IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'D', NEW DELHI

Before Sh. Kul Bharat, Judicial Member

Dr. B. R. R. Kumar, Accountant Member

(Through Video Conferencing)

ITA No. 6383/Del/2017 : Asstt. Year : 2014-15

ACIT, International Taxation, Circle-1(2)(2), New Delhi	Vs	Datamine International Ltd., (Now CAE Datamine International Ltd.), A-41, Ground Floor, Mohan Cooperative Industrial Area, Mathura Road, New Delhi-110044
(APPELLANT)		**(RESPONDENT)**
PAN No. AAACD7600A		

Assessee by : Sh. V. K. Aggarwal, AR
Revenue by : None

Date of Hearing: 29.09.2021		**Date of Pronouncement: 26.11.2021**

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeal has been filed by the Revenue against the order of the ld. CIT(A)-42, New Delhi dated 04.07.2017.

2. Following grounds have been raised by the Revenue:

"1. That in the facts and circumstances of the case, and in law, the ld. CIT(A) erred in deleting the addition made by the AO, and in holding that the revenue received by the assessee from supply of software is not taxable in India as Royalty u/s 9(1)(vi) of the Income Tax Act, as well as Article 13 of the India-UK DTAA.

1.1 That in the facts and circumstances of the case, and in law, the ld. CIT(A) erred in deleting the addition made by the AO, without considering Explanation 4 & 5

to Section 9(1)(vi) which have been inserted by the Finance Act 2012.

1.2 That in the facts and circumstances of the case, and in law, the ld. CIT(A) erred in deleting the addition made by the AO, after holding that even if the receipts were in the nature of Royalty, this arises through the Permanent Establishment (PE) and Article 7 of the India-UK DTAA shall apply disregarding the fact that the PE was not the owner of the copyright, and Royalty income was not effectively connected to the PE and was rightly taxed as Royalty by the AO, under Article 13(3) o the India-UK DTAA and Section 9(1)(vi) of the Income Tax Act.

1.3 That in the facts and circumstances of the case, and in law, the ld. CIT(A) erred in deleting the addition made by the AO, without considering the decisions in Synopsys International Old Ltd. 212 Taxman 454 (Kar.); Verizon Communications Singapore Pte. Ltd. 361 ITR 575 (Mad.) and Viacom 18 Media Ltd. 153 ITD 384 (Mum.).”

3. The assessee company is a branch office of M/s CAE Mining International Ltd, UK (CMIL, UK). The appellant is engaged in the activity of providing mining solutions through software developed by M/s Datamine Corporate Ltd., UK. The appellant claimed that,

a) It is a simple trader in mining software. First, the end user places the order on the appellant. Then on the basis of this order, the appellant places the order on CMIL, UK. Thereafter, CMIL, UK places the order on Datamine Corporate Ltd., UK and buys the relevant software in the form of CD. CMIL, UK sells the same CD to the appellant. The appellant in turn sells the same CD to the end user.

b) The assessee is also being assessed regularly to sales tax on the sale of goods, i.e. Software.

c) The appellant has filed its return of income for the A.Y. 2014-15 on 27/11/2015 declaring business income of Rs.92,18,420/-.

d) The case of the appellant is covered under Indo-UK DTAA. In particular, the case of the assessee is covered under the exclusionary clause 5(a) of Article 13 of Indo-UK DTAA.

e) The case of the assessee is not covered under clause 3(a) of Article 13 of Indo-UK DTAA because the assessee has derived the business receipts and not royalty by selling software.

f) The amendment made in the definition of royalty in the IT Act is not applicable to the DTAA. Since, there is a market difference in the definition of royalty in the Act and in the DTAA, the definition in the Act is not applicable to the appellant.

g) The accounts of the assessee are duly audited. No defect was found in the books of accounts. Books of accounts are rejected. None of the items of expenditure was found to be disallowed. Under the circumstances, business income could not be estimated and actual business income as per accounts should have been taxed.

4. However, the AO treated the receipts from supply of software as royalty income and the export services as Fee for Technical Services with the following observations:

"On the basis of the above, it is clear that the assessee's receipts 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 UK DTAA. This royalty income could not be considered to be effectively connected to the PE of the assessee in India as none of the copyright in the given softwares are owned by branch office in India. The parent company is the sole owner of the copyright either directly or indirectly. The branch office in India does not own any of the copyright for which royalty income accrues/arises in India. Therefore, it is held that softwares royalty income received by the company should be brought to tax on gross basis of taxation. Further, the export services provided by company qualify as Fee for Technical Services (FTS). Therefore, amount of Rs. 2,74,16,326/- is to be taxed @ 10% on gross basis."

5. Aggrieved the assessee filed appeal before the ld. CIT(A).

6. The ld. CIT(A) held that,

"the appellant is a branch office of Datamine International Limited (DIL), UK. The appellant, on receipt of the orders from the customers places, the order on DIL UK, which is the ultimate holding company, which in turn buys the relevant software in the form of CDs from DCL. The appellant thereafter makes sale of software for perpetuity as per the terms of the agreement. The appellant submitted that the buyer is prohibited from making further copies for the use except for backup purposes. The appellant filed before me a detailed chart which shows that the same buyers purchased multiple number of CDs of the same software, which would certainly not have been

required, if the buyer was given right to make further copies. In view of this, it is evident that the license granted by the appellant was limited to those rights which were necessary to enable the licensee to operate the program. In view of this, the appellant's case is squarely covered by the decision of Hon'ble Delhi High Court in the case of DIT versus Infrasoft Ltd (supra) and CIT Vs. Dynamic Vertical Software India Private limited (supra). I find that the appellant is also being assessed to Sales Tax on the sale of such software. The appellant's case is also further covered by the ITAT Delhi in the case of Haliburton Exports Inc. Vs. ACIT (supra) and of the ITAT (Hyderabad) in the case of M/s Infotech Enterprises Ltd Vs. Additional CIT (supra).

6.3 The learned AO has relied upon the amendment brought in section 9(1)(vi), by virtue of insertion of explanation to Section 9 by the Finance Act 2012. However, in view of the decision of Hon'ble ITAT Mumbai in the case of B4U International Holding Ltd Vs. DCIT (supra), and of ITAT Delhi in the case of Convergys Customer Management Company (supra), it is a settled issue that the amendment in the in Section 9(1)(vi) will not impact the provisions of the relevant Double Taxation Avoidance Agreements.

6.4 It is seen that the definition of 'Royalty' in the Indo-UK DTAA is quite restrictive, compared to the definition given in section 9(1)(vi) of the Income Tax Act, 1961, and therefore the appellant being a non-resident taxpayer, was eligible to exercise the option to choose the beneficial provisions in the form of section 90 (2). It is seen that in the Indo-Kazakhastan

DTAA, the definition of the term "royalties" clearly and specifically included "software" in the ambit of "Copyright of literary, artistic, scientific work". However "software" is not included in the definition of "Royalty" in the case of in the Indo-UK DTAA.

6.5 It is seen that as per Article 13(6) of Indo-UK DTAA, if the royalty arises through a permanent establishment to a non-resident, Article 7 shall apply. Since in the case of the appellant, the main business was that of trading of CDs containing software to the end-user procured from the head office of the appellant company and for which purpose the appellant company, being the branch office in India, itself served as the permanent establishment, any income even if were in the nature of royalty, had to be taxed as business income in terms of the Article 7. In view of the above mentioned various grounds, I hold that the receipt of the appellant from sale of software to end-users was not in the nature of "royalty". My Ld. Predecessor has also decided this issue for AY 2008-09 on the similar lines. I have also decided this issue for AY 2012-13 on the similar lines. Accordingly Ground No. 3 and 4 are decided in favour of the appellant."

7. Heard the arguments of both the parties and perused the material available on record.

8. The Co-ordinate Bench of ITAT in assessee's own case in ITA No. 5651/Del/2010 order dated 14.03.2016. The relevant portion of the order is reproduced herewith for ready reference which is as under:

"12.7. There is another dimension of this issue. While going through the Distributors Agreement, we have noted that the assessee has simply purchased shrink-wrapped software or off-the-shelf software from the Corporate. The assessee was not allowed to use the copyright of such software, which obviously vest in the Corporate. Since the assessee itself has not acquired any copyright in the mining software, it cannot resell or transfer anything more than what it has acquired. We, therefore, hold that the consideration received by the assessee for sale of shrink wrapped software cannot be considered as `Royalties' within the meaning of Article 13 of the DTAA as the same is a consideration for sale of a copyrighted product and not use of any copyright.

13.1. Now we take up the contention of the ld. DR that provisions of section 9(1)(vi) should be applied to determine the taxability of the amount. It was contended that as the ld. AR has admitted the amount of sale of software covered under Explanation 4 to section 9(1)(vi), the same should be taxed as such.

13.2. In this regard, we find that sub-section (1) of section 90 of the Act provides that the Central Government may enter into an agreement with the Government of any other country for the granting of relief of tax in respect of income on which tax has been paid in two different tax jurisdictions. Sub-section (2) of section 90 unequivocally provides that where the Central Government has entered into an agreement with the Government of any country outside India under sub-section (1) for granting relief of tax or for avoidance of double taxation,

then, in relation to the assessee to whom such agreement applies, ' the provisions of this Act shall apply to the extent they are more beneficial to that assessee'. The crux of sub-section (2) is that where a DTAA has been entered into with another country, then the provisions of the Act shall apply only if they are more beneficial to the assessee. In simple words, if there is a conflict between the provisions under the Act and the DTAA, the assessee will be subjected to the more beneficial provision out of the two. If the provision of the Act on a particular issue is more beneficial to the assessee vis-a-vis that in the DTAA, then such provision of the Act shall apply and vice versa. The Hon'ble Supreme Court in the case of CIT v. P.V.A.L. Kulandagan Chettiar (2004) 267 ITR 654 (SC) has held that the provisions of sections 4 and 5 are subject to the contrary provision, if any, in DTAA. Such provisions of a DTAA shall prevail over the Act and work as an exception to or modification of sections 4 and 5. Similar view has been taken by the Hon'ble Bombay High Court in CIT v. Siemens Aktiongesellschaft (2009) 310 ITR 320 (Bom.). In the light of the above discussion, it becomes vivid that if the provisions of the Treaty are more beneficial to the assessee vis-a-vis its counterpart in the Act, then the assessee shall be entitled to be ruled by the provisions of the Treaty. We have held above that amount from sale of software falls under Article 7 (Business profits) and not under Article 13 (Royalties). Since the position as per the DTAA is more beneficial to the assessee in comparison with that under the Act, in which the receipts admittedly fall under section 9(1)(vi), we hold that the assessee is entitled to exercise option in his favour by choosing to be governed by the DTAA.

14.1. Be that as it may, we find that there is another aspect of the matter. This is without prejudice to our finding that consideration for sale of software does not fall within the scope of the term `Royalties'. Even if the view point of the AO is accepted for a moment, with which we do not really agree, that such amount falls under para 3(a) of Article 13, in our considered opinion, even then the amount cannot be taxed as `Royalties' because of the operation of para 6 of Article 13, which reads as under:-

"6. The provisions of paragraphs 1 and 2 of this Article shall not apply if the beneficial owner of the royalties or fees for technical services, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties or fees for technical services arise through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the right, property or contract in respect of which the royalties or fees for technical services are paid is effectively connected with such permanent establishment or fixed base. In such case, the provision of Article 7 (Business profits) or Article 15 (Independent personal services) of this Convention, as the case may be, shall apply."

14.2. Para 6 of Article 13, to the extent applicable, states that the provisions of paragraphs 1 and 2 of this Article shall not apply if the beneficial owner of the royalties or fees for technical services, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties or fees for technical services arise through a

permanent establishment situated therein. In simple terms, this means that the amount falling under para 3 of Article 13 cannot be taxed as Royalties under paras 1 and 2, if the beneficial owner of the royalties, being a resident of a Contracting State (UK), carries on business in the other Contracting State (India) in which the royalties arises through a permanent establishment situated therein (India). Once these conditions are satisfied, then the later part of para 6 comes into play, as per which the provision of Article 7 (Business profits) of this Convention shall apply. In other words, on the fulfillment of the conditions in the first part of para 6, the amount shall not be considered as `royalties' under paras 1 and 2 of Article 13, but shall fall for consideration under Article 7 of the DTAA, being, `Business profits'. There is no dispute on the fact that the assessee is a UK company having its branch office in India (which is its permanent establishment) and the transactions in question are sale of computer software made by such permanent establishment to certain parties in India. This shows that all the requisite conditions for the applicability of first part of para 6 of Article 13 are fully satisfied. On such fulfillment, the amount of `royalties' is liable to be considered under Article 7 (Business profits). As the assessee has declared such receipts under Article 7, the view taken by the authorities in this regard, shifting such amount from Article 7 (business profits) to Article 13 (royalties), being contrary to the mandate of the DTAA, is liable to be and is hereby set aside.

15. In the final analysis, we approve the assessee's stand on the sale of computer software as business profits, by jettisoning the Revenue's viewpoint of royalty. This ground is allowed."

9. The Supreme Court of India on in the case of Engineering Analysis Centre of Excellence Private Limited(LL 2021 SC 124) settled the long-running contentious issue over how payments made by Indian customers to non-resident suppliers for the use or resale of computer software should be characterised, providing much-needed tax certainty on the issue. On the provisions of DTAA.

10. The excerpts of the order of the Hon'ble Apex Court is as under:

"11. SC observes that all the DTAAs involved in the current case are based on OECD Model Convention and are similar. Examines India-Singapore DTAA and refers to CBDT Circular No. 333 dated April 2, 1982 to clarify that the expression "royalty", when occurring in section 9 of the Income Tax Act, has to be construed with reference to Article 12 of the DTAA. Holds that royalties are payments of any kind received as consideration for "the use of, or the right to use, any copyright" of a literary work, which includes a computer programme or software.

12. Observes that Article 30 of India-USA DTAA carves out a distinction in 'entry into force' where, provisions of the DTAA will apply when 'taxes are withheld at source' only in the case of USA, not India. Examines the equivalent of Article 30 of Indo-US DTAA in other DTAAs of India and infers that logic behind the article in the aforementioned DTAA is connected with US1 domestic tax laws and not Indian domestic law governing TDS liability. Highlights that OECD Commentary on Article 30 on 'entry into force' provides that the aforementioned article depends on domestic laws of contracting state.

13. On application of DTAA provisions (on account of Article 30 of India-USA DTAA) to TDS u/s 195, rejects Revenue's contention that section 195 deals with deduction made prior to assessment to tax, not being in the nature of tax and a stage prior to declaring a person as 'assessee in default'. Refers to SC ruling in CE Technology and clarifies that a

deduction is to be made u/s 195 only if tax is payable by non-resident assessee, holds that charging and machinery provisions u/s 9 and 195 are interlinked.

14. SC supports its observation by clarifying that as per Revenue's contention that DTAA is inapplicable while discharging TDS liability u/s 195, deduction to be made u/s 195 would be much higher than the respective DTAA rate which would result in a disproportionate deduction of tax by the resident as compared to the rates applicable to the non-resident.

On definition of Royalty in DTAA vis-a-vis the Act

15. SC highlights that the question posed by SC in GE Technology, before the HC was whether ITAT was justified in holding that the amounts paid by the appellants to the foreign software suppliers did not amount to royalty, as a result of which, no liability to deduct TDS arose and observes that the expression 'royalty' under Explanation 2 to section 9(1)(vi) is wider than the expression contained in India-Singapore DTAA in the following aspects:

(i) it also includes lump sum consideration not chargeable under capital gains;
(ii) 'all or any rights' includes transfer of license; and
(iii) includes that term transfer 'in respect of any copyright of any literary work.

16. SC clarifies that transfer of 'all or any rights in respect of' u/s 9(1)(vi) correspond to sections 14(a), 14(b) and 30 of the Copyright Act, and is more expansive that DTAA provision which reads - 'use of, or the right to use' any copyright.

17. On application of explanation 4 to section 9(1)(vi), SC holds that explanation 4 is not a clarificatory of the position of the law as it stood since 1976, since:

(i) explanation 3 refers to computer software for the first time w.e.f. 1991 and explanation 4 cannot apply to any right for the use of or the

right to use computer software even before the term "computer software" was inserted in the statute;

(ii) section 2(o) of the Copyright Act, the term "computer software" was introduced for the first time in the definition of a literary work, and defined under section 2(ffc) only in 1994.

18. On application of withholding provisions prior to insertion of explanation 4 on the presumption that explanation 4 always existed in the statute, SC relies upon tow latin maxims - lex non cogit ad impossibilia, i.e., the law does not demand the impossible and impotentia excusat legem i.e., when there is a disability that makes it impossible to obey the law, the alleged disobedience of the law is excused. Relies on SC ruling in Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal, where on the basis of the aforementioned legal maxims, the respondent was relieved of the mandatory obligation to furnish certificate under the Evidence Act, 1872, after failing to obtain it despite several steps taken by the respondent.

19. Refers to Bombay HC ruling in NGC Networks (India) in the context of explanation 6 to section 9(l)(vi) introduced in 2012 w.r.e.f. 1976 and Western Coalfields in the context of retrospective amendment to section 17(2)(ii) to highlight the impossibility of discharging withholding obligation. Holds that person mentioned in section 195 cannot be expected to do the impossible, namely, to apply the expanded definition of "royalty" inserted by explanation 4 to section 9(l)(vi), for the assessment years in question.

On various AAR rulings and HC judgments

20. SC upholds the rationale behind AAR rulings in Dassault Systems and Geoquest Systems whereas held that Citrix Systems did not state the law correctly. SC found that on first principles, the extract from Copinger and Skone James on Copyright (14th Edition) (1999) referred to in Dassault Systems made it clear that the ownership of copyright in a work is different from the ownership of the physical material in which the

copyrighted work may be embedded which got completely missed out in Citrix Systems.

21. SC finds the ruling in Citrix Systems self-contradictory as it laid down that the DTAA which defines 'royalties' be given a go-bye and instead be understood in common parlance and found it difficult as to why the AAR was not constrained by the definition of 'copyright' as per section 14 of the Copyright Act since as per section 16 of the Copyright Act no person is entitled to copyright otherwise than under the provisions of the Copyright Act or any other law in force.

22. SC finds the judgment of Samsung Electronics defective as the error same as the error made in Citrix Systems was made by Karnataka HC i.e., no distinction was made between computer software that was sold/licensed on a CD/other physical medium and the parting of copyright in respect of any of the rights or interest in any of the rights mentioned in sections 14(a) and 14(b) of the Copyright Act.

23. SC also set aside the judgment in Synopsis International as incorrect on the following grounds:

(i) incorrectly held that the expression 'in respect of' in explanation 2(v) of section 9(1)(vi) would become otiose when interpreted as synonymous to 'on' or 'attributable to' which has been so interpreted by SC in State of Madras v. Swastik Tobacco Factory, (1966) 3 SCR 79 in the context of tax statute.

(ii) completely missed section 16 of the Copyright Act which states that ’no person shall be entitled to copyright...otherwise than under and in accordance with the provisions of this Act or of any other law for the time being in force1 and makes it clear that the expression 'copyright' has to be understood only as is stated in section 14 of the Copyright Act and not otherwise;

(iii) wholly incorrect in stating that storage of computer programme per se would constitute infringement of copyright and was directly contrary t:o the terms of section 52(l)(aa) of the Copyright Act;

(iv) erred in referring to section 9(1)(vi) of the Act and applying it to India-Ireland DTAA and failed to properly appreciate explanation 4 to section 90(2) of the Act;

(v) incorrect in finding that when a copyrighted article is sold, the end-user gets the right to use the intellectual property rights embodied in the copyright which would therefore amount to transfer of an exclusive right of the copyright owner in the work, is also wholly incorrect.

24. SC approved the judgments by Delhi HC in Ericsson, Nokia Networks, Infrasoft, ZTE Corporation and added that these judgments also accord with the OECD Commentary on which most of India's DTAAs are based. SC summarized the law laid down by Delhi HC as follows:

"i) Copyright is an exclusive right, which is negative in nature, being a right to restrict others from doing certain acts.

ii) Copyright is an intangible, incorporeal right, in the nature of a privilege, which is quite independent of any material substance. Ownership of copyright in a work is different from the ownership of the physical material in which the copyrighted work may happen to be embodied. An obvious example is the purchaser of a book or a CD/DVD, who becomes the owner of the physical article, but does not become the owner of the copyright inherent in the work, such copyright remaining exclusively with the owner.

iii) Parting with copyright entails parting with the right to do any of the acts mentioned in section 14 of the Copyright Act. The transfer of the material substance does not, of itself, serve to transfer the copyright therein. The transfer of the ownership of the physical substance, in which copyright subsists, gives the purchaser the right to do with it whatever he pleases, except the right to reproduce the same and issue it to the public, unless such copies are already in circulation, and the other acts mentioned in section 14 of the Copyright Act.

iv) A licence from a copyright owner, conferring no proprietary interest on the licensee, does not entail parting with any copyright, and is different from a licence issued under section 30 of the Copyright Act, which is a

licence which grants the licensee an interest in the rights mentioned in section 14(a) and 14(b) of the Copyright Act. Where the core of a transaction is to authorize the end-user to have access to and make use of the "licensed" computer software product over which the licensee has no exclusive rights, no copyright is parted with and consequently, no infringement takes place, as is recognized by section 52(1)(aa) of the Copyright Act. It makes no difference whether the end-user is enabled to use computer software that is customised to its specifications or otherwise.

v) A non-exclusive, non-transferable licence, merely enabling the use of a copyrighted product, is in the nature of restrictive conditions which are ancillary to such use, and cannot be construed as a licence to enjoy all or any of the enumerated rights mentioned in section 14 of the Copyright Act, or create any interest in any such rights so as to attract section 30 of the Copyright Act.

vi) The right to reproduce and the right to use computer software are distinct and separate rights..... the former amounting to parting with copyright and the latter, in the context of non-exclusive EULAs, not being so."

On Doctrine of Exhaustion

25. SC surveys domestic as well as foreign cases dealing with the first sale doctrine, including judgments of the Delhi HC in Warner Bros, and John Wiley & Sons. Notes that the first sale doctrine was statutorily recognized for cinematographic films following the 2012 amendment to section 14(d)(ii) of the Copyright Act, 1957, which deleted the expression 'regardless of whether such copy has been sold or given on hire on earlier occasion'. Clarifies that u/s 14(a)(ii) of Copyright Act, the distribution right subsists with the owner of copyright to issue copies of the work to the public, to the extent such copies are not copies already in circulation, thereby manifesting a legislative intent to apply the doctrine of first sale/principle of exhaustion. Notes that a similar amendment was made in 1999 to section 14(b)(ii) which defined copyright with respect to computer

programmes. Infers that the first sale doctrine does applies to computer programmes.

26. SC notes that section 14(b)(ii) applies only to the 'making' of copies of the computer programme and then selling them and the object of the provision is to interdict reproduction of the said computer programme and consequent transfer of the reproduced computer programme to subsequent acquirers/end-users. Clarifies that sale by the author of a computer software to a distributor for onward sale to an end-user, cannot possibly be hit by the provisions of section 14(b)(ii).

27. SC highlights that in the instant case, the distributor cannot use the computer software at all and has to pass on the said software, as shrink-wrapped by the owner, to the end-user for a consideration, the distributor's profit margin being that of an intermediary who merely resells the same product to the end- user. Holds that there is no transfer of the interest in copyright pertaining to the distribution of the computer programme to the distributor.

28. SC holds that the distribution of the copyrighted computer software, as done in the cases in appeal does not constitute the grant of an interest in copyright under section 14(b)(ii), necessitating the deduction of tax at source under section 195.

On OECD Commentary.

29. SC expresses that DTAAs that have been entered into by India with other Contracting States have to be interpreted liberally with a view to implement the true intention of the parties.

30. Observing that all the DTAAs which are subject matter of consideration in the present case have, as their starting point, either the OECD Model Tax Convention and/or the UN Model Double Taxation Convention between Developed and Developing Countries insofar as the taxation of royalty for parting with copyright is concerned, SC highlights the importance of OECD commentary provided in the OECD Model Tax Convention.

31. SC remarks "When the definition of "royalties" is seen in all the DTAAs that we are concerned with, it is found that "royalties" is defined in a manner either identical with or similar to the definition contained in Article 12 of the OECD Model Tax Convention. This being the case, the OECD Commentary on the provisions of the OECD Model Tax Convention then becomes relevant."

32. As regards India's position w.r.t. OECD commentary 'reserving its right' to tax royalties, SC opines, "It is significant to note that after India took such positions qua the OECD Commentary, no bilateral amendment was made by India and the other Contracting States to change the definition of royalties contained in any of the DTAAs that we are concerned with in these appeals, in accordance with its position." Also refers to Delhi HC ruling in New Skies Satellite BV where it was held that mere taking of positions with respect to the OECD Commentary would not alter the DTAA's provisions, unless they are actually amended by a bilateral re-negotiation. Thus, SC states that the OECD Commentary on Article 12 of the OECD Model Tax Convention, incorporated in the DTAAs, will continue to have persuasive value as to the interpretation of the term "royalties" contained therein.

33. SC rejects Revenue's reliance placed on the E-Commerce Report 2016 that proposed equalization levy on specified digital services and also recommended that withholding tax on digital transactions would require an express inclusion in tax treaties in order to be feasible. SC points out that these reports do not carry the matter much further as they are recommendatory reports expressing the views of the committee members, which the Government of India may accept or reject. SC elucidates that even if the position put forth in the aforementioned reports were to be accepted, a DTAA would have to be bilaterally amended before any such recommendation can become law in force for the purposes of the Act.

34. As regards reliance placed by the Revenue on SC ruling in Commissioner of Customs v. G.M. Exports, where four propositions were culled out in the context of the levy of an anti-dumping duty in consonance with the General Agreement on Tariffs and Trade (GATT), 1994, SC states that the conclusions drawn in the aforesaid case have "no direct relevance

to the facts at hand as the effect of section 90(2) of the Income Tax Act, read with explanation 4 thereof..."

35. SC also refers to CBDT Circular No. 10/2002 dated Oct 9, 2002 whereby CBDT, after referring to Sec.195 had itself made a distinction between remittances for royalties and remittances for supply of articles or computer software in the proforma of the certificate to be issued as per the circular. SC opines "This is one more circumstance to show that the Revenue has itself appreciated the difference between the payment of royalty and the supply/use of computer software in the form of goods, which is then treated as business income of the assessee taxable in India if it has a PE in India."

11. The Hon'ble Apex Court held,

"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.

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 (AAR) (supra) is set aside. The appeals from the impugned judgments of the High Court of Delhi are dismissed."

12. Hence, keeping in view the judgments of the Co-ordinate Bench of ITAT in the assessee's own case and that of the Hon'ble Apex Court, we hereby dismiss the appeal of the Revenue.

Order Pronounced in the Open Court on 26/11/2021.

Sd/-	Sd/-
(Kul Bharat)	**(Dr. B. R. R. Kumar)**
Judicial Member	**Accountant Member**

Dated: 26/11/2021

Subodh Kumar, Sr. PS
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR