

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

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

IT(IT)A No.1274/Bang/2019
Assessment year: 2016-17

M/s. Autodesk Asia Pte. Ltd., 3, Fusionopolis Way 10/21 Symbiosis, Singapore, Foreign, Singapore. PAN: AAFCA 6398 D	Vs.	The Assistant Commissioner of Income Tax (International Taxation), Circle – 1(1), Bengaluru.
APPELLANT		RESPONDENT

Assessee by	:	Shri. T. Suryanarayana, Advocate
Revenue by	:	Ms. Neera Malhotra, CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	05.08.2021
Date of Pronouncement	:	09.08.2021

ORDER

Per N.V. Vasudevan, Vice President:

This is an appeal by the assessee against the Order dated 24.04.2019 passed by the ACIT (International Taxation), Circle -1(1), Bengaluru, under section 143(3) read with Section 144C of the Income Tax Act, 1961 (Act), in relation to AY 2016-17.

2. The assessee is a company incorporated in Singapore and is a tax resident of Singapore in terms of the India Singapore Double Taxation Avoidance Agreement (DTAA). The assessee is engaged in the business of distribution of computer software and providing ancillary services in the Asia Pacific region. During the relevant previous year, the assessee sold

software and provided certain ancillary services to its Indian distributors / customers. In certain cases, the assessee sold hardware together with embedded software to Indian parties. It was the case of the assessee that the sale of software / hardware was made outside India and the proceeds received from Indian distributors / customers was received by the assessee outside India. In the draft Order of Assessment, the AO treated the money received by the assessee on sale of software licence along with associated hardwares to the Indian customers as in the nature of royalty and brought the same to tax. The assessee filed the objections before the Dispute Resolution Panel (DRP) against the action of the AO but the DRP confirmed the order of the AO. The AO passed the final Order of Assessment incorporating the addition made by the AO in the draft Assessment Order. The assessee is in appeal against the final Assessment Order dated 24.04.2019 before this Tribunal.

3. Learned Counsel for the assessee brought to our notice that on a similar issue in assessee's own case for Assessment Year 2010-11 to 2013-14, this Tribunal in its order dated 14.06.2021 in IT(TP)A No.1758/Bang/2013, 294/Bang/2015, 489/Bang/2016, 191/Bang/2017 held that the amount received by the assessee cannot be regarded as royalty and therefore the same cannot be brought to tax. Following are the observations of the Tribunal:

“11. Admittedly, the issue involved in present appeals has been set at rest by the decision of Hon'ble Supreme Court in a recent case of Engineering Analysis Centre of Excellence Pvt. Ltd. vs CIT reported in 2021 SCC online SC 159. Hon'ble Supreme Court while considering the issue of royalty on sale of software have considered the decision of Hon'ble

Karnataka High Court in case of CIT vs Samsung Electronics Co Ltd. (supra) and various other decisions.

12. We have perused the submissions advanced by both sides in light of records placed before us. We note that Hon'ble Supreme Court considered the issue by observing as under:-

"3. One group of appeals arises from a common judgment of the High Court of Karnataka dated 15.10.2011 reported as *CIT v. Samsung Electronics Co. Ltd.*, (2012) 345 ITR 494, by which the question which was posed before the High Court, was answered stating that the amounts paid by the concerned persons resident in India to non-resident, foreign software suppliers, amounted to royalty and as this was .so, the same constituted taxable income deemed to accrue in India under section 9(1)(vi) of the Income Tax Act, 1961 ["Income Tax Act"], thereby making it incumbent upon all such persons to deduct tax at source and pay such tax deductible at source ['TDS'] under section 195 of the Income Tax Act. This judgment dated 15.10.2011 has been relied upon by the subsequent impugned judgments passed by the High Court of Karnataka to decide the same question in favour of the Revenue.

The appeals before us may be grouped into four categories:

i) *The first category deals with cases in which computer software is purchased directly by an end-user, resident in India, from a foreign, non- resident supplier or manufacturer.*

ii) *The second category of cases deals with resident Indian companies that act as distributors or resellers, by purchasing computer software from foreign, non-resident suppliers or manufacturers and then reselling the same to resident Indian end-users.*

iii) *The third category concerns cases wherein the distributor happens to be a foreign, non-resident vendor, who, after purchasing software from a foreign, non-resident seller, resells the same to resident Indian distributors or end-users.*

iv) *The fourth category includes cases wherein computer software is affixed onto hardware and is sold as an integrated unit/ equipment." Hon'ble Supreme Court, considered various arguments advanced by the Revenue as well as the assessee's and came to the conclusion as under:*

CONCLUSION

168. *Given the definition of royalties contained in Article 12 of the DTAA's mentioned in paragraph 41 of this judgment, it is clear that*

there is no obligation on the persons mentioned in section 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 Ta Act (section 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 end-users/distributors to non-resident computer software manufacturers/ 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.

170.The appeals from the impugned judgments of the High Court of Karnataka are allowed, and the aforesaid judgments are set aside. The ruling of the AAR in Citrix Systems (AJAR) (supra) is set aside. The appeals from the impugned judgments of the High Court of Delhi are dismissed."

13. We note that cse of present assessee falls within the second and forth category analysed by Hon'ble Supreme Court. Respectfully following the above view by Hon'ble Supreme Court in case of Engineering Analysis Centre of Excellence Pvt. Ltd. Vs. CIT (Supra). We hold that purchase of software in the present facts does not amount to give rise to any taxable income in India as a result of which provisions of sec.195 of the Act are not attracted. The assessee does not have any obligation to deduct tax at source. Therefore, provisions of sec.9(1)(vi) along with Explant6ion 2 is not applicable to present assessee's. Accordingly we allow the appeal in terms of Ground No.3. All other grounds becomes academic."

4. Respectfully following the decision of the Tribunal, we allow the appeal of the assessee and hold that consideration received for sale of software with associated hardware cannot be regarded as royalty and cannot be brought to tax in India. Appeal of the assessee is accordingly allowed.

5. In the result, the appeal of the assessee is allowed.

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

Sd/-

(B. R. BASKARAN)
Accountant Member

Bangalore,

Dated: 09.08.2021.

/NS/*

Sd/-

(N. V. VASUDEVAN)
Vice President

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

By order

Assistant Registrar
ITAT, Bangalore.