IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH: BANGALORE

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER

IT(IT)A Nos.1023 to 1025 & 1046/Bang/2023
Assessment Years: 2014-15, 2015-16, 2017-18 & 2016-17 respectively

DCIT International Taxation Circle-1(2) Bangalore	**Vs.**	Synamedia India Pvt. Ltd. B9A & 9B7th Floor Pritech Park SEZ S.No.51-64/4 Sarjapur Outer Ring Road Bellandur Village Bengaluru 560 103 Karnataka **PAN NO : AACCN1140K**
APPELLANT		**RESPONDENT**

Appellant by	:	Shri Ketan Ved, A.R.
Respondent by	:	Shri D.K. Mishra, D.R.

Date of Hearing	:	25.01.2024
Date of Pronouncement	:	25.01.2024

O R D E R

PER CHANDRA POOJARI, ACCOUNTANT MEMBER:

All these appeals by revenue are directed against the following orders of CIT(A):

IT(IT)A No.	Assessment year	Dae of order passed u/s 250 of the Act
1023/Bang/2023	2014-15	31.10.2023
1024/Bang/2023	2015-16	31.10.2023
1025/Bang/2023	2017-18	31.10.2023
1046/Bang/2023	2016-17	31.10.2023

1.1 Since facts and issues in all these appeals are common, we consider facts narrated in IT(IT)A No.1023/Bang/2023 relating to the assessment year 2014-15, which are as follows:

2. The assessee, formerly known as M/s. Cisco Video Technologies India Pvt Ltd. (CVTIPL) is in the business of providing software support

and development services. CVTIPL is a wholly owned subsidiary of NDS Limited UK, a company incorporated under the laws of UK. The assessee provides research and development, marketing, sales, general and administrative support services primarily to its holding company. During the year 2012, there was global acquisition of NDS Limited, UK by the Cisco Group. Consequent to this, the assessee had become the distributor of NDS products in India. Verification u/s133A(2A) was carried out at the business premises of the assessee on 6-12-2017. During the course of survey proceedings, it was seen that the assessee had made payments/booked expenses to the tune of Rs.15,82,38,841/- to NDS Ltd., UK during the FY 2013-14 for services in nature of installation, configuration, operation, maintenance etc. Though the services rendered were in the nature of FTS, the assessee was not deducting taxes, based on the argument that no technical knowledge, skill, know how or process was made available to CVTIPL by NDS Ltd. U.K. Pursuant to the survey u/s 133A(2A), the AO issued a show-cause notice u/s 201/201 (IA) on 20.4.2018, asking the assessee to show cause why it had not deducted taxes on the payment made by it to NDS Ltd. UK.

2.1 NDS Ltd. UK is engaged in the supply of software licenses and hardware components in the nature of viewing cards, set-top boxes, CAM hardware, etc., to customers in India. The company's major product is the video guard conditional access system, which is used by leading pay TV operators in the world. NDS technology includes end-to-end connections for satellite, broadband IPTV etc., Further, NDS UK provides support services for ensuring the deployment/maintenance of hardware and software license supplied through the assessee, which is its subsidiary. NDS Ltd., UK was earlier operating through its branch office in India. Pursuant to an internal reorganization, the operations of the branch office were closed in the year 2006. Subsequently, by way of an agreement effective from 1 April 2006, the services of the assessee were used to develop software and other technology relating to the business of NDS Ltd., UK and to provide support and maintenance services to

customers of NDS UK. By way of a service agreement effective from 1 July 2006 between NDS Ltd., UK and the assessee, NDS Ltd., UK agreed to use the services of the assessee for pre-sales support and marketing services to potential and existing customers. As per the submissions of the assessee dated 20-02-2018, the nature of services under the services contract includes the following:

- Installation, configuration, optimization, operation, maintenance, support, remote diagnosis, telephonic support, management and administration of NDS systems.
- Resolution and remote-diagnosis of any emergency or minor failure of NDS products whereby the product or its part thereof is inoperative or its performance is also downgraded that normal operations are prevented or severely hindered or if product or any part thereof fails to meet the performance criteria described in the technical specification in any material respect.
- Resolution of failure of the products to perform any or combination of the features such as back-up failure or inability to perform normal preventive maintenance, faulty hardware, process or application redundancy not being available etc.
- The resolution may be in the nature of telephonic support wherein the required services are provided within the agreed turnaround time. The customers may be provided access to the support resources to report any problem related to equipment or software, ascertain status of previously logged problem request or to discuss action plan or escalate a problem in response to which technical support and technical problem management services are provided. Where practical, resolution of the fault would be demonstrated by simulating the fault and solution on the customer's test system.
- The support services include maintenance services whereby time-to-time software updates are provided in the form of software patches with customer installation instruction or software patches

may be installed via remote access. The support services also include preventive maintenance wherein regular routine maintenance checks will be performed on the hardware components and systems e.g. Monitoring the size of database files.

- The services include planned activity and software support services. Also, when a customer wishes to relocate or reconfigure the systems from time to time to meet charging operational requirement, such changes will be accommodated by way of decommissioning, transport, recommissioning etc. as a part of the support services.

2.2 Apart from one-time payments for installation of hardware and integration of NDS software with hardware, NDS Ltd. UK was being paid every year on account of supply of viewing cards, STBs, Software fees for viewing cards, Head end license fees for set up boxes, Conditional access fees, Middleware and EPG Royalties and receipts for support services. 2.3 The rendering of technical services is governed by a Distribution Agreement between the assessee and NDS Limited, UK. NDS Ltd. UK enters into an agreement with Indian cable TV operators, like TATA SKY, HATHWAY, AIRTEL etc. for supply of hardware, installation and integration. After the initial installation and integration, NDS Ltd. UK contracts with the cable TV operators for supply of viewing cards, set-top boxes, software upgradation etc. NDS Ltd. UK sells its products, including the software to the Indian TV pay channels and also supports the after-sales services to the Indian customers. The support and after sales services are carried through its subsidiary, CVTIPL, in terms of the Distribution Agreement. As per the Distribution Agreement, the assessee engages into a service contract with Indian customers and the necessary support relating to the service is provided by NDS Ltd.UK to such third-party customers with the assistance of the assessee. The AO has reproduced a sample service agreement between Bharti Telemedia Limited and NDS Ltd., which gives details of the license given by NDS Ltd. UK to its customers. The AO then referred to the assessment in the case

of NDS Ltd. UK, wherein it was established that the payment received by the company for the use of its software by the customers was in the nature of royalty. The services rendered by NDS Ltd. UK to the assessee for providing after-sales service to the customers were in the nature of technical services and hence the payment made by the assessee to NDS Ltd. UK was Fees for Technical Services (FTS).

2.3 Before the AO, the assessee submitted that the payments made by it to NDS Ltd.UK could not be regarded as FTS as per the DTAA as it was not in the nature of payment ancillary and subsidiary to royalty payments and therefore the applicability of clause (a) and (b) of Article 13 of the India-U.K. DTAA would not come into picture. Through the services rendered by NDS UK, though they entailed utilizing technical knowledge of hardware, software etc., no technical knowledge, skill, know-how or process was made available.to the service recipient i.e. the assessee. The services provided by NDS Ltd. UK though they involved the developing of technical plan/technical design, did not result in subsequent transfer of the technical plan or design. However, the AO held that the services were highly technical and hence the services rendered squarely fit into the meaning of FTS as per the Act and DTAA. The services were inextricably linked to the license of software, supply of hardware, licensing of copyright etc. The AO also referred to subsection 4 of Section 5 of the Distributor Agreement, wherein it was stated that the manufacturer i.e. NDS Ltd. U.K. may make available to the distributor i.e. the assessee, the manufacturer's expertise, know-how, technical personnel in order to facilitate distribution of products and services. The AO noted that by way of an amendment signed on 20-02-2015 to the Distributor agreement, this section 5.4 had been deleted in its entirety. In the recital of the amendment agreement, it is stated that the manufacturer will not provide technical assistance to the distributor. The AO felt that the Distribution Agreement had been amended to circumvent specific provisions of the 'make available' clause of the DTAA and to escape the taxation of the receipts which were in the nature of FTS. The

AO held that NDS UK had disclosed the information in connection with its inventions, know-how etc., confidential know-how etc. to the assessee for performing its obligations under the said agreement. NDS Ltd. UK had also entered into a Research and Development services agreement with the assessee to perform research and development services on behalf of NDS Ltd.UK. For this purpose, the assessee had access to confidential information of NDS Ltd.UK which it used for its research purpose viz. for development of software and software upgrade. This had also been stated by the product manager in his statement recorded u/s 131, which the AO has reproduced at para 9.2 of the impugned order. Thus, as per the AO, there was a continuous transfer of technical know-how and knowledge between NDS Ltd.UK and the assessee.

2.4 Based on the above findings, the AO held the assessee to be an assessee in default for non-compliance of the provisions of section 195 of the Act and the liability u/s 201 and 201(1A), with respect to the payment in the nature of FTS to the NDS Ltd. UK was worked out as follows:

Total Remittance	Tax u/s 201 including EC and SC	Interest u/s 201 (IA)	Total tax liability
15,82,38,841	2,37,35,826	1,21,05,271	3,58,41,097

2.5 The interest u/s 201 (IA) is calculated from the last day of the relevant previous year. Aggrieved by the levy of the above demand, the assessee went in appeal before CIT(A). The ld. CIT(A) has considered the earlier order of the Tribunal in assessee's own case in AYs 2016-17 & 2017-18 and also the judgement of Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Pvt. Ltd. reported in 432 ITR 471 and allowed the appeal of the assessee. Against this revenue is in appeal before us by way of common grounds in all these appeals as follows:

1. *"Whether on the facts and in the circumstances of the case and in law, the CIT(A) is right in quashing the order of the assessing officer relying on the order of the ITAT which in turn has relied upon the decision of the Hon'ble Supreme Court in the case of*

Engineering Analysis Centre of Excellence Pvt. Ltd. Vs CTT, 432 ITR 471, wherein the Department has preferred a Review Petition before the Hon'ble Supreme Court?

2. *Whether the CIT(A) is right in disregarding the AO's argument that the provisions of the DTAA between India-UK w.r.t royalty are to be interpreted in harmony with the Section 9 of the Income Tax Act, 1961?*

3. *Whether the C1T(A) is right in ignoring the observation of the AO in order u/s. 20Hhat subsection 4 of section 5 of Distributorship agreement stated that the assessee may make available to the distributor, the technical know-how, expertise etc.?"*

3. After hearing both the parties, we are of the opinion that similar issue came for consideration in assessee's own case in IT(IT)A No.940/Bang/2023, the Tribunal vide order dated 13.12.2023 held as under:

"4. *We have heard the rival submissions and perused the materials available on record. Similar issue came for consideration before this Tribunal in assessee's own case for the assessment year 2006-07 in ITA No.363/Bang/2017 dated 12.11.2021, wherein held as under:*

"23. In respect of agreement between the assessee and DEN, the relevant terms of the licence is as follows:

LICENSE

License Grant. *In consideration of payment by DEN of all license fees due in accordance with Schedule 1, and subject at all times to DEN complying with the terms and conditions of this Agreement, NDS hereby grants to DEN the non-transferable object code only right and license in the Territory.*

(a) *To use the NDS Software, NDS Hardware, Third Party Hardware and Third Party Software in accordance with Schedule 2 but only as is strictly required to provide the services to Subscribers using STBs incorporating the Components;*

(b) *From Acceptance, to make, store and use two back-up copies of the NDS Software and Third Party Software on back-up server(s) but only as required as part of a disaster recovery programme or expressly permitted under applicable law;*

(c) *From Acceptance, to use the Components as integrated in the STBs but only as is strictly required to provide the services to the Subscribers;*

(d) *To use the documentation in connection with the operation of the NDS Systems;*

(e) *From Acceptance, to distribute the Viewing Cards to Subscribers in the Territory so that such Subscribers may, in conjunction with the STBs receive* ***the*** *Services in the Territory; and*

From Acceptance, to grant Subscribers a sublicense to use the NDS Software incorporated into the Viewing Cards but only as is strictly required to receive the Services from DEN and on terms consistent with those set out in Clause 7.2 and 7.4 which relate to the NDS Software contained on the Viewing Cards.

24. The terms of the other licence agreement between the various parties have not been set out in the order of assessment though the copies of the same are available in the Paper Book. The terms of the agreement are clearly similar to the terms of the agreement which the Hon'ble Supreme Court analyzed in the case of Engineering Analysis. We shall anlyse the terms of the Agreement between the Assessee and Bharati Telemedia as a sample. Techinical and commercial proposal given by the Assessee alongwith the STB provides technical specifications for the engineering of the relevant systems. That by itself cannot be the basis to conclude that there has been use of any copyright or that technical services have been provided. This is like providing a technical and user manual describing the system and does not imply granting of any copyright rights or transferring technical knowledge. The software is only licensed for use without granting any license over the copyrights [see Article 3 – 3.01 – clause (a) at Page 58]. There are further restrictions on such license like (a) no copies to be made (b) no reverse engineering decompiling or otherwise (c) no sub-license rights (see clause 3.02 at Page 59). The clauses are typical clauses in a Software End User License Agreement (EULA) as analysed by Hon'ble Supreme Court in the Engineering Analysis case (see paras 45 – 47 of the SC judgment). The Viewing cards, Set Top Boxes and the software to run it are together an integrated system. This is similar to the fourth category examined by the Supreme Court. The Supreme Court approved the judgment of Delhi High Court (para 118) in the cases of Ericsson and Nokia which dealt with the sale of integrated telecom equipment with embedded software (para 110). The AO also acknowledges that STB, Viewing Card and embedded software is an integrated system. There were certain inferences drawn by the AO based on the FAO given along with the STB. Even if software is licensed and not sold, it is akin to sale based on real nature of transaction. Bharti is just a distributor of Assessee's products (ie, integrated system). Distributor is buying products for onward sale – para 45 of SC judgment. Use of hardware and software to run are key characteristics of an integrated system. Even if it is licensed, the real nature is that of a sale as per para 51 of SC judgment (one has to look at the real nature of the transaction upon reading the agreement as a whole as laid down by the Hon'ble Supreme Court and para 52 of SC judgment (licensing is akin to sale – reference to SC judgment in TCS case). With reference to paras 4.1 to 4.8 of FAO, it is clear from para 73 of SC judgment that granting of license has to be granting license over copyright rights as per section 14(b) read with 14(a) of Copyright Act. In para 97 the Hon'ble Supreme Court has observed that under software license agreement, customer is licensed to only use the software as such and not the copyrights in the software, therefore granting of license in such cases does not amount to royalty (Assessee's case is similar – see Article 3.01 and 3.02 of the Agreement). In para 109 of SC judgment, it has been specifically laid down that it is wholly incorrect to say that license in software EULA is license to use copyrights. In para 117 for overall conclusions of SC in the context of distinction between license over copyright and license to use

copyrighted product – specifically para 117(v), the Hon'ble Supreme Court has held that even if fee schedule refers to royalty payment, this is consideration for purchase of an integrated system. One has to look at the overall agreement and the real nature of the transaction (para 51 of SC judgment). On the AO's reference in para 4.4 of FAO as license being for use of IPR over viewing cards and software is incorrect since as per Article 3.01 and 3.02 (page 58-59 of paper book), license is for simplicitor use of the software, with several restrictions. Also, as per clause 3.04 (No license to accessed materials) and clause 3.05 (Ownership), no license whatsoever is granted over using the IPR in the software. License is to only use software to enable using the accompanying hardware, as part of an integrated system. Aspect of training referred to in para 4.5 of FAO does not advance AO's case since software and hardware are part of an integrated system akin to supply of goods. When training is provided to use it, it is similar to initial training provided by a vendor of any high end electronic or integrated equipment (for example, telecom equipment as examined by Delhi HC in Ericsson case). This doesn't amount to training in furtherance of license of copyright. With reference to para 4.6 on provision of operations and maintenance manual, this is akin to provision of a User Manual which describes the functioning of any equipment. For example, every sale of a TV comes with an operations and user manual. With refence to para 4.7, the providing of AMC services like repair, etc is akin to post-sale standard AMC services provided in the case of any sale of equipment. This AMC service does not in any way make the original transaction a royalty transaction. Since the AY is AY 2010-11 (ie, prior to the Finance Act, 2012 amendment by way of inserting Explanation 4 to Section 9(1)(vi) of the Act, as per the SC in its judgment, the Finance Act, 2012 amendment has to be read as expanding the scope of royalty with prospective effect from the Assessment Year 2013-14 (After FA, 2012 was enacted) and cannot be upheld as clarificatory so as to apply retrospectively for previous assessment years (para 73 - 74, 78 and 79). Therefore, the payments made under the customer contracts are not be treated as "royalty" under section 9(1)(vi) of the Act itself for the subject AY 2010-11, even without reference to the DTAA. Under the DTAA, clearly these are not "royalty" payments under Article 12 of the India – UK DTAA as held by the SC (UK DTAA has also been examined by the SC para 40.

25. As already observed in the earlier paragraph, the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence (P) Ltd. (2021) 125 Taxmann.com 42 (SC) held that A copyright is an exclusive right that restricts others from doing certain acts. A copyright is an intangible right, in the nature of a privilege, entirely independent of any material substance. Owning copyright in a work is different from owning the physical material in which the copyrighted work may be embodied. Computer programs are categorised as literary work under the Copyright Act. Section 14 of the Copyright Act states that a copyright is an exclusive right to do or authorise the doing of certain acts in respect of a work, including literary work. The Hon'ble Court took the view that a transfer of copyright would occur only when the owner of the copyright parts with the right to do any of the acts mentioned in section 14 of the Copyright Act, 1957(Copyright Act). In the case of a computer program, section 14(b) of the Copyright Act, speaks explicitly of two sets of acts:

1. *The seven acts enumerated in sub-clause (a); and*
2. *The eighth act of selling or giving of commercial rental or offering for sale or commercial rental any copy of the computer program.*

The seven acts as enumerated in section 14(a) of the Copyright Act, in respect of literary works are:

1. *To reproduce the work in any material form, including the storing of it in any medium electronically;*
2. *To issue copies of the work to the public, provided they are not copies already in circulation;*
3. *To perform the work in public, or communicate it to the public;*
4. *To make any cinematographic film or sound recording in respect of the work;*
5. *To make any translation of the work;*
6. *To make any adaptation of the work; and*
7. *To do, in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in sub-clauses (1) to (6).*

The court held that a licence from a copyright owner, conferring no proprietary interest on the licensee, does not involve parting with any copyright. It said this is different from a licence issued under section 30 of the Copyright Act, which grants the licensee an interest in the rights mentioned in section 14(a) and 14(b) of the Copyright Act. What is 'licensed' by the foreign, non-resident supplier to the distributor and resold to the resident end-user, or directly supplied to the resident end-user, is the sale of a physical object which contains an embedded computer program. Therefore, it was a case of sale of goods. The payments made by end-users and distributors are akin to a payment for the sale of goods and not for a copyright license under the Copyright Act. The decision of the Hon'ble Karnataka High Cour in the case of CIT Vs. Samsung Electronics Co. Ltd. (2011) 16 taxmann.com 141 (Karn.), on which the revenue authorities placed reliance in making the impugned addition stood overruled by the Hon'ble Supreme Court. We have already set out the terms of the Agreement under which software in question was sold by the Assessee to its distributions and the terms of the EULA. The same are identical to the case decided by the Hon'ble Supreme Court and hence the ratio laid down therein would squarely apply to the present case also.

26. On the question whether the provisions of the Act can override the provisions of the DTAA, the Hon'ble Court held that Explanation 4 was inserted in section 9(1)(vi) of the ITA in 2012 to clarify that the "transfer of all or any rights" in respect of any right, property, or information included and had always included the "transfer of all or any right for use or right to use a computer software". The court ruled that Explanation 4 to section 9(1)(vi) expanded the scope of royalty under Explanation 2 to section 9(1)(vi). Prior to the aforesaid amendment, a payment could only be treated as royalty if it involved a transfer of all or any rights in copyright by way of license or other similar arrangements under the Copyright Act. The court held that once a DTAA applies, the provisions of the Act can only apply to the extent they are more beneficial to the taxpayer and therefore the definition of 'royalties' will have the meaning assigned to it by the DTAA which was more beneficial. It was held that the term 'copyright' has to be understood in the context

of the Copyright Act. The court said that by virtue of Article 12(3) of the DTAA, royalties are payments of any kind received as a consideration for "the use of, or the right to use, any copyright "of a literary work includes a computer program or software. It was held that the regarding the expression "use of or the right to use", the position would be the same under explanation 2(v) of section 9(1)(vi) because there must be, under the licence granted or sales made, a transfer of any rights contained in sections 14(a) or 14(b) of the Copyright Act. Since the end-user only gets the right to use computer software under a non-exclusive licence, ensuring the owner continues to retain ownership under section 14(b) of the Copyright Act read with sub-section 14(a) (i)-(vii), payments for computer software sold/licenced on a CD/other physical media cannot be classed as a royalty.

27. The terms of the licence in the present case does not grant any proprietory interest on the licencee and there is no parting of any copy right in favour of the licencee. It is non-exclusive non-tranferrable licence merely enabling the use of the copy righted product and does not create any interest in copy right and therefore the payment for such licence would not be in the nature of royalty as defined in DTAA. We therefore hold that the sum in question cannot be brought to tax as royalty."

4.1 *The same order has been followed by this Tribunal for the assessment years 2010-11, 2012-13 & 2013-14. Being so, we allow the ground taken by the assessee on similar lines."*

3.1. Respectfully following the above order of the Tribunal, we are inclined to decide the issue in favour of the assessee and against the revenue.

4. In the result, all the four appeals filed by the revenue are dismissed.

Order pronounced in the open court on 25th Jan, 2024

Sd/-	**Sd/-**
(Beena Pillai)	**(Chandra Poojari)**
Judicial Member	**Accountant Member**

Bangalore,
Dated 25th Jan, 2024.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The DR, ITAT, Bangalore.
5 Guard file

By order

Asst. Registrar,
ITAT, Bangalore.