IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER

IT(IT)A No. 288/Bang/2018
Assessment year : 2013-14

NICE Systems Technologies Inc., [2425, NORTH, Central Expressway STE500, Richardson, Texas, USA.] **C/o. Nice Interactive Solutions Pvt. Ltd.,** 3, Quadrant, 8th Floor, Tower-1, Umiya Business Bay, Marathahalli Sarjapur Outer Ring Road, **Bangalore – 560 103.** **PAN: AACCI 3389R**	Vs.	The Joint Commissioner of Income Tax (OSD), Circle 1(2), International Taxation, Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri Aliasgar Rampurawala, CA
Respondent by	:	Ms. Neera Malhotra, CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	09.08.2021
Date of Pronouncement	:	09.08.2021

O R D E R

Per Chandra Poojari, Accountant Member

This appeal by the assessee is directed against the order of CIT(Appeals)-12, Bengaluru dated 30.11.2017 for the assessment year 2013-14.

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

"The grounds mentioned herein taken by the Appellant are without prejudice to one another.

1. That in the facts and in circumstances of the case and in law, the order passed by the Joint Commissioner of Income-tax Officer(OSD), Circle- 1(2), International Taxation, Bangalore (learned Assessing Officer' or 'learned AO') and Learned Assistant Commissioner of Income-tax (Appeals) - 12, Bangalore ['CIT(A)'], is bad in law and liable to be set aside.

2. That in the facts and circumstances in the case and in law, the learned CIT(A) erred in upholding the action of the learned AO, in bringing to tax the receipts from the sale of software of INR 2,94,75,658 as royalty income.

3. That in the facts and circumstances in the case and in law, the learned CIT(A) erred in upholding the action of the learned AO, in bringing to tax foreign exchange difference of INR 9,41,63o arising on account of reconciliation of total receipts of the Company with the receipts appearing in Form 26AS.

4. That in the facts and circumstances in the case and in law, the learned CIT(A) erred in upholding the action of the learned AO, in not appreciating that the Appellant is a foreign company and receives income in foreign currency and therefore the foreign exchange difference is notional in nature.

That the Appellant craves leave to add to and/or to alter, amend, rescind, modify the grounds herein below or produce further documents before or at the time of hearing of this Appeal."

3. Further, the assessee has filed application for admission of additional grounds. The additional grounds are as follows:-

"5. On the facts and in the circumstances of the case and in law, order dated April 20, 2016 passed by the learned Joint Commissioner of Income-tax (OSD), Circle 1(2), International Taxation, Bangalore ("JCIT") under section 143(3) read with section 144C of the Income-tax Act, 1961 ("Act") is illegal, bad in law and without jurisdiction as the learned JCIT failed to establish that he possessed legal and valid powers of performing

the functions of an Assessing Officer conferred on him under section 120(4)(b) of the Act.

6. On the facts and in the circumstances of the case and in law, order dated April 20, 2016 passed by the learned JCIT is bad in law as the learned JCIT failed to establish that he possessed a valid order for transfer of jurisdiction from Deputy Commissioner of Income-tax, International Taxation, Circle 1(2), Bangalore under section 127 of the Act.

The Appellant craves leave to add, alter, amend or withdraw any of the grounds of appeal and to submit such statements, documents and papers as may be considered necessary either at or before the appeal hearing."

4. At the time of hearing, the additional grounds were not pressed and the same are dismissed as such.

5. Ground No.1 is general in nature and requires no adjudication.

6. Ground No.2 is with regard to taxation of income from sale of commercial off-the-shelf software. The assessee has not offered income in this regard for the following reasons:-

i. The intellectual property rights of the software rests with the assessee and is never transferred to customers in India.

ii. The income would be considered as Royalty only is user is permitted commercial exploitation of the copy right in the software

iii. What is given to the customer is only to use the copy righted article and not the copy right.

iv. The customers don't have any authority to reproduce the software in any material form.

7. The AO relying on the judgments of the Hon'ble High Court of Karnataka in the cases of *CIT v. Synopsis International Ltd., 212 Taxman 454 (Kar), CIT v. Sunray Computer P. Ltd. , 348 ITR 196 (Kar)* and CIT v.

Samsung Electronics, 345 ITR 494 (Kar) held that the income from sale of software as royalty both in terms of the Income-tax Act, 1961 [the Act] and DTAA and brought the same to tax. On appeal, the CIT(Appeals) confirmed the action of the AO. Against this, the assessee is in appeal before the Tribunal.

8. The ld. AR submitted this issue is squarely covered by the judgment of Hon'ble Supreme Court in the case of ENGINEERING ANALYSIS CENTRE FOR EXCELLENCE PRIVATE LIMITED VS COMMISSIONER OF INCOME TAX & ANOTHER – AIR 2021 SC 124 / 432 ITR 471 (SC). 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 of 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 2(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 Section 195(1) of the Income Tax Act, or such person 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 not 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 is 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 to Section 30 of the Copyright Act, inasmuch as Section 30 of the Copyright Act speaks of granting an 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, least 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 book. 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 reproduce and make copies of the aforesaid book with the permission of the author it can be said that 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, is the law declared by this Court in the context of a sales tax statute in Tata Consultancy Services v. State of A.P., 2005(1) SCC 308 (see paragraph 27).
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> 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 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 to 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 assessees, have no application in the facts of these cases.
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> 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 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."

9. According to the ld. DR, the consideration received by the assessee from Indian customers in respect of licence granted for use of computer software is not at all examined by the AO by considering the relevant

agreement of licence which has to be looked into in the light of judgment of the Hon'ble Supreme Court in the case of *Engineering Analysis Centre For Excellence Private Limited v. CIT, 432 ITR 271 (SC).*

10. We have heard both the parties and perused the material on record. In this case, the ld. AR placed reliance on the above judgment of the Supreme Court. However, there is no specific finding by the lower authorities with regard to the licence agreement through which the assessee granted to the parties to use the software to say whether it is just the sale of software or royalty. In our opinion, it is appropriate to remit the issue in the light of judgment of the Hon'ble Supreme Court in *Engineering Analysis Centre For Excellence Private Limited (supra)*. Accordingly, this issue is remitted back to the file of Assessing Officer for fresh consideration and decision in accordance with law.

11. The next issue in ground Nos.3 & 4 is with regard to bringing to tax foreign exchange difference of Rs.9,41,630 arising on account of reconciliation of total receipts of the Company with the receipts appearing in Form 26AS.

12. On verification of Form 26AS, it was found that the assessee had received income from following Indian companies, from which tax was also deducted:-

Customer	Amount Received
Wipro Limited	30542660
ConcentrixDaksh Business process Services Pvt Ltd	17682243
HCL Technologies Ltd.	1622118
Accenture Services Pvt. Ltd.	8837958
Total	58684979

13. In the return of income the receipts shown were only Rs.23103335 on which tax was paid @ 10% u/s. 115 of the Act. The assessee filed the following reconciliation :-

Particulars	Amount
Total receipts as per 26AS	58684979
Less: Income from software licenses not offered to tax, as they are not taxable as per Indo-US DTAA	29475658
Less: Income offered to tax in next accounting year on receipt basis	5164356
Less: Foreign exchange adjustments	941630
Income as per return	23103335

14. The AO proposed to bring Rs.941630 to tax for non-explanation of reducing this income to which the assessee submitted as follows:-

a. The Indian customers for the purpose of deduction of tax, applied the provisions of Rule 26 of the I.T. Rules and applied the FE rate prevailing on the date of remittance.

b. Rule 115 of the I.T. Rules prescribes that the income received in foreign currency has to be converted into Indian currency by adopting the TT buying rate prevailing on the specified date. This procedure is laid down in respect of income chargeable to tax on salaries, interest, income from house property, business or profession, other sources, dividends and capital gains.

c. Since the income of the assessee don't fall under any of the above categories of income, the assessee has adopted the FE rate as on the last day of the previous year. This has resulted in reducing the aforesaid income and therefore same be accepted.

15. The AO was of the view that it is undisputed that the assessee has received the sums from Indian customers in USD at the rate prevailing on the date of remittance. When the assessee has enjoyed that benefit there is no rationale in adopting year end rate. Rule 115 has visualized certain

situations and for the nature of incomes dealt therein, permits adopting of rate different than the rate of actual receipt. Such a benefit is not available for the FTS. Even on this ground the procedure adopted by the assessee is not acceptable and therefore the AO brought Rs 941630 to tax.

16. On appeal, the CIT(Appeals) confirmed the order of AO observing that the AO has rightly held that the assessee received the payment from the Indian customers in USD at the rate prevailing on the date of remittance. Hence, there is no reason for adopting the rate prevailing as on 31st March, which the assessee has artificially deflated the receipts by adopting the rate as on 31st March as against the rate on the date of remittance. The rate on the date of remittance gives the actual amount received and it is not notional as contended by the assessee. Further Rule 115 of the I.T. Rules which prescribes the conversion of receipts in foreign currency by adopting the telegraphic transfer buying rate prevailing on the "specified date", is applicable only for specific incomes which does not include royalty. For all these reasons the addition made by the AO was sustained by the CIT(Appeals). Against this, the assessee is in appeal before us.

17. We have heard both the parties and perused the material on record. The contention of the ld. AR is that the assessee adopted the rate as on 31st March to quantify the receipts appearing in Form 26AS with regard to income received in foreign exchange. According to him, Rule 115 of the I.T. Rules is not applicable to royalty income. In our opinion, the argument of the ld. AR is totally misconceived. The last date in the balance sheet of 31st March is the date of preparation of balance sheet and not for quantifying the foreign exchange rate. In this case, the assessee actually received this amount and that date itself should be considered to determine the value of the amount of tax deducted at source on royalty and not the last date of balance sheet. Being so, we are not in agreement with the

contention of the ld. AR. Accordingly, the order of the CIT(Appeals) is confirmed. These grounds are dismissed.

18. In the result, the appeal is partly allowed for statistical purposes.

Pronounced in the open court on this 9th day of August, 2021.

Sd/-	Sd/-
(N V VASUDEVAN)	(CHANDRA POOJARI)
VICE PRESIDENT	ACCOUNTANT MEMBER

Bangalore,
Dated, the 9th August, 2021.

/*Desai S Murthy /*

Copy to:

1. Appellant 2. Respondent 3. CIT 4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.