

IN THE INCOME TAX APPELLATE TRIBUNAL  
“C” BENCH : BANGALORE

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

Sl. No.	M.P No.	A.Y
1	99/Bang/2021 (In 1971/Bang/2019)	2016-17
2	100 to 111/Bang/2021 (In 1972 to 1983/Bang/2019)	2017-18
3	112 to 122/Bang/2021 (In 1984 to 1994/Bang/2019)	2018-19
4	123 to 132/Bang/2021 (In 1995 to 2004/Bang/2019)	2019-20

Sl. No.	IT(ITA) No.	A.Y
1	1971/Bang/2019	2016-17
2	1972 to 1983/Bang/2019	2017-18
3	1984 to 1994/Bang/2019	2018-19
4	1995 to 2004/Bang/2019	2019-20

M/s Edgeverve Systems Ltd., 44/97A Konappana Agrahara, Hosur Road, Electronic City, Bengaluru-560100. PAN – AADCE 6300 K	Vs.	The Asst. Commissioner of Income-tax (International Taxation), Circle-1(1), Bengaluru.
APPELLANT		RESPONDENT

Assessee by	:	Shri Padamchand Khincha, C.A
Revenue by	:	Smt. Priyadarshini Besaganni, JCIT (DR)

Date of hearing	:	10.12.2021
Date of Pronouncement	:	13.12.2021

**ORDER**

**PER BENCH:-**

**MISCELLANEOUS APPLICATIONS:-**

All the 34 miscellaneous applications have been filed by the assessee seeking recall of the common order dated 03-01-2020 passed by the Tribunal ex-parte, without hearing the assessee. All these appeals relate to the assessment years 2016-17 to 2019-20.

2. The Ld A.R Shri Padamchand Khincha, Chartered Accountant submitted that he was given power of attorney to represent the impugned appeals before the Tribunal. However, on the date of hearing of the above said appeals, he was arguing before another bench and hence he could not be present before the bench, when these appeals were called out. Hence the Tribunal has disposed of the appeals, ex-parte without hearing the assessee. He submitted that he appeared before the bench subsequently, but he was informed that all the appeals have already been heard. Accordingly, he submitted that non-appearance before the bench on the date of hearing was not deliberate or intentional. Accordingly he submitted that there was sufficient cause for not appearing before the bench and accordingly prayed that the impugned common order passed in all the 34 appeals may kindly be recalled exercising power given under Rule 24 of the Appellate Tribunal Rules, 1963.

3. The Ld D.R submitted that the Tribunal has passed detailed order following the decision rendered by jurisdictional Hon'ble Karnataka High Court. Hence, there is no mistake apparent from record in the order passed by the Tribunal.

4. We heard the parties and perused the record. We notice that the Ld Representative of the assessee could not appear before the bench for the reason that he was arguing another case before another bench. He also submitted that he appeared before the bench, which heard these appeals, subsequently on the very same day, but he was informed that the appeals have already been heard. Under these set of facts, we are of the view that there was sufficient cause for the assessee for non-appearance. Accordingly, exercising the power granted to the Tribunal under Rule 24 of the Appellate Tribunal Rules, 1963, we recall the ex-parte order passed in all the 34 appeals.

**APPEALS FILED BY THE ASSESSEE:-**

5. The Ld A.R submitted that all these appeals may also be disposed of, since the issues contested therein are now covered by the decision rendered by Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence P Ltd Vs. CIT (2021) (125 taxmann.com 432). Accordingly, with the concurrence of both the parties, all these appeals were taken up for hearing.

6. The Ld A.R submitted that that the assessee filed all these appeals before Ld CIT(A) u/s 248 of the Act denying its liability to deduct tax at source. The assessee had initially paid the TDS amount applicable to the payments made to the Non-residents and has filed these appeals denying its liability to deduct TDS from those payments. The issues contested in all these appeals broadly involve the question whether the payments made to various non-resident persons are for the right to use any copyright and whether such payments fall under the category of "royalty", requiring

deduction of tax at source. He submitted that the above said issue now stands covered by the decision rendered by Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence P Ltd Vs. CIT (2021) 125 taxmann.com 432, wherein the decision rendered by Hon'ble Karnataka Court in the case of Samsung Electronics Co Ltd (ITA Mos. 2808/2005 (16 taxmann.com 141)(Kar) was reversed. He submitted that the Ld CIT(A) had followed the decision rendered by Karnataka High Court in the case of Samsung Electronics Co Ltd (supra) to decide the issue against the assessee. In view of the decision rendered by Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence P Ltd (supra), the decision rendered by Ld CIT(A) needs to be reversed.

7. The Ld. D.R. submitted that the decision rendered by Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence P Ltd (supra) cannot be blindly followed. She submitted that each payment made by the assessee needs to be examined on the basis of the agreement entered between the assessee and the suppliers of software in order to find out whether there was transfer of copy right or not. Accordingly, the Ld. D.R. submitted that the entire issues may be restored to the file of the A.O. for examining it afresh and assessee may be directed to furnish the agreements/ other information and explanations that may be called for by the A.O.

8. We heard the parties. We notice that the Ld CIT(A) has followed the decision rendered by Hon'ble Karnataka High Court in the case of Samsung Electronics Co. Ltd (supra) to decide the issues against the assessee. However the above said decision has

since been reversed by Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence P Ltd (supra). The issue of granting license to use software was examined in the context of its taxability as royalty by Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence (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.<sup>3</sup>
- (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.<sup>4</sup>
- (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 seller, resells the same to resident Indian distributors or end-users.<sup>5</sup>
- (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.

The Hon'ble Supreme Court analysed the agreements entered in respect of all the four categories mentioned above and gave 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 licence 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 licence 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 "licence" that is granted *vide* the EULA, is not 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 is 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 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 licence 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 licence 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 licence.

9. After analysing the provisions of Income tax Act, provisions of DTAA, the relevant agreements entered by the assesseees 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 DTAAAs 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 assesseees, 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.

11. We notice that the Ld CIT(A) has also referred to Copy right Act in his order. It is also pertinent to mention that the Hon'ble Supreme Court has analysed the provisions of Copy right Act and their applicability to the payments made for use of software. 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.

12. However, as rightly pointed out by Ld D.R, we are of the view that the issues contested in all these appeals require fresh examination at the end of Ld CIT(A) applying the ratio of the decision rendered by Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence P Ltd (supra). Accordingly, we set aside the orders passed by Ld CIT(A) in all these appeals and restore all the issues to his file for examining them afresh applying the ratio of the decision rendered by Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence P Ltd (supra).

13. In the result, all the miscellaneous applications are allowed and all the appeals filed by the assessee are treated as allowed for statistical purposes.

Order pronounced in the open court on 13th December 2021.

**Sd/-**  
**(Beena Pillai)**  
**Judicial Member**

**Sd/-**  
**(B.R Baskaran)**  
**Accountant Member**

Bangalore,  
Dated, 13<sup>th</sup> December 2021

/ vms /

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

1. Date of Dictation .....
2. Date on which the typed draft is placed  
before the dictating Member .....  
Date on which the approved draft comes to Sr.P.S
3. ....
4. Date on which the fair order is placed  
before the dictating Member .....
5. Date on which the fair order comes back to the Sr.  
P.S. ....
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