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3013/Del/2017

ITA

No.

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'D' NEW DELHI**

**BEFORE SHRI R. K. PANDA ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER**

**I.T.A. No. 3013/DEL/2017 (A.Y 2014-15)
(THROUGH VIDEO CONFERENCING)**

Symantec Asia Pacific Pte. Ltd. 6, Temasek Boulevard, #12-01 Sutech Tower Four Singapore AAOCS1828F (APPELLANT)	Vs	DCIT (International Taxation) Circle-3(1)(2), Room No. 419, Block E-2, Civic Centre, J. L. N. Marg, New Delhi (RESPONDENT)
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Appellant by	Sh. Nageshwar Rao, Adv & Mrs. Deepika Aggarwal, Adv
Respondent by	Dr. Prabha Kant, CIT DR

Date of Hearing	31.03.2021
Date of Pronouncement	15.04.2021

ORDER

PER SUCHITRA KAMBLE, JM

This appeal is filed by the assessee against order dated 10/02/2017 passed by Income Tax Department, Singapore, for assessment year 2014-15.

2. The grounds of appeal are as under:-

“Based on the facts and circumstances of the case, Symantec Asia Pacific Ptd. Ltd. (hereinafter referred to as the ‘Appellant’) respectfully craves leave to prefer an appeal under section 253(I)(d) of the Income-tax Act, 1961 (hereinafter referred to as the ‘Act’), against the order dated 14 March 2017 (received by the Appellant on 20 March 2017) passed by the learned Deputy Commissioner of Income-tax, Circle 3(1)(2), International Taxation, New Delhi (hereinafter referred to as ‘AO’) in pursuance of the directions issued by the

Hon'ble Dispute Resolution Panel - 2, New Delhi (hereinafter referred to as 'DRP').dated 10 February 2017 under section 143(3) of the Act read with section 144C(13) of the Act on the following grounds, which are independent of and without prejudice to each other.

Ground 1 - Consideration from sale of software licenses of Rs. 2,42,52,89,282 taxed as royalty

On the facts and in the circumstances of the case and in law, the learned AO and the Hon'ble DRP has erred in treating the consideration received from sale of software license taxable as 'Royalty' both under the provisions of the Act as well as Article 12 of the Double Taxation Avoidance Agreement ('DTAA') between India and Singapore

The learned AO and the Hon'ble DRP failed to appreciate the Appellant's arguments and submissions explaining that the software licences sold by the Appellant are goods and not services

The learned AO and the Hon'ble DRP erred in holding that the Appellant grants right in the copyright of the software licenses, instead of treating the grant of software licenses as copyrighted article without any rights in the copyright.

The learned AO and the Hon'ble DRP erred in holding that the term 'use' or 'right to use' does not presuppose commercial exploitation of software

The learned AO and the Hon'ble DRP erred in treating that sale of software licenses by the Assessee involved consideration for use or right to use any process assuming that computer program is process

The learned AO and the Hon'ble DRP erred in not following the binding decisions of the jurisdictional Hon'ble Delhi High Court which squarely covered the aforesaid issue.

Ground 2 - Initiation of penalty proceedings under section 271(I)(c) of the Act

On the facts and in the circumstances of the case and in law, the learned AO erred in initiating penalty proceedings under section 271(I)(c) of the Act."

3. The assessee company is formed under the laws of Singapore and the Company does not have any presence in India either by way of a Permanent Establishment or fixed base as defined under Article 5 of the Double Tax Avoidance Agreement entered between India and Singapore as mentioned in the Assessment Order. The draft assessment order was passed on 5/9/2016. The assessee filed return of income for AY 2014-15 on 27/09/2014, declaring total income at Rs. 'NIL'. During the relevant Financial Year, the assessee had received amount of Rs.242,52,89,282/- on account of sale of licence standard software, Maintenance and Support Services to its own users customers in India. The assessee sold application software like community wires software to the end users for their self used either directly or indirectly through authorised distributors, resellers or service providers in India and not for making copies of its product/software and sale to others thereby making profit by way of exploiting the IPRs which are with the assessee. After examining the details filed like distributor agreement, general and administrative service agreement, licence agreement etc. The Assessing Officer raised a query that the consideration amounting to Rs.242,52,89,282/- on sale of licence software should be treated as receipts received on account of sale of licence software as royalty. As held in earlier years. The Assessing Officer made addition of Rs.242,52,89,282/- towards royalty income at 10% on gross basis as per DGTAA between India and Singapore.

4. Being aggrieved by the assessment order, the assessee filed appeal before us.

5. The Ld. AR submitted that the issue in present Assessment Year is already covered by the decision of the Hon'ble Apex Court in case of Engineering Analysis Centre of Excellence Pvt. Ltd. Vs. CIT (Civil Appeal No 8733_8744 of 2018 order dated 2/3/2021. The Ld. AR also relied upon the decision of the Tribunal in assessee's own case for Ay 2013-14, 2012-13, 2017-

18, 2014-15 & 2015-16 as well as Ay 2016-17, ITA No. 1000/Del/2017 for Ay 2013-14 order dated 31/8/2020).

6. The Ld. DR submitted that the issue of software income whether royalty or not has been settled by the Apex Court in assessee's favour and relied upon the assessment order.

7. We have heard both the parties and perused all the relevant material available on record. The issue of software income is not a royalty income is settled by the Hon'ble Apex Court in case of Engineering Analysis Centre of Excellence Pvt. Ltd. (Supra). The Hon'ble Apex Court held as under:

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 to use any copyright. The provisions contained in the Income Tax Act (section 9(1)(vi), along with explanations 2 and 4 thereof), which deal with royalty, not being more beneficial to the assessee, 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 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.

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170. The appeals from the impugned judgments of the High Court of Karnataka are allowed, and the aforesaid judgments are set aside. The ruling of the AAR in Citrix Systems (AAR) (supra) is set aside. The appeals from the impugned judgments of the High Court of Delhi are dismissed.”

The Legal Principal and the factual matrix are identical in present Assessment year of the assessee to that of the issues discussed in case of Engineering Analysis Centre of Excellence Pvt. Ltd.. Besides this, the issue is covered in favour of assessee in previous year as well. Hence, the appeal of the assessee is allowed.

8. In result, the appeal of the assessee is allowed

Order pronounced in the Open Court on this 15th Day of April, 2021.

Sd/-
(R. K. PANDA)
ACCOUNTANT MEMBER

Sd/-
(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Dated : 15 /04/2021

R. Naheed *

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

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Date of dictation	01.04.2021
Date on which the typed draft is placed before the dictating Member	01.04.2021
Date on which the typed draft is placed before the Other Member	15.04.2021
Date on which the approved draft comes to the Sr. PS/PS	15.04.2021
Date on which the fair order is placed before the Dictating Member for pronouncement	15.04.2021
Date on which the fair order comes back to the Sr. PS/PS	15.04.2021
Date on which the final order is uploaded on the website of ITAT	15.04.2021
Date on which the file goes to the Bench Clerk	15.04.2021
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	



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