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IN THE INCOME TAX APPELLATE TRIBUNAL
'B' BENCH: BANGALORE

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

IT(IT)A No. 129/Bang/2023
Assessment Year : 2019-20

M/s. Cisco Systems International B.V., C/o. Ernst & Young LLP (Authorised Representative) "Divyasree Chambers", First Floor, 'A' Wing, # 11 O' Shaughnessy Road, Langford Gardens, Bengaluru – 560 025. **PAN: AADCC9201D**	**Vs.**	The Deputy Commissioner of Income Tax, International Taxation, Circle 1(1), Bengaluru.
APPELLANT		**RESPONDENT**

Assessee by	:	Shri Nageswar Rao, Advocate
Revenue by	:	Shri Sunil Kumar Singh, CIT-2 (DR)

Date of Hearing	:	19-04-2023
Date of Pronouncement	:	18-05-2023

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present appeal is filed by assessee against the final assessment order passed by the Ld.DCIT, International Taxation, Circle – 1(1), Bangalore for A.Y. 2019-20 on following grounds of appeal:

"Cisco Systems International B.V. (hereinafter referred to as 'the Appellant'), respectfully craves leaveto prefer an appeal against the order dated January 25, 2023 (impugned order) passed by Ld. Assessing Officer (hereinafter referred to as the 'AO') under section 143(3) read with section 1440(13) of the Income-tax Act, 1961 ('the Act') pursuant to directions dated December 15, 2022 issued by Ld. DRP under section 144C (5) of the Act inter-alia on the following grounds which are without prejudice to each other:

That on the facts and circumstances of the case and in law:

A. <u>Grounds relating to corporate tax matters:</u>

1. The draft assessment order dated March 31, 2022, and final assessment order dated January 25, 2023, is bad in law as no valid notice under section 143(2) of the Act was issued by the jurisdictional assessing officer.

Without prejudice to the above:

2. Learned DRP/AO erred in selectively reading out of context few parts of agreements entered into with customers in India leading to misinterpretation and making factually incorrect observations, erroneous conclusions that right to adapt the software was granted to certain customers.

3. Ld. DRP/AO misinterpreted provisions of the Act and Double Taxation Avoidance Agreement entered into between India and Netherlands ('DTAA') and consequently erred in bringing to tax receipts from sale of software licences and support services received by Appellant, as income in the nature of Royalty/Fees for Technical Services ('FTS')

3.1. Ld. DRP/AO erred in not appreciating that the receipts of the Assessee are for supply of copies of the software license and not for the information of the industrial, commercial or scientific experience.

3.2. Ld. DRP/AO erred in treating receipts of the Appellant from supply of copyrighted software license as income in the nature of 'Royalty' as per the provisions of the Act and DTAA.

3.3. Ld. DRP/AO has erred, in treating the receipts of the Appellant from supply of support services as FTS/royalty under the provisions of the DTAA, based on various assumptions and surmises not substantiated by factual observations.

4. Ld. DRP/AO have erred in lightly ignoring decisions of Hon'ble Tribunal in Appellant's own case as also decision of Hon'ble Supreme Court. Impugned order does not indicate any justification for not following principle of consistency.

B. Grounds of appeal relating to other matters
5. Ld. AO has erred in law by not allowing full credit of taxes deducted at source as duly available to the Appellant.
6. The learned AO has erred in law by levying interest of INR 18,81,21,462 under section 234B of the Act, which is on account of the adjustments proposed to the returned income.
The Appellant submits that each of the above grounds is independent and without prejudice to one another.
The Appellant craves leave to add, alter, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of the appeal, so as to enable the Hon'ble Tribunal to decide on the appeal in accordance with the law."

2. Brief facts of the case are as under:

2.1 Cisco Systems International B.V. (hereinafter referred to as 'the Assessee' or 'CSI By') is a company incorporated under the laws of The Netherlands and is assessed to tax by the DCIT, International Taxation - Circle 1(1), Bengaluru. The Ld.AO noted that the assessee is engaged in manufacture and selling of Cisco products and provide the related support and services. The assessee submitted before the authorities below that being a tax resident of The Netherlands in accordance with the provisions of Article 4 of the India — Netherlands double taxation avoidance agreement, it is eligible to be taxed as per the provisions of the DTAA to the extent they are more beneficial than the provisions of the Income-tax Act, 1961 ('the Act') and also that the assessee did not have any Permanent Establishment ('PE') in India as defined under Article 5 of the DTAA.

2.2 During the AY 2019-20, assessee filed a return of income declaring NIL income and claiming refund of INR 183,63.68.220 on account of taxes withheld by the customers in India.

2.3 Subsequently. notices under Section 143(2) and 142(1) of the Act were issued to the assessee initiating scrutiny assessment

proceedings. During the assessment proceedings, the Ld.AO called for certain information/ details which were duly furnished by the assessee. Subsequently, the Ld.AO issued a draft assessment order under Section 143(3) of the Act dated 31.03.2022. The Ld.AO in the draft order proposed to assess the total income of the assessee at INR 2242,62,05,750.

2.4 It is submitted that, the facts for A.Ys. 2017-18 and 2018-19 are identical which is recorded by the Ld.AO in the draft assessment order dated 31.03.2022. The assessee also submitted that this issue has been considered by *Coordinate Bench of this Tribunal* in assessee's own case, the details of which are as under:

Assessment Year	Appeal No.	Date of order
2011-12	IT(IT) No. 760/Bang/2022	16.12.2022
2018-19	IT(IT)A No. 761/Bang/2022	16.12.2022
2016-17	IT(IT)A No. 1415/Bang/2019	30.09.2021
2017-18	IT(IT)A No. 188/Bang/2021	12.10.2021

2.5 However in the draft assessment order served on the assessee, the Ld.AO proposed to make the following additions by observing as under:

> *"12.7 Hence both the software and service offerings of CSIBV falls under the purview of royalty and hence the total revenue from sale of software and service amounting to Rs.2242,66,05,750 is to be taxed as income in the nature of royalty in the hands of CSIBV for AY 2019-20. Alternatively, the earlier contention, Rs. 341,81,33,779 is to be taxed as Royalty pertaining to sale of software and Rs. 1900,84,71,971 pertaining to sale of services which is to be taxed as FTS. From the above discussion, it is proved that the payments received by CSIBV of. Rs. 2242,66,05,750 during the financial year relevant to AY*

> *2019-20 constitute Royalty/FTS, both under Income Tax Act, 1961, and under the Double Taxation Avoidance Agreement between India and Netherlands."*

2.6 On receipt of the draft assessment order, the assessee filed objections before the DRP. The DRP also did not consider the view taken by this *Tribunal* in the preceding assessment years and confirmed the addition proposed by the Ld.AO.

3. The Ld.AR submitted that assessee also raised a legal ground before the DRP challenging the validity of the draft assessment order dated 31.03.2022 by submitting that no valid notice u/s. 143(2) was issued by the jurisdictional assessing officer. It was submitted before the DRP that as per CBDT notification no. 61/2019, 143(2) notice has to be issued by the Ld.AO. It was submitted that, in the facts of the present case, the notice u/s. 143(2) was issued by *ACIT vs. National e-Assessment Centre (1)(2),* who did not have jurisdiction over the assessee.

3.1 It was submitted by the assessee that, the proceedings initiated under faceless assessment procedure is invalid as the CBDT had issued order u/s. 119 of the Act on 13.08.2020, wherein it provided that the cases assigned to international charges would not fall under the purview of faceless assessment scheme.

3.2 The DRP after considering various submissions of the assessee observed and held as under:

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2.4 Addl. Ground of objection No. 4

Objection No. 4.1: The impugned draft assessment order dated March 31, 2022 is bad in law as no valid notice under section 143(2) of the Act was issued by the jurisdictional assessing officer.

2.4.1 The CBDT notified Income Tax E-assessment Scheme, 2019 vide Notification No.61/2019 Income Tax, w.e.f. 12.09.2019. Para 3 & 5 of the said Notification are reproduced hereunder:

> "3. Scope of the Scheme— The assessment under this Scheme shall be made in respect of such territorial area, or persons or class of persons, or incomes or class of incomes, or cases or class of cases, as may be specified by the Board."
>
> 5. Procedure for assessment— (1) The assessment under this Scheme shall be made as per the following procedure, namely:—
> (i) the National e-Assessment Centre shall serve a notice on the assessee under sub-section (2) of section 143, specifying the issues for selection of his case for assessment;"

2.4.2 Section 143(2) has been amended by Finance Act, 2016. The word "Assessing Officer or prescribed authority" has been inserted for the purpose of issuance of notice u/s. 143(2). Earlier it was only Assessing Officer. Further as per Rule 12E and Notification No.25 of 2021, [Notification No. 25/2021/F. No. 187/3/2020-ITA-I] the ACIT/DCIT (NeFAC) is the prescribed authority. The Notification is reproduced hereunder for ready reference:

> *"In exercise of powers conferred under sub-section (2) of section 143 of Income-tax Act, 1961 (43 of 1961) (the Act) read with Rule 12E of the*

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Income-tax Rules, 1962, the Central Board of Direct Taxes hereby authorises the Assistant Commissioner of Income-tax/Deputy Commissioner of Income-tax (NaFAC) having her / his headquarters at Delhi, to act as the 'Prescribed Income-tax Authority' for the purpose of sub-section (2) of section 143 of the Act, in respect of returns furnished under section 139 or in response to a notice issued under sub-section (1) of section 142 of the said Act, or sub-section (1) of section 148 of the Act, for the purpose of issuance of notice under sub-section (2) of section 143 of the said Act.

2. This notification shall come into force from the 1st day of April, 2021."

2.4.3 A clarification has been sought on the objection of the assessee on the issue of notice u/s 143(2) by NEAC / NeFAC. It is learnt that the AO has calrified on the objection of the assessee at the time of proceedings befoe the AO and the same is reproduced as under:-

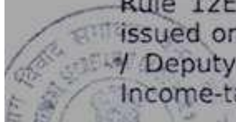
"In reference to the assessment proceedings undergoing in your case, your objections to the notice u/s 143(2) vide your reply dated 07.01.2022 have been perused. In your reply, you have challenged the validity of the assessment proceedings in view of the fact that the notice u/s 143(2) was issued by the National Faceless Assessment Centre (NaFAC) when the jurisdiction in your case lies in the international taxation charge.

In this regard, your objections to the validity of the assessment proceedings have been considered and found to be incorrect. The provisions of Section 143(2) of the Act were amended vide the Finance Act, 2016 to provide that notice under the said sub-section may be served on the assessee by the Assessing Officer or the prescribed income-tax authority. The relevant extract of the Memorandum to the Finance Bill, 2016 is produced below for your reference:

"Sub-section (2) of section 143 provides that, if the Assessing Officer considers it necessary and expedient to ensure that the assessee has not understated the income or has not computed excessive loss or has not under-paid the tax in any manner, he shall serve on the assessee a notice requiring him to produce, or cause to be produced on a specified date, any evidence on which the assessee may rely in support of the return.

In order to ensure timely service of notice issued under sub-section (2) of section 143, it is proposed to amend sub-section (2) of section 143 to provide that notice under the said sub-section may be served on the assessee by the Assessing Officer or the prescribed income-tax authority, either to attend the office of the Assessing Officer or to produce, or cause to be produced before the Assessing Officer any evidence on which the assessee may rely in support of the return."

In exercise of the powers conferred by the amended provision, read with Rule 12E of the Income-tax Rules, 1962, Notification No. 25 of 2021 was issued on 31.03.2021 authorising the Assistant Commissioner of Income-tax / Deputy Commissioner of Income-tax (NaFAC) to act as the 'Prescribed Income-tax Authority' for the purpose of Section 143(2) of the Act.



Through a conjoint reading of the amended provisions of Section 143(2); the Memorandum to the Finance Bill, 2016; Rule 12E of the Income-tax Rules, 1962; and Notification No. 25 of 2021; it is clear that Assistant Commissioner of Income-tax / Deputy Commissioner of Income-tax (NaFAC) has been authorized as the 'Prescribed Income-tax Authority' for the issuance of notice u/s 143(2) in all cases, and not merely the cases where the assessment proceedings are to be completed as per the provisions of Section 144B of the Act. The Notification No. 72/2019 and CBDT Orders dated August 13, 2020 and March 31, 2021 relied upon by the assessee do not apply in the instant case as they were issued in relation to conduct of assessment proceedings u/s 144B of the Act.

The Notification No. 25 of 2021 which is applicable in the instant case has been issued under the provisions of Section 143(2) and is applicable in all cases, not merely in cases where assessment proceedings are to be conducted under Section 144B.

In view of the same, your contentions to the validity of the assessment proceedings are hereby disposed off and you are requested to cooperate during the assessment proceedings by providing the requisite information / documents on or before the due dates."

2.4.4 As per the Faceless Scheme, all Notices are to be issued to the tax payers electronically by the National e-Assessment Centre. Thus, the notice issued u/s. 143(2) by the NeAC is in order. Once the notice u/s. 143(2) has been issued by the NeAC, the case has been assigned to the Jurisdictional AO for proceeding to finalise the assessment.

2.4.5 Once a valid notice has been issued by the designated authority, the question of issuing further notice u/s. 143(2) by the jurisdictional AO does not arise. The Income-tax Act, 1961 does not permit multiple issue of Notice u/s 143(2).

2.4.6 The other contentions / submissions made have been perused and placed on record. On perusal of the same it is found that the notice issued u/s. 143(2) is valid in Law. Thus the contention of the assessee on the issue of Notice u/s. 143(2) fails.

3.3 The DRP thus dismissed the objections raised by assessee on both the issue.

4. On receipt of the DRP directions, the Ld.AO passed the final assessment order by making addition of Rs.2242,66,05,750/- in the hands of the assessee.

Aggrieved by the final assessment order, the assessee is in appeal before this *Tribunal.*

5. Ground no. 1 is general in nature and therefore do not require adjudication.

6. Ground no. 2 raised by assessee is challenging the validity of draft assessment order passed by the Ld.AO.

6.1 We havealso perused the observations of the DRP reproduced hereinabove and the response of the Ld.AO to the objections of the assessee that are reproduced in the DRP directions. We do not find any merit in the legal ground raised by the assessee based on the observations recorded by the DRP.

Accordingly, ground no. 2 raised by the assessee stands dismissed.

7. At the outset, the Ld.AR submitted that the issues raised by the assessee on merits in **Ground nos. 3-4** stands squarely covered by the decisions of *Coordinate Bench of this Tribunal* in assessee's own case for preceding assessment years.

7.1 The Ld.DR on the contrary, relied on the orders passed by the authorities below.

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

7.2 We note that in the order dated 12.10.2021 passed by the *Coordinate Bench of this Tribunal* in assessee's own case for A.Y. 2017-18, this *Tribunal* has observed that *Hon'ble Karnataka High Court* in assessee's own case for A.Y. 2011-12 in *ITA No. 7/2019* by order dated 26.03.2021 has upheld the view of this *Tribunal* on this issue. It is submitted that there is no change in terms and conditions of the agreement in the year under consideration also. He submitted that the assessee is not transferring any copyright, but granting only user license. It has been contended

that the decision rendered by the *Hon'ble Supreme Court* in the case of *Engineering Analysis Centre of Excellence (supra)* is followed by the *co-ordinate bench* in AY 201415, 2015-16 and 2016-17 and the same should be followed in this year also.

7.3 *Hon'ble Supreme Court* in case of *Engineering Analysis Centre for Excellent Pvt. Ltd. vs CIT (supra)* while considering the issue had looked into the ratio is laid down by the jurisdictional High Court, and the other decisions that was relied on by the Ld.AO. *Hon'ble Supreme Court* in paragraph 27,47,52,168 & 169 observed as under:

> *"24. The Apex Court in the aforesaid case has held in paragraphs 27, 47, 52, 168 & 169 as under:*
>
> *"27. The machinery provision contained in Section 195 of the Income Tax Act is inextricably linked with the charging provision contained in Section 9 read with Section 4 o the Income Tax Act, as a result of which, a person resident in India, responsible for paying a sum of money, "chargeable under the provisions of [the] Act", to a non-resident, shall at the time of credit of such amount to the account of the payee in any mode, deduct tax at source at the rate in force which, under Section (37A)(iii) of the Income. Tax Act, is the rate in force prescribed by the DTAA. Importantly, such deduction is only to be made if 'the non-resident is liable to pay tax under the charging provision contained in Section 9 read with Section 4 of the Income Tax Act, ,read with the DTAA. Thus, it is only when the non-resident is liable to pay income tax in India on income deemed to arise in India and no deduction of TDS is made under Sector 105(1) of the Income Tax Act, or such perion has, after applying Section 195(2) of the Income Tax Act, not deducted such proportion of tax as is required, that the consequences of a failure to deduct and pay, reflected in Section 201 of the Income Tax Act, follow, by virtue of which the resident-payee is deemed an "assessee in default", and thus, is made liable to pay tax, interest and penalty thereon. This position is also made amply clear by the referral order in the concerned appeals from the High Court of Karnataka, namely, the judgment of this Court in GE Technology (supra).*
>
> *47. In all these cases, the "licence" that is granted vide the EULA, is riot a licence in terms of Section 30 of the*

Copyright Act, which transfers an interest in all or any of the rights contained in Sections 14(a) and 14(b) of the Copyright Act, but s a "licence" which imposes restrictions or conditions for the use of computer software. Thus it cannot be said that any of the EULAs that we are concerned with are referred lo Section 30 of the Copyright Act, inasmuch as Section 30 of the Copyright Act speaks of granting ar1 interest in any of the rights mentioned in Sections 14(a) and 14(b) of the Copyright Act. The EULAs in all the appeals before us do not grant any such right or interest, !east of all, a right or interest to reproduce the computer software. In point of fact, such reproduction is expressly interdicted, and it is also expressly stated that no vestige of copyright is at all transferred, either to the distributor or to the end-user. A simple illustration to explain the aforesaid position will suffice. If an English publisher sells 2000 copies of a particular book to an Indian distributor, who then resells the same at a profit, no copyright in the aforesaid book is transferred to the Indian distributor, either by way of licence or otherwise, inasmuch as the Indian distributor only makes a profit on the sale of each hook. Importantly, there is no right in the Indian distributor to reproduce the aforesaid book and then sell copies of the same. On the other hand, if an English publisher were to sell the same book to an Indian publisher, this time with the right to reproduced and make copies of the aforesaid book with the permission of the author it can be said the copyright in the book has been transferred by way of licence or otherwise, and what the Indian publisher will pay for, is the right to reproduce the book, which can then be characterized as royalty for the exclusive right to reproduce the book in the territory mentioned by the licence.

52. There can be no doubt as to the real nature of the transactions in the appeals before us. What is "licensed" by the foreign, non-resident supplier to the distributor and resold to the resident end-user, or directly supplied to the resident end-user, is in fact the sale of a physical object which contains an embedded computer programme, and is therefore, a sale of goods, which, as has been correctly pointed out by the learned counsel for the assessees, the law declared by this Court in the context of sales tax statute in Tata Consultancy Services v. State of A.P., 2005(1) SCC 308 (see paragraph 27).

168. Given the definition of royalties contained in Article 12 of the DTAAs mentioned in paragraph 41 of this Judgment, it is clear that there is no obligation on

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> *the persons mentioned in S.195 of the Income Tax Act to deduct tax at source, as the distribution agreements/EULAs in the facts of these cases do not create any interest or right in such distributors/end-users, which would amount o the use of or right to use any copyright. The provisions contained in the Income Tax Act (S. 9(1) (vi), along with explanations 2 and 4 thereof), which deal with royalty, not being more beneficial to the asessees, have no application in the facts of these cases.*
>
> *169. Our answer to the question posed before us, is that the amounts paid by resident Indian end-users/distributors to non-resident computer software manufacture/suppliers, as consideration for the resale/use of the computer software through EULAs /distribution agreements, is not the payment of royalty' for the use of copyright in the computer software and that the same does not give rise to any income taxable in India, as a result of which the persons referred to in Section 195 of the Income Tax Act were not liable to deduce any TDS under Section 195 of the Income Tax Act. The answer to this question will apply to all, four categories of cases enumerated by us, in paragraph-4 of this judgment.*
>
> ***8.** In the light of the aforesaid judgment delivered by the Hon'ble Supreme Court, the question of law framed in the present appeal is decided in favour of the assessee and against the revenue."*

7.4 Similar view has been taken by the *Coordinate Bench of this Tribunal* in the appeals mentioned hereinabove in assessee's own case. In the light of the above observations, and respectfully following the decision of *Hon'ble Supreme Court*, we are of the view that Ld.CIT(A) erred in treating the receipts from sale of software with the support services as royalty.

Accordingly ground nos. 3 to 4 raised by assessee stands allowed.

8. **Ground no. 5** is raised by assessee seeking the credit of TDS that is paid by assessee. The Ld.AO is directed to verify the details filed by the assessee and consider the claim in accordance with law.

Accordingly, ground no. 5 raised by assessee stands allowed.

9. **Ground no. 6** is consequential in nature and therefore do not require adjudication.

In the result, the appeal filed by the assessee stands partly allowed.

Order pronounced in the open court on 18th May, 2023.

Sd/-	Sd/-
(CHANDRA POOJARI)	(BEENA PILLAI)
Accountant Member	Judicial Member

Bangalore,
Dated, the 18th May, 2023.
/MS /

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2. Respondent
3. CIT
4. DR, ITAT, Bangalore
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By order

Assistant Registrar,
ITAT, Bangalore