WWW.LEGALERAONLINE.COM

IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES "A", BANGALORE

Before Shri Chandra Poojari, AM & Shri George George K, JM

ITA No.3287/Bang/2018 : Asst.Year 2010-2011
ITA No.3288/Bang/2018 : Asst.Year 2011-2012
ITA No.3289/Bang/2018 : Asst.Year 2012-2013

M/s.Altisource Business Solutions Private Limited,3rd Floor, A & B Wing, Block No.12, Pritech ParkBellandur Village, Marathahali Ring Road, Sarjapur Bangalore – 560 103. **PAN : AAACO9467A.**	v.	The Asst.Commissioner of Income-tax, Circle 1(2) (International Taxation) Bangalore.
(Appellant)		(Respondent)

Appellant by : Sri.K.R.Vasudevan, Advocate
Respondent by : Sri.Kannan Narayanan, JCIT-DR

Date of Hearing : 16.03.2021		**Date of Pronouncement : 17.03.2021**

ORDER

Per George George K, JM :

These appeals at the instance of the assessee are directed against various orders of the CIT(A). The relevant assessment years are 2010-2011 to 2012-2013.

2. The brief facts of the case are as follow:

The assessee is a private limited company. It provides contract software development and support services and information technology (IT) enabled services including data analysis, compilation and transmission of customized software to overseas affiliates. The assessments were completed by making disallowance of software expenses paid to non-residents by invoking the provisions of section 40(a)(ia) of the I.T.Act.

WWW.LEGALERAONLINE.COM

3. Based on the disallowance u/s 40(a)(ia) of the I.T.Act, in assessments completed, proceedings u/s 201(1) of the I.T.Act was initiated. The assessee was show caused why it should not be treated as an assessee in default for non-deduction of tax at source u/s 195 of the I.T.Act. The assessee filed detailed response to the above said show cause notice. However, proceedings were completed by the Assessing Officer u/s 201(1) and 201(1A) of the I.T.Act by treating the assessee as an assessee in default. The view taken by the Assessing Officer was confirmed by the CIT(A).

4. Aggrieved by the orders of the CIT(A) for the assessment years 2010-2011, 2011-2012 and 2012-2013, the assessee has preferred these appeals before the Tribunal. The learned Counsel for the assessee has submitted that the issue in question is covered in favour of the assessee by the judgment of the Hon'ble Apex Court in the case of *Engineering Analysis Centre of Excellence Pvt. Ltd. – Civil Appeal Nos.8733-8734/2018* (judgment dated 02.03.2021). It was further submitted that as regards the disallowance made in assessment orders by invoking the provisions of section 40(a)(ia) of the I.T.Act, the Tribunal vide order in IT(TP)A Nos.178 & 335/Bang/2015 (order dated 11.03.2021), has deleted the same by placing reliance on the judgment of the Hon'ble Apex Court in the case of *Engineering Analysis Centre of Excellence Pvt. Ltd. (supra)*. The assessee has filed a brief written submission, which reads as follow:-

> *"1. As per section 195 of the Act, tax is required to be deducted at source from any payments made to non-resident which are chargeable as income liable to tax in India.*

WWW.LEGALERAONLINE.COM

2. In order to determine whether any payment is chargeable to tax in India, it is required to examine the nature of such payment under the provisions of the Act (and the provisions of relevant DTAA if more beneficial to the assessee).

3. As per the provisions of section 5 of the Act, in case of non-residents, amounts includible in their total income i.e. taxable income would be all income from whatever sources derived which-

a. is received or is deemed to be received in India in such year by or on behalf of such person,

or

b. accrues or arises or deemed to accrue or arise to him in India during such year.

4. As per section 9(1)(vi) of the Act, income deemed to accrue or arise in India includes income by way of royalty payable by a person who is a resident in India.

5. As per Explanation 2 to section 9(1)(vi) of Act, the term 'royalties' means

"consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head "Capital gains") for – i.

ii.
iii.
iv.
iva ....

v. the transfer of all or any rights (including the granting of a licence) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, but not including consideration for the sale, distribution or exhibition of cinematographic films; or

vi.

6. Explanation 3 to section 9(1)(vi) clarifies that "computer software" means any computer programme recorded on any disc, tape, perforated media or other information storage device and includes any such programme or any customized electronic data.

WWW.LEGALERAONLINE.COM

7. Explanation 4 to section 9(1)(vi) further clarifies that transfer of all or any rights in respect of any right, property or information includes and has always included transfer of all or any right for use or right to use a computer software (including granting of a licence) irrespective of the medium through which such right is transferred.

8. The Appellant submits that in the definition of royalty under the Act, the phrase 'including the granting of a licence' is found, that does not mean that even a non-exclusive licence permitting user for in-house purpose would be covered by this expression. The Company submits that any and every licence is not contemplated by the term "license" which appears in the royalty definition. It should take colour from the preceding expression 'transfer of rights in respect of copyright'.

9. In the instant case, we submit that Appellant has been granted the user licence to use the software (and not the copyright in the software) for its internal business purposes. The Appellant has got the license to use. the software and such license does not grant the Company right to make copies of such software even for its internal purposes. Thus, we submit that what is transferred is a copyrighted article and not a copyright itself. Hence, consideration paid is not taxable as royalty under the provisions of the ct

10. The Appellant submits that the software purchased are only a copyrighted article and there is no transfer of copyright and in such case the same cannot be treated as royalty under the tax treaties with the respective countries (that is Singapore, USA, Philadelphia, Ireland, Atlanta and Australia).

11. Further the Appellant wishes to submit that if transfer of software does not amount to transfer of copyright, annual maintenance services/license renewal etc. would not be taxable as fees for technical services under treaties of country of residence of payee (Singapore, USA and Australia) on account of the following:

a. Such services are not ancillary and subsidiary to application or enjoyment of copyright

b. Such services do not make available technical knowledge, skill, knowhow etc.,

12. In this regard, the Appellant places reliance on recent ruling by Supreme Court of India in case of Engineering Analysis Centre of Excellence Private Limited, wherein the Apex Court has noted that:

WWW.LEGALERAONLINE.COM

- The end user can only use the computer programme by installing it in the computer hardware and cannot reproduce the same for sale or transfer, i.e, no act contrary to the terms imposed by the End-User License Agreements

- The licence granted vide the End-User License Agreements is not a license in terms of section 30 of the Indian Copyright Act, 1957 (CA) but is a licence which imposes restrictions or conditions for the use of the computer software

13. Accordingly, the Supreme Court has also observed that based on the definition of 'royalty' contained in Article 12 of the DTAAs, the distribution agreements/ End-User License Agreements do not create any interest or right in such distributors /end users, which would amount to the use of or right to use any copyright. The Apex Court also noted that the definition under the Act is wider as compared to the definition in DTAA in at least the following three aspects:

- Consideration includes lumpsum consideration which would not amount to income of the recipient chargeable under the head 'capital gains';

- Transfer of 'all or any rights' expressly includes the granting of licence in respect thereof;

and

- Such transfer must be 'in respect of any copyright of any literary work.

Accordingly, the Apex Court has held that the provisions of the Act [section 9(1)(vi), along with Explanations 2 and 4 thereof}, are not being more beneficial to the assessees, the same have no application.

5. The learned Departmental Representative submitted that the matter needs to be restored to the A.O. for examination whether non-resident owner continues to have proprietary rights in the software and use of software by the Indian company is limited and there is no transfer of copyright.

6. We have heard rival submissions and perused the material on record. It is clear from the order of the Assessing Officer passed u/s 201(1A) of the I.T.Act and the order of the

WWW.LEGALERAONLINE.COM

CIT(A) confirming the same that assessee had only purchased software, which is copyrighted article and there is no transfer of copyright, and therefore, in such cases, the same cannot be treated as "royalty" under the respective tax treaty. The Hon'ble Apex Court in the case of Engineering Analysis Centre of Excellence Private Limited (supra) has noted that the end user can only use the computer programme by installing it in the computer hardware and cannot reproduce the same for sale or transfer and the licence granted vide the End-User License Agreements is not a license in terms of section 30 of the Indian Copyright Act, 1957 (CA) but is a licence which imposes restrictions or conditions for the use of the computer software. The Hon'ble Supreme Court has also observed that based on the definition of 'royalty' contained in Article 12 of the DTAAs, the distribution agreements/ End-User License Agreements do not create any interest or right in such distributors/end users, which would amount to the use of or right to use any copyright. The Hon'ble Apex Court also noted that the definition under the Act is wider as compared to the definition in DTAA in at least the following three aspects:

- Consideration includes lumpsum consideration which would not amount to income of the recipient chargeable under the head 'capital gains';

- Transfer of 'all or any rights' expressly includes the granting of licence in respect thereof; and

- Such transfer must be 'in respect of any copyright of any literary work.

WWW.LEGALERAONLINE.COM

.

Accordingly, the Hon'ble Apex Court has held that the provisions of the Act [section 9(1)(vi), along with Explanations 2 and 4 thereof), are not more beneficial to the assessees and hence, the same have no application. The conclusion of the Hon'ble Apex Court at pages 225 and 226 reads as follow:-

> *"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 the persons mentioned in section 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 to the use of or right in such distributors / end-users, which would amount to the use of or right to use any copyright. The provisions contained in the Income Tax Act (section 9(1)(vi), along with explanation 2 and 4 thereof) which deal with royalty, not being more beneficial to the assessees, 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-user / distributors to non-resident computer software manufacturers / 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 deduct 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."*

7. Moreover, the disallowance in the assessment order by invoking section 40(a)(ia) of the I.T.Act was deleted by the ITAT in order dated 11.03.2021 (supra) by following the above judgment of the Hon'ble Apex Court. Therefore, following the judgment of the Hon'ble Apex Court in the case of *Engineers Analysis Centre of Excellence (P) Ltd. v. CIT (supra)*, we hold that amounts paid by the assessee to the non-resident computer

WWW.LEGALERAONLINE.COM

software manufacturers / suppliers as consideration for the resale / use of computer software, is not payment of royalty for use of copyright in the computer software. Hence, the consideration paid to non-resident software manufactures / suppliers does not give rise to income taxable in India and was not liable for deduction of tax at source u/s 195 of the I.T.Act. It is ordered accordingly.

8. In the result, the appeals filed by the assessee are allowed.

Order pronounced on this 17th day of March, 2021.

Sd/-	**Sd/-**
(Chandra Poojari)	**(George George K)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Bangalore; Dated : 17th March, 2021.
Devadas G*

BY THE PEOPLE. FOR THE PEOPLE. OF THE PEOPLE

Copy to :

1. The Appellant.
2. The Respondent.
3. The CIT(A)-12, Bangalore.
4. The CIT (International Taxation), Bangalore.
5. The DR, ITAT, Bengaluru.
6. Guard File.

Asst.Registrar/ITAT, Bangalore