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

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT AND
SHRI B.R. BASKARAN, ACCOUNTANT MEMBER

IT(IT)A Nos.107 to 114/Bang/2018
Assessment Years: 2010-11, 2010-11, 2011-12, 2011-12, 2012-13, 2012-13, 2009-10 & 2009-10 respectively

M/s. Acer India Private Ltd. Embassy Heights, 6th Floor No.13, Magrath Road Next to Hosmat Hospital Bangalore-560 025 **PAN NO : AACCA1237A**	**Vs.**	Deputy Commissioner of Income-tax (IT) Circle-1(1), Bangalore
APPELLANT		**RESPONDENT**

Appellant by	:	Shri Sharath Rao, A.R.
Respondent by	:	Shri Pradeep Kumar, D.R.

Date of Hearing	:	01.10.2020
Date of Pronouncement	:	05.10.2020

O R D E R

PER B.R. BASKARAN, ACCOUNTANT MEMBER:

All the appeals filed by the assessee are directed against the orders passed by Ld CIT(A)-12, Bengaluru and they relate to the assessment years 2009-10 to 2012-13. The assessee is aggrieved by the decision of Ld CIT(A) in confirming the demand raised u/s 201(1) of the Income-tax Act,1961 ['the Act' for short] and the interest charged u/s 201(1A) of the Act treating the assessee as assessee in default for not deducting tax at source u/s 195 of the Act from the payment made for purchase of licensed software.

2. The Ld A.R of the assessee submitted that the assessee has filed separate appeals for the demand raised u/s 201(1) and the interest charged u/s 201(1A) for each of the years and accordingly eight appeals came to be posted before us for the four years, referred above.

3. At the outset, the Ld A.R submitted that the assessee company is engaged in the business of manufacture and trading of computer systems and peripherals. It also provides marketing support services for Acer brand products. The assessee has purchased software from non-residents and it did not deduct TDS from the payments made towards the said purchases. Hence the assessing officer has treated the assessee as assessee in default and initiated proceedings u/s 201(1) of the Act for assessment years 2009-10 to 2012-13. In this regard, the AO has placed his reliance on the decision rendered by Hon'ble jurisdictional Karnataka High Court in the case of Samsung Electronics Co Ltd (2011) (345 ITR 494) (Kar), wherein it was held that the payment made for purchase of license to use a software is "royalty" income in the hands of non-resident. Accordingly, the AO held that the assessee should have deducted tax at source u/s 195 of the Act from the payments made to the non-residents towards consideration for purchase of license to use software. Accordingly the AO raised demand u/s 201(1) and also charged interest u/s 201(1A) of the Act in all the four years under consideration. The Ld CIT(A) also confirmed the orders passed by the AO.

4. The Ld A.R further submitted that Hon'ble Karnataka High Court has rendered its decision holding that the payments made for purchase of license to use software in the case of Samsung Electronics Co Ltd (supra) on 15.10.2011. Prior to the said decision of jurisdictional High Court, there were decisions holding that the payments for software licenses do not constitute royalty. One such

decision is the decision rendered by the Tribunal in the case of Sonata Information Technology Ltd vs. ACIT (103 ITD 324). The Ld A.R submitted that the proceedings under consideration related to failure to deduct tax at source and the assessee did not deduct tax at source under bonafide belief, since there were decisions holding that no TDS is required to be made for payments made for purchase of software. He submitted that the Courts have held that the liability to deduct tax at source cannot be fastened on the basis of retrospective amendment to the Act or a subsequent ruling of a Court. He submitted that, in the following cases, the Tribunal has held that the assessee cannot be fastened with the TDS liability on account of subsequent amendment or subsequent ruling of the Court and accordingly disallowance made u/s 40(a)(i) of the Act was deleted.

(a) Teekays Interior Solutions P Ltd (ITA No.400/Bang/2017)

(b) Infineon Technologies India P Ltd (IT(TP)A No.405/Bang/2015)

(c) GE Medical Systems India P Ltd (ITA 1368/Bang/2019)

(d) WS Atkins India P Ltd (2015)(41 ITR(T) 397)(Bang. Trib)

The Ld A.R submitted that the decision of jurisdictional High Court was rendered on 15.10.2011. Accordingly he submitted that the assessee should not be fastened with the TDS liability for the payments made prior to 15.10.2011. Accordingly he prayed that the demand raised u/s 201(1) and 201(1A) for the payments made prior to 15.10.2011 be deleted.

5. We heard Ld D.R and perused the record. We notice that the co-ordinate bench has examined the issue of making disallowance u/s 40(a)(i) of the Act for non-deduction of tax at source on the basis of subsequent amendment/decision of High Court in the case of Infineon Technologies India P Ltd (supra). For the sake of

convenience, we extract below the relevant observations made by the co-ordinate bench in the above cited case:-

> "25. We have carefully considered the rival submissions. The payment in question was made to the non-resident in the previous year relevant to AY. 10-11. Therefore the law as on 31.3.2010 the last date of the previous year was that payment for purchase of off shelf software was not in the nature of royalty. In Sonata Information Technology Ltd. v. ACIT (103 ITD 324) decision rendered on 31.1.2006, it was held that payments for software licenses do not constitute royalty under the provisions of the Act and hence disallowance under section40(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 15.10.11 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 section1941/195 of the Act. 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 IT(TP)A Nos.405 & 474/Bang/2015 in CIT v Samsung Electronics Co. Ltd. (16 taxmann.com 141) was passed on October 15,2011). Courts have consistently upheld this principle as seen in:
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> ♦ ITO v. Clear Water Technology Services (P.) Ltd. (52 taxmann.com 115)
>
> ♦ Kerala Vision Ltd. v. ACIT (46 taxmann.com 50)

♦ Sonic Biochem Extractions (P.) Ltd. v. ITO (35 taxmann.com 463)

♦ Channel Guide India Ltd. v. ACIT (25 taxmann.com 25)

♦ DCI v. Virola International (20 14(2) TMI 653) ♦ CIT v. Kotak Securities Ltd. (20 taxmann.com 846).

26. The above decisions have been considered and discussed in the case of Ingersoll Rand (India) Ltd. (supra) by the Bangalore Bench of the ITAT and it was held therein that prior to the decision of Hon'ble jurisdictional High Court in the case of CIT v. Samsung Electronics Co. Ltd. (supra) which was passed on 15.10.2011 transactions carried out on purchase of off the shelf software are not liable to TDS and hence there can be no disallowance u/s.40(a)(ia) of the Act based on subsequent development of law after the date on which payments are made.

27. we are of the view that in the light of law as laid down by this Tribunal in the case of Ingersoll Rand (I) Ltd. (supra), there cannot be a retrospective obligation to deduct tax at source and therefore as on the date when the assessee made payments to the non-resident for acquiring off-the-shelf software cannot be regarded as in the nature of royalty and therefore there was no obligation on the part of assessee to deduct tax at source. The payment would be in the nature of business profits in the hands of non-resident and since admittedly the non-resident does not have a Permanent Establishment in India, the sum in question is not chargeable to tax in the hands of non-resident. Consequently, the disallowance made IT(TP)A Nos.405 & 474/Bang/2015 u/s. 40(a)(ia) of the Act has to be deleted. We direct accordingly. Ground No.14 by the assessee is accordingly allowed."

6. In the case of M/s Teekays Interior Solutions Pvt Ltd (supra), the co-ordinate has considered the issue of making disallowance u/s 40(a)(ia) of the Act on the basis of subsequent decision rendered by Hon'ble Karnataka High Court in the case of Samsung Electronics Co Ltd (supra). The decision rendered by the co-ordinate bench is extracted below:-

"9. The next issue contested by the assessee relates to disallowance of expenditure claimed towards software purchase. The assessee had purchased a software named AutoCAD version 2011 at a cost of Rs.1,10,775 and claimed the same as revenue expenditure. The A.O., however, held the same to be capital in nature. The A.O. also noticed that the assessee has not deducted tax at source u/s 194J of the Act. Accordingly, he proceeded to disallow the depreciation by invoking the provisions of section 40(a)(ia) of the Act. In the appellate proceedings, the learned CIT(A) took support of the decision rendered by the Hon'ble Karnataka High Court in the case of *M/s.Samsung Electronics Company Limited [(2011) 203 taxmann.com 477 (Kar.)]* and held that the payment made for purchase of software is in the nature of royalty. Accordingly, he directed the A.O. to treat the expenditure on purchase of software as revenue in nature. Since the assessee has failed to deduct tax at source on the said payment, the learned CIT(A) confirmed the disallowance made u/s 40(a)(ia) of the Act.

10. Since the revenue has not filed any appeal challenging the order passed by Ld CIT(A), the issue that requires consideration is whether the disallowance of cost of software u/s 40(a)(ia) of the Act is justified or not. The Ld A.R submitted that the decision holding that the payment made towards purchase of software is in the nature of Royalty attracting TDS provisions, was rendered by the Hon'ble Karnataka High Court in the case of *Samsung Electronics Company Ltd. (supra)* on 15.10.2011, whereas the impugned transaction of purchase of software has taken place before 31.03.2011. The Ld A.R submitted that the law relating to nature of software purchases was pronounced by the Hon'ble High Court only on 15.10.2011, where as the impugned

transaction has taken place prior to that. She submitted that before the decision of Hon'ble High Court, the assessee was under bonafide belief with the support of certain case laws that there was no requirement to deduct tax at source from the payment made towards software purchases. Accordingly, by placing her reliance on the decision rendered by the co-ordinate bench in the case of *Allegis Services India Pvt. Ltd. v. DCIT [(2017) 51 CCH 0083],* the learned AR submitted that the liability to deduct tax at source, in the facts of the present case, cannot be fastened upon the assessee retrospectively.

11. We heard the learned DR and perused the record. We noticed that an identical issue was considered by the co-ordinate bench in the case of *Allegis Services India Pvt. Ltd. (supra)* and identical disallowance made was deleted by the co-ordinate bench on the reasoning that the TDS liability cannot be fastened upon the assessee retrospectively. For the sake of convenience, we extract below the operating portion of the order passed by the co-ordinate bench:-

> "4. Ground Nos.2 to 5 are regarding disallowance under Section 40(a)(ia) of the Income Tax Act, 1961 (in short 'the Act') of payment towards software licenses treated by the Assessing Officer as royalty for want of TDS. The assessee has also raised additional grounds which are as under :
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> Corporate tax matters
>
> **21.** " Without prejudice to the grounds 2 to 4, the Learned CIT(A) has failed to appreciate that during the Financial Year 2008-09 relevant to the Assessment Year 2009-10, the Appellant was not liable to withhold tax on the payments made as there was no provision under the Act mandating the deduction of tax at source on the payments made on purchase of computer software and there were many favorable judicial precedence including the jurisdictional tribunal rulings.
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> **22.** Without prejudice to the grounds 2 to 4, the learned CIT(A) erred in not appreciating the fact that explanation 5 to Section 9(1)(vi) was inserted vide Finance Act, 2012 with effect from 1 June 1976 and was hit by the doctrine of 'impossibility of performance'."

The additional grounds raised by the assessee are not new issues but an additional plea/argument raised by the assessee regarding the disallowance made by the Assessing Officer under Section 40(a)(ia) of the Act. Therefore in view of the fact that the substantial issue has been raised in the main ground, the additional grounds raised by the assessee on the same issue are admitted for consideration and adjudication along with the Ground Nos.2 to 5.

5. The learned Authorised Representative of the assessee has submitted that prior to the decision of Hon'ble jurisdictional High Court in the case of **CIT Vs. Samsung Electronics Co. Ltd.** 320 ITR 209, the assessee was under the bona fide belief that the payment on account of software licenses does not fall under the definition of royalty and therefore the assessee was under no obligation to deduct tax at source on the said payment for software license. He has further submitted that there were number of judicial precedents on this issue wherein this Tribunal has held that the payment made for purchase of software does not fall under the definition of royalty provided under Section 9(1)(vi) of the Act. Thus he has submitted that a subsequent amendment or a decision cannot be thrust upon the assessee for deduction of tax in respect of a transaction completed much prior to the said decision. In support of his contention, he has relied upon decision of the co-ordinate bench of this Tribunal dt.23.11.2016 in the case of **ACIT Vs. Aurigene** learned Authorised Representative has submitted that disallowance made by the Assessing Officer is not justified when there was no such law or declaration of law at the time of payment made by the assessee to cast the duty on the assessee to deduct tax.

6. On the other hand, the learned Departmental Representative has submitted that the decision of Hon'ble jurisdictional High Court in the case of **CIT Vs. Samsung Electronics Co. Ltd.** (supra) though was subsequent to the transaction in question however, the said decision has not brought into statute any new law but it is only a declaration and interpretation of existing law. He has relied upon the orders of the authorities below.

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 was completed in the F.Y.2008-09 whereas the decision of Hon'ble jurisdictional 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 :

" *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. ACIT (103 ITD 324) which had held that payments for software licenses do not constitute royalty under the provisions of the Act and hence disallowance under section40(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 15.10.11 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 section194J/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 thedefinition of royalty with retrospective effect from 01.04.1976) or asubsequent ruling of a court (the Karnataka HC in CIT v Samsung Electronics Co. Ltd. (16 taxmann.com 141) was passed on October 15,2011). Courts have consistently upheld this principle as seen in:

- *ITO v. Clear Water Technology Services (P.) Ltd. (52 taxmann.com115)*
- *Kerala Vision Ltd v. ACIT (46 taxmann.com 50)*
- *Sonic Biochem Extractions (P.) Ltd v. ITO (35 taxmann.com 463)*
- *Channel Guide India Ltd v. ACIT (25 taxmann.com 25)*
- *DCIv. Virola International (20 14(2) TMI 653)*
- *CIT v. Kotak Securities Ltd. (20 taxmann.com 846).*

04. The relevant portion of the CIT(A) order is extracted as under :

" Disallowance of expenses under 40(a)(i) / 40(a)(ia) :

5.1. As regards disallowance of expenses under 40(a)(i)/40(a)(ia), it has been submitted that the company had determined the rate of tax to be deducted and following the judgments that were prevalent at the time of tax deduction, Supreme Court in the case of Tata Consultancy Services and jurisdictional Tribunal in the case of Samsung Electronics Co. Ltd, the appellant submitted that the said judgment shall not be applicable since it was pronounced on 15/10/2011 and Velankani Mauritius Ltd., whereas the liability to deduct tax for the appellant was the F.Y. 2010-11. The appellant has relied on the judgment of Cochin Tribunal in the case of Kerala Vision Ltd and Agra Tribunal in the case of Virola International, wherein it was held that –

"The law amended was undoubtedly retrospective in nature but so far as tax withholding liability is concerned, it depends on the law as it

existed at the point of time when payments, from which taxes ought to have been withheld, were made. The tax-deductor cannot be expected to have clairvoyance of knowing how the law will change in future."

Further, software payment was included in definition of royalty only vide Explanation to section 9(1)(vi)inserted retrospectively vide Finance Act, 2012 and when the purchase was made, the appellant did not have the benefit of clarification brought by the retrospective amendment. It is impossible to fasten liability for deducting tax at source retrospectively as tax is to be deducted at source at the time when the payment is credited or made. This view has been upheld by the Bangalore Tribunal in the case of DCIT vs M/s WS Atkins India Pvt Ltd (ITA No 14671Bang12014 and the Mumbai Tribunal in the case of Channel Guide India Ltd. vs ACIT ([2012] 25 taxmann.com 25).

5.2 The ITAT 'C' Bench in the case M/s WS Atkins India Pvt. Ltd and in the case of Infotech Enterprises Ltd of the Hyderabad Bench of the Tribunal wherein it has been held that section 40(a)(ia) would not apply to disallow payments when TDS was not done and subsequently become taxable on account of a retrospective legislation. It has also referred to in the case of Sonic Biochem Extractions Pvt. Ltd. (supra), identical issue was considered and decided by the Mumbai Tribunal. Following were the relevant observations:-

"The assessee purchased software, capitalized the payment to the computers account as the software came along with the hardware of computers and claimed depreciation. On the ground that purchase of software is essentially purchase of copyright which attracts tax deduction at source under section 194J, the Assessing Officer involved the provisions of section 40(a)(ia) and disallowed the depreciation claimed. The Commissioner (Appeals), confirmed the action of the Assessing Officer on the ground that the

purchase of software amounted to acquisition of intangible asset and therefore, the payment was royalty and disallowable.

On appeal:
Held, (i) that mere purchase of software, a copyrighted article, for utilisation of computers cannot be considered as purchase of copyright and royalty. The assessee did not acquire any rights for making copies, selling or acquiring which generally could be considered within the definition of "royalty". Explanation 2 to section 9(1)(vi) cannot be applied to purchase of a copyrighted software, which does not involve any commercial exploitation thereof. The assessee simply purchased software delivered along with computer hardware for utilization in the day-to-day business."

5.3 Relying on the above decision, the ITAT `C'Bench, Bangalore upheld the order of the CIT(A) who had observed that the assessee did not have the benefit of the clarification brought brought about by the retrospective amendment that the payments tantamount to payment for royalty and consequently tax was to be deducted u/s 194J. The law as extant on the date when the payment for obtaining the software was made, has not categorically laid down that tax is required to be deducted. It is impossible to fasten liability for deducting tax at source retrospectively.

5.4 In view of the above decisions, it is correct to say that it is not possible to fasten liabili ty for deducting tax at source retrospectively as tax is to be deducted at source at the time when the payment is credited or made. When purchase of software was made the assessee did not have the benefit of the clarification brought about by the retrospective amendment. The contention of the appellant is correct that the softwar e payment disallowed by the AO did not warrant withholding of the tax u/s 40(a)(ia) and 40(a)(ia) (by an order of corrigendum dt 20.11.2015) of the Act. Therefore disallowance

made by the AO on account of software payment want of withholding of tax is hereby deleted."

05. The CIT(A) followed the decision of this Tribunal in M/s WS Atkins India Pvt. Ltd, supra, which referred the decisions of Hyderabad Bench of the Tribunal in Infotech Enterprises Ltd in ITA 115/HYD/2011 wherein it has been held that section 40(a)(ia) would not apply to disallow payments when TDS was not done and subsequently become taxable on account of a retrospective legislation. It has also referred to the decisions of the Delhi & Mumbai Tribunal in SMS Demag Pvt Ltd , 132 ITJ 498 & Sonic Biochem Extractions Pvt. Ltd. 23 ITR (Trib) 447, respectively. We uphold the decision of the CIT(A) and dismiss the grounds raised by the Revenue."

Thus it is clear that the co-ordinate Bench of this Tribunal while deciding this issue has taken note of various decisions in favour of the assessee on the point that the payment for purchase of software does not fall in the definition of royalty. Respectfully following the decision of co-ordinate Bench of this Tribunal, we delete the disallowance made by the Assessing Officer."

12. Consistent with the view taken on the above case, we also hold that the assessee cannot be fastened with the liability to deduct tax at source retrospectively and accordingly, we set aside the order passed by the learned CIT(A) on this issue and direct the A.O. to delete the impugned addition."

7. In our considered view, the principles set out in the above said decisions could be applied to the instant cases also, even though the issue involved in these cases relate to the demand raised u/s 201(1) and consequent interest charged u/s 201(1A) of the Act. In the instant case also, the assessee was under bonafide belief that there was no required to deduct tax at source from the payments made for purchase of software, since there were certain decisions holding so. However, the jurisdictional High Court held that the payments made for purchase of software is in the nature of royalty and the said

decision came to be pronounced on 15.10.2011. Accordingly, following the principles laid down by the co-ordinate benches in the above cited cases, we hold that the assessee cannot be treated as an assessee in default in respect of payments made for purchase of licensed software prior to 15.10.2011, being the date of pronouncement of the decision in the case of Samsung Electronics Co. Ltd (supra). Accordingly, the demand raised in the hands of the assessee u/s 201(1) and 201(1A) for assessment years 2009-10 to 2011-12 could not be sustained and the demands raised in respect of payments made prior to 15.10.2011 in assessment year 2012-13 could also not be sustained.

8. Accordingly, we set aside the orders passed by Ld CIT(A) for assessment years 2009-10 to 2011-12 and direct the AO to delete the demands raised u/s 201(1) and 201(1A) of the Act. We also modify the order passed by Ld CIT(A) for assessment year 2012-13 and direct the AO to delete the demands raised in respect of payments made prior to 15.10.2011 in that year.

9. In the result, the appeals filed by the assessee for assessment years 2009-10 to 2011-12 are allowed and the appeals filed for AY 2012-13 are partly allowed.

Order pronounced in the open court on 5th Oct, 2020.

Sd/-	**Sd/-**
(N.V. Vasudevan)	**(B.R. Baskaran)**
Vice President	**Accountant Member**

Bangalore,
Dated 5th Oct, 2020.
VG/SPS

Copy to:

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

By order

Asst. Registrar, ITAT, Bangalore.