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

BEFORE SHRI B.R. BASKARAN, ACCOUNTANT MEMBER
AND
SMT BEENA PILLAI, JUDICIAL MEMBER

ITA. No. 409/Bang/2018
Assessment Year: 2013-14

M/s. IBM Singapore Pte Limited, C/o. IBM India Private Ltd., No. 12, Subramanya Arcade, Bannerghatta main road, Bangalore – 560 029.[PAN: AACCI2917B	vs.	The Deputy Commissioner of Income-tax, Circle 1 (1) (International Taxation) Bangalore.
(Appellant)		(Respondent)

For Assessee:	Shri Sharath Rao, Advocate
For Revenue :	Shri Gopinath C.H., CIT (DR)

Date of Hearing :	23.09.2021
Date of Pronouncement :	11.10.2021

ORDER

PER BEENA PILLAI, JM.

Present appeal is filed by assessee against order dated 21.12.2017 passed by Ld.CIT(A)-12, Bangalore for assessment year 2013-14.

At the outset, the Ld.AR submitted that on similar facts, identical issues raised by assessee were considered by coordinate bench of this *Tribunal* by order dated 23.08.2016 for assessment year 2014-15 in assessee's own case and in ITA Nos. 3229 & 3060/Bang/2018 and 1311 to

1313/Bang/2018 by order dated 03.09.2021 for assessment years 2009-10, 2010-11 & 2012-13.

He placed reliance on observations of coordinate bench of this *Tribunal* and the decision rendered therein for the common issues alleged in the present appeal. He also submitted that the transaction for year under consideration arises out of the same contract that was considered by coordinate bench of this *Tribunal* for assessment year 2014-15.

2. On the contrary the Ld. CIT DR placed reliance on orders passed by authorities below.

3. **Ground No. 1** is general in nature and therefore do not require adjudication.

4. At the time of hearing the Ld. AR also did not press ground 2 relating to the reopening of assessment under section 147 of the Act.

5. At the time of hearing, the Ld. AR did not press **Ground 4** in the relief claimed in appeal filed as Annexure to form 36, relating to assessment of amount received as reimbursement of expenses treating the same as "Fee for technical services".

6. **Accordingly, those grounds are dismissed as not pressed.**

7. **Ground No. 3** relate to the assessment of sale proceeds received on sale of software licenses as "Royalty income".

7.1. Coordinate bench of this *Tribunal* in assessee's own case for assessment year 2014-15 (supra) decided this issue as under:

> *"4.The assessee is a Singapore based company engaged in the business of dealing in software & hardware products. Under the provisions of Indian Income tax Act, the assessee is a non-resident. During the year under consideration, the assessee has sold software licenses to its Associated Enterprise (AE) and also to other Indian customers. The assessee did not offer any income on such sale for taxation in India. The Ld A.R submitted that the AE of the assessee, viz., M/s IBM India Pvt Ltd is the authorized distributor of software licenses sold by the assessee. In respect of sales made to Non-Associated enterprises, the Ld A.R submitted that majority of sales were made to "other distributors" and in few cases, it was sold to End users also. The details of sales effected by the assessee during the year under consideration in India are tabulated as under by the A.O.*

Sl.No.	***Name of the Party***	***Sale value (in Rs.)***	***Offered for taxation or not***
1.	*IBM India Pvt. Ltd.*	*416,00,24,726*	*No*
2.	*Non Associated Enterprises*	*25,94,40,459*	*No*
Total		***441,94,65,185***	

> *5. The A.O. took the view that the above said aggregate sale consideration of Rs.441.94 Crores constitute "royalty" in the hands of the assessee both under section 9(1)(vi) of the Income-tax Act,1961 ['the Act' for short] and under Double Taxation Avoidance Agreement (DTAA) entered between India and Singapore. Accordingly, he made addition of Rs.441.94 crores to the total income returned by the assessee. The A.O.*

placed his reliance on the decision rendered by Hon'ble Karnataka High Court in the case of Samsung Electronics Company Ltd. (345 ITR 494) and Synopsis International Old Limited (ITA Nos.11-15/2008). The Ld. CIT(A) also confirmed the addition and hence the assessee has filed this appeal before us.

6. The Ld. A.R. submitted that the assessee has sold only licenses to use the software and it did not part with any of its right over the products within the meaning of Copy right Act. He further submitted that the provisions of DTAA entered between India and Singapore shall govern these transactions and as per the provisions of DTAA, the sale receipts of software licenses cannot be taxed as "royalty". For all these propositions, the Ld A.R placed his reliance on the decision rendered by Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Pvt. Ltd. (2021) 125 Taxmann.com 42.

7. The Ld A.R submitted that the tax authorities have placed their reliance on the decisions rendered by Hon'ble Karnataka High Court in the case of Samsung Electronics Co Ltd (supra) and Synopsis International Old Ltd (supra). However, both the decisions have been reversed by the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence P Ltd (supra).

8. The Ld A.R further submitted that the Hon'ble Supreme Court has delivered its decision holding that the software licenses cannot be taxed as royalty under the provisions of DTAA unless copy rights are parted with. The Hon'ble Supreme Court has examined some agreements entered by software suppliers with the Distributors/ end users on sample basis in this regard. It included the agreements entered by the assessee with its distributors (referred as "re-marketeers")/ End users and also the End User's License Agreement (EULA) entered between the distributors and the end users.

(a) The agreement entered by the assessee with End users has been extracted in paragraph 44(i) of the order of Hon'ble Supreme Court.

(b) The agreement entered by the assessee with IBM India (re-marketeer) has been extracted in paragraph 44(ii)a of its order by Hon'ble Supreme Court and

(c) The agreement entered by IBM India (r-marketeer) with the end users has been extracted in paragraph 44(ii)b of the order.

The Ld.AR submitted that the very same terms and conditions of granting license to use software continue during this year also. The Hon'ble Supreme Court has concluded that the payments made by the distributors and end-users to the non-resident software supplier placed in Singapore, is not "royalty" within the meaning of the provisions of DTAA and hence the distributors/end users are not liable to deduct tax at source u/s 195 of the Act from the payments made to the non-resident software supplier located in Singapore on the reasoning that the distributor's agreement and end-user's license agreement in the facts of cases before Hon'ble Supreme Court do not create any interest or right in such distributors/end-users, which would amount to use or right to use any copy right.

9. The Ld A.R submitted that the assessee herein is a Singapore resident governed by the DTAA entered between India and Singapore. On the examination of very same DTAA provisions, the Hon'ble Supreme Court has held that the payments given by the distributors/end users to the assessee are not "royalty" within the meaning of provisions of DTAA and hence there was no liability to deduct tax at source from those payments u/s 195 of the Act, since no income is chargeable to tax in India. In the instant case, the AO has assessed the sale proceeds received on sale of licenses as "royalty". In view of the above cited decision of Hon'ble Supreme Court, the sale proceeds received on sale of software licenses cannot be assessed as "royalty". Accordingly, the Ld.AR submitted that the impugned addition made by the AO and confirmed by Ld CIT(A) is liable to be deleted.

10. The Ld. D.R. on the contrary, placed his reliance on the decision rendered by Ld. CIT(A).

11. We heard the parties on this issue and perused the record. As submitted by Ld.A.R., the Hon'ble Supreme Court has examined the issue whether the payments received by non-resident suppliers for selling software licenses are royalty or not in the case of Engineering Analysis Centre of Excellence (P) Ltd (supra). The Hon'ble Supreme Court examined this question considering four types of situations, which has been narrated as under:-

*"**4.** 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 resells the same to resident Indian distributor or end-users.

(iv) The fourth category includes cases wherein computer software is affixed onto hardware and is sold as an integrated unit/equipment by foreign, non-resident suppliers to resident Indian distributors or end-users.

***12.** The Hon'ble Supreme Court analysed sample agreements in respect of all the four categories and gave the following finding:-*

***"45.** A reading of the aforesaid distribution agreement would show that what is granted to the distributor is only a non-exclusive, non-transferable license to resell computer software, it being expressly stipulated that no copyright in the computer programme is transferred either to the distributor or to the ultimate end-user. This is further amplified by stating that apart from a right to use the computer programme by the end-user himself, there is no further right to sub-license or transfer, nor is there any right to reverse-engineer, modify, reproduce in any manner otherwise than permitted by the license to the end-user. What is paid by way of consideration, therefore, by the distributor in India to the foreign, non-resident manufacturer or supplier, is the price of the computer programme as goods, either in a medium which stores the software or in a medium by which software is embedded in hardware, which may be then further resold by the distributor to the end-user in India, the distributor making a profit on such resale. **Importantly, the distributor does not get the right to use the product at all**.*

46.** When it comes to an end-user who is directly sold the computer programme, **such end-user can only use it by installing it in the computer hardware owned by the end-

user and cannot in any manner reproduce the same for sale or transfer, contrary to the terms imposed by the EULA.

47. *In all these cases, 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. Thus, it cannot be said that any of the EULAs that we are concerned with are referable 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 license 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 license or otherwise, and what the Indian publisher will pay for, is the right to reproduce the book, which can then be characterised as royalty for the exclusive right to reproduce the book in the territory mentioned by the license.*

13. After analysing the provisions of Income tax Act, provisions of DTAA, the relevant agreements entered by the assessees with non-resident software suppliers, provisions of Copy right Acts, the circulars issued by CBDT, various case laws relied upon by the parties, the Hon'ble Supreme Court concluded as under:-

"CONCLUSION

168**. Given the definition of royalties contained in Article 12 of the DTAAs 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-tax Act (section 9(1)(vi), along with explanations 2 and 4 thereof), which deal with royalty, not being more beneficial to the assessees, 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."*

14. We also notice that the decision rendered by Hon'ble Karnataka High Court in the case of Samsung Electronics Co Ltd (supra) has been reversed by Hon'ble Supreme Court in paragraph 101-102 of its order. Similarly, the decision rendered in the case of Synopsis International Old Ltd (supra) by Hon'ble Karnataka High Court has been reversed in paragraph 103 – 109 of its order. Before us, the Ld. A.R. submitted that the terms of agreements remain the same during the year under consideration also. Accordingly, as per the decision rendered by Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Pvt. Ltd. (supra), sale proceeds received by the assessee on sale of software licenses cannot be categorized as "Royalty" within the meaning of provisions of DTAA. Accordingly, we set aside the order passed by Ld. CIT(A) on this issue and direct the A.O. to delete the addition made as "royalty" income.

8. We heard the Ld.DR on this issue and perused the record. We find merit in the submissions of the Ld.AR.

Respectfully following the aforesaid view we direct the Ld.AO to delete the addition made as royalty income.

Accordingly these grounds raised by assessee stands allowed.

9. It is submitted by the Ld.AR that, assessee do not wish to press **Ground No. 2** relating to the reopening of assessment under section 147 of the Act.

10. It is also submitted by the Ld. AR that assessee do not wish to press that **Ground No. 3** relating to assessment of amount received as reimbursement of expenses treating the same as "Fee for technical services".

Accordingly these grounds stands dismissed as not pressed.

In the result, the appeal filed by assessee stands partly allowed.

Order pronounced in the open court on 11th October, 2021.

Sd/-	Sd/-
(B.R. BASKARAN)	**(BEENA PILLAI)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 11th October, 2021.
/MS/

Copy to

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

By order

Assistant Registrar
Income-tax Appellate Tribunal
Bangalore