

IN THE INCOME TAX APPELLATE TRIBUNNAL
MUMBAI BENCH "K", MUMBAI
BEFORE SHRI C.N. PRASAD (JUDICIAL MEMBER)
AND
SHRI ASHWANI TANEJA (ACCOUNTANT MEMBER)

I.T.A.No.7513/Mum/2010
(Assessment Years : 2005-06)

Dy.CIT-LTU, Centre-1, World Trade Centre, 28 th Floor, Cuffe Parade, Mumbai-5	V/s	M/s Tata Consultancy Services Ltd 9 th Floor, Nirmal Bldg, Nariman Point Mumbai-21
		PAN : AAACR4849R
Appellant		Respondent

Appellant by	Shri N.K. Chand, CIT-DR
Respondent by	Shri Dinesh Vyas, Sr.Counsel

Date of hearing	15.03.2017
Date of order	23.03.2017

ORDER

Per Ashwani Taneja, AM:-

The present appeal has been fixed as a result of order dated 29.07.2006 in M.A.No. 93 of 2016 passed by the Tribunal in this case wherein the Tribunal had recalled its earlier order with respect to Ground No 3 raised by the Revenue in its appeal by observing as under:-

“5-We would like to reproduce the Ground 3 raised by the AO and same reads as under:-

On the facts and in the circumstances of the case and in law the Id. CIT('A) erred in allowing software expenses u/s. 40(a)(i) on account of non deduction of TDS amounting Rs. 25,11,88,831/-”.

While deciding the appeal, the Tribunal at paragraph No. 13 has decided the issue as under:-

“13. Considering the rival contentions, we find that the argument of the assessee is correct. The locally acquired software expenses have been treated as capital expenditure, placing reliance on various judicial decisions, which hold that the expenses on software are in the nature of capital expenditure and depreciation is to be allowed on the same. As such, expenses on imported software are also in nature of capital expenditure and depreciation needs to be allowed thereon. The AO, therefore is directed to allow the depreciation on the imported software purchased by the assessee This alternative plea raised by the assessee, hence is accepted.”

From the above discussion it is clear that the Ground No.3 raised by the AO i.e. disallowance u/s. 40(a)(i) remained adjudicated that the alternative plea taken by the assessee was accepted. Therefore, we are of the opinion that matter should be placed before regular Bench to decide the issue(GOA-3) afresh.”

2. From the perusal of the above, it is clear that arguments on Ground No 3 of the appeal filed by the Revenue are to be heard and the adjudicated afresh by us.

3. During the course of hearing, Id.CIT(DR) assailed the order of Ld. CIT(A) and supported the order of the AO on this issue. It was submitted by him that it was rightly held by the AO that the payments made for software purchased by the assessee amounted to “royalty” as envisaged in Explanation 3 to section 9(1)(vi) of the Act. Therefore assessee ought to have deducted tax at source since assessee failed in deducting tax at source, the AO rightly invoked the provision of section 40(a)(i) of the Act for making disallowance of the impugned payments made by the assessee on account of import of software. It was submitted by him that the software purchased by the ‘assessee’ is admittedly a ‘shrink wrapped software’ which has been purchased off the shelf for the purpose of internal use and also for trading purposes. It was submitted that amendment has been made in section 9(1)(vi) of the Act by Finance Act, 2012 and after the amendment the amount paid for the software will clearly

be treated as 'royalty' as defined under the Act and therefore liable to tax. It was further submitted by him that in any case even prior to said amendment the amount was liable to be taxed as 'royalty' as was held in many judgments. Reliance was placed by him on the judgment of Karnataka High Court in the case of CIT vs Samsung Electronics Company Limited 345 ITR 494 and requested for reversing the order of Ld. CIT(A).

4. Per contra in the Ld. Senior Counsel of the assessee vehemently supported the order of the Ld. CIT(A). It was firstly argued by him that the payment for purchases of software was actually meant for acquiring the 'copy righted article' and not for 'transfer of any right in a copyright '. Accordingly it cannot be construed as 'royalty' under clause (v) of Explanation 2 to section 9(1)(vi) of the Act and therefore not taxable in the hands of the payee in India. Therefore provision of section 195 would not be applicable and consequently no disallowance can be made under section 40(a)(i) of the Act. For this proposition, he placed reliance of the following judgments:-

- i. Shinhan Bank(2016) 76 taxmann.com 42 (Mumbai ITAT) (dt. July 04,2016 at pg 4; para 8
- ii. Vinzas Solutions India(P.) Ltd. [2017] 77 Taxmann.com 279 (Madras)- at pg 3; para 7
- iii. M tech India (P.) Limited [2016] 381 ITR 31 (Delhi) (dt. January 19,2016) at pg 37-38; para 12-14
- iv. Ericsson AB [2012] 343 ITR 470 (Delhi) – at pg 501; para 59
- v. Sonata Information Techonology Ltd. v. ACIT [2006] 103 ITD 324 (Bangalore ITAT) – at pg 9; para 6
- vi. Sonic Biochem Extractions Pvt Ltd[2013] 23 ITR (T) 447 (Mumbai ITAT) – at page 10; para 35
- vii. Motorola Inc. [2005] 95 ITD 269 (Delhi ITAT) (SB) – at pg 66; para 141 upto para 172.

5. It was further argued by the Ld. Senior Counsel that even under the DTAA's of India with respective countries of the suppliers from whom software was

purchased, the payment of purchase of software cannot be regarded as 'royalty' since definition of 'royalty' under DTAA is narrower than the definition given in the Act. In support of this proposition, he relied upon the following judgments:-

- i. Qad Europe B.V. [2017] 77 taxmann.com 267 (Mumbai ITAT) (dt. December 21,2016)
- ii. First Advantage (P.) Ltd [2017] 77 taxmann.com 195 (Mumbai ITAT) (dt.January 11,2017)
- iii. Reliance Industries Limited [2016] 159 ITD 208 (Mumbai ITAT) (dt. May 18, 2016)
- iv. M/s Baan Global BV. [2016] 49 ITR(T) 73 (Mumbai ITAT) (dt. June 13,2016)
- v. Capgemini Business Services (India) Limited [2016] 158 ITD 1 (Mumbai ITAT) (dt. February 29, 2016)
- vi. Quaolcomm India (P.) Ltd [2017] 77 taxmann.com 56 (Hyd ITAT) (dt. October28,2016)
- vii. Infracsoft Limited [2014] 264 CTR 329 (Delhi)
- viii. Ericsson AB [2012] 343 ITR 470 (Delhi)
- ix. Nokia Networks (358 ITR 259) (Delhi).

6. It was also argued by him that out of the total amount disallowed by the AO of Rs. 25,11,88,831/- a sum of Rs. 5,59,54,982/- was paid on account of purchase of software for the purpose of resale/ trading. In this transaction assessee did not obtain any licence from the supplier and earned only margin for trading or reselling of such software. Therefore, the payment for the software was clearly on account of purchase of goods and cannot be treated as 'royalty' by any stretch of imagination and therefore no disallowance u/s 40(a) (i) can be made in respect of the same. Reliance in this regard was placed following judgments:

- i. Vinzas Solutions India(P.) Ltd. [2017] 77 Taxmann.com 279(Madras)

ii. M tech India (P.) Limited [2016] 381 ITR 31 (Delhi) (dt. January 19,2016)

iii. Dynamic Vertical Software India P. Ltd. [2011] 332 ITR 222 (Delhi).

7. Ld. Senior Counsel then distinguished the judgment of Hon'ble Karnataka High Court relied upon by the Ld. CIT DR in the case of Samsung Electronic Company Ltd. (supra) and submitted that this judgment has been considered and distinguished in various judgments by Hon'ble Delhi High Court and by various benches of the Mumbai Tribunal in many cases. For this proposition, he relied upon the following judgments:-

i. Shinhan Bank[2016] 76 taxmann.com 42 (Mumbai ITAT) (dt. July 04, 2016)

ii. M/s Baan Global BV [2016] 71 taxmann.com 213 (Mumbai ITAT) (dt. June 13, 2016)

iii. M Tech India (P.) Limited [2016] 381 ITR 31 (Delhi) (dt. January 19,2016)

iv. Infracsoft Limited [2014] 264 CTR 329 (Delhi)

v. Sonic Blochem Extractions Pvt Ltd [2013] 35 Taxmann.com 463 (Mumbai ITAT).

8. It was further submitted by him that in any case even if amendment made by Finance Act, 2012 is taken into account, no disallowance can be made u/s 40(a)(i) in view of the well settled principle of 'impossibility of performance' since the assessee cannot be expected to deduct tax at source retrospectively in respect of the transactions carried out in early years. For this proposition, he relied upon the following judgments:-

i. Shinhan Bank [2016] 76 taxmann.com 42 (Mumbai ITAT) (dt. July 04,2016)

ii. Channel Guide India Ltd. vs. Assistant Commissioner of Income Tax [2012] 20 ITR (T) 438 (Mumbai ITAT)

iii. Krishnaswamy S. Pd vs. Union of India [2006] 281 ITR 305 (SC)

iv. Infotech Enterprises Ltd. Vs. Additional Commissioner of Income Tax [2014] 30 ITR(T) 542 (Hyderabad ITAT)

v. Sterling Abrasives Ltd. Vs. Income Tax Officer [2010] 3 taxman.com 757 (Ahmedabad ITAT)

9. Lastly, it was submitted by the Ld. Sr. Counsel that in case two views are possible, then the view in favour of the assessee should be followed in view of following judgements:-

Reliance Industries Ltd [2016] 69 Taxmann.com 311 (Mumbai ITAT)(
dt. May 18, 2016)

Capgemini Business Services (India) Ltd [2016] 68 Taxmann.com 36
(Mumbai ITAT) (dt. February 29,2016)

CIT vs. Vegetable Products (88 ITR 192)(SC)

Mysore Minerals vs. CIT (239 ITR 775 (SC)

UOI vs. Onkar S. Kanwar (258 ITR 761)(SC)

Pradip J Mehta vs CIT (300 ITR 231)(SC)

Mahindra & Mahindra vs DCIT (58 TTJ 567 (Mumbai ITAT)

10. The Ld. Senior Counsel requested for upholding the order of Ld. CIT(A) in view of the aforesaid arguments and facts and circumstances of the case.

11. We have gone through the arguments made by both the sides, orders passed by the lower authorities and also the judgements relied upon before us.

12. The brief facts are that during the impugned assessment year, the assessee purchased software from local market as well as from abroad. The amounts paid aggregating to Rs.25.11 crores towards software purchased by way of imports were disallowed by the AO u/s 40(a)(i) on the ground that the assessee failed to deduct tax at source u/s 195 of the Act upon the payments made to the foreign suppliers. On the basis of facts recorded by the lower

authorities it is noted that expenditure claimed as deduction on account of purchase of software by the assessee which was disallowed by the AO comprises of following two categories:-

<u>Particulars</u>	<u>Amount</u>
Software for internal use	Rs. 19,52,33,849
Software for trading purposes	<u>Rs. 5,59,54,982</u>
Total	<u>Rs. 25,11,88,831</u>

The admitted case of both the parties before us is that it is a case of purchase of 'shrink wrapped software'. On analysis of orders passed by the lower authorities, it is noted by us that as far as software purchased for the purpose of trading is concerned, the assessee claimed deduction in the P & L Account on account of purchases made for software and debited the same in P & L Account and corresponding sales of the software were credited in the P & L Account. Effectively, the assessee included in its income, the amount of margin earned on trading of software. The AO has not allowed the cost of product sold by the assessee to the extent of Rs.5,59,54,982 on the ground that assessee did not deduct tax on the said amount. The contention of the AO was that the said amount represented payment on account of 'royalty' as envisaged in section 9(1)(vi) of the Act. We raised a query to the Ld. CIT-DR as to how the amount paid for purchasing the software could be termed as 'royalty', by any stretch of imagination, even within the meaning of section 9(1)(vi) of the Act. In response, the Ld. CIT-DR was not able to give any cogent reasoning. Therefore, after taking into account all facts and circumstances of this case, we fail to find any justification in the action of assessing officer with respect to disallowance made by him on account of software purchased for trading purposes.

13. Further, we have analysed the terms of some of the agreements entered into by the assessee with its suppliers for purchase of software. In one of the agreements dated 28-06-2004, between Veritas Software Asia Pacific Trading Pte Ltd, Singapore and the assessee, following clauses are worth noting:-

1. “LICENSE GRANT

2.1 VERITAS grants Customer, subject to the terms and conditions of this Agreement, a perpetual, non-exclusive, non-transferable license to use the Licensed Software in accordance with the Documentation, on the Designated Computers in the Territory, solely in support of customers internal business operations.

2.2 Customer may make a single copy of the Licensed Software and documentation for archival purposes. All copies made pursuant to this section shall be complete copies, and shall include all copyright, trademark, and other notices in the original. Customer may not otherwise copy the Licensed Software or Documentation without VERITAS'S prior written consent.

2.3 Customer's rights to use the Licensed Software and documentation shall be limited to those expressly granted in this Section

2. All rights not expressly granted to Customer are retained by VERITAS.

3. LICENSE RESTRICTIONS

Customer shall not without VERITAS'S prior written consent, cause or permit the: (a) use, copying, modification, rental, lease, sublease, sublicense, or transfer of the licensed Software or Documentation, except as expressly provided in this Agreement; (b) creation of any derivative works based on the Licensed Software or Documentation, (c) reverse engineering, disassembly, or decompiling of the Licensed software; (d) use of the Licensed Software or Documentation in connection with a service bureau or like activity whereby Customer, without purchasing a license from VERITAS, operates or uses the licensed Software or Documentation for the benefit of a third party who has

not purchased a copy of the Licensed Software; or (e) use of the Licensed Software or Documentation by any party other than Customer. In addition, Customer may only use the Licensed Software on a host based device that is the Designated Computer to which such Licensed Software is licensed. In addition, Customer shall use the Licensed Software only on the Designated Computers for which it has purchased an appropriate number and level of licenses and shall not use any Licensed Software to create or manage more devices (real or virtual) than the number of devices for which VERITAS has received corresponding license fees.

4. OWNERSHIP

VERITAS retains all right, title and interest in the Licensed Software and Documentation and in all copies, improvements, enhancements, modifications and derivative works of the Licensed Software or Documentation including, without limitation, all patent, copyright, trade secret and trademark rights."

14. Perusal of this agreement suggests that neither there was any transfer of copyright nor the vendor has given any permission for commercial exploitation of the copyright of the software. No source codes etc have been supplied by the vendor to the assessee. There is no permission given to the assessee to make any modification or re-engineering of the software, which was supplied for the limited purpose of internal use of the assessee. Ownership with regard to title and interest in the licensed software is retained by the supplier. It is noted that Ld. CIT(A) has also gone through various agreements and thereafter recorded following observations at page 9 of his order:-

"3.6.1.4. Based on the general terms of software purchase agreement, appellant submitted that payments made by the Company for acquiring software for its own use is not "royalty" as defined under the Act as well as the relevant applicable treaty for the following reasons:

- Computer Software can only be covered under clause (v) of Explanation 2 to section 9(1)(vi) under*

'copyright' since computer software is a 'literary work' under the Copyright Act, 1957 of India.

- *No Copyright right is given within the meaning of section 14 of the Copyright Act since the Appellant does not have any right to reproduce, issue copies of the program to the public to sell the program or give it on commercial rent, etc.*
- *All the title and rights in the software remain with the seller. The Appellant has a perpetual license which is akin to a purchase of a product/goods.*
- *The amount payable by the Appellant to the seller is for transfer of a copyrighted article and not transfer of a copyright per se.*
- *In any case, payment for purchase of software for the purpose of trading cannot be regarded as payment of 'royalty'.*

15. Finally, after analyzing the facts of this case and legal possession applicable at that time, it was held by Ld. CIT(A) that the amount paid by the assessee for purchase of aforesaid software would not fall within the definition of 'royalty' as envisaged under the law and was thus not taxable in the hands of the payee in India in absence of there being any 'PE' of the vendors in India. Relevant portion of his findings is reproduced below:-

"3.8.16. I have considered the contentions of the appellant, facts of the case as well as the contentions of the Ld. Addl. CIT in this regard. I agree with the contentions put forth by the appellant that the payment towards purchase of software product is payment for copyrighted article and hence, it only represented the purchase price of an article and could not be considered as Royalty either under the Act or under the Act or under the DTAA. It is purely in the nature of Business Income and in the absence of Permanent Establishment (PE) in India of the Non-resident (NRs) payees, the amount to remitted to NRs are not chargeable to tax.

Relying on the recent decisions in the case of Van oord ACZ India (P) Ltd and Prasad Production Ltd(Supra) and the contentions of the appellant, I agree with the view that withholding tax obligation on payer applies on payments to non-residents only if there is income chargeable to tax in India. Accordingly, there was no obligation of the appellant to deduct tax at source under section 195 of the Act, from making remittances to non-residents.

In view of above, I agree with the appellant's contention that no tax was deductible on the same and accordingly, no disallowance can be made under section 40(a)(i) of the Act."

16. Nothing wrong could be pointed out by the Ld. CIT(DR) in the well reasoned findings recorded by the Ld. CIT(A). Further, we have also examined the latest legal position in this regard on the basis of judgments relied upon the Ld. Senior Counsel before us. It is noted that in the case of **Shinhan Bank vs DDIT** (Supra) similar situations arose before the Mumbai bench of the Tribunal wherein the AO had disallowed the deductions claimed by the assessee on account of payment made for purchase of software u/s 40(a)(i) for non deduction of tax at source u/s 195 by the said assessee. Hon'ble Bench examined latest legal position in this regard and held that impugned payments were not liable to the taxed as 'royalty' in the hands of payees (i.e. suppliers) and therefore, no tax was required to be deducted at source and thus no disallowance could have been made u/s 40(a)(i), by observing as follows:-

"8. We have heard the rival submissions and also perused the relevant findings given in the impugned order. The payment towards software charges to "M/s. Comas Inc" for procurement of software has been treated as "Royalty" by the AO. Revenue's stand before us is that, now in the wake of Explanation 4 to section 9(1)(vi) the payment on account of computer software including granting of license which has been brought in the statute by the Finance Act, 2012 with retrospective effect from 1.6.1976 brings such type of payment within the scope and

ambit of enlarged definition of "Royalty". Admittedly, at the time of payment to "M/s. Comas Inc' for the software charges in May 2008 by the assessee there was no such provision under the Act that transfer of any right for use or right to use the computer software included granting of license irrespective of medium through which such right is transferred was not there in the statute. The case of the assessee has been that it has only purchased software for its banking business and license was given only for using the software. There is no transfer of any copyright albeit it was the transfer of the copyrighted article. Without going into the merits whether the said payment will fall within the nature of "Royalty" under the newly amended provision brought with retrospective effect or not, we are of the opinion that, at the time of making of the payment there was no such provision under the law to tax such payment of computer software as "Royalty". In fact, as pointed out by the Id. CIT (A), the decision of Special Bench in the case of "Motorola Inc" (supra) was there wherein it was held that if the licensees Js not allowed to exploit the computer software commercial]] which they had acquired required under the license agreement and only the copyrighted software which by itself was an article and not any copyright therein, then, the payment made for cop^yrighted article which represented the purchase price cannot be considered as "Royalty" under the provisions of section 9(1)(vi) of the Act. Once that is so, then it is very difficult to hold that the assessee should have deducted TDS on such payment when there was no clear-cut law that such a payment would be taxable in India. Here, the maxim of "lex non cogit ad impossilia, that is, the law of the possibly compelling a person to do something which is impossible, that is, when there is no provision for taxing an amount in India then how it can be expected that tax should be deducted on such a payment. This view has been upheld by the ITAT Mumbai Bench in the case of Channel Guide India Lid (supra) and catena of other decisions as cited by Id. Counsel, wherein it has been held that, assessee cannot held to be liable for deducting TDS in view of the retrospective amendment which has come at a much later date. Thus, we hold that the assessee was not obliged to deduct TDS at the time of making the payment and the law which has come into statute after four years from the date of payment cannot be held

to be applied retrospectively at best for deduction of TDS. Thus we hold that disallowance u/s. 40(a)(i) for non-deduction of TDS cannot be upheld. So far as the reliance placed by the Id. DR in the decision of Hon'ble Karnataka High Court in the case of "Samsung Electronics Co. Ltd." (supra), we find that the Hon'ble Delhi High Court in several cases like, DITv. Nokia Networks and DIT vs. Infrasoftware Ltd. has considered the said issue and has not followed the ratio laid down by the Karnataka High Court in "Samsung Electronics Co. Ltd. " (supra). Since, the Delhi High Court is the latest decision, wherein the decision of Hon'ble Karnataka High Court has been considered, therefore, we are inclined to follow the same. The findings of the Honble Delhi High Court in the case of Infrasoftware Ltd. (supra) are reproduced below:

"97. What is transferred is neither the copyright in the software nor the use of the copyright in the software, but what is transferred is the right to use the copyrighted material or article which is clearly distinct from the rights in a copyright. The right that is transferred is not a right to use the copyright but is only limited to the right to use the copyrighted material and the same does not give rise to any royalty income and would be business income.

98. We are not in agreement with the decision of the Karnataka High Court in the case of Samsung Electronics Co. Lid. (supra) that right to make a copy of the software and storing the same in the hard disk of the designated computer and taking backup copy would amount to copyri⁹ht work under section 14(1) of the Copyright Act and the payment made for the grant of the licence for the said purpose would constitute royalty. The license granted to the licensee permitting him to download the computer programme and storing it in the computer for his own use was only incidental to the facility extended to the licensee to make use of the copyrighted product for his internal business purpose. The said process was necessary to make the programme functiona1 and to have access to it and is qualitatively different from the right contemplated by the said provision because it is only integral to the use of copyrighted product. The right to make a backup copy

purely as a temporary protection against loss, destruction or damage has been held by the Delhi High Court in Nokia Networks OY (supra) as not amounting to acquiring a copyright in the software."

Thus, respectfully following the proposition laid down by the Hon'ble Delhi High Court, we hold that the assessee was not liable to deduct TDS on such payment. Therefore, no disallowance u/s. 40(a)(i) is called for in the present case."

17. It may be noted from the above that Hon'ble Bench has also considered and distinguished the judgment of Hon'ble Karnataka High Court in the case of Samsung Electronics Company Ltd (Supra). It is noted at the cost of repetition that the case before us is admittedly that of purchase of 'shrink wrapped software'. Identical situation came up before **Hon'ble Madras High Court** in a recent judgment in the case of **CIT vs Vinzas Solutions India (P) Ltd** (Supra) wherein the department invoked provisions of section 40(a)(i) by treating the amount of purchase of software as 'royalty' under Explanations 4 and 5 of section 9(1)(vi) of the Act and the assessee in the said case was a dealer engaged in buying and selling of software products in the open market. It was contended on behalf of the assessee before the Hon'ble High Court that the transaction in question was one of purchase and sale of product and nothing more. After analysing the entire situation, Hon'ble High Court accepted the contention of the assessee and held as under:-

"4. We are of the view that the provisions of section 9(1)(vi) dealing with and defining 'Royalty' cannot be made applicable to a situation of outright purchase and sale of a product. The Corpus Juris Secundum understands Royalty thus:

"The word 'royalty' means a share of the product or profit reserved by the owner for permitting another to use the property, the share of the production or profit paid to the owner; a share of the product or proceeds therefrom reserved to the owner for permitting the another to use the property; the share of the produce reserved to the owner

for permitting another to exploit and use the property; a share of the profit, reserved by the owner for permitting another to use the property; the amount reserved or the rental to be paid the original owner of the whole estate.”

5. *The Madras High Court in CIT vs Neyveli Lignite Corporation Ltd., reported in 243 ITR 458 states thus explaining the concept of Royalty:-*

'The term 'royalty' normally connotes the payment made by a person who has exclusive right over a thing for allowing another to make use of that thing which may be either physical or intellectual property or thing. The exclusivity of the right in relation to the thing for which royalty is paid should be with the grantor of that right. Mere passing of information concerning the design of a machine which is a tailor-made to meet the requirement of a buyers does not by itself amount to transfer of any right of exclusive user, so as to render the payment made therefore being regarded as 'royalty'

6. *Courts have consistently noted the difference between a transaction of sale of a 'copyrighted article' and one of 'copyright' itself. See Tata Consultancy Services v. State of Andhra Pradesh [2004] 271 LTR 401 [SC] ; Sundwiger EMFG [2004] 266 ITR 11 0 ; Dassault Systems K.K., In Re, [2010] 229 CTR 125 [AAR] ; ISRO Satellite Centre [ISAC], in Re [2008] 307 ITR 59 [AARJ and Asia Satellite Telecommunications Co. v. DIT [2011] 332 ITR 340 [Delhi].*

7. *The provisions of section 9(1)(vi) as a whole, would stand attracted in the case of the latter and not the former. Explanations 4 and 7 relied by the authorities would thus have to be read and understood only in that context and cannot be expanded to bring within its fold transaction beyond the realm of the provision. The Tribunal has relied on the decision of the Division Bench of the Delhi High Court in the case of The Principal Commissioner of Income Tax vs M Tech India Pvt Lid, which supports our view as above. It is brought to our notice that the decision of the Delhi High Court has not been accepted by the Department and an SLP is pending. Be that as it may, in view of the facts and circumstances as observed above, we have no hesitation in dismissing the Departmental Appeal answering the questions of law in favour of the assessee and against the Revenue.”*

18. It is also noted by us that identical view had been taken by **Hon'ble Delhi High Court** in his judgment passed in the case of **PCIT vs M.Tech India P.Ltd** (Supra) wherein after considering the judgment of Hon'ble Karnataka High Court in the case of Samsung Electronics company Ltd.(Supra), it was held that in case where an assessee acquires the right to use a software, the payment so made would amount to 'royalty'; however, in cases where the payments are made for purchase of software as product, the consideration paid cannot be considered to be for use or right to use the software. It was also held that where the software is held as a product it would amount to sale of goods and thus consideration paid for purchase of goods cannot be construed as 'royalty'. It was observed that there was clearly a distinction between the cases where consideration was paid to acquire the right to use a patent or a copyright and cases where payment was made to acquire patented or a copyrighted product/material. In the latter case, the consideration paid would have to be treated as payment for purchase of product rather than consideration for use of patent or copyright. Our attention was also drawn on the decisions taken by **Mumbai Bench** of the Tribunal in the case of **Qad Europe B.V. vs. DDIT** (Supra) which has been authored by one of us (i.e. Accountant Member) wherein detailed discussion has been made on the issue before us and after analysing the law, it was held that the payment made for purchase of software for internal use would not amount to payment for 'royalty' as envisaged under the law. It is noted that following observation of the bench may be useful here:-

"Now, if we analyse and compare various provisions of the Copyright Act with the relevant clauses of the master agreement, it is noted that the said agreement does not permit HLL to carry out any alteration or conversion of any nature, so as to fall within the definition of 'adaptation' as defined in Copyright Act, 1957. The right given to the customer for reproduction was only for the limited purpose so as to make it usable for all the offices of HLL in India and

no right was given to HLL for commercial exploitation of the same. It is also noted that the terms of the agreement do not allow or authorise HLL to do any of the acts covered by the definition of 'copyright'. Under these circumstances, the payment made by HLL cannot be construed as payment made towards 'use' of copyright particularly when the provisions of Indian Income-tax Act and DTAA are read together with the provisions of the Copyright Act, 1957.

17. Further, it is also noted by us that DTAA's of few countries make a specific mention that payment made for software would be included within the definition of 'Royalty'. Reference can be made to the DTAA with Malaysia, Romania, Kazakhstan and Morocco. However India Netherlands DTAA does not include software while defining 'Royalty'. Under these circumstances, we find that it would be difficult to characterise the payment received by the assessee on account of sale of software as payment received on account of 'Royalty'."

19. It is further noted by us that identical view has been taken in various other judgments as have been relied upon by the Ld. Senior Counsel which are not being repeated here, for the sake of brevity.

20. It is also noted that recently **Mumbai Bench** of ITAT has taken identical view in the case of **DDIT vs Shell Information Technology International BV** (in ITA No 5051/MUM/2009 Order Dt 15th March, 2017), wherein entire law available as on date has been discussed in detail and it was held that amount paid for purchase of software product would not fall within the definition of 'royalty'. The Bench relied in extenso upon the judgments of Hon'ble Delhi High Court in the case of DIT vs Infrasoftware Ltd, supra and DIT vs New Skies Satellite Ltd 95 CCH 0032.

21. Thus, taking into account totality of facts and circumstances of the case and legal position as discussed above, we find that it was rightly held by Ld. CIT(A) that TDS was not required to be deducted in this case. Therefore, disallowance made by AO by invoking provisions of section 40(a)(i) has been rightly deleted by Ld. CIT(A). No interference is called for in his order and

therefore, the same is upheld.

22. As a result, aforesaid Ground No 3 raised by the Revenue is dismissed.

Order was pronounced in the open court at the conclusion of hearing. .

Sd/-

sd/-

(C.N. PRASAD)	(ASHWANI TANEJA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dt : 23 .03.2017

pk/-

Copy to :

1. The appellant
2. The respondent
3. The CIT(A)
4. The CIT
5. The Ld. Departmental Representative for the Revenue, "K" Bench

(True copy)

By order

ASSTT.REGISTRAR, ITAT, MUMBAI BENCHES