

**IN THE INCOME TAX APPELLATE TRIBUNAL
“A”BENCH: BANGALORE**

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

IT(TP)A No.2867/Bang/2018
Assessment Year: 2015-16

M/s. Informatica LLC C/o Informatica Business Solutions Pvt. Ltd. No.66/1, Bagmane Commez 02, Bagmane Tech Park C.V. Raman Nagar Bangalore 560 093 PAN NO :AACCI2354Q	Vs.	Deputy Commissioner of Income-tax Circle-1(2) Bangalore
APPELLANT		RESPONDENT

Appellant by	:	Shri T. Suryanarayana, A.R.
Respondent by	:	Ms. Neera Malhotra, D.R.

Date of Hearing	:	05.08.2021
Date of Pronouncement	:	05.08.2021

ORDER

PERB.R. BASKARAN, ACCOUNTANT MEMBER:

The assessee has filed this appeal challenging the assessment order dated 16.8.2018 passed by the A.O. for assessment year 2015-16 in pursuance of directions given by Ld. Dispute Resolution Panel (DRP). All the grounds urged by the assessee are directed against the action of the A.O. in assessing the receipts by way of sale value of software and provision of ancillary support services as royalty receipts/FTS income.

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2. The facts relating to the issue are stated in brief. The assessee is a company incorporated in the United States of America and it is stated that the assessee is engaged in the business of developing, manufacturing and distribution of software products from outside India and also providing ancillary support services from outside India. The assessee has entered into agreements with distributors/resellers/customers in India for supplying software products and providing ancillary support services. For the year under consideration, the assessee filed return of income declaring nil income. The A.O. noticed that the assessee has received a sum of Rs.42,15,77,354/- towards sale of software licenses and providing ancillary support services. The break-up of the same are given below:-

Sale of software products	- USD 3,615,851
Provision of support services	- USD 3,158,777

The AO held that the above receipts are liable to taxed as royalty/Fee for Technical Services in the hands of the assessee. In this regard, the A.O. placed reliance on the decision rendered by Hon'ble High Court of Karnataka in the case of CIT Vs. Samsung Electronics Company Ltd. in ITA No.2808 of 2005 dated 15.10.2011. Accordingly, he proposed to assess the sale receipts on account of sale of software licenses and support services amounting to Rs.42,15,17,354/- as royalty/FTS income in the draft assessment order.

3. The assessee filed the petition before Ld. DRP, which held that the impugned receipts are rightly assessable as royalty income for use of copy right. Accordingly, the A.O. passed the final assessment order assessing the above said income as royalty/FTS. Aggrieved, the assessee has filed this appeal before us.

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4. The Ld. A.R. submitted that the assessee has sold software products and also received income for providing support services. He submitted that providing ancillary support services is also related to sale of software products only. He submitted that the decision rendered by Hon'ble Karnataka High Court in the case of Samsung Electronics Company Ltd. (supra), which was relied upon by the AO, has since been reversed by Hon'ble Supreme Court in the case of Engineering Analysis Centre for Excellence Pvt. Ltd. (432 ITR 471). The Ld. A.R. further submitted that an identical issue was examined in the assessee's own case by the coordinate bench in assessment year 2016-17 and following decision rendered by Hon'ble Supreme Court in the case of Engineering Analysis Centre for Excellence Pvt. Ltd., the coordinate bench held that the receipts by way of sale of software licenses and provision of ancillary support services cannot be assessed as royalty income.

5. We heard Ld. D.R. who did not contradict the submission made by Ld. A.R.

6. We notice that an identical issue has been examined by the coordinate bench in the assessee's own case in AY 2016-17 and it has been decided in favour of the assessee with the following observations:

5. Similar issue for AY 2011-12 in the case of Nice Ltd. came up before the Hon'ble High Court of Karnataka in ITA No.7/2019 and vide judgment dated 26.3.2021 it was held as under:-

"7. The controversy involved in the present case, as informed by the learned Counsel for the parties stands concluded on account of the judgment delivered by the Hon'ble Supreme Court in the case of ENGINEERING ANALYSIS CENTRE FOR EXCELLENCE PRIVATE LIMITED VS COMMISSIONER OF INCOME TAX & ANOTHER – AIR 2021 SC 124 / 432 ITR 471 (SC). The Apex Court in the aforesaid case has held in paragraphs 27, 47, 52, 168 & 169 as under:

“27. The machinery provision contained in Section 195 of the Income Tax Act is inextricably linked with the charging provision contained in Section 9 read with Section 4 of the Income Tax Act, as a result of which, a person resident in India, responsible for paying a sum of money, “chargeable under the provisions of [the] Act”, to a non-resident, shall at the time of credit of such amount to the account of the payee in any mode, deduct tax at source at the rate in force which, under Section 2(37A)(iii) of the Income Tax Act, is the rate in force prescribed by the DTAA. Importantly, such deduction is only to be made if the non-resident is liable to pay tax under the charging provision contained in Section 9 read with Section 4 of the Income Tax Act, read with the DTAA. Thus, it is only when the non-resident is liable to pay income tax in India on income deemed to arise in India and no deduction of TDS is made under Section 195(1) of the Income Tax Act, or such person has, after applying Section 195(2) of the Income Tax Act, not deducted such proportion of tax as is required, that the consequences of a failure to deduct and pay, reflected in Section 201 of the Income Tax Act, follow, by virtue of which the resident-payee is deemed an “assessee in default”, and thus, is made liable to pay tax, interest and penalty thereon. This position is also made amply clear by the referral order in the concerned appeals from the High Court of Karnataka, namely, the judgment of this Court in GE Technology (supra). 47. In all these cases, the “licence” that is granted vide the EULA, is not a licence in terms of Section 30 of the Copyright Act, which transfers an interest in all or any of the rights contained in Sections 14(a) and 14(b) of the Copyright Act, but is a “licence” which imposes restrictions or conditions for the use of computer software. Thus, it cannot be said that any of the EULAs that we are concerned with are referred to Section 30 of the Copyright Act, inasmuch as Section 30 of the Copyright Act speaks of granting an interest in any of the rights mentioned in Sections 14(a) and 14(b) of the Copyright Act. The EULAs in all the appeals before us do not grant any such right or interest, least of all, a right or interest to reproduce the computer software. In point of fact, such reproduction is expressly interdicted, and it is also expressly stated that no vestige of copyright is at all transferred, either to the distributor or to the end-user. A simple illustration to explain the aforesaid position will suffice. If an English publisher sells 2000 copies of a particular book to an Indian distributor, who then resells the same at a profit, no copyright in the aforesaid book is transferred to the Indian distributor, either by way of licence or otherwise, inasmuch as the Indian distributor only makes a profit on the sale of each book. Importantly, there is no right in the Indian distributor to reproduce the aforesaid book and then sell copies of the same. On the other hand, if an English publisher were to sell the same book to an Indian publisher, this time with the

right to reproduce and make copies of the aforesaid book with the permission of the author it can be said that copyright in the book has been transferred by way of licence or otherwise, and what the Indian publisher will pay for, is the right to reproduce the book, which can then be characterized as royalty for the exclusive right to reproduce the book in the territory mentioned by the licence. 52. There can be no doubt as to the real nature of the transactions in the appeals before us. What is “licensed” by the foreign, non-resident supplier to the distributor and resold to the resident end-user, or directly supplied to the resident end-user, is in fact the sale of a physical object which contains an embedded computer programme, and is therefore, a sale of goods, which, as has been correctly pointed out by the learned counsel for the assesseees, is the law declared by this Court in the context of a sales tax statute in Tata Consultancy Services v. State of A.P., 2005(1) SCC 308 (see paragraph 27). 168. Given the definition of royalties contained in Article 12 of the DTAAAs mentioned in paragraph 41 of this judgment, it is clear that there is no obligation on the persons mentioned in S.195 of the Income Tax Act to deduct tax at source, as the distribution agreements/ EULAs in the facts of these cases do not create any interest or right in such distributors/end-users, which would amount to the use of or right to use any copyright. The provisions contained in the Income Tax Act (S. 9(1) (vi), along with explanations 2 and 4 thereof), which deal with royalty, not being more beneficial to the assesseees, have no application in the facts of these cases.

169. Our answer to the question posed before us, is that the amounts paid by resident Indian endusers/distributors to non-resident computer software manufacture/suppliers, as consideration for the resale/use of the computer software through EULAs/ distribution agreements, is not the payment of royalty for the use of copyright in the computer software, and that the same does not give rise to any income taxable in India, as a result of which the persons referred to in Section 195 of the Income Tax Act were not liable to deduct any TDS under Section 195 of the Income Tax Act. The answer to this question will apply to all four categories of cases enumerated by us in paragraph-4 of this judgment.

8. In the light of the aforesaid judgment delivered by the Hon'ble Supreme Court, the question of law framed in the present appeal is decided in favour of the assessee and against the revenue.”

6. Further, the judgment relied on by the DRP in the case of Samsung Electronics (supra) was reversed by the Hon'ble Supreme Court in Civil Appeal No.8733-8734/2018 &Ors. in the case of Engineering Analysis Centre for Excellence Private Limited v. CIT &Anr. (supra) which has been

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extracted in the foregoing paragraph. Being so, the issue before us is already settled by the Hon'ble Supreme Court in favour of assessee."

7. Accordingly, following the decision rendered by Hon'ble Supreme Court in the case of Engineering Analysis Centre for Excellence Pvt. Ltd. (supra) and also following the decision rendered by the co-ordinate bench in AY 2016-17, we hold that receipts by way of sale of software licenses and provision of ancillary support services connected with the sale of software products cannot be assessed as royalty/FTS income in the hands of the assessee. Accordingly, we set aside the order passed by the AO on this issue.

8. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 5th Aug, 2021.

Sd/-
(N.V. Vasudevan)
Vice President

Sd/-
(B.R. Baskaran)
Accountant Member

Bangalore,
Dated 5th Aug, 2021.
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