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

BEFORE SH. R.K. PANDA, ACCOUNTANT MEMBER
AND
SH. N. K. CHOUDHRY, JUDICIAL MEMBER
(THROUGH VIDEO CONFERENCING)

ITA No. 140/Del/2021
Assessment Year: 2017-18

M/s. Nagravision S.A. **C/o. Ernst & Young LLP,** **Golf View Corporate** **Tower,Tower B, Sector 42,** **Golf Course Road, Gurugram** **PAN : AADCN6048B** **(APPELLANT)**	**Vs**	**DCIT** **Circle-2(2)(2),** **International Taxation,** **New Delhi** **(RESPONDENT)**

Appellant by	Smt. Ananya Kapoor, Adv.
Respondent by	Ms. Naina Soin Kapil, CIT

Date of hearing:	06/01/2022
Date of Pronouncement:	31/01/2022

ORDER

PER N. K. CHOUDHRY, JM:

The instant appeal has been preferred by the Assessee/Appellant herein against the Assessment Order dated 28-12-2020 and the rectification Order dated 11-01-2021, passed by the Deputy Commissioner Income Tax, Circle Int. Tax. 2(2)(2), (herein after referred to as " Ld. DCIT ") respectively u/s. 143(3) r.w.s 144C (13) and 154 of the Income Tax Act (for short 'the Act') for the A.Y. 2017-18.

2. In this case, the Ld. DCIT has passed the Assessment order dated 28-12-2020 and assessed the income of the Appellant to the tune of Rs. 55,72,38,772/-and also ordered for penalty proceedings u/s. 270 A of the Act.

Thereafter the Appellant filed anApplication u/s 154 of the Act for rectification of the said Assessment Order to the extent to allow the tax rate at 10% without Surcharge and Cess as per India-Switzerland tax treaty. By considering the submissions of the Appellant, though the said rectification sought by the Appellant was allowed by the ld. DCIT by passing Rectification Order dated 11.01.2021 and assessing the income of Rs. 55,72,38,772/- u/s. 154 r.w.s. 143(3) of the Act., however the Ld. DCIT restricted the credit of TDS at Rs. 5,57,23,879 instead of Rs. 5,66,27,192/- previously allowed to the Appellant vide assessment order dated 28 December 2020 passed u/s 143(3) r.w.s. 144C(13) of the Act.

3. The Appellantbeing aggrieved by the said Assessment order and Rectification order,preferred the instant appeal by raising following grounds of appeal.

"1. That on the facts and circumstances of the case and in law, the assessment order dated 28 December 2020 ('impugned order') passed by the Learned Deputy Commissioner of Income Tax, Circle 2(2)(2), International Taxation, Delhi (hereinafter referred to as 'the Ld. AO') under section ('u/s') 143(3) read with section 144C(13) of the Income-tax Act, 1961 ('the Act'), pursuant to the directions of the Learned Dispute Resolution Panel -2, Delhi ('the Ld. DRP'), rectified vide order dated 11 January 2021 passed u/s 154 read with section 143(3) of the Act, is bad in law.

2. That on the facts and circumstances of the case and in law, the Ld. AO has erred in passing the impugned order which is based on surmises and conjectures, and is therefore, bad in law and void-ab-initio.

Non-taxability of revenues from supply of Conditional

Access Systems ('CAS') and Middleware products (i.e., standard software products)

3. That on the facts and circumstances of the case and in law, the Ld. AO has erred in alleging that the consideration earned by the Appellant from supply of CAS and Middleware products to the Indian customers falls within the ambit of 'royalties' as defined u/s 9(l)(vi) of the Act and Article 12(3) of the India-Swiss Confederation Double Taxation Avoidance Agreement ('India-Swiss tax treaty').

4. That on the facts and circumstances of the case and in law, the Ld. AO has erred in disregarding that the revenue earned by the Appellant from supply of CAS and Middleware products represents business income, which is not taxable in India in the absence of any Permanent Establishment ('PE') of the Appellant in India, in accordance with the provisions of the Act as well as Article 5 read with Article 7 of the India-Swiss tax treaty.

Shortfall in grant of credit for Taxes Deducted at Source ('TDS') and initiation of penalty proceedings

5. That the Ld. AO has erred in restricting the credit for TDS to Rs. 5,52,23,879 as per the rectification order dated 11 January 2021 passed u/s 154 of the Act r.w.s. 143(3) of the Act vis-a-vis TDS credit amounting to Rs. 5,66,27,192 as claimed by the Appellant in the RoI and previously allowed to the Appellant by the Ld. AO vide the assessment order dated 28 December 2020 passed u/s 143(3) r.w.s. 144C(13) of the Act.

6. That the Ld. AO has erred in initiating penalty proceedings u/s 270A of the Act.

The Appellant submits that each of the above grounds are independent and without prejudice to one other.

That the Appellant reserves its right to add, alter, amend, substitute or withdraw any ground of appeal either before or at the time of hearing of this appeal.

The Appellant prays that appropriate relief be granted on the said grounds of appeal and the facts and circumstances of the Appellant's case."

4.Heard the parties and perused the material available on record. The Ground No. 1 and 2 raised before us are general in nature, hence do not require specific adjudication.

4.1 In support of grounds no. 3 and 4, the Appellant has submitted thatthe consideration earned by the Appellant from supply of CAS and Middleware products to the Indian customers do not falls within the ambit of 'royalties' as defined u/s 9(l)(vi) of the Act and Article 12(3) of the India-Swiss Confederation Double Taxation Avoidance Agreement ('India-Swiss tax treaty').

Further, the revenue earned by the Appellant from supply of CAS and Middleware products,though represents business income, however in the absence of Permanent Establishment ('PE') of the Appellant in India,the same is not taxable in India, as per the provisions of the Act as well as Article 5 read with Article 7 of the India-Swiss tax treaty.

4.2 It was also claimed by the Appellant that issues raised in grounds no 3 and 4, are squarely covered by the order of the Hon'ble Tribunal in Appellant's own case i.e. ITA No.9130/Del/2019 AY 2016-17 decided on 06-07-2020 and recent Judgement of the Hon'ble Apex Court in Engineering Analysis Centre for ExcellencePrivateLimitedVsCommissioner of IncomeTax&Another –AIR2021SC124/432ITR471(SC).

4.3 The Ld. DR did not refute the claim of the Appellant.

4.4 We have given thoughtful consideration to the submissions of the Appellant and perused the order and judgement as referred above by the Appellant and observe that the issues under consideration as raised vide grounds no. 3 and 4 in this appeal, are identically the same, as have been decided by the Hon'ble Tribunal in Appellant's own case i.e. ITA No.9130/Del/2019 for the previous AY 2016-17 decided on 06-07-2020 and even covered by the recent judgment of theHon'ble Supreme Courtin the case of Engineering Analysis Centre For ExcellencePrivateLimitedVsCommissioner Of IncomeTax&Another (Supra).

4.5 Relevant and concluding part of the Order passed by the Hon'ble Tribunal in ITA No.9130/Del/2019(Supra), is reproduced as under:-

> ***3.*** *The first issue raised by the assessee vide Ground of appeal Nos. 3 & 4 is against the revenue earned by the assessee from sale of hardware equipment in the nature of 'Royalty' as per provisions of both, section 9(1)(vi) of the Act and Article 12(3) of the India-Switzerland Taxation Avoidance Agreement (IndiaSwiss Tax Treaty). The case of the assessee is that the revenue earned by the assessee from sale of hardware equipment represents business income, which is not taxable in India in the absence of any Permanent Establishment (in short "PE") of the assessee in India, in accordance with the provisions of the Act as well as Article 5 read with Article 7of the India-Swiss Tax Treaty.*
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> ***4.*** *Further, the assessee has raised Ground of appeal Nos.5 & 6 against the orders of the Assessing Officer in alleging that the consideration earned by the assessee from supply of CAS and Middleware products to the Indian customers falls within the ambit of 'Royalties' as defined under section 9(1)(vi) of the Act and Article 12(3) of the India-Swiss Tax Treaty. The case of the assessee is that the revenue earned by the assessee from supply of CAS and Middleware products represents business income, which is not taxable in India in the absence of any PE of the assessee in India, in accordance with the provisions of the Act as well as Article 5 r.w. Article 7 of the India-Swiss Tax Treaty.*
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> ***11.****The issue raised vide Ground of appeal No.3 to 6 is interlinked and hence, the same are being decided together.*
>
> ***30.*** *In view of the above said propositions, we hold that what*

has been transferred is limited right to use copyrighted material, then the receipts on sale of licensing of software is not Royalty in view of the beneficial provisions of the DTAA between India and Sweden. We further hold that amended definition of 'Royalty' under the domestic law cannot be extended to the definition of 'Royalty' under DTAA, where the term 'Royalty' originally defined has not been amended. As per definition of 'Royalty' under DTAA, it is payment received in consideration for use or right to use any copyright of literary, artistic or scientific work, etc.; thus, purchase of copyrighted article does not fall in realm of 'Royalty'. We also hold that since the provisions of DTAA overrides the provisions of Income Tax Act and are more beneficial and the definition of 'Royalty' having not undergone any amendment in Tax Treaty, the assessee was not liable to be taxed on aforesaid receipts of Licensing software and also on sale of Hardware. Accordingly, we hold so. The Ground of appeal Nos. 3 to 6 are thus allowed.

4.6 For brevity and ready reference, relevant and concluding paras of the aforementioned Judgment of the Hon'ble Apex Court in the case of Engineering Analysis Centre for ExcellencePrivateLimitedVsCommissioner of IncomeTax&Another (Supra) are reproduced asunder:

" 3. *One group of appeals arises from a common judgment of the High Court of Karnataka dated 15.10.2011 reported as CIT v. Samsung Electronics Co. Ltd., (2012) 345 ITR 494, by which the question which was posed before the High Court, was answered stating that the amounts paid by the concerned persons resident in India to non-resident, foreign software suppliers, amounted to royalty and as this was so, the same constituted taxable income deemed to accrue in India under section 9(1)(vi) of the Income Tax Act, 1961 ["Income Tax Act"], thereby making it incumbent upon all such persons to deduct tax at source and pay such tax deductible at source ["TDS"] under section 195 of the Income Tax Act. This judgment dated 15.10.2011 has been relied upon by the subsequent impugned judgments passed by the High Court of Karnataka to decide the same question in favour of the Revenue.*

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, nonresident suppliers or manufacturers and then reselling the same to resident Indian end-users.

iii) iii) The third category concerns cases wherein the distributor happens to be a foreign, non-resident vendor, who, after purchasing software from a foreign, nonresident seller, resells the same to resident Indian distributors 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.

27. *The machinery provision contained in Section 195 oftheIncomeTaxActisinextricablylinkedwiththechargingprovisio ncontainedinSection9readwithSection 4 of the Income Tax Act, as a result of which, aperson resident in India, responsible for paying a sum ofmoney, "chargeable under the provisions of [the] Act", toa non-resident, shall at the time of credit of such amountto the account of the payee in any mode, deduct tax atsourceattherateinforcewhich,underSection2(37A)(iii)of the Income Tax Act, is the rate in force prescribed bytheDTAA.Importantly,suchdeductionisonlytobemadeif the non-resident is liable to pay tax under the chargingprovisioncontainedinSection9readwithSection4oftheIn come Tax Act, read with the DTAA. Thus, it is onlywhenthenon-residentisliabletopayincometaxinIndiaon income deemed to arise in India and no deduction ofTDS is made under Section 195(1) of the Income Tax Act,or such person has, after applying Section 195(2) of theIncomeTaxAct,notdeductedsuchproportionoftaxasisrequired ,thattheconsequencesofafailuretodeductandpay,reflectedinSect ion201oftheIncomeTaxAct,follow,byvirtueofwhichtheresident-payeeisdeemedan"Assessee in default", and thus, is made liable to pay tax,interest and penalty thereon. This position is also madeamplyclearbythereferralorderintheconcernedappealsfrom the High Court of Karnataka, namely, the judgmentofthisCourtinGETechnology(supra).*

47. *In all these cases, the "licence" that is granted videthe EULA, is not a licence in terms of Section 30 of theCopyright Act, which transfers an interest in all or any ofthe rights contained in Sections 14(a) and 14(b) of theCopyrightAct,butisa"licence"whichimposesrestrictionsorcon ditionsfortheuseofcomputersoftware.Thus,itcannotbesaidthata*

nyoftheEULAs that we are concerned with are referred to Section 30 oftheCopyrightAct,inasmuchasSection30oftheCopyright Act speaks of granting an interest in any of therightsmentionedinSections14(a)and14(b)oftheCopyright Act. The EULAs in all the appeals before us donot grant any such right or interest, least of all, a right orinterest to reproduce the computer software. In point offact, such reproduction is expressly interdicted, and it isalso expressly stated that no vestige of copyright is at alltransferred, either to the distributor or to the end-user. Asimple illustration to explain the aforesaid position willsuffice.IfanEnglish publishersells 2000copies ofaparticular book to an Indian distributor, who then resellsthe same at a profit, no copyright in the aforesaid book istransferred to the Indian distributor,either by way oflicence or otherwise, inasmuch as the Indian distributoronlymakesaprofitonthesaleofeachbook.Importantly,t hereisnorightintheIndiandistributortoreproducetheaforesaid book and then sell copies of the same. On theother hand, if an English publisher were to sell the samebook to an Indian publisher, this time with the right toreproduceandmakecopiesoftheaforesaidbookwiththepermissi on of the author it can be said that copyright inthebookhasbeentransferredbywayoflicenceorotherwise, and what the Indian publisher will pay for, istherighttoreproducethebook,whichcanthenbecharacterizedas royaltyfortheexclusiverighttoreproducethebookintheterritoryme ntionedbythelicence.

53. *There can be no doubt as to the real nature of thetransactions in the appeals before us. What is "licensed"by the foreign, non-resident supplier to the distributorandresoldtotheresidentend-user,ordirectlysuppliedtothe residentend-user, is infact the saleof a physicalobjectwhichcontainsanembeddedcomputerprogramme , and is therefore, a sale of goods, which, ashas been correctly pointed out by the learned counsel forthe assesses , is the law declared by this Court in thecontextofasalestaxstatuteinTataConsultancy Services v.StateofA.P.,2005(1)SCC308(seeparagraph27).*

56. *What is made clear by the judgment in GE Technology (supra) is the fact that the "person" spoken of in section 195(1) of the Income Tax Act is liable to make the necessary deductions only if the non-resident is liable to pay tax as an assessee under the Income Tax Act, and not otherwise. This judgment also*

clarifies, after referring to CBDT Circular No. 728 dated 30.10.1995, that the tax deductor must take into consideration the effect of the DTAA provisions. The crucial link, therefore, is that a deduction is to be made only if tax is payable by the non-resident assessee, which is underscored by this judgment, stating that the charging and machinery provisions contained in sections 9 and 195 of the Income Tax Act are interlinked.

171. *The Revenue, therefore, when referring to "royalties" under the DTAA, makes a distinction between such royalties, no doubt in the context of technical services, and remittances for supply of computer software, which is then treated as business profits, taxable under the relevant DTAA depending upon whether there is a PE through which the assessee operates in India. 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.*

172. *Given the definition of royalties contained in Article 12 of the DTAA as 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 to 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 assesses, have no application in the facts of these cases.*

173. *Our answer to the question posed before us, is that the amounts paid by resident Indian end-users/distributors to non-*

residentcomputersoftwaremanufacture/ suppliers,asconsiderationfortheresale/use of the computer softwarethroughEULAs/distribution agreements, is not the payment of royalty forthe use of copyright in the computer software, and thatthesamedoesnotgiverisetoanyincometaxableinIndia,as a result of which the persons referred to in Section 195of the Income Tax Act were not liable to deduct any TDSunder Section 195 of the Income Tax Act. The answer tothisquestion willapply toallfour categories ofcasesenumeratedbyusinparagraph-4ofthisjudgment.

174. *The appeals from the impugned judgments of theHigh Court of Karnataka are allowed, and the aforesaidjudgments are set aside. The ruling of the AAR in CitrixSystems (AAR) (supra) is set aside. The appeals from theimpugnedjudgmentsoftheHighCourtofDelhiaredismissed."*

4.7 Since the issues involved in grounds no. 3 and 4 of the present Appeal are squarely covered in favour of the Appellantby the order of Hon'ble Co-ordinate Bench in Appellant's Own case for the AY 2016-17and aforesaid Judgment ofHon'ble Supreme Court as referred above, consequently the grounds no. 3 and 4 are allowed in favour of the Appellant.

4.8 With regard to ground No. 5, considering the peculiar facts and circumstances of the case, we deem it appropriate to remit the issue in dispute to the file of AO with a direction to grant an opportunity to the Appellant to reconcile the details of the TDS and allow necessary credit as per law, hence ordered accordingly. This ground is accordingly allowed for statistical purposes.

4.9 Since the ground No. 6 is premature, hence the same is dismissed.

5. In the result the Appeal filed by the Appellant is partly allowed for statistical purposes.

Order Pronounced in the open court on 31/01/2022.

-Sd/-	-Sd/-
(R.K. PANDA)	**(N.K. CHOUDHRY)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Binita
Date:31.01.2022

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. DCIT, Circle Int. Tax. 2(2)(2)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI