2019

Sd/-	**Sd/-**
(C.N.PRASAD)	**(G. MANJUNATHA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai; Dated 25/11/2019
Thirumalesh Sr.PS

Copy of the Order forwarded to :

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

BY ORDER,

सत्यापित प्रति //True Copy//

(Asstt. Registrar)
ITAT, Mumbai