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

BEFORE SHRI GEORGE GEORGE K., VICE PRESIDENT
AND
SHRI WASEEM AHMED, ACCOUNTANT MEMBER

IT(IT)A Nos. 1412 to 1414/Bang/2024
Assessment Years : 2015-16 to 2017-18

The Deputy Commissioner of Income Tax, Circle – 1(2), (International taxation), Bengaluru.	Vs.	M/s. Blue Yonder Inc, Tower A, Mantari Commercio, Outer Ring Road, Bellandur, Bengaluru. **PAN: AACCJ 3581C**
APPELLANT		RESPONDENT

Appellant by	:	Shri T. Suryanarayana, Sr. Advocate
Respondent by	:	Ms. Neera Malhotra, CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	03.09.2024
Date of Pronouncement	:	12.09.2024

ORDER

Per Bench

These appeals at the instance of the revenue are directed against three separate orders of the CIT(Appeals)-12, Bengaluru passed under section 250 of the Income Tax Act, 1961 (the Act). The relevant Assessment Years are 2015-16 to 2017-18. Common issues are raised in these appeals, hence they were heard together and are being disposed of by this consolidated order.

2. The issues raised in these appeals are with regard to taxability of:-

(i) Sale of software to third party customers in India.
(ii) Maintenance/installation/consulting/support services to third party customers in India.
(iii) Reimbursement of cost from Indian entity.

3. For the assessment years 2015-16 to 2017-18 returns were filed without disclosing the receipts on account of sale of software, licenses/annual maintenance services, software implementation & consultancy services from various customers in India. The assessment was completed u/s. 143(3) r.w.s. 144C of the Act for the AYs 2015-16 to 2017-18 by bringing to tax the above said receipts.

4. Aggrieved by the assessment orders for the AYs 2015-16 to 2017-18, the assessee filed appeals before the First Appellate Authority. The CIT(Appeals) by following the judicial pronouncements in the following cases decided the issue in favour of the assessee:-

(i) Engineering Analysis Centre of Excellence P. Ltd. v. CIT reported in [2021] 432 ITR 471 (SC).

(ii) Hon'ble High Court of Karnataka judgment dated 29.5.2023 in ITA No.977 of 2017 in assessee's own case for AYs 2008-09 & 2010-11.

(iii) Order of the ITAT in assessee's own case for AY 2014-15 in IT(IT)A No.2696/Bang/2017, order dated 12.8.2021, etc.

5. Aggrieved by the orders passed by the CIT(Appeals) for AYs 2015-16 to 2017-18, the revenue has filed the present appeals before the Tribunal.

6. The ld. DR submitted that the assessee did not sell shrink wrap software, but it had sold customised software. The ld. DR placed on record brief written submissions which reads as follows:-

> *"Blue Yonder Inc , USA is a company engaged in development and sale of supply chain management software. In AY 2019-20, the assessee had receipts of Rs 18,08,12,620 towards sale of software , which according to the assessee was non taxable.*
>
> *The assessee in grounds of appeal number 3 before the CIT-A held that the AO had grossly erred in taxing the amount which was considered non taxable by the assessee. The Hon'ble CIT-A examined the issue and allowed the assessee's appeal placing reliance on ITAT's order in the assessee's case for AY 2014-15.*
>
> *The submission on the various grounds of appeal filed by revenue are as under :*
>
> *1. The ITAT for AY 2015-15 in assessee's case has relied on Supreme Court decision of Engineering Analysis to hold that receipts from sale of software are not royalty .*
>
> *2. The software sold by assessee is capable of being customised as per the requirement of the customer.*
>
> *3. The assessee in his submission dated 26.09.2021 had submitted a sample agreement with Asian Paints Limited . A copy of the same is enclosed as Annexure 1. Para 5 of the agreement makes it clear that the software may also include embedded third party software or in other words, customization of software is possible.*
>
> *4. Thus the owner of the software has in fact parted with atleast one of the rights listed in section 14(a)/ 14(b) of the copyrights Act. These software being different from those considered by the Apex Court in the case of Engineering Analysis, the Tribunal for AY 2014-15 has erred in not appreciating the fact that the case of Engineering Analysis is not applicable in the instant case.*

> *5. A copy of assessee's submission on the issue of taxability of software receipts is enclosed as Annexure 2.*
>
> *6. The assessee is into the sale of customized software and not merely a shrink wrap software . Enquiries u/s 133(6)) for AY 21-22, (which is just 2 years prior to AY 19-20 which is under consideration) has revealed that the assessee is not selling shrink wrap software, but customized software. A copy of draft assessment order for AY 21-22 is enclosed as Annexure 3."*

7. The ld. AR, on the other hand, submitted that subsequent to the CIT(Appeals) order, the Tribunal in assessee's own case for AYs 2019-20 and 2021-22 had decided the issue in favour of the assessee by following the judgment of the Hon'ble Apex Court in the case of Engineering Analysis Centre of Excellence P. Ltd. [2021] 432 ITR 471 (SC) and assessee's own case in the earlier years decided by the Hon'ble High Court and the ITAT.

8. We have heard the rival submissions and perused the material on record. The issue for adjudication before us with regard to taxability of following receipts.

> *(i) Receipt from sale of software.*
> *(ii) Receipt from sale and installation and support services.*
> *(iii) Reimbursement of cost from Indian entity.*

9. We find that as regards the taxability of receipts on account of sale of software and from sale of installation and support services to third persons, the issues are squarely covered by the Order of the Tribunal in assessee's own case for the Assessment Year 2019-20 in IT(IT)A No.424/Bang/2023 (Revenue's appeal). The discussions on these issues are at paras 14.1 to 14.15 and final conclusion is at para 15. The Tribunal had followed previous decisions in assessee's own

case and judgment of the Hon'ble Apex Court in the case of Engineering Analysis Centre of Excellence (P) Ltd., Vs. CIT reported in (2021) 432 ITR 472 (SC). The relevant contentions raised by the learned AR, learned DR and the findings of the Tribunal in assessee's own case for Assessment Year 2019-20 reads as follows:

*"__**Revenue's Appeal in IT(IT)A No.424/Bang/2023**__:*

14. Ground Nos.1 to 3 of the revenue's appeal are with regard to non-taxability of sale of software and AMC as royalty.

14.1 The ld. A.R. submitted that as stated above, while filing the return of income, the Assessee had declared Rs. 44,23,96,360/- as income and claimed the same amount as exempt income in Schedule EI thereby declaring NIL income. In the assessment order, the only issue on which an addition was sought to be made was the reimbursements received from BY India which the AO sought to treat as 'Fees for Included Services'. While computing the total assessed income, the Assessing Officer erroneously proceeded on the basis that Rs. 44,23,96,360/- is the returned income and computed the assessed income at Rs. 92,18,40,761/- as under:

Sl. No	***Particulars***	***Returned income***
1.	*Returned income*	*44,23,96,360/-*
2.	*Reimbursement receipts considered taxable by the Assessing Officer*	*47,94,44,402/-*
3.	*Total assessed income*	*92,18,40,761/-*

The break-up of Rs. 44,23,96,360/- is as under:

Sl. No	***Particulars***	***Returned income***
1.	*Software and maintenance receipts*	*18,08,12,620/-*
2.	*Reimbursement receipts from BY India*	*26,15,83,740/-*
3.	*Total receipts as per return of income*	*44,23,96,360/-*

14.2 Thus, it is evident that the Assessing Officer taxed software, annual maintenance and installation receipts to the tune of Rs. 18,08,12,620/-, without providing any reasons for the same and clearly the same was on account of an error in computation rather than an intended addition to the total income.

14.3 The ld. A.R. submitted that in any case, the Assessee had received a sum of Rs. 18,08,12,620/- towards sale of software and provision of annual maintenance and installation services to third party Indian customers, which is neither taxable under Section 9(1)(vi) of the Act nor under Article 12 of the India-USA Double Taxation Avoidance Agreement ('India-USA DTAA' for short) as 'royalty'. The CIT(A) granted relief to the Assessee holding that the same would not qualify as royalty and consequently, the consideration received by the Assessee towards maintenance services, implementation and consultancy services would not be taxable in India as fees for technical services. He submitted that the ld. CIT(A) placed reliance on the decision of this Tribunal in Assessee's own case for assessment year 2014-15 and held that the sale of software would not constitute royalty under the provisions of the Act and the India-USA DTAA. Further, it was held that since the receipts on account of sale of software are not in the nature of royalty, the income received towards annual maintenance services, implementation and consultancy services also cannot be brought to tax as FTS.

14.4 The ld. A.R. submitted that the issue on taxability of income from sale of software is squarely covered by the decision of the Hon'ble Karnataka High Court in Assessee's own case for assessment year 2008-09 and 2010¬11 (Order dated 29.05.2023 in ITA No. 977/2017) and this Tribunal for assessment year 2014- 15 in Assessee's own case (Order dated 12.08.2021 in IT(IT)A No. 2696/Bang/2017), and also by the decision of the Hon'ble Supreme Court in Engineering Analysis Centre of Excellence (P.) Ltd. v. CIT (reported in [2021] 125 taxmann.com 42 (SC)). Further, the issue on taxability of income from AMC is squarely covered in Assessee's own case for the assessment years 2008-09 and 2010- 11 by the decision of the High Court of Karnataka and for assessment year 2014-15 by the decision of this Tribunal.

14.5 He submitted that the Revenue, in the written submissions filed on 07.09.2023, has attempted to distinguish the above decisions alleging that the Assessee provides customized software solutions over cloud based on the specific needs of its customers and not merely shrink-wrapped software. For this purpose, the draft assessment order for assessment year 2021-22 has been relied upon.

14.6 He submitted that firstly, an assessment order for a subsequent assessment year, that too a draft one, where the Company has contested the underlying addition to total income, cannot be the basis to decide the issue for the current assessment year. Further, it is also submitted that the material/ agreements gathered as a part of assessment proceedings for a subsequent assessment year cannot be used for concluding on the taxability of underlying transactions in a prior assessment year.

14.7 Secondly, there is no customization involved. The Assessee is engaged in sale of standardized software. There are various standard modules that the Assessee has already created in the software that it licenses. Depending on the sector that the customer belongs to and the requirement laid down, the modules are provided to the customer. There is no further customization of the software codes etc. based on customer's requirements. He submitted that the Assessee does not provide any rights to the customer to exploit the software sold and the software is used by the customer in their capacity as an end/ ultimate user.

14.8 He submitted that clause 5 relied upon in the agreement with Asian Paints produced along with the Revenue's written submissions dated 07.09.2023 nowhere indicates that there is customization. All that the clause states is that there could be some third party software embedded in the software provided by the Assessee to the end customers and states that such third party software is subject to additional terms of use. This cannot, by any stretch of imagination, lead to the conclusion that there is parting with the copyright right in the software. Which of the rights contemplated in Section 14 of the Copyright Act has been parted with is not forthcoming from the written submissions filed. The responses to notices issued 133(6) for assessment year 2021-22 as extracted in the draft assessment order for assessment year 2021-22 of Pepsi Co. do not also indicate that it is customized

software. It is only an inference drawn by the Assessing Officer on the basis of surmises.

14.9 He further submitted that as stated above, the purchasers of the software had no right, proprietary or exclusive, except to use the said software for their internal business. The payments received by the Assessee is for the use of copyrighted article and not for the use of a copyright. He submitted that no right vests in the end-users to reproduce, sell or make copies of the same.

14.10 He submitted that a non-exclusive, non-transferable and royalty-free license was granted to the purchasers that merely enabled use of a copyrighted product and thus, the consideration received would not be 'royalty' in terms of Section 9 (1)(vi) of the Act. Section 9(1)(vi) of the Act defines royalty to inter alia mean any consideration received for (i) the transfer of all or any rights (including the granting of a license) in respect of a patent, invention, model, design, secret formula or process or trade mark or similar property (clause (i)); (ii) the use of any patent, invention, model, design, secret formula or process or trade mark or similar property (clause (iii)); (iii) the use or right to use any industrial, commercial or scientific equipment but not including the amounts referred to in Section 44BB (clause (iva)). He submitted that the Assessee owns the title, copyright and other intellectual property rights in the software and the same is not transferred to the customers in India and therefore, the consideration received by the Assessee would not constitute royalty in terms of Section 9(1)(vi) of the Act.

14.11 Even in terms of Article 12 of the India-US DTAA, Article 12(3) of the India-USA DTAA defines the term 'royalty' as "payments of any kind received as a consideration for the use of, or the right to use, any copyright of a literary, artistic, or scientific work, including cinematograph films or work on film, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience, including gains derived from the alienation of any such right or property which are contingent on the productivity, use, or disposition thereof; and …….

14.12 He submitted that even in terms of the DTAA, the payments made to the Assessee would not constitute 'royalty' within the meaning of Article 12 of the India-USA DTAA as the payments are not for transfer of copyright to the purchasers but for sale of software.

14.13 With respect to annual maintenance and installation services rendered to Indian customers, the Assessee submits that the said services are a part and parcel of the sale of software and therefore, the nature of such services would derive its value from the principal component of the transaction, i.e., sale of software. Therefore, he submitted that the said receipts also cannot be brought to tax given that the underlying software would not be taxable as royalty under the provisions of the Act read with the DTAA.

14.14 Without prejudice to the above, the ld. A.R. submitted that that the income towards AMC would not constitute Fees for Included services under India-USA DTAA given that:

- *the AMC services are inextricably and essentially linked to sale of underlying software, which is not chargeable to tax as royalty; and*

- *The Assessee does not 'make available' any technical knowledge, experience, skill, etc. to the customers while provision of such services.*

14.15 The ld. A.R. also placed reliance on the decision of Hon'ble Karnataka High Court (rendered for AY 2008-09 and AY 2010-11) and this Tribunal's decision (rendered for AY 2014-15) in Assessee's own case, wherein it was held that income towards AMC is not liable to tax in India.

15. We have heard the rival submissions and perused the materials available on record. Admittedly, this issue came for consideration before this Tribunal as discussed in ground Nos.2 to 5 in assessee's appeal as above. Accordingly, this issue raised by the revenue is dismissed."

10. Since the facts of the instant case is identical to the facts considered by the Tribunal for the Assessment Year 2019-20, we hold

that receipt from sale of software cannot be brought to tax as "royalty". Similar is the receipt from installation and support services as FIS.

11. As regards the reimbursement of computer and hardware maintenance, we find that the issue is squarely covered in favour of the assessee by the Order of the Tribunal in ITA No.401/Bang/2023 for the Assessment Year 2019-20 (the assessee's appeal). The relevant contention of the AR, DR and the findings of the Tribunal for the Assessment Year 2019-20 reads as follows:

> ***"4. Ground Nos.2 to 5 in assessee's appeal are with regard to erroneous treatment of reimbursements as 'royalty'/'fees' for included services***.
>
> *4.1 In this regard, the ld. A.R. submitted that during the year, the Assessee had received a sum of Rs. 47,94,44,402/- towards reimbursements of expenses incurred by the Assessee on behalf on BY India. The break-up of such reimbursements is as under:*

Sl. No	***Nature of reimbursement***	***Amount***
1.	*Computer hardware maintenance*	*3,88,04,561*
2.	*Employee immigration expenses*	*2,85,02,503*
3.	*Employee insurance charges*	*11,44,589*
4.	*Professional fees*	*3,98,45,239*
5.	*Host country tax*	*8,60,70,802*
6.	*Computer software maintenance*	*17,37,43,255*
7.	*Subscription charges*	*7,52,70,596*
8.	*Telecommunication charges*	*1,97,41,529*
9.	*Restricted Stock Unit expenses*	*1,63,21,328*
	Total	***47,94,44,402***

> *4.2 He submitted that the Assessing Officer held the aforesaid payments to be in the nature of 'fees for technical services' in the hands of the Assessee on the ground that the Assessee makes available technical and managerial skills and knowledge to BY India for the latter to function seamlessly in software product development and services. On appeal, with respect to the*

payments towards (i) Employee immigration expenses; (ii) employee insurance charges; (iii) professional fees; and (iv) restricted stock unit expenses, the CIT(A) deleted the addition made holding that the same would not fall under the category of technical or consulting services and that they do not satisfy the conditions to be treated as 'fees for included services'. As regards payments received towards (i) computer software maintenance; (ii) subscription charges; and (iii) telecommunication charges, the CIT(A) held the same to be in the nature of 'royalty' and sustained the addition. However, the ld. CIT(A) failed to adjudicate on reimbursements received towards (i) computer hardware maintenance; and (ii) host country tax. He submitted that the Assessee has filed an application under Section 154 of the Act before the CIT(A) seeking rectification to the said extent and the same is pending adjudication.

4.3 In this regard, he submitted that the payments received by the Assessee were purely in the nature of cost-to-cost reimbursements and does not contain any income element. The various services are procured centrally from various vendors for commercial and administrative reasons and the costs pertaining to the relevant BY entities is cross charged without any mark-up. While the Assessee procures the services centrally, the distribution, installation, postsale services if any are the responsibility of the service provider and the Assessee is not involved at any stage. He submitted that the terms of the cost reimbursement agreement clearly evidences that the payments made to the Assessee were pure reimbursements without any mark-up being charged. In this regard, he placed reliance is placed on the following decisions:

- ***DIT v. A.P. Moller Maersk A S** (reported in [2017] 78 taxmann.com 287 (SC)) paras 10-11;*

- ***CIT v. Siemens Aktiongesellschaft** – (reported in [2009] 177 Taxman 81 (Bombay)) para 33; and*

- ***CIT v. Dunlop Rubber Co. Ltd.** (reported in [1982] 10 Taxman 179 (Calcutta)) pages 37-39 of the caselaw compilation.*

4.4 The ld. A.R. has given a brief description of the reimbursements as follows:

(i). Computer software maintenance*:*

(a) The Assessee has entered into agreement with Dell and Cisco for software and hardware maintenance support services on a day-to-day basis for its group companies, including BY India. In terms of the agreement, the cost in this regard is borne by the Assessee and allocated to BY India on a cost-to-cost basis for the charges allocable to BY India.

(ii). Subscription charges:

(b) The Assessee makes payments to LinkedIn and Monster for usage of their database by group companies including BY India for hiring potential candidates. The Assessee does not obtain any modification or reproduction rights from the vendors. The cost incurred by the Assessee is allocated to each group entity including BY India and cross charged on a cost-to-cost basis.

(iii). Telecommunication charges:

(c) He submitted that the Assessee makes payment to 'Sprint' for the usage of link lines. This provides customers with a secure VPN solution with any-to-any intranet connectivity, as a private means to connect their enterprise sites and between multiple customers over VPN. The Assessee bears the cost and the same is allocated to BY India on a proportionate and cost-to-cost basis.

4.5 The ld. A.R. submitted that while the Assessing Officer held the above to be FTS, the ld. CIT(A) held the receipts to be in the nature of royalty. Under the DTAA, in order for a payment to be in the nature of fees for technical services, the services ought to 'make available' technical knowledge, experience, skill, know-how or processes, or consists of the development and transfer of a technical plan or technical design. Technology will be considered 'make available' when the person acquiring the service is enabled to apply the technology without depending on

the provider. He placed reliance in this regard on the decision of the Hon'ble High Court of Karnataka in the case of CIT v. De Beers India Minerals (P.) Ltd. (reported in [2012] 21 taxmann.com 214 (Karnataka) – para 22. In the present case, the mandatory precondition of 'make available' is not satisfied in any of the aforesaid services, and therefore the payments are not in the nature of fees for technical service. In view of the above, he submitted that the reimbursements received from BY India is not taxable in India either under the Act or under the DTAA.

4.6 With regard to taxability of computer software and hardware maintenance expenses, the ld. A.R. submitted that the services are provided to BY India on a need basis and post availing such services, BY India will not be able to independently apply the knowledge. No technical knowledge, skill etc. are made available to BY India by the service providers. Therefore, the receipts in respect of these expenses cannot be held to be FIS under Article 12 of the DTAA.

4.7 The ld. A.R. submitted that the ld. CIT(A) was also not correct in holding the same to be 'royalty'. As is evident from the agreements entered into between the Assessee and Cisco, and the Assessee and Sai Global, no exclusive or proprietary right in the software is made available to the user of the software and only a mere right to use the software is given. The order of the CIT(A) nowhere discusses how the payments for software maintenance can be construed as royalty. He placed reliance on the following decisions:

- *Hon'ble Supreme Court of India in Engineering Analysis Centre of Excellence (P.) Ltd. v. CIT; and*

- *Hon'ble Karnataka High Court's order for assessment year 2008¬09 and AY 2010-11 and this Tribunal's order for assessment year 2014-15 in Assessee's own case – para 4.1*

4.8 On the issue of taxability of subscription charges, the ld. A.R. submitted that the payments are made for usage of the database by the group companies for hiring of potential candidates. The reimbursements received from BY India towards the use of

database of Salesforce is in the nature of a consideration to obtain rights to use the copyrighted database and not the right to use the copyright in the database. He submitted that the copyright is not transferred to the subscribers. He further submitted that BY India does not get the physical access or control over the equipment used by Salesforce in collating and maintaining the database. The subscription fee paid is not for the use of the equipment but for availing the facility of accessing the data/information collated by Salesforce. On a perusal of the agreement with Service Now Inc. it is evident that the customer is granted non-sublicensable, non-transferable and non-exclusive licenses. He placed reliance on the following decisions:

- *Pluralsight LLC. V. DCIT (order dated 21.08.2023 passed by this Hon'ble Tribunal in ITA No. 37/Bang/2023) – paras 11-14 and 20;*

- *Goldman Sachs & Co. LLC v. DCIT (reported in [2023] 152 taxmann.com 251 (Mumbai – Trib.)) – paras 16-19; and*

- *DCIT v. Welspun Corporation Limited (reported in [2017] 77 taxmann.com 165 (Ahm.)) – paras 46-50.*

4.9 On the issue of taxability of telecommunication expenses, the ld. A.R. submitted that the ld. CIT(A) has relied on the decision of this Tribunal in the case of Vodafone South Limited v. DDIT to hold that telecommunication charges claimed as reimbursement are to be held to be royalty under the DTAA which has now been reversed by the jurisdictional High Court reported in Order dated 14.07.2023 passed in ITA No. 160/2015 and connected matters. In any event, he submitted that reimbursements received from BY India towards the usage of link line provided by Spirit for basic bandwidth services does not involve any right to use scientific equipment. He placed reliance on the following decisions:

- *Telefonica Depreciation Espama v. ACIT (order dated 10.08.2023 passed by this Hon'ble Tribunal in IT(IT)A No. 2657/Bang/2019) – paras 3.8 to 5.2.21;*

- *Communications Global Network Services Limited v. DCIT (order dated 29.08.2023 passed by this Hon'ble Tribunal in IT(IT)A No. 89/Bang/2019) – paras 5-8; and*

- *Cerner Healthcare Solutions India (P.) Ltd v. DCIT (reported in [2022] 141 taxmann.com 564 (Bangalore - Trib.)) – Paras 15-20.*

5. On the other hand, the ld. D.R. submitted that the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Pvt. Ltd. Vs. CIT reported in 432 ITR 471 (SC) considered the agreements related to the parties who were the party to the cases before the Hon'ble Supreme Court and the Hon'ble Supreme Court has no occasion to examine the agreement entered by the present assessee with the various parties. As such, the ratio laid down in that judgement cannot be applied to the facts of the assessee's case.

6. We have heard the rival submissions and perused the materials available on record. Admittedly, the impugned issue came for consideration before Hon'ble Karnataka High Court for the assessment years 2008-09 & 2010¬11 and the Hon'ble Court vide order in ITA No.977 of 2017 dated 29.5.2023 has held as under:

JUDGMENT

Learned Advocate for the assesses submits that issue involved in this petition's covered by the decision of the Hon'ble Supreme Court in Civil Appeal Nos.8733- 8734/2018, which is sought to be reviewed.

2. The same is not disputed by Shri K.V.Aravind, learned standing counsel for the Revenue.

3. Hence, the following:

ORDER

(1) Appeal is allowed.

(2) Substantial questions of law are answered in favour of assessee and against Revenue.

(3) As prayed for, liberty is reserved to re-open this appeal based on the outcome of review petition in R.P.(C) No.001422-001497/2021 pending before the Hon'ble Supreme Court. No costs."

6.1 Further, the Tribunal in assessment year 2014-15 had an occasion to examine the same issue in IT(IT)A No.2696/Bang/2017 dated 12.8.2021 wherein held as under:

"3. Brief facts of the case are as follow:

The draft assessment order was passed on 31.12.2016, wherein it was concluded that the amount received by the assessee-company for sale of software would constitute royalty within the meaning of Article 12(3) of the DTAA and as per the provisions of section 9(1)(vi) of the I.T.Act. The A.O. also brought to tax the receipts from Indian customers on account of annual maintenance service, implementation and consultancy as fees for technical services u/s 9(1)(vii) of the I.T.Act and fees for included services under Article 12(4)(a) of India-US DTAA. The assessee filed objections before the Dispute Resolution Panel (DRP). The DRP issued directions dated 08.09.2017. The DRP rejected the objections raised by the assessee. Accordingly, final assessment order was passed on 12.10.2017 u/s 143(3) r.w.s. 144C(13) of the I.T.Act.

4. Aggrieved by the final assessment order, the assessee has preferred this appeal before the Tribunal. The learned AR, at the very outset, submitted that the issue in question is squarely covered in favour of the assessee by the judgment of the Hon'ble Apex Court in the case of Engineering Analysis Centre of Excellence P.Ltd. v. CIT reported in [2021] 432 ITR 471 (SC), wherein it was categorically held that sale of software would not constitute royalty within the provisions of section 9(1)(vi) of the I.T.Act and Article 12(4)(a) of the DTAA between India and USA.

> *4.1 As regards the amounts received towards annual maintenance services, implementation and consultancy services, it was stated that when the receipts on account of sale of software itself not included as royalty. Miscellaneous income on the same such as annual maintenance also cannot be brought to tax as fees for technical services.*
>
> *4.2 The learned Departmental Representative was not able to controvert the submissions made by the assessee. In view of the judgment of the Hon'ble Apex Court, which is identical to the facts of the instant case, we hold that the payment received by the assessee-company towards sale of software would not constitute royalty and cannot be brought to tax. Further the miscellaneous receipts on account of sale of software also cannot be brought to tax as fees for technical services. It is ordered accordingly.*
>
> *5. In the result, the appeal filed by the assessee is allowed."*

6.2 Contrary to this, now the ld. D.R. wants to reargue the case on same issue considered by jurisdictional High Court as well as by the Tribunal on earlier occasion stating that the agreements of the present assessee were not examined by the Hon'ble Supreme Court. In our opinion, when the issue is already settled by the Hon'ble Supreme Court, we are not in a position to take a different view on the same matter. Judicial discipline requires consistency in its proceedings. Being so, applying the ratio laid down by earlier decision of the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Pvt. Ltd. cited (supra), we allow the ground Nos.2 to 5 in favour of the assessee. Accordingly, these grounds of the appeal of the assessee are allowed."

12. The aforesaid Order of the Tribunal (para 6.2) had followed the judgment of Hon'ble Apex Court in the case of Engineering Analysis Centre of Excellence Pvt. Ltd., Vs. CIT (supra) and held that

reimbursement of computer and hardware maintenance from entity in India cannot be FTS/FIS. The facts of instant case and the facts considered by Tribunal for Assessment Year 2019-20 in assessee's own case are identical, therefore the departmental appeals are rejected.

13. It is to be mentioned that the ld. DR's submissions is limited only on taxability of software receipts. It is the contention of the ld. DR that it is not shrink wrap software that is sold, but customised software. It is stated in the submission that the owner of the software (assessee in this case) has parted with atleast one of the rights listed in section 14(a)/14(b) of the Copyrights Act. The ld. DR placed has placed on record a sample agreement entered by the assessee with Asian Paints Ltd. to buttress her submission. We have perused the agreement which is placed on record. There is nothing in clause (5) of the said agreement which states that the assessee has parted with copyright of the said software to the buyer/purchaser of the software. Customisation of the software by the assessee does not make the purchaser/buyer of the software the owner of the software so as to reproduce the same for further sales. In other words, what the assessee had sold as software, whether customised or not, is only on a copyright article and not copyright per se. Therefore, the Hon'ble Supreme Court judgment in the case of *Engineering Analysis Centre of Excellence P. Ltd.* (supra) squarely applies to the facts of the instant case and the said contentions of the ld. DR are hereby rejected.

14. In the result, all the appeals of the revenue are dismissed.

Pronounced in the open court on this 12th day of September, 2024.

Sd/-	Sd/-
(WASEEM AHMED) ACCOUNTANT MEMBER	(GEORGE GEORGE K.) VICE PRESIDENT

Bangalore,
Dated, the 12th September, 2024.

/*Desai S Murthy* /

Copy to:

1. Appellant 2. Respondent 3. Pr. CIT 4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.