IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "C", PUNE

BEFORE SHRI R.S. SYAL, VICE PRESIDENT AND
SHRI PARTHA SARATHI CHAUDHURY, JUDICIAL MEMBER

आयकर अपील सं. / ITA No.306/PUN/2021

निर्धारण वर्ष / Assessment Year : 2013-14

ACIT, Circle-1, Pune (Appellant)	**Vs.**	M/s. Faurecia Systems D'echappement, Plot No.T-187, Pimpri Industrial Area (B. G. Block), Behind Bhosari Police Station, Bhosari, Pune - 411 026 Maharashtra PAN : AABCF7193F

Assessee by	Shri Siddhesh Chaugule
Revenue by	Shri Piyush Kumar Singh Yadav
Date of hearing	11-07-2022
Date of pronouncement	12-07-2022

आदेश / ORDER

PER R.S.SYAL, VP :

This appeal by the Revenue is directed against the order passed by the CIT(A) -13, Pune on 12-04-2021 deleting penalty of Rs.89,99,637/- imposed by the Assessing Officer (AO) u/s.271(1)(c) of the Income-tax Act, 1961 (hereinafter also called 'the Act') in relation to the A.Y. 2013-14

2. Tersely stated, the facts of the case are that the assessee is tax resident of France, who filed its return declaring total income at

Rs.7.73 crore. During the course of assessment proceedings, the AO observed that a sum of Rs.12.88 crore was not included in its total income. This amount consisted of a sum of Rs.4.32 crore towards I.T. Support services and Rs.8.56 crore towards Software Maintenance services. He, therefore, included Rs.12.88 crore in the total income in the draft order. The assessee approached the Dispute Resolution Panel (DRP), which held that receipt of I.T. Support services amounting to Rs.4.32 crore as not chargeable to tax. However, Software Maintenance charges of Rs.8.56 crore were held to rightly added as Royalty both under the provisions of the Act as well as the India-France Double Taxation Avoidance Agreement (DTAA). The final assessment order was passed giving effect to the directions given by the DRP. The assessee accepted such final assessment order and did not prefer any appeal before the Tribunal, thereby assigning finality to the addition of Rs.8.56 crore as royalty income on account of rendition of Software maintenance services to the two Indian entities of the group. The AO imposed penalty of Rs.89.99 lakh on such addition. The ld. CIT(A) deleted the penalty by relying on the judgment of the Hon'ble Supreme Court in the case of *Engineering*

Analysis Centre of Excellence Pvt. Ltd. Vs. CIT (2021) 432 ITR 472 (SC). Aggrieved thereby, the Revenue has come up in appeal before the Tribunal.

3. We have cogitated over the rival submissions and scanned through the relevant material on record. The assessee contended before the authorities below that it purchased certain software and then licensed them to its two Indian entities in lieu of which a sum of Rs.8.56 crore was received. The AO treated such Software Maintenance service charges as Royalty in the draft order. The assessee placed reliance on the judgment of the Hon'ble Delhi High Court in *DIT Vs. Infrasoft Ltd. (2014) 264 CTR 329 (Delhi)* in support of non-taxability. The DRP rejected the assessee's claim by relying on the judgment of Hon'ble Karnataka High Court in *CIT Vs. Samsung Electronics Company Ltd. (2012) 345 ITR 494 (Kar.).* We find that the Hon'ble Supreme Court in *Engineering Analysis Centre of Excellence Pvt. Ltd. (supra)* has overturned the decision of *Samsung Electronics (supra)* by holding held that 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. 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 hence, the consideration for it cannot be treated as Royalty in the hands of the recipient. If we view the receipt of Rs.8.56 crore as consideration for licensing of software, as has been decided by the authorities below on macro level, then obviously, the amount is not chargeable to tax in the hue of *Engineering Analysis Centre of Excellence Pvt. Ltd. (supra)* with a fortiori of no penalty u/s.271(1)(c)of the Act.

4. The ld. DR strongly refuted the finding given by the ld. CIT(A) in treating the receipt as a *quid-pro-quo* for granting license of software to the Indian entities. He submitted that it was *ex facie* clear from the order of the AO as well as the direction of the DRP and, in fact, a categorical finding has been recorded therein to that effect that the assessee received Rs.8.56 crore as consideration for allowing access to its Database situated in France. He urged that it was not a case of Software Royalty but Industrial Royalty for use of the equipment. Relying on the order passed by the Pune Benches of the Tribunal in *Vanderlande*

Industries Private Limited Vs. ACIT dated 09-02-2022 (ITA No.48/PUN/2018), he took us through the relevant discussion in the order about considering the decision in *Engineering Analysis Centre of Excellence Pvt. Ltd. (supra)*, and finally holding the consideration as Industrial Royalty covered under Explanation 2(iva) to section 9(1)(vi) of the Act, being, the consideration for "*the use or right to use any industrial, commercial or scientific equipment*". In that view of the matter, it was strongly contended that the asseessee knew this legal position *ab initio* and still furnished wrong particulars of income by not offering the amount to tax, which is a good case for imposition of the penalty. He further bolstered his point of view by stating that the assessee accepted the addition without assailing it in further quantum appeal.

5. Albeit, the AO treated Rs.8.56 crore received by the assessee as a consideration for licensing of the software, he did realize during the course of the draft proceedings, that the assessee, in fact, granted license "*only to authorize the licensee to have access to the copyrighted database rather than granting any right in or over the copyright as such*". This discussion has been made on

page 12 of the draft order. Similar is the position regarding the direction given by the DRP in which the assessee's contention has been recorded at page 4 submitting that "*the assessee does not grant the Indian entity any right of Copyright and only right to access the software is provided. The right given is limited to use the applications based on the server of it for the use of Indian entities"*. Even though the assessee categorically admitted that the consideration received was for allowing access to the Indian entities to the assessee's servers abroad, yet the DRP also proceeded on the premise as if some software license was transferred by the assessee to its Indian entity. This ingrains that the assessee received Rs.8.56 crore from the Indian entities for allowing access to its Database or IT infrastructure facility abroad.

6. Now we turn to the decision of the Pune Benches in *Vanderlande Industries (supra),* emphatically relied by the ld. DR. The Tribunal in that case has drawn a distinction between Copyright Royalty and Industrial Royalty by holding that whereas the consideration for the use of software constitutes software royalty but the consideration for the use of IT Infrastructure facility an industrial royalty. It further held that the decision in the case of

Engineering Analysis Centre of Excellence Pvt. Ltd. (supra) is applicable in the case of Copyright Royalty. *Ex consequenti*, the consideration received by the assessee in that case for the use of the IT Infrastructure facility was held to be in the nature of Royalty chargeable to tax in the hands of the non-resident assessee. Similar view has been taken by the Pune Benches of the Tribunal in the case of *M/s. Bekaert Industries Private Limited Vs. DCIT (ITA No.1003/PUN/2017 dated 13-12-2021.*

7. Going with the *ratio* of the above Pune Tribunal orders, the amount in question received by the assessee as a consideration for allowing access to its Database abroad will not be governed by the decision in *Engineering Analysis (SC)* as this decision applies only to the cases of software transferred without giving any right to copy. Resultantly, it will be royalty chargeable to tax as has been held by the AO and accepted by the assessee. This judgment may apply to that part of the overall transaction of the assessee which is restricted to purchasing software for the purpose of installation in its Database Facility. As the assessee acquired the software only for the purpose of end-use without having any right to copy, the beneficial *ratio* of the judgment may get triggered so as to benefit

the licensor of such software, pulling the consideration out of the domain of royalty. But insofar as the transaction under consideration is concerned, the same pertains to allowing access to its Database or IT Infrastructure facility, which is established with various components, such as, software, hardware and networking and does not involve licensing of any software simpliciter. Whereas software is just a computer software, the IT Infrastructure facility is an equipment. *Por una parte*, payment for software is governed by the software royalty covered under Explanations 3 and 4 read with Explanation 2(v) of section 9(1)(vi), *por otra parte*, the payment for IT Infrastructure facility is governed by industrial royalty covered under Explanation 2(iva) of section 9(1)(vi), being, consideration for: `*the use or right to use any industrial, commercial or scientific equipment…'*. The IT infrastructure set up by the non-resident assessee is in the nature of an `equipment' covered under clause (iva) of Explanation 2 to section 9(1)(vi) of the Act and hence the consideration received for its user constitutes industrial royalty. The decision in *Engineering Analysis (SC)* does not deal with a case of industrial royalty. Unlike consideration for software license becoming royalty only

on the licensee getting a right to copy the programme embedded in a software, there cannot be a case of gaining access to the underlined technology of the equipment, when payment is made for using it. That is the *raison d'etre* for the legislature using the word `copyright' in clause (v) of the Explanation 2 and omitting it in the clause (iva). If the assessee's point of view of the consideration for the use of the IT facility becoming royalty only on getting access to the underlined technology is taken to logical conclusion, then the applicability of clause (iva) of the Explanation 2 will invariably be ousted making it a redundant piece of legislation as there cannot be a case of paying something for using an equipment by getting access to the underlined technology which led to its creation. In a loose sense, one can say that the access is automatically obtained to the underlined technology of the Facility when it is used. But, strictly speaking, the user of an equipment implies its use simpliciter *de hors* access to its underlined technology facilitating the operation. As section 9(1) of the Act is a deeming provision and it unequivocally provides, *inter alia,* for treating consideration for the *use of equipment* as royalty, we cannot countenance the contention of the ld. AR for reading the

words `use of equipment' as equivalent of `*getting access to the underlined technology'*. In our view, the proposition suggesting to read the mandate of copyright royalty cases in the context of industrial royalty cases is grossly misconceived. That appears precisely to be the reason for the assessee appreciating the correct position as per law and thus accepting the assessment order and not challenging the taxability of the amount as royalty in quantum proceedings.

8. The mere fact that an assessee has not challenged the addition does not *per se* lead to imposition or confirmation of penalty u/s.271(1)(c) of the Act thereon. The relevant facts and circumstances of the case need to be viewed independently for the purpose of penalty, which is distinct proceeding. Amongst others, it is a well settled proposition that penalty cannot be imposed on a debatable issue. If a favourable view initially canvassed by the assessee is judicially substantiated, it cannot lead to imposition of penalty simply because there exists a contrary view which the assessee has finally chosen by not filing an appeal.

9. Reverting to the prevailing factual panorama, we find that as against the unfavorable view of the Pune Tribunal in the cases

discussed *supra*, there is another decision of the Delhi Tribunal in *Ovid Technologies Inc., Vs. DCIT (ITA No.5171/Del/2018)* holding that consideration received for granting license to access online database does not fall within the definition of Royalty. In view of the prevalence of divergent views on the point, we hold that the penalty is not sustainable. The conclusion drawn in the impugned order is, ergo, accorded imprimatur on this legal score.

10. In the result, the appeal is dismissed.

Order pronounced in the Open Court on 12th July, 2022.

Sd/-	Sd/-
(PARTHA SARATHI CHAUDHURY)	**(R.S.SYAL)**
JUDICIAL MEMBER	**VICE PRESIDENT**

पुणे Pune; दिनांक Dated : 12th July, 2022
सतीश

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to</u>:

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. The CIT(A)-13 Pune
4. The Pr.CIT-V, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे
6. "**सी**" / DR 'C', ITAT, Pune;
   गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune

		Date	
1.	Draft dictated on	11-07-2022	Sr.PS
2.	Draft placed before author	12-07-2022	Sr.PS
3.	Draft proposed & placed before the second member		JM
4.	Draft discussed/approved by Second Member.		JM
5.	Approved Draft comes to the Sr.PS/PS		Sr.PS
6.	Kept for pronouncement on		Sr.PS
7.	Date of uploading order		Sr.PS
8.	File sent to the Bench Clerk		Sr.PS
9.	Date on which file goes to the Head Clerk		
10.	Date on which file goes to the A.R.		
11.	Date of dispatch of Order.		

*