

**IN THE INCOME TAX APPELLATE TRIBUNAL,  
MUMBAI BENCH ‘I’, MUMBAI**

**BEFORE SHRI M. BALAGANESH, ACCOUNTANT MEMBER  
AND  
SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No.2040/M/2021  
Assessment Year: 2017-18**

M/s. Dassault Systemes Solid Works Corporation, C/o Deloitte Haskins and Sells LLP, 7 <sup>th</sup> Floor, ASV Ramana Towers 52, Venkatnarayana Road, Chennai – 600 017 <b>PAN: AAFCS8787E</b>	Vs.	The Asst. Commissioner of Income-tax (International Taxation)- 2(1)(2), Mumbai
(Appellant)		(Respondent)

**Present for:**

Assessee by : Shri Pranith Golecha, A.R.  
Revenue by : Shri Milind Chavan, Sr. D.R.

Date of Hearing : 05 . 05 . 2022

Date of Pronouncement : 27 . 05 . 2022

**ORDER**

**Per : Kuldip Singh, Judicial Member:**

The appellant, M/s. Dassault Systemes Solid Works Corporation (hereinafter referred to as ‘the assessee’) by filing the present appeal, sought to set aside the impugned order dated 24.02.2021 passed by Commissioner of Income Tax (Disputes Resolution Panel-1), Mumbai [hereinafter referred to as the CIT(DRP)] qua the assessment year 2017-18 on the grounds inter alia that :-

**“1. General**

**1.1 The order of the learned Assessing Officer ("AO") is contrary to canons of equity and natural justice, contrary to law and facts involved, not based on facts and circumstances of the case, contrary to mandatory provisions of the Income-tax Act, 1961 ("Act"), lacks jurisdiction and is liable to be struck down.**

**1.2 The learned AO has erred in law and on facts in computing the total income of the assessee at INR 74,18,49,200.**

**2. Taxability of receipts towards sale of software products**

**2.1 The Honourable DRP has erred in upholding the draft assessment order after rejecting the appellant's objections merely for the reason that the issue was decided against the appellant by the DRP in the earlier years, even as it noted that the binding decisions of the jurisdictional Mumbai Bench of the Income Tax Appellate Tribunal on identical issue in the appellant's own case for the earlier assessment years 2003-04, 2005-06 and 2006-07, 2007-08, 2009-10, 2011-12, 2013-14, 2014-15, 2015-16 and 2016-17 were concluded in favour of the appellant.**

**2.2 On the facts and the circumstances of the case and in law, the learned AO and DRP have erred in holding that the income from sale of shrink-wrapped software is taxable in India, being in the nature of royalty under the provisions of section 9(l)(vi) of the Act as well as Article 12(3) of the Double Taxation Avoidance Agreement ("DTAA\*} between India and USA.**

**2.3 On the facts and circumstances of the case and in law, the learned AO and DRP erred in not appreciating that the payments received on sale of shrink-wrapoed software is for 'sale of copyrighted article' and not 'transfer of copyright right' as the end users in India obtained only a right to use the software products as against any copyright right.**

***2.4. On the facts and circumstances of the case and in law, the learned AO has erred in holding that software is a process or a property similar to patent, invention, design, secret formula, process, etc as defined under Explanation 2 to section 9(l)(vi) of the Act.***

***2.5. The learned AO has erred in law in stating that the retrospective amendment to section 9(l)(vi) of the Act by way of insertion of Explanation 4 to the said section through Finance Act 2012 is applicable also to the definition of "Royalty" under Article 12 of the DTAA.***

***2.6. The learned AO ought to have appreciated that the Hon'ble Supreme Court in the recent case of Engineering Analysis Centre of Excellence Private Limited (Civil Appeal No(s). 8733-8734/2018) (vide order dated 02 March 2021) held that the amount paid by resident Indian end users/ distributors to non-resident computer software manufacturers/ suppliers, is not payment for royalty for the use of copyright in the computer software, and held that such income shall not taxable in the hands of the non-resident,***

***2.7. The AO erred in levying interest under section 234A of the Act.***

***2.8. The AO erred in levying interest under section 234B of the Act.***

***Each of the above ground is independent and without prejudice to the other grounds of appeal preferred by the appellant.***

***The appellant craves leave to add, alter, vary, omit, substitute or amend the above grounds of appeal, at any time before or at, the time of hearing, of the appeal, so as to enable the Honourable Income Tax Appellate Tribunal to decide this appeal according to law."***

2. Briefly stated facts necessary for adjudication of the controversy at hand are : assessee is a non resident company

incorporated in USA, which is into the business of developing and marketing of 3D mechanical design solutions. The shrink wrap application software developed and sold by the assessee is used for 3D modeling. For the year under consideration the assessee has entered into software distribution agreement with reseller in India who buys “shrink wrapped software” from the assessee and in turn sells the same to the customers in India. The end user has limited rights to use the software for internal purposes, right to copy the software on hard disk all to make copies of archive purposes and the reproduction thereof is specifically prohibited except for backup purpose and the user cannot transfer the software.

3. During the scrutiny proceedings the Assessing Officer (AO) called upon the assessee to explain as to why the receipt of Rs.74,18,49,200/- from the sale of software project be not treated as royalty income. Declining the contentions raised by the assessee AO passed draft order holding that the payment received by the assessee from the reseller in India for acquisition of computer software are held to be in the nature of royalty and chargeable to tax in India.

4. Assessee carried the matter before the Ld. DRP by way of filing objections who has rejected the same by upholding the addition made by the AO.

5. Pursuant to the draft order and order passed by the Ld. DRP, the AO proceeded to frame the assessment at Rs.74,18,49,200/- under section 143(3) read with section 144C(13) of the Income Tax Act, 1961 (for short ‘the Act’). Feeling

aggrieved the assessee has come up before the Tribunal by way of filing present appeal.

6. We have heard the Ld. Authorised Representatives of the parties to the appeal, perused the orders passed by the Ld. Lower Revenue Authorities and documents available on record in the light of the facts and circumstances of the case and law applicable thereto.

7. At the very outset, the Ld. A.R. for the assessee contended that the identical issue has already been decided in favour of the assessee in its own case in earlier year from A.Y. 2003-04 to 2016-17 by the Tribunal and this fact is admitted by the AO in para 5.1(vi) that “though the ITAT has decided in favour of the assessee, the department is in appeal against the said decision before the Hon’ble Bombay High Court”, hence proceeded to treat the total receipt/income of Rs.74,18,49,195/- from sale of “shrink wrapped software” taxable in India being in the nature of royalty under the provisions of section 9(1)(vi) of the Act as well as article 12(13) of the Double Taxation Avoidance Agreement (DTAA) between India and the USA.

8. The Ld. D.R. for the Revenue though admitted the fact that in the earlier years issue has already been decided in favour of the assessee by the Tribunal but the department intends to keep this issue alive as it has already gone in appeal against the earlier order before the Hon’ble Bombay High Court.

9. We have perused the order passed by the co-ordinate Bench of the Tribunal in assessee’s own case for A.Y. 2016-17 available

at page 8 to 13 of the case law paper book, which is on the identical issue in the identical facts and circumstances of the case. No distinguishable facts have been brought on record by the Ld. Lower Revenue Authorities. Co-ordinate Bench of the Tribunal in order dated 30.06.2020 for A.Y. 2016-17 held that income derived by the assessee from the sale of “shrink wrapped software” being a copy righted article would not be construed as royalty by returning following findings:

***“9. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record, as well as the judicial pronouncements relied upon by them. On a perusal of the recent order of the Tribunal i.e ITAT “I” Bench, Mumbai, in the assessee’s own case for the immediately preceding year i.e A.Y 2015-16 in ITA No. 7027/Mum/2018, dated 10.01.2019, we find that it was observed by the Tribunal as under:***

***“5. We have heard the rival submissions and perused the orders of the authorities below and the decision of the Coordinate Bench. On a perusal of the order of the Tribunal for the earlier assessment year we find that this issue has been decided by the Tribunal observing as under: -***

***“3. At the outset, Ld. AR placed on record series of the order of the Tribunal in assessee’s own case for the A.Y. 2003-04 order dated 15/12/2009, A.Y. 2005-06 order dated 01/04/2010, A.Y.2006-07 order dated 08/02/2012, A.Y.2007-08 order dated 31/03/2016, 4 ITA No. 7027/MUM/2018 (A.Y: 2015-16) Dassault Systems Solidworks Corporation A.Y.2009-10 order dated 31/03/2016 and A.Y.2011-12 order dated 28/02/2017 wherein exactly similar issue was decided in favour of the assessee and it was held that receipts towards sale of software products was not liable to tax as royalty. The precise observation of the Tribunal for the A.Y.2011- 12 order dated 28/02/2017 reads as under:-***

***ISSUE NO.1 TO 7:- 4. Issue no. 1 to 7 are interconnected, therefore, are being taken up together for adjudication. Under these issues, it is to be determined that the receipt from the sale of software products to clients in India through its distributor / reseller amounting to USD 6.05 millions is in the nature of royalty or not. The learned representative of***

*the assessee has argued that the case of the assessee has duly been covered by the decision of the Hon'ble Income Tax Appellate Tribunal in the assessee's own case for the A.Y.2002-03 in ITA No. 3095/Mum/2007 order dated 15th December 2009 and for the A.Y.2005-06 in ITA No.5097/Mum/2008 order dated 1st April 2010 and for A.Y.2006-07 in ITA No.3219/Mum/2010 order dated 08.02.2012 and for A.Y.2007-08 in ITA No.8721/Mum/2010 order dated 31.03.2016 and for A.Y.2009-10 in ITA No.7790/Mum/2012 order dated 31.03.2016. Therefore, in the said circumstances, the order passed by the Assessing Officer on the direction of the DRP is wrong against law and facts and is liable to be set aside and the receipt is not liable to be treated as royalty. It is also argued that when no patent right was sold however computer programs were sold which could not be taxed in view of the provision u/s.9(1) of the Act therefore in the said circumstances the amount in question is not liable to be treated as royalty. However, on the other hand, the learned representative of the department has refuted the said contentions and argued that the Hon'ble Karnataka High Court has decided the issue in favour of the revenue in the cases of CIT Vs. Synopsis International Old Ltd., 212 Taxman 0454 (Kar. HC), dated 03.08.2010, CIT V. Samsung Electronics Co. Ltd. & Others, (2011) 345 ITR 0494, Kar HC, dated 15.10.2011, CIT V. Wipro Ltd. (2011), 355 ITR 0284 (Kar) / 203 Taxman 621 (Kar.) HC, dated 15.10.2011 and CIT Vs. CGI Information Systems and Management Consultants (P) Ltd., (2014) 48 Taxmann.com 264 (Kar), dated 09.06.2014. It is also specifically argued that the Jurisdictional Tribunal in case of the DIT(IT) Vs. Reliance Infocomm Ltd. (Mum Trib) dated 06.09.2013 has followed the decision of Hon'ble Karnataka High Court in the case of CIT Vs. Synopsis International Old Ltd., 212 Taxman 0454 (Kar. HC), dated 03.08.2010 and CIT Vs. Samsung Electronics Co. Ltd. & Others, (2011) 345 ITR 0494, Kar HC, dated 15.10.2011. Therefore, in the said circumstances the order passed by the 5 ITA No. 7027/MUM/2018 (A.Y: 2015-16) Dassault Systems Solidworks Corporation Assessing Officer is justifiable which is not liable to be interfere with at this appellate stage. Keeping in view of the argument advanced by the parties and perused the record carefully, it is apparent on record that the said issue has been decided in favour of the assessee by the Hon'ble Income Tax Appellate Tribunal in the assessee's own case for the A.Y.2002-03 in ITA No. 3095/Mum/2007 order dated 15th December 2009 and*

*for the A.Y.2005-06 in ITA No.5097/Mum/2008 order dated 1st April 2010 and for A.Y.2006-07 in ITA No.3219/Mum/2010 order dated 08.02.2012 and for A.Y.2007-08 in ITA No.8721/Mum/2010 order dated 31.03.2016 and for A.Y.2009-10 in ITA No.7790/Mum/2012 order dated 31.03.2016. On appraisal of the latest order for the A.Y.2009-10, we found that the Hon'ble Income Tax Appellate Tribunal considered the order passed by the Hon'ble Karnataka High Court which was favour of the assessee. In the said order, the discussion in this regard is hereby reproduced below:-*

*“5. We see no reasons to take any other view of the matter than the view so taken by the coordinate bench. There is nothing much that we can add to such a well researched and erudite order either. The decisions of non jurisdictional High Courts, in favour of the revenue on this point, have already been dealt with in this order. As to what should be done in a situation in which there are conflicting views of Hon'ble non jurisdictional High Courts and in which we do not have the benefit of guidance from Hon'ble jurisdictional High Court, we can only add, with respectful concurrence, the views expressed below by the coordinate benches: .....It will be wholly inappropriate for us to choose views of one of the High Courts based on our perceptions about reasonableness of the respective viewpoint, as such an exercise will be de facto amount to sitting in judgment over the views of the High Courts something diametrically opposed to the very basic principles of hierarchical judicial system. We have to, with our highest respect of both the Hon'le High Courts, adopt an objective criterion for deciding as to which of the Hon'ble High Court should be followed by us.*

*8. We find guidance from the judgment of Hon'ble Supreme Court in the matter of CIT Vs. Vegetable Products Ltd. 1973 CTR (SC) 177 : (1972) 88 ITR 192 (SC). Hon'ble Supreme Court has laid down a principle that “if two reasonable constructions of a taxing provisions are possible, that construction which favours the assessee must be adopted”. This principle has been consistently followed by the various authorities as also by the Hon'ble Supreme Court itself. In another Supreme Court judgment Petron Engg. Construction 6 ITA No. 7027/MUM/2018 (A.Y: 2015-16) Dassault Systems Solidworks Corporation (P.) Ltd. & Anr. Vs. CBDT & Ors. (1998) 75 CTR (SC)*

*20: (1989) 175 ITR 523 (SC), it has been reiterated that the above principle of law is well established and there is no doubt about that. ITA No.936/M/2015 A.Y.2011-12 8 Hon'ble Supreme Court had, however, some occasions to deviate from this general principle of interpretation of taxing statute which can be construed as exceptions to this general rule. It has been held that the rule of resolving ambiguities in favour of taxpayer does not apply to deductions, exemptions and exceptions which are allowable only when plainly authorized. This exception, laid down in *Littman vs Barron 1952(2) AIR 393* and followed by apex Court in *Mangalore Chemicals & Fertilizers Ltd. vs Dy. Commr. of CT (1992) Suppl. (1) SCC 21* and *Novopan India Ltd. vs CCE & C 1994 (73) ELT 769 (SC)*, has been summed up in the words of Lord Lohen, in case of ambiguity, a taxing statute should be construed in favour of a tax-payer does not apply to a provision giving taxpayer relief in certain cases from a section clearly imposing liability. This exception, in the present case, has no application. The rule of resolving ambiguity in favour of the assessee does not also apply where the interpretation in favour of assessee will have to treat the provisions unconstitutional, as held in the matter of *State of M.P. vs Dadabhoy's New Chirmiry Ponri Hill Colliery Co. Ltd. AIR 1972 (SC) 614*. [*Tej International Pvt. Ltd. Vs. DCIT (2000) 69 TTJ 650 (Del)*]*

*52. Even otherwise, the Revenue has not cited any direct case law of the jurisdictional High Court of Bombay before us. In the case laws cited by the Revenue of the Hon'le Karnataka High Court in the matter of *CIT Vs. Samsung Electronics Company Ltd.*" (supra) and *CIT Vs. Synopsis International Old Ltd.* (supra) though a view in favour of the Revenue has been taken, but, the Hon'ble Delhi High Court in the case of *DIT Vs. Infracsoft Ltd.* (supra) which is a latter decision and has discussed the Samsung case also has taken the view in favour of the assessee. The Hon'ble Delhi High Court has taken the identical view favouring the assessee in the case of *DIT Vs. Nokia Network* (supra) and in the case of *DIT Vs. Ericson A.B.* (supra) also. The Hon'ble Bombay High Court in the case of the *Addl. Commissioner of Sales Tax Vs/ M/s. Ankit International, Sales Tax Appeal No.9 of 2011* vide order dated 15th September, 2011 while relying upon the decision of the Hon'ble Supreme Court in the *Commissioner of Income Tax V. Vegetable Product Ltd. (1973) 88 ITR 192* and in*

*Mauri Yeast India Pvt. Ltd. Vs. Stte of U.P. (2008) 14 VST 259 (SC) : (2008) 5 S.C.C. 680 has held that, if two views in regard to the interpretation of a provision are possible, the Court would be justified in adopting that construction which favours the assessee. Reliance can also be placed in this regard on the 7 ITA No. 7027/MUM/2018 (A.Y: 2015-16) Dassault Systems Solidworks Corporation decision of Hon'ble Supreme Court in Bihar State Electricity Board and another Vs. M/s. Usha Martin Industries and another : (1997) 5 SSC 289. We accordingly adopt the construction in favour of the assessee. [Capgemini Business Services India Ltd. Vs. ACIT (TS 100 ITAT 2016 (Mum))]*

*6. In view of the above discussion and having noted that there is no material difference in the facts of the case for this year vis-à-vis the facts of the assessment year 2006-07 as discussed above, respectfully following the views of the coordinate benches, we uphold the grievance of the assessee. It is, therefore, held that the receipts of Rs.19,20,14,000/- on account of receipts for software are not exigible to tax in India. The Assessing Officer is, therefore, directed to delete the impugned addition of Rs.19,20,14,000/.*

*7. In the result, the appeal is allowed. Pronounced in the open court today on 31st day of March, 2016.”*

*5. However, the present case has been decided in view of the latest law settled by the Hon'ble Delhi High Court in case of Ericsson AV (343 ITR 470) (Del.) On appraisal of the above mentioned finding, it came into the notice that the Hon'ble Delhi High Court in case of DIT Vs. Infracsoft Ltd. 264 CTR 329 (Del.) and in case of CIT Vs. Vegetable Products Ltd. 88 ITR 192 (SC) has decided this issue in favour of the assessee. Since, the matter has also been considered by the Hon'ble Income Tax Appellate Tribunal and decided this issue in favour of the assessee specifically for the A.Y.2002-03 in ITA No. 3095/Mum/2007 order dated 15th December 2009 and for the A.Y.2005-06 in ITA No.5097/Mum/2008 order dated 1st April 2010 and for A.Y.2006-07 in ITA No.3219/Mum/2010 order dated 08.02.2012 and for A.Y.2007-08 in ITA No.8721/Mum/2010 order dated 31.03.2016 and for A.Y.2009-10 in ITA No.7790/Mum/2012 order dated 31.03.2016 in which the receipt on account of sale of Shrinkwrap software is not in the nature of royalty hence is not liable ITA No.936/M/2015 A.Y.2011-12 12 in India un view of the provision of section 9(1)(iv) of*

*the Act as well as Article 12(3) of the Double Taxation Avoidance Agreement between India and U.S.A. In view of the said circumstances, we are of the view that the case of the assessee is fully covered by the above mentioned decisions and the finding of the Assessing Officer is based upon the DRP direction is wrong against law and facts and is hereby ordered to be set aside on this issue. It is therefore held that receipt to the tune of Rs.26,87,30,378/- on account of the receipt for sale of shrinkwrap software is not liable to tax in India. Therefore, the Assessing Officer is hereby directed to delete the full addition. Accordingly, these 8 ITA No. 7027/MUM/2018 (A.Y: 2015-16) Dassault Systems Solidworks Corporation issues are decided in favour of the assessee against the revenue.*

*6. In the result, the appeal filed by the assessee is hereby ordered to be Allowed.”*

*4. We have gone through the orders of the Tribunal as cited by Ld. AR and Tribunal Order dated 28/02/2017, wherein the Tribunal have held that receipts from sale of Shrink-wrap software is not liable to tax in India accordingly, AO was directed to delete the addition so made on account of receipts for sale of Shrink-wrap software. Facts and circumstances in both the years under consideration are parimateria, therefore, respectfully following the order of the Tribunal in assessee's own case, we do not find any justification for taxing the receipt as taxable as royalty.”*

*6. No distinguishing facts have been brought to our notice. Thus, facts being identical, respectfully following the said decision we allow the ground raised by the assessee on this issue.”*

10. So following the earlier year precedence on the identical issue by the co-ordinate Bench of the Tribunal, we are of the considered view that income derived by the assessee from the sale of “shrink wrapped software” being a copy righted article would not be construed as royalty under the provisions of section 9(1)(vi) of the Act as well as Article 12(13) of the DTAA between India and the USA. Co-ordinate Bench of the Tribunal also held that assessee being a non resident company incorporated in the USA would not be liable to tax in India in respect of the receipt from the sale of

software by treating the same in the nature of royalty and as such ordered to be deleted. Merely because of the fact that the Revenue has gone in appeal in the earlier years the findings returned by the co-ordinate Bench of the Tribunal cannot be brushed aside. Consequently, appeal filed by the assessee is hereby allowed.

**Order pronounced in the open court on 27.05.2022.**

**Sd/-  
(M. BALAGANESH)  
ACCOUNTANT MEMBER**

**Sd/-  
(KULDIP SINGH)  
JUDICIAL MEMBER**

Mumbai, Dated: 27.05.2022.

\* Kishore, Sr. P.S.

Copy to: The Appellant  
The Respondent  
The CIT, Concerned, Mumbai  
The CIT (A) Concerned, Mumbai  
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.