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

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
SMT BEENA PILLAI, JUDICIAL MEMBER

IT(IT)A. No. 188/Bang/2021
Assessment Year: 2017-18

M/s. Cisco Systems International B.V., C/o SRBC & Associates LLP (Authorised Representative) "Divyasree Chambers", First Floor, 'A' Wing, # 11 O' Shaughnessy Road, Langford Gardens, Bengaluru – 560 025. PAN: AADCC9201D	vs.	The Assistant Commissioner of Income Tax, International Taxation (1), Bengaluru.
(Appellant)		(Respondent)

Appellant by	Shri Nageswar Rao, Advocate
Respondent by	Shri Muzaffar Hussain, CIT (DR)

Date of Hearing :	04.10.2021
Date of Pronouncement :	12.10.2021

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER.

Present appeal has been filed by assessee against the final assessment order dated 23.03.2021 passed by JCIT-Intl. Tax, Bangalore for A.Y. 2017-18. It is submitted that the only issue raised by assessee in this appeal relate to treating the receipts of assessee's on account of sale of software to the Indian customers, as royalty.

2. It was submitted that during the relevant year under consideration assessee was also engaged in sale of tangible hardwares like routers, switches, optical network, storage area networking and home networking hardware. Assessee has also submitted that it has provided necessary support services to its customers in relation to the products supplied. In the instant case, we notice that the Ld.AO has extracted relevant clauses of the agreement in the assessment order and they are reproduced by us in the preceding paragraphs. A perusal of the same would show that the assessee is granting license to the integrators and also authorizing the integrator to grant license only for the purpose of using the software.

3. The Ld.AO treated the amount received by assessee under section 9(1)(vi) of the Act, and under the DTAA between India and Netherlands as royalty on which TDS is liable to be deducted under section 195 of the Act. The Ld.AO relied on the decision of *Hon'ble Karnataka High Court* in case of *CIT vs Samsung Electronics Co Ltd.*, reported in *(2011) 16 Taxmann.com 141*, decision of *AAR* in case of *Millennium ITA Software Ltd., Citrix Systems Asia Pacific Ltd.,* to come to the conclusion that the said receipts are taxable as royalty under the provisions of IT Act and India-Netherlands treaty.

4. At the outset, both sides submit that the issue raised on merits in the present appeal stands squarely covered by the decision of *Hon'ble Supreme Court* in case of *Engineering Analysis Centre for Excellent Pvt.Ltd vs CIT* reported in *(2021) 125 Taxmann.com 42.*

5. The Ld.Counsel submitted that, following the decision of *Hon'ble Supreme Court, Hon'ble Karnataka High Court* in *assessee's own case for assessment year 2011-12, in ITA No. 7/2019 by order dated 26/03/2021* decided the issue in favour of assessee.

i) it is the submission of Ld.Counsel that there is no change in terms and conditions of the agreement in the year under consideration also. He submitted that the assessee is not transferring any copyright, but granting only user license.

ii) it has been contended that the decision rendered by the *Hon'ble Supreme Court* in the case of *Engineering Analysis Centre of Excellence (supra)* is followed by the *co-ordinate bench* in AY 2014-15, 2015-16 and 2016-17 and the same should be followed in this year also.

6. We have perused submissions advanced by both sides in light of records placed before us.

7. We note that *Hon'ble Supreme Court* in case of *Engineering Analysis Centre for Excellent Pvt. Ltd. vs CIT (supra)* while considering the issue had looked into the ratio is laid down by the jurisdictional High Court, and the other decisions that was relied on by the Ld.AO. *Hon'ble Supreme Court* in paragraph 27,47,52,168 & 169 observed as under:

> *24. 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 o 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 (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 Sector 105(1) of the Income Tax Act, or such perion 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 riot 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 s 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 lo Section 30 of the Copyright Act, inasmuch as Section 30 of the Copyright Act speaks of granting ar1 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, !east 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 hook. 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 reproduced and make copies of the aforesaid book with the permission of the author it can be said the 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 assessees, the law declared by this Court in the context of 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 DTAAs 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 o 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 asessees, 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 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 deduce 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.

8. Similar view has been taken by the *co-ordinate bench* in *IT(TP)A No. 2542/Bang/2018 & 2812/Bang/2017 order dated 02.07.2021*. In the light of the above observations, and respectfully following the decision of *Hon'ble Supreme Court*, we are of the view that Ld.CIT(A) erred in treating the receipts from sale of software with the support services as royalty.

Accordingly grounds raised by assessee stands allowed.

9. The assessee has filed additional grounds vide application dated 22/04/2021 in the assessment years under consideration, is stated to be not pressed at the time of hearing.

Accordingly we do not consider the admission of additional grounds raised by assessee.

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

Order pronounced in the open court on 12th October, 2021.

Sd/-	Sd/-
(CHANDRA POOJARI)	**(BEENA PILLAI)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 12th 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