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

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

| ITA No.1307/Bang/2019 |
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| Assessment year: 2009-10 |

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| M/s. Altair Engineering India Pvt. Ltd.,<br>Prestige Trade Tower,<br>Municipal No.46, First Floor,<br>Palace Road, Municipal Ward No.77,<br>Sampangiramanagar,<br>Bengaluru – 560 001.<br>**PAN: AABCA 1860 A** | Vs. | The DCIT,<br>Circle – 1(1)(1),<br>Bengaluru. |
| APPELLANT | | RESPONDENT |

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| Assessee by | : | Shri. M. V. Gowtham, CA |
| Revenue by | : | Shri. Pradeep Kumar, CIT(DR)(ITAT), Bengaluru. |

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| Date of hearing | : | 09.03.2021 |
| Date of Pronouncement | : | 19.03.2021 |

**O R D E R**

***Per N.V. Vasudevan, Vice President***

This is an appeal by the assessee against the order dated 15.05.2019 of CIT(A)-1, Bangalore, relating to AY 2009-10.

2. The facts arising to this aforesaid appeal are that the assessee is a company engaged in software product development and related services. In the assessment proceedings, the AO noticed that the assessee debited a sum of Rs.17,11,41,734/- towards software purchases. The assessee submitted before the AO that it was trading in software owned by Altair Inc., which owns the Intellectual Property (IP) rights as well the remarketing rights of the computer software and related materials. Altair India has been granted

distribution rights under a specific distribution agreement for marketing and distributing this software in India and a few other countries. These software procurements were against back to back orders from end customers. In short, it was submitted that the income of the Assessee was only in the nature of a trading profit obtained by the assessee and not any revenue in nature of fee. Some of the software was also in nature of maintenance renewal. The Assessee submitted that it followed the accounting treatment as per India GAAP. The assessee also maintained that there was no need to deduct tax on such software purchases.

3. In the final order of assessment dated 31.01.2014 passed under section 143(3) r.w.s. 144C of the Income Tax Act, 1961 ('the Act') the AO disallowed the claim of the assessee for deduction of the aforesaid sums because the assessee did not deduct tax at source and payments made to non-residents as required under section 195 of the Act. The following were the relevant observations of the AO:

> *"6.8 Considering above, it was seen that the assessee failed to deduct tax on the amount of Rs 17,1.1,41,734/-. Therefore, an amount Rs 17,11,41,734/- is was proposed to be disallowed by invoking provision of section 40(a) (i) and added to the total income of the assessee.*
>
> *6.9 It is also protectively noted that any software license purchased in perpetuity should be treated as a capital expenditure eligible for depreciation at the rate of 60 %. Some of the details of software purchased indicate that the expenditures have been incurred for purchase of software in perpetuity. These software expenses should have been capitalized. However, considering the fact that the assessee has not made TDS on the said revenue expenditure claimed, this issue shall come into focus for disallowance only when the TDS issue is resolved. Nonetheless, the capital items of software purchases are held disallowed from being claimed as revenue expenditure. If any of the Appellate Authorities were to hold that the expenditure is allowable without TDS being made therefrom, then the whole amount is held as capital expenditure on which assessee is eligible for a depreciation @ 60 % as applicable."*

4. The addition made by the AO was confirmed by the CIT(A) and on further appeal by the assessee, the Triubnal in IT(TP)A No.171/Bang/2014 by its order dated 03.05.2017 remanded the issue to AO for considering the claim of the assessee that it had deducted tax at source on the payment made to the non-residents. The following were the relevant observations of the Tribunal:

> *"22.As regards the other grounds of appeal relates to disallowance of Rs. 17,11,41,734/-. The AO disallowed the software expenses of Rs. 17,11,41,734/- on the ground that no TDS was deducted at source.* ***It is submitted before us that the AO had disallowed the same that inspite of the fact that the appellant-company had complied with TDS provisions. of the AO for due verification and if it is found that the assessee had complied with the TDS provisions the same may be allowed as deducted."***

5. Pursuant to the order of the ITAT, the AO passed an order under section 143(3) r.w.s. 254 of the Act in which the AO agreed that the assessee has deducted tax at source on the payments made to non-residents. He, however, held that the expenses in question were capital in nature and therefore cannot be allowed as deduction. He further held that the assessee would be entitled to 60% depreciation on the value of computer software purchases as a result, the AO disallowed a sum of Rs.6,84,56,694/- which 40% of the payments made to the non-residents for purchase of software by the assessee.

6. The assessee filed an application under section 154 of the Act against the Order Giving Effect dated 31.01.2018 passed by the AO. In this application, the assessee submitted that the only aspect the AO has to examine in the set aside proceedings is whether the TDS has been made by the assessee or not and since the assessee had made TDS on the payments made to non-residents, the AO ought to have deleted the disallowance to expenses made

in the original order of assessment. This application filed by the assessee under section 154 of the Act was rejected by the AO by an order dated 03.05.2018 in which the AO has observed that there is no mistake apparent in the Order Giving Effect dated 31.01.2018. Against the aforesaid order of the AO passed under section 154 of the Act, assessee filed an appeal before the CIT(A). The CIT(A) was of the view that in the original order of assessment under section 143(3) of the Act, the AO had not only disallowed the payment made to non-residents for non-deduction of tax at source, but also made an alternative case that the expenditure was capital in nature. The CIT(A) was of the view that in respect of alternative case made by the AO in the original order of assessment passed under section 143(3) of the Act, the assessee ought to have challenged that portion of the order also and since the assessee failed to do so, the AO was justified in treating the expenditure as capital and allowing only depreciation. The CIT(A) also expressed the view that the issue was debatable and therefore the proceedings under section 154 of the Act was not appropriate.

7. Aggrieved by the order of the CIT(A), the assessee is in appeal before the Tribunal. Learned Counsel for the assessee submitted before us that as against the original order of assessment passed under section 143(3) of the Act dated 31.01.2014 in which the AO also made observations by way of an alternative case to disallow the expenses in question that the expenditure in question was capital in nature, the assessee filed objections before the DRP and the DRP had specifically given an adjudication that the expenditure was not capital expenditure. The DRP held as follows:

> *"Since the payment made towards acquisition of the software in question has already been held to be 'royalty' on which TDS was deductible, the protective assessment of the expenditure as capital in nature and the related objections raised by the assessee are not adjudicated here in detail.* ***On the facts and circumstances of the***

***case, the said expenditure does not appear to create any capital asset for the assessee and hence the same cannot be treated as a capital expenditure. We direct the AO accordingly."***

8. It was submitted by the learned Counsel for the assessee that the issue with regard to whether the expenditure is capital or revenue no longer survives in view of the directions of the DRP dated 29.11.2013. which have become final. The AO, therefore, while giving effect to the order of the Tribunal dated 31.01.2018 cannot go into the question as to whether the expenditure is capital or revenue. Learned DR however relied on the order of the CIT(A).

9. After considering the rival submissions, we are of the view that the issue that was remanded by the Tribunal in the order dated 03.05.2017 was only to verify whether the assessee had made TDS. The question whether expenditure can be regarded as capital in nature has already been decided by the DRP in its direction dated 29.11.2018 and the DRP has already held that the expenditure in question cannot be regarded as an expenditure of capital in nature. The aforesaid directions of the DRP has not been challenged either by the Assessee or the revenue and have become final. Therefore, the AO while giving effect to the order of the Tribunal, was not competent to go into the question as to whether the expenditure of software is capital or revenue in nature.

10. In our view, in the light of the DRP's findings which we have already extracted above there cannot be any debate or doubt on the claim of the assessee and the AO's Order Giving Effect to the directions of the Tribunal suffer from an apparent mistake from the face of the record and therefore the proceedings under section 154 of the Act were justified. We, therefore, direct that the deduction claimed by the assessee should be allowed.

11. In the result, appeal by the assessee is allowed.

*Pronounced in the open court on the date mentioned on the caption page.*

**Sd/-** **Sd/-**

**( B. R. BASKARAN )**
**Accountant Member**

**( N. V. VASUDEVAN)**
**Vice President**

Bangalore,
Dated: 19.03.2021.
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Copy to:

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

By order

Assistant Registrar
ITAT, Bangalore.