

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'D' NEW DELHI**

**BEFORE SHRI R. K. PANDA ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER**

**I.T.A. No. 1035/DEL/2016 (A.Y 2013-14)
(THROUGH VIDEO CONFERENCING)**

Dimple Creation Pvt. Ltd. C-64, Okhla Industrial Area, Phase-II New Delhi AAACD2155Q (APPELLANT)	Vs	ITO (International Taxation) Ward-1(2) New Delhi (RESPONDENT)
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Appellant by	Sh. Ashok Manik, CA
Respondent by	Sh. E. V. Bhaskar, Sr. DR

Date of Hearing	10.08.2021
Date of Pronouncement	16.09.2021

ORDER

PER SUCHITRA KAMBLE, JM

This appeal is filed by the assessee against the order dated 21/12/2015 passed by CIT(A)-42, New Delhi for assessment year 2013-14.

2. The grounds of appeal are as under:-

1. *"The Ld.CIT(A) has grossly erred on the facts of the case and in law upholding the action of the A.O in coming to the conclusion that on the remittances of Rs. 3185523/- made by the assessee TDS u/s 195 should have been deducted. As according to him the remittances to M/s TUKATECH INC, E. SLAUSON, AVENUE U.S.A, LOS ANGELES, CA 90040, U.S.A for supply of software which is his income as per both Section 9(1)(VI) and as per Article 12(3) of India with U.S.A DTAA.*

3. The assessee is a Private Limited Company. The assessee is engaged in the business of manufacturing of export of Readymade Garments and during

the year, the assessee remitted \$59650 equivalent to Rs.31,85,523/- to M/s Tukatech Inc, E. Slauson, Avenue USA, Los Angeles, CA 90040, U.S.A for the purpose of Software vide Invoice Number 208364 and the amount was remitted through normal banking channels after obtaining certificate from Chartered Accountants and no tax was deducted while remitting the amount on the purchase of software. To verify the remittance after approval from DIT (International transaction) on 9/10/2013, notice u/s 133(6) under Income Tax Act, 1961 was issued thereby calling for certain information which was supplied by the assessee vide letter dated 22/10/2013. Thereafter, a query was raised as to why withholding tax was not deducted when the remittance made is for payment of royalty covered u/s 9(1) (vi) of the Income Tax Act. The submission of the assessee dated 24/10/2013 was not accepted by the Assessing Officer who vide order dated 21/2/2104 passed u/s 201(1)/201(1A) read with Section 195 of the Act held that the TDS on the remittance should have been deducted and demand of Rs.7,64,542/- was created against the assessee which includes interest on account of delay in deduction.

4. Being aggrieved by the order u/s 201(1), 201(1A) read with Section 195 of the Act. The assessee filed appeal before the CIT(A). The CIT(A) dismissed the appeal of the assessee.

5. The Ld. AR submitted that the assessee had purchased Software programmes from M/s Tukatech INC L. A. U.S,A as per assessee's specific requirements and they supplied the same to the assessee vide 4 invoices which was referred by the Ld. AR from pages 7 to 10 of the paper book. The assessee made the remittance without deducting any tax under Section 195(1) of the Income Tax Act, 1961, but the Assessing Officer held that the receipt of M/S TUKATECH INC from supply of software are taxable in India as royalty income both under section 9(1)(vi) of the Act and under Article 12(3) of India-USA DTAA and thus taxed under Section 195(1) which was required to be deducted. Thus, the Assessing Officer created demand with interest amounting to Rs.

7,64,542. The CIT (A) upheld the order of Assessing Officer and held that through purchase of software, the assessee had acquired copy right. Therefore, the CIT(A) relied upon the decision of Hon'ble High Court of Karnataka in case of CIT Vs Samsung Electronics Co. Ltd. 345 ITR 494, wherein it is held that royalty is taxable both under the domestic law as well under Article 12(3) of the Info-USA DTAA. The Ld. AR further submitted that the Hon'ble Apex court recently in March 2021 in the case of M/S Engineering Analysis Centre of Excellence (P) Ltd Civil Appeal Nos. 8733-8734 of held that payments made to non-resident computer software manufacturer /Suppliers for the use/ resale of the software is not taxable as Royalty, thereby overruling the decision of the Hon'ble Karnataka high court given in the case of Samsung electronics Co. Ltd. On the basis of which CIT (A) had upheld the order of Assessing Officer. The Ld. AR submitted that the Hon'ble Apex court had further upheld the decision of the Hon'ble Delhi High Court in case of Director of Income Tax Vs Infrasoftware Ltd. 264 CTR 329 where it was held that payment made to foreign buyer under licence agreement for allowing the use of software is not royalty.

6. The Ld. DR submitted that the CIT(A) has rightly dismissed the appeal of the assessee as the assessee has not made copies of the Software nor restrained from allowing use of license by other parties. The Ld. DR further submitted that the decision of the Hon'ble Supreme Court in case of Engineering Analysis Centre of Excellence Pvt. Ltd. Vs. CIT (supra) is not applicable in the present case as the factual matrix of the assessee's case are different as it was a re-sale of software.

7. In rejoinder, the Ld. AR submitted that the Revenue at no point of time has denied the fact that the receipt of M/s Tukatech Inc, E. Slauson, Avenue USA, Los Angeles, CA 90040, U.S.A from supply of Software coming under the purview of Article 12(3) of the India USA DTAA and it is a supply of software and not that of re-sale which is emerged in Para 34 of the order of the ITO, TDS passed u/s 201(1), 201(1A) of the Act.

7. We have heard both the parties and perused the material available on record. It is pertinent to note that para 4 of the Hon'ble Apex Court decision in case of Engineering Analysis (Supra) has categorically given the findings thereby observing that the computer software cannot be held as royalty as set out in Paragraph 169 of the said decision. The Ld. DR's contention that the factual matrix is different is not sustainable as the ratio related to royalty is very much dealt by the Apex Court thereby observing that the same is applicable to computer software cases in different types of series which has been already defined. The Hon'ble Supreme Court clearly held that there is no element of royalty in these type of transactions. Thus, the appeal of the assessee is allowed.

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

Order pronounced in the Open Court on this 16th Day of September, 2021.

Sd/-

**(R. K. PANDA)
ACCOUNTANT MEMBER**

Sd/-

**(SUCHITRA KAMBLE)
JUDICIAL MEMBER**

Dated : 16/09/2021

*R. Naheed **

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

