IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI 'I' BENCH, MUMBAI

[Coram: Pramod Kumar (Vice President),
and Amit Shukla (Judicial Member)]

ITA No.: 431/Mum/2022
Assessment year: 2018-19

Dassault Systemes SolidWorks Corporation **…….……. Appellant**
C/o Deloittee Haskins and Sells LLP,
7th floor, ASV Ramana Towers,
52, Ventaknarayana Road, Chennai 600 017.
[PAN: AAFCS8787E]

Vs.

Asst. Commissioner of Income Tax
(International Taxation)-2(1)(2),
Mumbai **…….…… Respondent**

Appearances by:
Punith Golecha & Akshay Kumar *for the appellant*
Milind Chavan *for the respondent*

Date of concluding the hearing : June 08, 2022
Date of pronouncement the order : August 26, 2022

O R D E R

Per Pramod Kumar, VP:

1. By way of this appeal, the assessee appellant has challenged correctness of the order dated 6th January, 2022 passed by the Assessing Officer under section 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961, for the assessment year 2018-19.

2. Grievances raised by the assessee appellant are as follows :

"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 84,64,53,490.

2. <u>Taxability of receipts towards sale of software products</u>

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(1)(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 have erred in not appreciating that the payments received on sale of shrink-wrapped 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(1)(vi) of the Act.

2.5 The learned AO has erred in law in stating that the retrospective amendment to section 9(1)(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 learned AO erred in not granting the TDS credit to the extent of INR 8,84,58,733 claimed by the appellant in the Income tax return as per form 26AS.

2.8. The learned AO erred in levying interest under section 234A of the Act.

2.9. The learned 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."

3. Learned representatives fairly agree that the issues in appeal are squarely covered, in favour of the assessee, by decisions of the co-ordinate benches in assessee's own cases, for the assessment years 2003-04 to 2016-17 - copies of which are placed before us at pages 1 to 129 of the Paper Book. Learned counsel for the assessee has also invited our attention to the latest decision dated 27.05.2022 on the same issue and in assessee's own case for the assessment year 2017-18, which, *inter alia*, observes as follows :

> **"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:**
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> > ***"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 assesssee'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:***
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> > > ***"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: -***
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> > > > ***"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 w ell 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, lain 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 Hom'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. Infrasoft 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. Infrasoft 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."

4. We see no reasons to take any other view than the view so taken by the co-ordinate benches. Respectfully following the same, we uphold the plea of the assessee and direct the Assessing Officer to delete the impugned addition of Rs.84,45,97,710/-. The assessee gets the relief accordingly.

5. In the result, the appeal is allowed. Pronounced in the open court today on the 26th August 2022.

Sd/-
Amit Shukla
(Judicial Member)

Sd/-
Pramod Kumar
(Vice President)

Mumbai, dated the 26th day of August 2022.

Copies to: *(1) The Appellant* *(2) The respondent*
(3) CIT *(4) CIT(A)*
(5) DR *(6) Guard File*

By order

Assistant Registrar/Sr.PS
Income Tax Appellate Tribunal
Mumbai benches, Mumbai