

**IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH : BANGALORE**

**BEFORE SMT BEENA PILLAI, JUDICIAL MEMBER
AND
SHRI WASEEM AHMED, ACCOUNTANT MEMBER**

Appeal No.	Appellant	Respondent	Assessment Year
ITA/IT(TP)A Nos. 1008, 1092, 1166 & 484/Bang/2019	M/s. Samsung R&D Institute India – Bangalore Pvt. Ltd., 2870, Phoenix Building, Bagmane Constellation Business Park, Outer Ring Road, Doddanekundi Circle, Marathahalli Post, Bangalore – 560 037. PAN: AAICS6290F	The Joint / Deputy Commissioner of Income Tax, Circle – 6(1)(1), Bangalore.	2011-12 to 2014-15
ITA/IT(TP)A Nos. 958, 1045, 1046 & 978/Bang/2019	The Joint Commissioner of Income Tax, Special Range – 6, Bangalore.	M/s. Samsung R&D Institute India – Bangalore Pvt. Ltd., 2870, Phoenix Building, Bagmane Constellation Business Park, Outer Ring Road, Doddanekundi Circle, Marathahalli Post, Bangalore – 560 037. PAN: AAICS6290F	2011-12 to 2014-15

Assessee by	:	Smt. Tanmayee Rajkumar, Advocate
Revenue by	:	Shri D.K. Mishra, CIT-DR

Date of Hearing	:	18-04-2024
Date of Pronouncement	:	30-05-2024

ORDER**PER BENCH**

Present cross appeals filed by the assessee and revenue against the following impugned orders.

Assessment Year	Date of impugned order
2011-12	25-02-2019
2012-13	12-03-2019
2013-14	15-03-2019
2014-15	31-12-2018

2. The Ld.AR submitted a chart of issues summarising the grounds raised by assessee as well as revenue for the years under consideration.

Issues	AY 2011-12	AY 2012-13	AY 2013-14	AY 2014-15
<u>Revenue's appeals</u>				
Transfer Pricing. (Infructuous on account of Mutual Agreement Procedure ('MAP'))	Ground Nos. 2 - 4	Ground No. 2	Ground No. 2	Ground Nos. 2-10
Restriction of depreciation claimed on server/network equipments. (Covered by the decision of this Hon'ble Tribunal in Appellant's own case for the assessment year 200910) (Order dated 03.03.2017 passed by this Hon'ble Tribunal in IT(TP)A No. 55/Bang/2015 & IT(TP)A No. 60/Ban/2015)	Ground No. 5	Ground No. 3	Ground No. 3	Ground No. 11

Issues	AY 2011-12	AY 2012-13	AY 2013-14	AY 2014-15
<u>Assessee's appeals (Revised grounds pursuant to MAP filed on 13.02.2024)</u>				
Transfer Pricing (Academic)	Ground No. 2	Ground No. 2	Ground No. 2	Ground No. 2
Disallowance of depreciation claimed on purchase of software under Section 40(a)(i)/(ia) of the Income-tax Act, 1961 ('the Act'). (Covered by the decision of the Hon'ble Karnataka High Court in PCIT-7 v. Tally Solutions (P.) Ltd.) (Reported in [2021] 123 taxmann.com 21)	Ground Nos. 3-6	Ground Nos. 3-6	Ground Nos. 3-6	Ground Nos. 3-5
Interest under Section 234A of the Act. (Return of income filed within time stipulated)	-	-	-	Ground No. 6
Interest under Section 234B of the Act.	Ground No. 7	Ground No. 7	Ground No. 7	Ground No. 7
Interest under Section 234C of the Act.	-	Ground No. 8	-	-

3. The Ld.AR submitted that pursuant to the MAP entered into between the competent authorities of India and Korea with respect to the transfer pricing adjustment made in the hands of assessee, the transfer pricing issues contested in the respective grounds for the years under consideration as tabulated hereinabove, in the assessee's appeal stands withdrawn. The

assessee accordingly filed revised grounds of appeal pursuant to the MAP proceedings having culminated.

Accordingly, the respective grounds mentioned hereinabove becomes infructuous in both assessee's as well as departmental appeals.

Accordingly, ground no. 2 in assessee's appeal for all years under consideration; Ground nos. 2-4 for A.Y. 2011-12, ground no. 2 for A.Ys. 2012-13 & 2013-14; and Ground nos. 2-10 for A.Y. 2014-15 in revenue's appeal stands dismissed as infructuous.

The only issue that remains to be adjudicated is regarding the disallowance of depreciation claimed on purchases of software u/s. 40(a)(i) / (ia) of the act.

4. Brief facts of the case leading to this issue are as under:

4.1 Assessee purchased certain software from resident and non-resident vendors during the years under consideration amounting to Rs.4,45,30,207/- that was capitalised in the books of accounts and depreciation at 60% was claimed u/s. 32 of the act. During the course of the assessment proceedings, the Ld.AO disallowed the depreciation of software by invoking the provisions of section 40(a)(i)/(ia) of the act for non-deduction of tax at source. The Ld.AO was of the opinion that the software purchased by the assessee were copyrights and therefore the payments were in the nature of royalty.

4.2 The Ld.AO further made disallowance in respect of depreciation claimed by the assessee on servers / network equipments by restricting the depreciation at 15%.

4.3 Aggrieved by the order of the Ld.CIT(A), the assessee is in appeal before this *Tribunal*.

5. At the outset, the Ld.AR submitted that, the issue stands squarely covered in favour of the assessee by the decision of *Hon'ble Jurisdictional High Court* in case of *PCIT vs. Tally Solutions Pvt. Ltd.* reported in (2021) 123 taxmann.com 21.

6. The Ld.AR submitted that assessee is engaged in the business of development and sale of software project licenses, software maintenance as the profile of the assessee in the TP study captures itself to be a captive service provider and all the research and development carried out by the assessee are owned by the AE. The Ld.AR submitted that assessee had purchased software which was a “copyrighted article”, and therefore it was not liable to deduct TDS. She submitted that the Ld.CIT(A) categorically recorded in para 4.11.2 that identical payments made by assessee during Assessment Year 2009-10 was allowed by the first appellate authority by relying on the decisions of this *Tribunal* in case of *SKOL Breweries Ltd. vs. ACIT* reported in (2013) 29 taxmann.com 111, *SMS Demag Pvt. Ltd. vs. DCIT* reported in (2010) 38 SOT 496 and held that provisions of section 40(a)(i)/(ia) referred to outgoing expenditure and not capital expenditure and hence depreciation cannot be disallowed.

6.1 It is further recorded by the Ld.CIT(A) that in case of *SMS Demag Pvt. Ltd. vs. DCIT (supra)*, Hon'ble Delhi Tribunal has held that provisions of section 40(a)(i)/(ia) were not applicable on the purchases of software.

6.2 On the contrary, the Ld.DR submitted that the decision of Hon'ble Karnataka High Court relied by the Ld.AR in case of *PCIT vs. Tally Solutions Pvt. Ltd. (supra)* are factually distinguishable, and therefore the nature of software purchased deserves to be examined. He thus prayed for remand of this issue to the Ld.AO.

7. We have perused the submissions advanced by both sides in the light of records placed before us.

8. Admittedly, assessee purchased software from residents as well as non residents on which TDS was not effectuated. The assessee capitalised the cost and depreciation was claimed @60%. The Ld.AO proceeded to disallow the depreciation claimed by the assessee u/s.40(a)(i)/(ia) of the act by holding that, the payment made was towards the 'use of copyright' and therefore, is taxable as royalty under section 9(1)(vi) of the act. It is an admitted fact that the assessee capitalised the software purchased and the expenditure was not claimed as revenue by the assessee in its books of account. Therefore, principally the depreciation could not be disallowed by invoking the provisions of section 40(a)(i)/(ia) of the act. Section 40(a)(i)/(ia) of the act deals

with the amount payable towards interest, royalty, FTS or other sum chargeable under the act. The phrase “amount payable” in the section indicates that, such amount can be claimed as deduction in the form of expenditure incurred for the purpose of business. Whereas in the present facts of the case, the assessee capitalised the expenditure. This aspect was ignored by the Ld.AO. We note that the Ld.AO disallowed the depreciation under section 40(a)(i)/(ia) by observing as under:

“5.5 Under the circumstances, I am constrained to invoke the amended provisions of section 9(1) with regard to definition of ‘royalty’ and to apply the same for the purpose of section 194J. Accordingly, the depreciation claimed by the assessee on computer software is considered for disallowance for non-deduction of TDS on payment made towards such purchase. In this regard, a doubt has been expressed by the assessee whether TDS provisions can be invoked for the purpose of disallowance of capital expenditure as it is opined that provisions of section 40(a)(ia) can be invoked only in respect of disallowance of revenue expenditure on which TDS has not been effected. This particular viewpoint of the assessee has been considered and found to be not in accordance with the provisions of the Income-tax Act in view of the following reasons:-

i. Section 40 of the Income-tax Act is finding place in chapter IV of Income-tax Act, i.e., provisions with regard to "Computation of Business Income". As such, section 40 can be invoked in respect of any disallowances to be made while computing the business income of the assessee.

ii. It is pertinent to note that the substantive provision of section 40 starts with "notwithstanding anything to the contrary in sections 30 to 38, the following amounts shall not be deducted in computing the income chargeable under the head 'profits & gains of business & profession' ". As such, the provisions of section 40 are applicable in respect of section 30 to 38.

iii. As per section 40, certain amounts on which TDS has not been effected shall not be deducted in computing the income under the head 'profits & gains of business &

profession'. As such, certain amounts which shall be deducted by virtue of section 30 to 38 while computing income under the head 'profits & gains of business & profession', shall be denied deduction by virtue of violating the TDS provisions.

iv. In view of the above, the basic requirement of invoking section 40 can be summarized as below:

a. Certain amounts claimed as deduction while computing income chargeable under the head 'profits & gains of business & profession' can be disallowed.

b. Even the amounts claimed as deduction by virtue of provisions of section 30 to 38 can also be disallowed.

c. Section 32 is falling in between section 30 to .38 of the Income-tax Act.

d. In case any deduction is claimed u/s 32 while computing income under the head 'profits & gains of business & profession', the same can also be disallowed if the assessee has violated the TDS provisions.

e. As per the provisions of section 40, there is no distinction between revenue expenditure and capital expenditure, but only condition is that if certain amount is claimed as deduction either by way of debiting to the P&L account or by way of depreciation u/s 32 without effecting TDS on such payments, the same can be disallowed.

5.6 In view of the aforementioned statutory position, it is amply clear that by virtue of section 40(a)(ia), the assessee is not entitled to claim deduction u/s 32 while computing the income under the head 'profits & gains of business & profession' in respect of computer software, i.e., royalty paid, for use of computer software since it had failed to deduct tax at source as required u/s 194J. Accordingly, the disallowance on account of section 40(a)(ia) r.w.s. 194J of Rs. 34,20,369/- representing software purchases where TDS was not effected, which works is disallowed and added to total income. (Addition:Rs.321,20,369/-)"

9. On preferring appeal before the Ld.CIT(A), the first appellate authority relied on the decision of *Hon'ble Karnataka High Court*

in the case of *Samsung Electronics Co. Ltd. reported in (2011) 203 Taxman 477* to disallow the claim. The decision relied by the Ld.CIT(A) has been reversed by *Hon'ble Supreme Court in Engineering Analysis Centre of Excellence (P) Ltd. vs. CIT reported in (2021) 125 taxmann.com 42* observed that *Hon'ble Karnataka High Court* as well as AAR decision in *Citrix Systems reported in (2012) 18 taxmann.com 172*, made no distinction between computer software that was sold/licensed on a CD/other physical medium; and, parting of copyright in respect of any of the rights or interest as per any rights, as mentioned in section 14(a) and 14(b) of the Copyright Act.

10. We also note that the Ld.CIT(A) relied on the decision of *Hon'ble Karnataka High Court* in case of *CIT vs. IBM reported in (2014) 43 taxmann.com 470*. We have perused the said decision and note that the facts of IBM are distinguishable. The *Hon'ble Court* was dealing with an issue wherein the revenue had challenged the view taken by *Tribunal* that amount utilised by IBM towards software projects are revenue expenditure. *Hon'ble High Court* upheld *Tribunal's* view, and has been reproduced by the Ld.CIT(A). In our opinion the decision of IBM does not have even an iota of similarity on the issue under consideration with respect to the present appeals.

11. In the present facts of the case the assessee capitalised the software as asset in the block of asset, it is eligible to claim

depreciation u/s 32(1)(ii) of the IT Act. Even otherwise, as per Explanation 5 to section 32 of the Act, it is obligatory on the part of the Assessing Officer to allow the depreciation, whether the assessee claims or not. The Ld.AR also contended that even otherwise, no income accrues or is deemed to accrue or arise in India on behalf of the non residents on purchase of software. Under the provisions of sec. 40(a)(i), the amount paid and claimed as deduction is not an allowable deduction on the assumption that, the said sum was chargeable to tax. But, in the instance case, deduction is being sought by the assessee by way of depreciation and not on capitalised sum of asset. There is a distinction between a claim when made of a deduction of the capitalized sum and the deduction claimed of a sum allowable to it u/s 32(1)(ii) of the Act.

12. Now the question arises is whether any amount paid outside India or to the Non Resident without deduction of tax at source and the assessee has capitalized the same in the fixed assets and claimed only depreciation is subjected to the provisions of sec. 40(a)(i) or not. The provisions of sec. 40(a)(i) reads as under:

"40. Notwithstanding anything to the contrary in sections 30 to 38, the following amounts shall not be deducted in computing the income chargeable under the head "Profits and gains of business or profession",—

<i>(a)</i>	<i>in the case of any assessee—</i>
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[(i) any interest (not being interest on a loan issued for public subscription before the 1st day of April, 1938), royalty, fees for technical services or other sum chargeable under this Act, which is payable,—

<i>(A)</i>	<i>outside India; or</i>
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<i>(B)</i>	<i>in India to a non-resident, not being a company or to a foreign company,</i>
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on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction, has not been paid during the previous year, or in the subsequent year before the expiry of the time prescribed under sub-section (1) of section 200 :

Provided that where in respect of any such sum, tax has been deducted in any subsequent year or, has been deducted in the previous year but paid in any subsequent year after the expiry of the time prescribed under sub-section (1) of section 200, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid.

Explanation.—For the purposes of this sub-clause,—

(A)	<i>"royalty" shall have the same meaning as in Explanation 2 to clause (vi) of sub-section (1) of section 9;</i>
(B)	<i>"fees for technical services" shall have the same meaning as in Explanation 2 to clause (vii) of sub-section (1) of section 9;</i>

“

13. Under section 40(a)(i) any interest (not being interest on loan issued for public before 1/4/1938), royalty fee for technical services or sum chargeable under this Act which is payable outside India or inside India to a non-resident not being a company or to a foreign company on which tax is deductible at source and such tax has not been deducted or, after deduction, has not been paid during the previous year or in the subsequent before the expiry of the time prescribed under sub-section (1) of section 200 shall not be allowed as deduction while computing the income chargeable under the head “Profit and gains of business or profession”.

13.1 There is a difference between the expenditure and other kind of deduction. The other kind of deduction which includes any loss incidental to carrying on the business, bad debts etc., which are deductible items itself not because an expenditure was

laid out and consequentially any sum has gone out; on the contrary the expenditure results a certain sums payable and goes out of the business of the assessee. Thus, in our view, section 40 refers to the outgoing amount chargeable under the act, and subject to TDS under Chapter XVII-B.

14. On the contrary, depreciation is a statutory deduction and after the insertion of Explanation 5 to sec. 32, it is obligatory on the part of the assessing officer to allow the deduction of depreciation on the eligible asset, irrespective of any claim made by the assessee. Therefore, depreciation is a mandatory deduction on the asset which is wholly or partly owned by the assessee and used for the purpose of business or profession which means the depreciation is a deduction for an asset owned by the assessee and used for the purpose of business and not for incurring of any expenditure.

15. The above view was expressed by *Hon'ble Mumbai Tribunal* in case of *SKOL Breweries Ltd. Vs. ACIT* reported in (2013) 29 *taxmann.com* 111.

16. *Hon'ble Karnataka High Court* while determining identical issue in case of *PCIT vs. Tally Solutions Pvt. Ltd. (supra)* has analysed this aspect in great detail as under:

“10. Thus, from close scrutiny of Section 40(a)(i) of the Act, it is axiomatic that an amount payable towards interest, royalty, fee for technical services or other sums chargeable under this Act shall not be deducted while computing the income under the head profit and gain of business or

profession on which tax is deductible at source; but such tax has not been deducted. The expression 'amount payable' which is otherwise an allowable deduction refers to the expenditure incurred for the purpose of business of the assessee and therefore, the said expenditure is a deductible claim. Thus, Section 40 refers to the outgoing amount chargeable under this At and subject to TDS under Chapter XVII-B. The deduction under Section 32 is not in respect of the amount paid or payable which is subjected to TDS; but is a statutory deduction on an asset which is otherwise eligible for deduction of depreciation. Section 40(a)(i) and (ia) of the Act provides for disallowance only in respect of expenditure, which is revenue in nature, therefore, the provision does not apply to a case of the assessee whose claim is for depreciation, which is not in the nature of expenditure but an allowance. The depreciation is not an outgoing expenditure and therefore, provisions of Section 40(a)(i) and (ia) of the Act are not applicable. In the absence of any requirement of law for making deduction of tax out of expenditure, which has been capitalized and no amount was claimed as revenue expenditure, no disallowance under Section 40(a)(i) and (ia) of the Act would be made. It is also pertinent to note that depreciation is a statutory deduction available to the assessee on a asset, which is wholly or partly owned by the assessee and used for business or profession. The depreciation is an allowance and not an expenditure, loss or trading liability. The Commissioner of Income Tax (Appeals) has held that the payment has been made by the assessee for an outright purchase of Intellectual Property Rights and not towards royalty and therefore, the provision of Section 40(a)(ia) of the Act is not attracted in respect of a claim for depreciation. The aforesaid finding has rightly been affirmed by the tribunal. The findings recorded by the Commissioner of Income Tax (Appeals) as well as the tribunal cannot be termed as perverse.

In view of preceding analysis, the substantial question of law framed by a bench of this court is answered against the revenue and in favour of the assessee.”

17. We note that identical is the situation in the present case of assessee, wherein, provisions of section 9(1)(vi) Explanation 2 was invoked in respect of the payment made towards purchase of

software that was capitalised on which depreciation u/s. 32 was claimed.

18. We therefore note that the objections of the Ld.DR that the facts in case of *PCIT vs. Tally Solutions Pvt. Ltd. (supra)* is distinguishable and stands rejected.

19. Coming to the argument of the Ld.DR that the nature of software purchased by the assessee needs to be analysed. We note that on this issue, *Hon'ble Supreme Court* in case of *Engineering Analysis Centre of Excellence (P) Ltd. vs. CIT* reported in (2021) 125 taxmann.com 42 wherein *Hon'ble Court* in para 100 held as under:

“100. Also, any ruling on the more expansive language contained in the explanations to Section 9(1)(vi) of the Income Tax Act would have to be ignored if it is wider and less beneficial to the assessee than the definition contained in the DTAA, as per section 90(2) of the Income Tax Act read with explanation 4 thereof, and Article 3(2) of the DTAA. Further, the expression "copyright" has to be understood in the context of the statute which deals with it, it being accepted that municipal laws which apply in the Contracting States must be applied unless there is any repugnancy to the terms of the DTAA.”

20. We shall also refer to section 90(2) of the Act that reads as under:

“90(2) where the Central Government has entered into an Agreement with the Government of any other country outside India under sub-section (1) for granting relief of tax, or as the case may be, avoidance of double taxation then in relation to the assessee to whom such agreement applies, the provisions of this Act, shall apply to the extent they are more beneficial to that assessee.”

21. *Hon'ble Supreme Court* held that, only if some right to use, without the right to commercially exploit the intellectual property in respect of a patent, invention, model, design, secret formula, process, copyright, literary or scientific work, are transferred, it cannot be regarded as royalty. There is nothing on record brought by the revenue in support of this argument. We therefore do not find any force in the argument advanced by the Ld.DR on this issue and the same stands rejected.

Accordingly, the issues raised in the grounds 3-6 for A.Ys. 2011-12 to 2013-14 and ground nos. 3-5 for A.Y. 2014-15 of assessee's appeal stands allowed.

22. In respect of the depreciation claimed on server / network equipment, both assessee as well as revenue are in appeal. The relevant grounds of assessee and revenue have been indicated in the table reproduced hereinabove.

23. The Ld.AR submitted that assessee is eligible for higher claim for depreciation on server / network equipment, as they form integral part of the computer. The Ld.AR submitted that in assessee's own case for A.Y. 2009-10, this *Tribunal* has allowed the claim in respect of depreciation on server / network equipment by following the decisions of *Hon'ble Madras High Court* in case of *Dinamalar vs. CIT* reported in (2016) 74 *taxmann.com* 14 and the decision of *Hon'ble Hyderabad Tribunal* in case of *ACIT vs. Ushodaya Enterprises Ltd.* reported in (2013) 33 *taxmann.com* 381.

23.1 On the contrary, the Ld.DR placed reliance on orders passed by authorities below.

24. We note that identical issue has been considered in assessee's own case for A.Y. 2009-10 wherein by following decision of *Hon'ble Madras High Court* in case of *Dinamalar vs. CIT (supra)*, this *Tribunal* has allowed the claim of assessee by granting the depreciation on peripherals at 60%. Nothing contrary to the above has been brought on record by the Ld. DR.

Accordingly, the ground no. 5 for A.Y. 2011-12, ground no. 3 for A.Ys. 2012-13 to 2013-14 and ground no. 11 for A.Y. 2014-15 raised by revenue on this issue stands dismissed.

In the result, the appeals filed by the assessee as per revised grounds stands allowed and the appeals filed by the revenue stands dismissed for the years under consideration.

Order pronounced in the open court on 30th May, 2024.

Sd/-
(WASEEM AHMED)
Accountant Member

Sd/-
(BEENA PILLAI)
Judicial Member

Bangalore,
Dated, the 30th May, 2024.
/MS /

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|---------------|------------------------|
| 1. Appellant | 2. Respondent |
| 3. CIT | 4. DR, ITAT, Bangalore |
| 5. Guard file | 6. CIT(A) |

By order

Assistant Registrar,
ITAT, Bangalore