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.2145 to 2167/Bang/2019
Assessment Years: 2018-19 to 2019-20 (April to February 2019)

Infosys Limited 44, Infosys Avenue Electronics City Hosur Road Bangalore 560 100 **PAN NO :AAACI4798L**	**Vs.**	Deputy Commissioner of Income-tax International Taxation Circle-1(2) Bengaluru
APPELLANT		**RESPONDENT**

Appellant by	**:**	Shri H. Padamchand Khincha, A.R.
Respondent by	**:**	Shri Pradeep Kumar, D.R.

Date of Hearing	**:**	06.08.2021
Date of Pronouncement	**:**	25.08.2021

O R D E R

PER BENCH:

These are appeals by the Assessee against a common order dated 31.7.2019 of the CIT(A)-12, Bengaluru-12, in relation to AY 2018-19 to AY 2019-20 (April, 2017 to February, 2019).

2. The assessee is a company incorporated in India and is engaged in the business of rendering software development services and also sale of software products and rendering information technology services. In the course of its business of software development, the Assessee uses other software under a license from its owners, it gets access to various

databases from the owner of the database, it avails facilities like webhosting/cloud hosting services, data, bandwidth, link connectivity as also various services such as legal, professional, training, certification, consulting, consulting and sub-contracting etc., from persons who are non-residents. In terms of Sec.195(1) of the Income Tax Act, 1961 (Act), the Assessee as a person responsible for paying to a non-resident, any sum chargeable under the provisions of this Act (not being income chargeable under the head "Salaries") shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force. In terms of Sec.195A of the Act, where under an agreement or other arrangement, the tax chargeable on any income is to be borne by the person by whom the income is payable, then, for the purposes of deduction of tax under those provisions such income shall be increased to such amount as would, after deduction of tax thereon at the rates in force for the financial year in which such income is payable, be equal to the net amount payable under such agreement or arrangement.

3. There is no dispute in these appeals that the Assessee deducted tax at source on the payment for the services referred to above to non-residents. There is also no dispute that as per the agreement with the non-resident, the Assessee was to bear the taxes payable by the non-resident and that the Assessee had deducted tax at source on the grossed-up sum payable including taxes payable by the non-resident.

4. In terms of Sec.248 of the Act, where under an agreement or other arrangement, the tax deductible on any income under Section 195 of the Act, is to be borne by the person by whom the income is payable, and such person having paid such tax to the credit of the Central Government, claims that no tax was required to be deducted on such income, he may appeal to the Commissioner (Appeals) for a declaration that no tax was deductible on

such income. In terms of Sec.249 (2)(a) of the Act, such appeal shall be presented within thirty days from the date of payment of the tax. The Assessee filed one appeal for payments made in a month. For example in ITA 2145/Bang/2019, the Assessee has made 16 payments to different non-residents in respect of different services in the month of April, 2017 and those 16 payments were subject matter of appeal by the Assessee u/s.248 of the Act before the first appellate authority, viz., the CIT(A). In an appeal u/s.248 of the Act, there would be no order passed by Income tax authority against which appeal is being filed because the appeal is filed only for a declaration that no tax is payable on the sum paid to the non-resident in the hands of the non-resident in India. The Hon'ble Karnataka High Court in the case of Jindal Thermal Company Ltd. Vs. DCIT (TDS) (2010) 321 ITR 31 (Karn.) has held that an appeal u/s.248 is maintainable even though there was no adjudication by the Income Tax Authority under the Act.

5. The appeals filed by the Assessee were decided by the CIT(A) by consolidating the 23 appeals filed for the period comprising of months April, 2017 to February, 2019 (23 months). The CIT(A) passed a common order for all the 23 appeals. On the basis of the classification and conclusions of the CIT(A), the payments by the Assessee to the non-residents can be classified in the following three broad categories viz., (1) Payments for software license fee, access to various online databases, web hosting, cloud computing, cloud space hiring, access of hardware access through software, access to online software training, membership fees, subscription of RSA token involving the right of right to use the software. (2) Data connectivity charges (also known as Network connectivity charges, LAN connectivity charges, Link connectivity charges, Link charges etc., (3) Data Centre Racks and Links Fees: (4) consulting fees connected and interlinked with software or cloud services; (5) Legal fees, professional fees, training fees, certification fees, sub-contracting charges etc.,

(1) <u>Payments for software licence fee, access to various online databases, web hosting, coud computing, cloud space hiring, access of hardware access through software, access to online software tranining, membership fees, subscription of RSA token involing the tright of right to use the software.</u>

6. The CIT(A) first identified same payees each month for the aforesaid period and for identical services. This exercise has been carried out by the CIT(A) in paragraphs 10 to 299 of the impugned common order and in paragraph-300 of the impugned order, the CIT(A) has summarized the nature of payments to the non-residents as follows:

> *"In the payments listed above, the majority of the payments are consideration paid for purchase of software, access to various databases, cloud computing, cloud space hiring, access of hardware overseas through software, access to online software training, etc. The argument of the appellant is that these payments are not in the nature of royalty. The grounds in this respect are therefore considered as under:*
>
> *Analysis of payments for software, access portals, access to online databases, etc."*

7. In paragraph 301 to 303, the CIT(A) has discussed the decision of the Hon'ble Karnataka High Court in the case of Samsung Electronics Co.Ltd. (2012) 16 taxmann.com 141(Karn.) and has concluded in paragraph 304 that in terms of the said decision payment made by Indian residents to the non-resident for supply of software and access to database is royalty.

8. Thereafter the CIT(A) dealt with and rejected the claim of the Assessee that the definition of Royalty under the Double Taxation Avoidance Agreement (DTAA) between India and the country in which the non-residents are tax resident has to be applied and not the definition of "Royalty" under the Act, and concluded as follows:

> ***"The claim: The transaction of sale of software and allowing the use of software does not fall within the definition of Royalty under respective treaties.***
>
> 304. *The appellant has argued that the transaction of purchase of software and allowing the use of software does not fall within the*

definition of Royalty under respective treaties. ***I have examined the same. Various treaties are examined alongwith the payments made[supra]. I find that the term "royalties" is defined as 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 any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific*** **experience. I find that the appellant's contentions are not correct.** I hold that the consideration paid by the appellant for the use of, or the right to use of the software is royalty as per various treaties.

The claim: The Appellant has not received any right in terms of section 14 of the Copyright Act.

306. The relevant part of the Section 14 in the Copyright Act, 1957 is as under:

Section 14 in the Copyright Act, 1957
1[14. Meaning of copyright.—For the purposes of this Act, "copyright" means the exclusive right subject to the provisions of this Act, to do or authorise the doing of any of the following acts in respect of a work or any substantial part thereof, namely:-1114. Meaning of copyright. — For the purposes of this Act, "copyright" means the exclusive right subject to the provisions of this Act, to do or authorise the doing of any of the following acts in respect of a work or any substantial part thereof, namely\:—"
(a) in the case of a literary, dramatic or musical work, not being a computer programme,—
(i) to reproduce the work in any material form including the storing of it in any medium by electronic means;
(ii) to issue copies of the work to the public not being copies already in circulation;
(iii) to perform the work in public, or communicate it to the public;
(iv) to make any cinematograph film or sound recording in respect of the work;
(v) to make any translation of the work;
(vi) to make any adaptation of the work;
(vii) to do, in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in sub-clauses (i) to (vi);
(b) in the case of a computer programme, —
(i) to do any of the acts specified in clause (a);
(ii) to sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer programme" Provided that such commercial rental does not apply in respect of computer programmes where the programme itself is not the essential object of the rental.

307. I find that the Appellant has not evaluated the grant of any right in terms of section 14(1)(iii) and 14(b)(ii) of the Copyright Act. ***I find that the grant of the license for the right to use or right to limited distribution is copyright in terms of section 14(a)(iii) and 14(b)(ii) of the Copyright Act."***

9. The final conclusion of the CIT(A) on the issue is in paragraph 331 of his order which reads thus:

"331. In view of the above, the argument of the appellant that consideration paid for purchase of software, access to various databases, cloud computing, cloud space hiring, access of hardware overseas through software, access to online software training, membership fees, subscription of RSA token, etc. [involving transfer of the right to use the software] is not royalty is not acceptable. The grounds in this respect are therefore dismissed."

(2) Data connectivity charges (also known as Network connectivity charges, LAN connecticity charges, Link connectivity charges, Link charges etc., and (3) Data Centre Racks and Links Fees:

10. Thereafter the CIT(A) examined the question whether payment of Data Connectivity Charges and Data Centre Racks and Links Fees are in the Royalty from paragraph 332 of the impugned order. In paragraph 333 to 350 of the impugned order, the CIT(A) has detailed as to how internet and telecommunications networks and the type of switching and circuits. In paragraph 351 to 357, the CIT(A) has concluded as follows:

351. "Against this background of patented processes, the claim of Royalty is examined.

Royalty

352. The appellant has claimed that even if there is an amendment in the IT Act 1961, it is still governed by the DTAA between India and other countries. Further, the appellant claims that the transaction is not taxable in India under the tax treaties.

353. I find that the definition of the 'Royalty' in the DTAA between India and other countries involves use of the phrase "payments of any kind received as a consideration for the use of, or the right to use". Another phrase use in all the treaties is "any patent, trade mark, design or model, plan, secret formula or process.

354. On examination of the activities of the assessee with reference to this treaty it is found that the payee is providing and is allowing use of equipment, processes, algorithms etc. to appellant. Although the issue of physical possession of the equipment has been raised by the appellant, it is seen that physical possession of the equipment is not possible either by payee or by the payer i.e. the appellant. In fact, the payee also does not have the possession of many of the equipment which are actually lying in the ocean. It is the constructive possession which is material here.

355. Further, this is a transaction in the nature of right to use of a part of the capacity as dedicated capacity for the customer. If the payee owns or has a right over a part of the equipment and process, it is giving to the appellant [payer] a right to use a part of that part owned or leased by it for one year or more depending on the agreement.

356. Thus, the appellant is making payments as a consideration for the use of equipment as well as several processes (many of which are secret arc[y]d patented). These payments are for commercial utilisation of such equipment and such processes while transferring the data. Such use is squarely covered by definition of Royalty in the tax.

357. Thus, I hold that the amount paid by the appellant is taxable as Royalty in the hands of payee in India under the various treaties also and the claim that there is no use of or right to use of equipment and/or processes is rejected."

\

11. The final conclusion of the CIT(A) on the payments towards Data Connectivity charges was as follows:

"373. Thus, the payments made by Appellant in respect of towards Data connectivity charges [also known as Network connectivity charges, LAN connectivity charges, Link connectivity charges, Link charges, telecommunications charges etc.] between various countries is held as Royalty. It is also held that it is also for use of software, patented processes as well as for use of or right to use of equipment. The appellant has rightly deducted TDS on the same. The arguments are rejected."

12. In Paragraph 358 to 372 of the impugned order, the CIT(A) has primarily discussed and placed reliance on decision of Hon'ble Madras High Court in the case of Verizon Communications Singapore Pvt.Ltd. Vs. ITO, ITA No. 147 to 149 of 2011 and 230 of 2012 dated 7.11.2003 wherein the provisions of Explanation 4 and 5 inserted by the Finance Act, 2012 w.e.f. 1.6.1976 were introduced to the definition of royalty u/s.9(1)(vi) of the Act.

(4) consulting fees connected and interlinked with software or cloud services;

and

(5)Legal fees, professional fees, training fees, certification fees etc.,

13. Thereafter the CIT(A) identified payment to various payees towards consulting fees, training fees etc., and concluded that these payments are in the nature of "fees for technical services rendered". The following were the conclusions of the CIT(A) in this regard:

> *"**CONSULTING FEES***
> *379. The appellant Infosys Limited has made payment for Consulting Fees to various entities. I have examined these. I find that most of these payments are made to the same entity which provided software or cloud services. Thus, I find that these services are interlinked. **Virtustream Inc** provides for cloud services as well as the Consulting for the same. Therefore, it is not possible to delink the two. Similarly, the payment to **Scaled Agile Inc** was made for consulting, training and certification services. Similar is the case it other cases. I find that **the appellant has rightly deducted TDS on the same. The arguments are rejected.***
>
> *Allegro Development — Technical training fee*
> *380. In the submission dt. 26.7.19 submitted on 29.7.19, the appellant has argued that the payments to allegro in respect of Technical training fee.*
> *381. The appellant Infosys Limited has made payment listed as under to Allegro Development in respect of Technical training fee. The payment in these appeals are listed as under:*

Sl.no.	Vendor Name	Vendor PAN	Country	Posting Date (DD/MM/YY)	Grossed-Up Invoice (INR)	TDS (INR)	Rate	Brief explanation on Nature of Service
1	Allegro Development GmbH	PANNOTAVBL	Switzerland	06/12/2017	1,51,870	15,187	10,00	Technical training fee
2	Allegro Development GmbH	PANNOTAVBL	Switzerland	06/12/2017	20,01,953	2,00,196	10.00	Technical training fee

382. The payment to Allergo Development Gmbh is for Instructor led training or ILT. It is the practice of training and learning material between an instructor and learners, either individuals or groups. Instructors can also be referred to as a facilitator, who may be knowledgeable and experienced in the learning material, but can also be used more for their facilitation skills and ability to deliver material to learners. It is also claimed that these are covered in exclusion clause of sec. 9(z)(vii)(b) [FTS].

383. The appellant has claimed that there is no "make available". The appellant has emphasized that training is a continuous process because technology is changing very fast. I have considered the argument. I find that once training is given knowledge is imparted and is therefore "made available". If the technology changes again training is given/received and again it is "made available". Therefore, this argument in respect of "Allegro Development GmbH" is also rejected.

legal fees, professional fees, training fees etc. - FTS

384. I find that most of legal fees, professional fees etc. are related to purchase of software, online training, online subscription etc. Therefore, it is not possible to accept the appellant's requests that TDS is not deductible on the same.

385. In some payments the appellant has failed to furnish evidences regarding nature of payments, agreements (legal fees, professional fees, training fees) usage of such services outside the country etc. therefore, it is not possible to agree to the contention of the appellant that these services were received outside India and therefore, are exempt under sec. g(3.)(vii)(b)[FTS]."

14. Aggrieved by the order of the CIT(A), the Assessee has preferred the present appeals before the Tribunal.

15. The learned counsel for the Assessee on the issue of payment for software license fees submitted that the question whether a payment to a non-resident is in the nature of royalty or not has to be tested in the light of the relevant provisions of DTAA between India and the country of which the non-resident payee is a tax resident. He submitted that the definition in the Act and the amendment to those provisions will have no impact on the tax

liability of the non-resident. He drew our attention to the provisions of Sec.9(1)(vi) (b) read with Expln.-2 of the Act reads thus:

Income deemed to accrue or arise in India.

9. *(1) The following incomes shall be deemed to accrue or arise in India :—*

(vi) income by way of royalty payable by—

(a) the Government ; or

(b) a person who is a resident, except where the royalty is payable in respect of any right, property or information used or services utilised for the purposes of a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India ; or

(c) a person who is a non-resident, where the royalty is payable in respect of any right, property or information used or services utilised for the purposes of a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India :

……..

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 (iv), (iva) and(v).

Explanation 3.—For the purposes of this clause, "computer software" means any computer programme recorded on any disc, tape, perforated media or other information storage device and includes any such programme or any customized electronic data.

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.

Explanation 5.—For the removal of doubts, it is hereby clarified that the royalty includes and has always included consideration in respect of any right, property or information, whether or not—

(a) the possession or control of such right, property or information is with the payer;

(b) such right, property or information is used directly by the payer;

(c) the location of such right, property or information is in India.

Explanation 6.—For the removal of doubts, it is hereby clarified that the expression "process" includes and shall be deemed to have always included transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal), cable, optic fibre or by any other similar technology, whether or not such process is secret;

16. The Ld. Counsel for the assessee submitted that payees are tax residents of various countries with whom India has a DTAA and therefore in view of Section 90(2) of the Act the provisions of the Act or the DTAA whichever is more beneficial to the assessee shall apply. He submitted that since the definition of royalty provided under the relevant Article of DTAA of whom the payees are tax residents provides for a much restricted definition of “Royalty”, the said definition provided under the DTAA is more beneficial as compared to the provisions of Section 9(1)(vi) of the Act, therefore, the provisions of DTAA shall apply. He pointed out that the CIT(A) in the impugned order has come to a conclusion that the payments in question are in the nature of royalty and hence taxable in the hands of the non-resident in India by placing reliance on the decision of the decision of Hon'ble Karnataka High Court in the case of CIT vs. Samsung Electronics

Ltd. 345 ITR 494 in favour of the revenue and against the Assessee. He submitted that the said decision of the Hon'ble Karnataka High Court, now stand overruled by the decision of the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence (P) Ltd. (2021) 125 Taxmann.com 42 (SC). The court envisaged 4 situations in which software could be subject matter of agreements between the supplier/licensor of software and distributors/end-users:

- *Purchase of computer software directly by a resident from a non-resident supplier or manufacturer;*
- *Purchase of software by a resident Indian company acting as a distributor or reseller and reselling to Indian end-users;*
- *Purchase of software by a non-resident distributor from a non-resident supplier and reselling to Indian distributors or end-users; and*
- *Computer software bundled with hardware sold by non-resident suppliers to resident Indian distributors or end-users.*

The revenue taxed payments as royalties under the Income Tax Act and relevant DTAA on the belief that the transactions involved a transfer of copyright. Taxpayers, however, were claiming the payments as business income.

17. The Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence (P) Ltd. (2021) 125 Taxmann.com 42 (SC) held that A copyright is an exclusive right that restricts others from doing certain acts. A copyright is an intangible right, in the nature of a privilege, entirely independent of any material substance. Owning copyright in a work is different from owning the physical material in which the copyrighted work may be embodied. Computer programs are categorised as literary work under the Copyright Act. Section 14 of the Copyright Act states that a copyright is an exclusive right to do or authorise the doing of certain acts in respect of a work, including literary work. The Hon'ble Court took the view that a transfer of copyright would occur only when the owner of the copyright parts with the right to do any of the acts mentioned in section 14 of the Copyright Act, 1957(Copyright Act). In the case of a computer

program, section 14(b) of the Copyright Act, speaks explicitly of two sets of acts:

1. *The seven acts enumerated in sub-clause (a); and*
2. *The eighth act of selling or giving of commercial rental or offering for sale or commercial rental any copy of the computer program.*

The seven acts as enumerated in section 14(a) of the Copyright Act, in respect of literary works are:

1. *To reproduce the work in any material form, including the storing of it in any medium electronically;*
2. *To issue copies of the work to the public, provided they are not copies already in circulation;*
3. *To perform the work in public, or communicate it to the public;*
4. *To make any cinematographic film or sound recording in respect of the work;*
5. *To make any translation of the work;*
6. *To make any adaptation of the work; and*
7. *To do, in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in sub-clauses (1) to (6).*

18. The court held that a license from a copyright owner, conferring no proprietary interest on the licensee, does not involve parting with any copyright. It said this is different from a license issued under section 30 of the Copyright Act, which grants the licensee an interest in the rights mentioned in section 14(a) and 14(b) of the Copyright Act. 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 the sale of a physical object which contains an embedded computer program. Therefore, it was a case of sale of goods. The payments made by end-users and distributors are akin to a payment for the sale of goods and not for a copyright license under the Copyright Act. The decision of the Hon'ble Karnataka High Court in the case of CIT Vs. Samsung Electronics Co. Ltd. (2011) 16 taxmann.com 141 (Karn.), on which the revenue authorities placed reliance in making the impugned addition stood overruled by the Hon'ble Supreme Court. It was submitted by the learned counsel for the Assessee that the case of the Assessee in the present

appeals falls under the first category and the ratio laid down by the Hon'ble supreme Court as above will be applicable to the case of the Assessee.

19. On the question whether the provisions of the Act can override the provisions of the DTAA, the Hon'ble Court held that Explanation 4 was inserted in section 9(1)(vi) of the ITA in 2012 to clarify that the "transfer of all or any rights" in respect of any right, property, or information included and had always included the "transfer of all or any right for use or right to use a computer software". The court ruled that Explanation 4 to section 9(1)(vi) expanded the scope of royalty under Explanation 2 to section 9(1)(vi). Prior to the aforesaid amendment, a payment could only be treated as royalty if it involved a transfer of all or any rights in copyright by way of license or other similar arrangements under the Copyright Act. The court held that once a DTAA applies, the provisions of the Act can only apply to the extent they are more beneficial to the taxpayer and therefore the definition of 'royalties' will have the meaning assigned to it by the DTAA which was more beneficial. It was held that the term 'copyright' has to be understood in the context of the Copyright Act. The court said that by virtue of Article 12(3) of the DTAA, royalties are payments of any kind received as a consideration for "the use of, or the right to use, any copyright "of a literary work includes a computer program or software. It was held that the regarding the expression "use of or the right to use", the position would be the same under explanation 2(v) of section 9(1)(vi) because there must be, under the license granted or sales made, a transfer of any rights contained in sections 14(a) or 14(b) of the Copyright Act. Since the end-user only gets the right to use computer software under a non-exclusive license, ensuring the owner continues to retain ownership under section 14(b) of the Copyright Act read with sub-section 14(a) (i)-(vii), payments for computer software sold/licensed on a CD/other physical media cannot be classed as a royalty.

20. The learned counsel for the Assessee cited the terms of the End user's Licence Agreement (EULA) with some of the non-residents and submitted

that as per the terms of the EULA, no right in copyright is given to the Assessee so as to characterize the payment to the non-resident as in the nature of royalty under the DTAA. We observe that the CIT(A) has not examined the issue from an analysis of the EULA and therefore these arguments and reference to the terms of the EULA which have not been considered at all, may not be appropriate before the tribunal.

21. With regard to the payments towards webhosting charges and cloud computing/cloud hosing charges, the learned counsel for the Assessee submitted that those charges are paid to get access to cloud space wherein the payer can store his data, applications, software etc. The payer is given an user id and password to use the storage space provided on cloud. It is a payment made for infrastructure service. The payer gets access to use software/processes which are copyrighted by the owner. He brought to our notice some of the terms of the agreement between the Assessee and Amazon Web Services Inc. And Virtusgreat Inc. and highlighted that on similar terms of agreement between another Assessee and Amazon Web Services Inc., the Pune Bench of ITAT in the case of EPRSS Prepaid Recharge Services India Pvt. Ltd. Vs. ITO (2018) 100 taxmann.com 52(Pune-Trib.) held that payments made for use of cloud space does not amount to payment of royalty. He highlighted the fact that the Pune Bench placed reliance on decision of Hon'ble Delhi High Court in the case of DIT Vs. New Skies Satellite BV (2016) 68 taxmann.com 8 (del) to a come to a conclusion that web hosing charges are not in the nature of royalty.

22. With regard to payments towards Data Connectivity Charges (also known as Network Connectivity charges, Lan Connectivity charges, Bandwidth Charges, Link Connectivity charges, Link Charges etc., the learned counsel highlighted the fact that the CIT(A) after discussing the technical facts and the workings involved in data or bandwidth connectivity concluded that payment is for use of equipment as well as several processes which are secreted and patented and hence in the nature of "royalty" under the DTAA and therefore liable to TDS u/s.195 of the Act.

He relied on the decision of the Hon'ble Delhi High Court in the case of New Skies Satellite BV (2016) 68 taxmann.com 8 (Delhi) wherein it was held that income from providing data transmission services by lease of transponders would not be regarded as "royalty" under the DTAA. It was also held that the retrospective amendments by way of introduction of Expln. 4 to 6 to Sec.9(1)(vi) of the Act by the Finance Act, 2012 would not be relevant under the DTAA. He submitted that the ratio laid down as above by the Hon'ble Delhi High Court has been approved by the Hon'ble Supreme Court in the case of Engineering Analysis (supra). He submitted that the reliance by the CIT(A) on the decision of the Hon'ble Madras High Court in the case of Verizon (supra) is not proper because the said decision has been explained in the case of New Skies Satellite BV (supra) by the Hon'ble Delhi High Court which has since been approved by the Hon'ble Supreme Court in the case of Engineering Analysis (supra) and therefore the decision in the case of Verizon (supra) no longer holds the field.

23. With regard to payments towards consulting fees, legal fees, professional fees, training fees, certification fees and sub-contracting charges, the learned counsel submitted that the payments were treated as royalty because they were related to purchase of software, training, online subscription etc. and therefore would also be in the nature of 'royalty'. He submitted that once the payment for use of software, access to online etc., is regarded as not in the nature of royalty, these payments should also be regarded not in the nature of royalty and hence not liable to TDS. Alternatively it was submitted that the conclusion that the payments were in the nature of Fees for Technical Services (FTS) cannot be sustained because the applicable DTAA regarding taxation of FTS need to be considered. According to him therefore the issue needs re-examination by the income tax authorities in the light of the applicable DTAA provisions.

24. The learned counsel for the Assessee also made a prayer for grant of refund together with interest u/s.244A of the Act and in this regard placed reliance on CBDT Circular No.11/2016.

25. The learned DR relied on the order of the CIT(A).

26. We have given a careful consideration to the rival submissions. It is clear from a perusal of the conclusions of the CIT(A) that the CIT(A) has primarily placed reliance on the decision of the Hon'ble Karnataka High Court in the case of CIT vs. Samsung Electronics Ltd. 345 ITR 494 in favour of the revenue and against the Assessee. As rightly submitted by the learned counsel for the Assessee, the said decision of the Hon'ble Karnataka High Court, now stand overruled by the decision of the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence (P) Ltd. (2021) 125 Taxmann.com 42 (SC). The Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence (P) Ltd. (2021) 125 Taxmann.com 42 (SC) held that A copyright is an exclusive right that restricts others from doing certain acts. A copyright is an intangible right, in the nature of a privilege, entirely independent of any material substance. Owning copyright in a work is different from owning the physical material in which the copyrighted work may be embodied. Computer programs are categorised as literary work under the Copyright Act. Section 14 of the Copyright Act states that a copyright is an exclusive right to do or authorise the doing of certain acts in respect of a work, including literary work. The Hon'ble Court took the view that a transfer of copyright would occur only when the owner of the copyright parts with the right to do any of the acts mentioned in section 14 of the Copyright Act, 1957(Copyright Act). The Court noted that the End User License Agreements (EULA) of the software do not transfer or assign the copyright over the software. The "license" that is granted vide the EULA, is not a license 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 "license" which imposes restrictions or conditions for the use of computer software.The Court held that the transaction is similar to 'a sale of goods'

as held by the SC in the case Tata Consultancy Services v. the State of A.P., 2005 (1) SCC 308. In this regard, Court held that: –

> *"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 program, and is, therefore, a sale of goods, which, as has been correctly pointed out by the learned counsel for the assessees, is the law declared by this Court in the context of a sales tax statute in "Tata Consultancy Services v. the State of A.P., 2005 (1) SCC 308"*

27. The Court noted that the terms of the Double Taxation Avoidance Agreement (DTAA) with foreign companies will have application in the case. The definition of 'royalty' in DTAAs will have application. Once a DTAA applies, the provisions of the Income Tax Act can only apply to the extent that they are more beneficial to the assessee and not otherwise. Where any term is defined in a DTAA, the definition contained in the DTAA is to be looked at. It is only where there is no such definition that the definition in the Income Tax Act can then be applied. The provisions contained in the Income Tax Act (section 9(1)(vi), along with explanations 2 and 4 thereof), which deal with royalty, not being more beneficial to the assessee, have no application.The decision of the Hon'ble Karnataka High Cour in the case of CIT Vs. Samsung Electronics Co. Ltd. (2011) 16 taxmann.com 141 (Karn.), on which the revenue authorities placed reliance in making the impugned addition stood overruled by the Hon'ble Supreme Court.

28. Since the revenue authorities primarily relied on the decision of Hon'ble Karnataka High Court in the case of Samsung Electronics Co.Ltd. (supra) in holding that the payment in question was in the nature of royalty and since in the light of the subsequent pronouncement of the Hon'ble Supreme Court in the case of Engineering Analysis (supra) overruling the decision of the Hon'ble Karnataka High Court in the case of Samsung Electronics Co.Ltd. (supra) and since the analysis of the EULA is necessary to come to a conclusion regarding the nature of the right that is given to the user of the software and since this exercise has not been

carried out by the authorities below, we deem it fit and appropriate to remit the issue to the AO for consideration afresh in the light of the principles laid down by the Hon'ble Supreme Court in the case of Engineering Analysis (supra). The AO will afford opportunity of being heard to the Assessee in the set aside proceedings.

29. With regard to the payments towards webhosting charges, the Pune Bench of ITAT in the case of EPRSS Prepaid Recharge Services India Pvt.Ltd. Vs. ITO (2018) 100 taxmann.com 52(Pune-Trib.) held that payments made for use of cloud space does not amount to payment of royalty. The Pune Bench placed reliance on decision of Hon'ble Delhi High Court in the case of DIT Vs. New Skies Satellite BV (2016) 68 taxmann.com 8 (del), which decision has been approved by the Hon'ble Supreme Court in the case of Engineering Analysis (supra), to a come to a conclusion that web hosing charges are not in the nature of royalty. The learned counsel also relied on the decision of the Mumbai Bench of ITAT in the case of DIT Vs.Savvis Communication Corporation (2016) 69 taxmann.com 106 (Mum-Trib). The Mumbai Bench explained the concept of use of scientific equipment whether would amount to royalty or not by observing as follows:

> *"9. We have noted that the very basis of the impugned addition is Assessing Officer's finding that the receipts in question were on account of use of scientific equipment, and, for that reason, giving rise to an income taxable under section 9(l)(vi] of the Act as also article 13[1)(» of the Indo US tax treaty. This finding, however, proceeds on the fallacy that when a scientific equipment is used by the assessee for rendering a service, the receipt will be construed as a receipt for use of scientific equipment. Undoubtedly, when the assessee receives an income on account of allowing a customer to use a scientific equipment, it does become taxable for the reason of its being characterized as such, but the use of a scientific equipment by the assessee, in the course of giving a service to the customer, is something very distinct from allowing the customer to use a scientific equipment. The true test is in finding out the answer to the fundamental question- is it the consideration for rendition of services, even though involving the use of scientific equipment, or is it the consideration for use of equipment simpUctor by the assessee? In the case of former, the consideration is not taxable, in the case of the latter, the consideration is taxable. In the case of Kotak Mahindra Primus Ltd Vs DDIT [(2007) 11 SOT 578 (Bom)], a coordinate bench, dealing with a situation in which the mainframe*

computer and the specialized software was used for rendering data processing services to an Indian entity, held so and observed that, "No part of this payment can be said to be for the use of specialized software on which data is processed or for the use of mainframe computer because the Indian company does not have any independent right to use the computer or even physical access to the mainframe computer, so as to use the mainframe computer or the specialized software." ***A payment cannot be said to be consideration for use of scientific equipment when person making the payment does not have an independent right to use such an equipment and physical access to it. In the present case also, what the assessee is providing is essentially web hosting service, though with the help of sophisticated scientific equipment, in the virtual world. The scientific equipment used by the assessee enable rendition of such a service, and such a use, which is not even by the Indian entity, is not an end in itself. In this view of the matter, even though the services rendered by the assessee to the Indian entities may involve use of certain scientific equipment, the receipts by the assessee cannot be treated as "consideration for the use of, or right to use of, scientific equipment" which is a sine qua non for taxability under section 9(l)(vi) read with Explanation 2 (iva) thereto."***

30. With regard to cloud computing/cloud hosting charges, the concept of Cloud computing is **the delivery of different services through the Internet**, including data storage, servers, databases, networking, and software. Cloud-based storage makes it possible to save files to a remote database and retrieve them on demand. Traditionally we store our data in our computer and can access the data only if the computer is available. In cloud computing the data is store in a server and can be accessed through any system. The Mumbai Tribunal in the case of Rackspace, US Inc. ITA No.1634/Mum/2016 and ITA Nos. 3507 & 1075/Mum/2017 order dated 29.5.2019 followed the earlier decision rendered in the case of American Chemical Society vs. DCIT in ITA No. 6811/Mum/2017 for the AY 2014-15 vide order dated 30.04.2019, wherein identical issue was decided in the context of right to use material in the form of journal,. The Tribunal held that the cloud hosting company creates / maintains information online and grants access to the journals, the assessee neither shares its experiences, techniques or methodology employed in evolving databases with the users, nor imparts any information relating to them. The terms of the agreement between the cloud host and the customer proider that the customer gets right to search, view and

display the articles (whether online or by taking a print) and reproducing or exploiting the same in any manner for personal use. The customers do not get any rights to the journal or articles therein. It was held that there was No 'use or right to use' in any copyright or any other intellectual property of any kind is provided by the assessee to its customers. Furthermore, the information resides on servers outside India, to which the customers have no right or access, nor do they possess control or dominion over the servers in any way.Therefore, the question of such payments qualifying as consideration for use or right to use any equipment, whether industrial, commercial or scientific, does not arise. The tribunal thereafter applied the ratio to the case of the Assessee Rackspace, US Inc. and held that the agreement between the assessee and its customer is for providing hosting and other ancillary services to the customer and not for the use of / leasing of any equipment. The Data Centre and the Infrastructure therein is used to provide these services belong to the assessee. The customers do not have physical control or possession over the servers and right to operate and manage this infrastructure / servers vest solely with the assessee. The agreements entered into the service level agreements. The agreement is to provide hosting services simpliciter and is not for the purpose of giving the underlying equipment on higher or lease. The customer is not even aware of the specific location of the server in the Data Centre where the customer application, web mail, websites etc. The tribunal therefore held that income from cloud hosting services was not royalty within the meaning of explanation (2) to section 9(1)(vi) of the Act as well as Article 12(3)(b) of the Indo-USA DTAA.

31. The conclusions with regard to payment for right to use software will equally apply to these payments also and the AO will examine the issue afresh as directed while remanding the issue with regard to payments for right to use software in the light of the agreement between the parties.

32. With regard to payments towards Data Connectivity Charges (also known as Network Connectivity charges, Lan Connectivity charges,

Bandwidth Charges, Link Connectivity charges, Link Charges etc., the revenue authorities concluded that payment is for use of equipment as well as several processes which are secreted and patented and hence in the nature of "royalty" under the DTAA and therefore liable to TDS u/s.195 of the Act. The Hon'ble Delhi High Court in the case of New Skies Satellite BV (2016) 68 taxmann.com 8 (Delhi) has held that income from providing data transmission services by lease of transponders would not be regarded as "royalty" under the DTAA. It was also held that the retrospective amendments by way of introduction of Expln. 4 to 6 to Sec.9(1)(vi) of the Act by the Finance Act, 2012 would not be relevant under the DTAA. He submitted that the ratio laid down as above by the Hon'ble Delhi High Court has been approved by the Hon'ble Supreme Court in the case of Engineering Analysis (supra). The reliance by the CIT(A) on the decision of the Hon'ble Madras High Court in the case of Verizon (India) (supra) is not proper because the said decision has been explained in the case of New Skies Satellite BV (supra) by the Hon'ble Delhi High Court which has since been approved by the Hon'ble Supreme Court in the case of Engineering Analysis (supra) and therefore the decision in the case of Verizon (supra) no longer holds the field. The Hon'ble Karnataka High Court in the case of CIT Vs. Infosys Technologies Ltd. (2014) 51 taxmann.com 417 (Karn.) has also taken similar view on taxability of Data connectivity charges (Down linking charges). The conclusions with regard to payment for right to use software will equally apply to these payments also and the AO will examine the issue afresh as directed while remanding the issue with regard to payments for right to use software in the light of the agreement between the parties.

33. With regard to payments towards transponder capacity, bandwidth, the concept has been explained by the Hon'ble Delhi High Court in the case of Asia Satellite Telecommunications Co Ltd. Vs. DIT (2011) 197 Taxman 263 (Delhi) The assessee in that case viz., Asia Satellite Telecommunications Co. Ltd., was a company incorporated in Hong Kong and carries on business of private satellite communications and broadcasting facilities.

The Assessee launched two satellites and placed them in a geostationary orbit in orbital slots, which initially were allotted by the International Telecommunication Union to UK, and subsequently handed over to China. These satellites neither use Indian orbital slots nor are they positioned over Indian airspace. The footprints of the satellite extended over four continents, viz., Asia, Australia, Eastern Europe and Northern Africa. The footprint is that area of the earth's surface over which a signal relayed from the assessee's satellite can be received. The Assessee enters into an agreement with TV channels, communication companies or other companies who desire to utilize the transponder capacity available on the appellant's satellite to relay their signals. The customers have their own relaying facilities, which are not situated in India. From these facilities, the signals are beamed in space where they are received by a transponder located in the appellant's satellite. The transponder receives the signals and on account of the distance the signals have travelled, they are required to be amplified. The amplification is a simple electrical operation. Thereafter, the frequency on which the signals are to be downlinked is changed only in order to facilitate the transmission of signals so that there is no distortion between the signals that are being received and the signals that are being relayed from the transponder. The transponder operations are commonly known, which are carried out not only in satellite transmission but also in the case of terrestrial transmission. There is no change in the content of the signals whatsoever that is carried out by the assessee in the transponder. Thereafter, the signals leave the transponder and are relayed over the entire footprint area where they can be received by the facilities of the appellant's customers or their customers. It was the case of the assessee that it has no role whatsoever to play either in the uplinking activity or in the receiving activity. Its role is confined in space where the transponder which it makes available to its customers performs a function which it is designed to perform. The only activity that is performed by the assessee on earth is the telemetry, tracking and control of the satellite. This is carried out from a control centre at Hong Kong. The Assessee claimed no part of the income generated by it from the

customers to whom the aforesaid services are provided was chargeable to tax in India. The Hon'ble Delhi High Court held that In order for income to be taxable u/s 9(1)(i), the carrying on of operations in India is a sine qua non. The assessee had no presence in India. The signals were uploaded and downloaded outside India. ***Merely because the footprint area included India and programmes were watched by Indian viewers did not mean that the assessee was carrying out business operations in India***. The Court held that the assessee was the operator of the satellites and continued to be in control of the satellite and had not "leased" the satellite to its customers. The satellite was used by the assessee for providing services to its customers. **There is a well known distinction between "lease of equipment" and "use of equipment"**. The Court held that there was no use of a "process" by the TV channels when no such purported use has taken place in India as the assessee and its customers are situated outside India. The agreements were executed abroad. ***The transponder was in orbit and merely because its footprint was on India did not mean that the process had taken place in India***. The Court held that since the end consumers i.e. persons watching TV in India are paying the cable operators who in turn are paying the TV channels, the flow of fund is traced to India and therefore the sum is taxable in India was held to be a far-fetched argument and ignores the fact that the income which is generated in India has been subjected to tax in India in the hands of the telecast operators. ***The payment by the telecast operators outside India to the assessee cannot be taxed on the basis that the end consumers are in India***;

34. The conclusions with regard to payment for right to use software and the overriding effect of DTAA over the Act, will equally apply to these payments also and the AO will examine the issue afresh as directed while remanding the issue with regard to payments for right to use software in the light of the agreement between the parties.

35. With regard to payments towards consulting fees, legal fees, professional fees, training fees, certification fees and sub-contracting charges, the learned counsel submitted that the payments were treated as royalty because they were related to purchase of software, training, online subscription etc. and therefore would also be in the nature of 'royalty'. Once the payment for use of software, access to online etc., is regarded as not in the nature of royalty, these payments should also be regarded not in the nature of royalty and hence not liable to TDS. Nevertheless, another conclusion of the revenue authorities was that the payments were in the nature of Fees for Technical Services (FTS) cannot be sustained because the applicable DTAA regarding taxation of FTS have not been considered. We are therefore of the view that the issue needs re-examination by the income tax authorities in the light of the applicable DTAA provisions. We hold and direct accordingly.

36. These appeals are accordingly treated as allowed for statistical purpose.

Order pronounced in the open court on 25th Aug, 2021.

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

Bangalore,
Dated 25th 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.