आयकर अपीलीय अधिकरण पुणे न्यायपीठ "ए" पुणे में
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "A", PUNE

सुश्री सुषमा चावला, न्यायिक सदस्य एवं श्री अनिल चतुर्वेदी, लेखा सदस्य के समक्ष

BEFORE MS. SUSHMA CHOWLA, JM AND SHRI ANIL CHATURVEDI, AM

आयकर अपील सं. / ITA No.1232/PUN/2015

निर्धारण वर्ष / Assessment Year : 2010-11

Opus Software Solutions Pvt. Ltd.,
1st Floor, Building No.4,
Commerzone, Samrat Ashok Path,
Yerawade,
Pune – 411006 .... अपीलार्थी/Appellant

PAN: AAACO2203N

Vs.

The Asst. Commissioner of Income Tax,
Circle-3, Pune .... प्रत्यर्थी / Respondent

अपीलार्थी की ओर से / Appellant by : Shri Nikhil Pathak
प्रत्यर्थी की ओर से / Respondent by : Ms. Shabana Parveen

सुनवाई की तारीख / **Date of Hearing : 18.03.2019**		घोषणा की तारीख / **Date of Pronouncement: 03.05.2019**

आदेश / ORDER

PER SUSHMA CHOWLA, JM:

The appeal filed by assessee is against order of CIT(A)-13, Pune, dated 25.06.2015 relating to assessment year 2010-11 against order passed under section 143(3) of the Income-tax Act, 1961 (in short 'the Act').

2. The assessee has raised the following ground of appeal:-

1) On the facts and in the circumstances of the case and in law the learned CIT(A) erred in confirming the disallowance of expenditure Rs.32,35,518/- by the Dy. Commissioner of Income tax Circle 3, Pune without appreciating the facts of the case and prevailing law. The appellant hereby prays your honour that the claim of expenditure may be allowed.

3. The issue raised in the present appeal is against disallowance of expenditure of ₹ 32,35,518/- under section 40(a)(i) of the Act.

4. Briefly, in the facts of the case, the assessee was engaged in software development. The case of assessee was picked up for scrutiny. The Assessing Officer noted that the assessee had made payment of ₹ 32,35,518/- to GFG Gorup Ltd., New Zealand for purchase of software. The Assessing Officer notes this to be licensed software and hence, was of the view that payment was in the nature of royalty and the assessee ought to have deducted tax at source. Since the assessee failed to deduct tax at source, expenditure of ₹ 32,35,518/- was disallowed in the hands of assessee.

5. Before the CIT(A), the assessee pointed out that in earlier year, the issue was decided in favour of assessee. However, the CIT(A) referred to the decision of Pune Bench of Tribunal in the case of Cummins Inc in ITA Nos.73 & 74/PN/2011, relating to assessment years 2004-05 and 2006-07, order dated 08.08.2013, wherein it was held that purchase of software was taxable as royalty under DTAA. The CIT(A) further relied on the decision of Mumbai Bench of Tribunal in DDIT Vs. Reliance Infocom [(TS-433-ITAT-2013(Mum)]. Reliance of assessee on the decision of Pune Bench of Tribunal in the case of Allianz SE Vs ADIT reported in 51 SOT 399 (Pune – Trib.) was not appreciated and the issue was decided against the assessee.

6. The assessee is in appeal against the order of CIT(A).

7. The learned Authorized Representative for the assessee pointed out that the issue stands covered by the ratio laid down by Pune Bench of Tribunal in John Deere India Pvt. Ltd. Vs. DDIT (IT) (2019) 70 ITR (Trib) 73 (Pune). He also pointed out that definition of 'royalty' under India and New Zealand Treaty was same as under the DTAA between India and USA. He referred to the definition of 'royalty' under both the DTAAs.

8. The learned Departmental Representative for the Revenue placed reliance on the orders of authorities below.

9. We have heard the rival contentions and perused the record. The issue which arises in the present appeal is whether the deduction claimed by assessee on purchase of licensed software is to be allowed as deduction in the hands of assessee or not. The Revenue authorities were of the view that purchase of licensed software by the assessee is akin to royalty and the assessee was duty bound to deduct tax at source. Since the assessee has failed to deduct tax at source, expenditure was disallowed in the hands of assessee. In this regard, the CIT(A) had placed reliance on the ratio laid down by Pune Bench of Tribunal in the case of Cummins Inc (supra) and Mumbai Bench of Tribunal in DDIT Vs. Reliance Infocom (supra). The case of assessee on the other hand, before us is that the issue now stands covered by latest decision of Pune Bench of Tribunal in John Deere India Pvt. Ltd. Vs. DDIT (supra). The Tribunal while deciding the issue of deduction of tax at source out

of payments made for purchase of software had in turn, referred to the orders passed in Miscellaneous Application in the case of both Cummins Inc (supra) and Reliance Infocom (supra), wherein the respective Benches of Tribunal had recalled their earlier orders and hence, reliance placed upon by the CIT(A) do not stand. The issue was considered at length and it was held that where the software is purchased across the counter as shrink proof software, then it is not akin to royalty both under the Income Tax Act or the DTAA. The Tribunal held that since the definition of 'royalty' has not been amended under DTAA, then the said definition would be paramount and would have to be applied for deciding the issue. It also held that amendment to section 9(1)(vi) of the Act by insertion of Explanations 4 to 6 would not change the scenario and make the assessee liable for deduction of tax at source in the relevant year. The relevant findings of Tribunal are in para 90, which read as under:-

> *"90. In conclusion, we hold that purchase of software by the assessee being copyrighted article is not covered by the term 'royalty' under section 9(1)(vi) of the Act. Where the assessee did not acquire any copyright in the software, is not covered under Explanation 2 to section 9(1)(vi) of the Act. We further hold that amended definition of 'royalty' under the domestic law cannot be extended to the definition of 'royalty' under DTAA, where the term 'royalty' originally defined has not been amended. As per definition of 'royalty' under DTAA, it is payment received in consideration for use or right to use any copyright of literary, artistic or scientific work, etc.; thus, purchase of copyrighted article does not fall in realm of 'royalty'. We also hold that since the provisions of DTAA overrides the provisions of Income Tax Act and are more beneficial and the definition of 'royalty' having not undergone any amendment in DTAA, the assessee was not liable to deduct tax for payments made for purchase of software. In such scenario, the assessee cannot be held to be in default and the demand created under section 201(1) and interest charged under section 201(1A) of the Act is thus, cancelled."*

10. In the entirety of the above said facts and circumstances, we find no merit in the orders of authorities below in having held the assessee to be in default for non deduction of tax at source out of aforesaid payments. We reverse the order of CIT(A) in this regard and direct the Assessing Officer to

allow the claim of expenditure of ₹ 32,35,518/-. The ground of appeal raised by assessee is thus, allowed.

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

Order pronounced on this 3rd day of May, 2019.

Sd/-	**Sd/-**
(ANIL CHATURVEDI)	**(SUSHMA CHOWLA)**
लेखा सदस्य / ACCOUNTANT MEMBER	**न्यायिक सदस्य / JUDICIAL MEMBER**

पुणे / Pune; दिनांक Dated : 3rd May, 2019.
GCVSR

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to :

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. आयकर आयुक्त(अपील) / The CIT(A)-13, Pune;
4. The CIT(IT/TP) / CIT-2, Pune;
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "ए" / DR 'A', ITAT, Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune