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

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

IT(TP)A No.1861/Bang/2017
Assessment Year : 2014-15

M/s. Autodesk Asia Pte Ltd., C/o Autodesk India Pvt. Ltd., Diyashree Chambers, A4, 'A' Wing, 2nd Floor, Langford Road, Bengaluru – 560 025. **PAN : AAFCA 6398 D**	Vs.	The Deputy Commissioner of Income Tax (International Taxation), Circle -1(1), Bengaluru.
APPELLANT		RESPONDENT

Appellant by	:	Smt. Manasa Anantha, Advocate
Respondent by	:	Ms. Neera Malhotra, CIT(DR)(ITAT), Bengaluru

Date of hearing	:	15.09.2021
Date of Pronouncement	:	20.09.2021

O R D E R

Per N. V. Vasudevan, Vice President:

This is an appeal by the assessee against the final Order of Assessment dated 14.07.2017 by the DCIT(International Taxation), Circle – 1(1), Bengaluru, passed under section 143(3) r.ws. 144C(5) of the Income Tax Act, 1961 (hereinafter called 'the Act'), relating to Assessment Year 2014-15.

2. In this appeal, the question for consideration is whether the assessee who is a non-resident and tax resident of Singapore in terms of the India-Singapore Double Taxation Avoidance Agreement (DTAA) who acts as a distributor of computer software and providing ancillary services in the Asia

Pacific region is taxable in respect of receipts on sale of computer software to Indian distributors / end users along with ancillary services.

3. The Assessee is a company incorporated in Singapore. The Company is a tax resident of Singapore in terms of the India-Singapore Double Taxation Avoidance Agreement (`the DTAA"). The assessee is engaged, *inter alia*, in the business of distribution of computer software and providing ancillary services in the Asia Pacific region. The computer software products distributed are design software which are used by architects, designers, engineers, etc. across several industries for the purpose of computer-aided designing. The assessee makes a payment to Autodesk Inc. in return, inter alia', for the manufacturing and distribution rights of the computer software granted to the assessee by Autodesk Inc., USA. The payment is computed based on a percentage of the computer software sales generated by the assessee. The assessee makes a margin by selling the computer software and related services to the third party distributors/ end-users. In India, the assessee supplies the computer software to Indian distributors/ end-users. The Indian distributors in turn sell the software to other distributors/ retail resellers in India who then sell the same to the end-users.

4. The assessee submitted before the AO that the computer software products distributed are design software which is used by architects, designers, engineers, etc. across several industries for the purpose of computer aided designing. The software products of the Assessee such as AutoCAD and Autodesk Inventor professional provides tools and technology needed to create designs, make presentations and design exploration tools. The software products of the Assessee can be used to

transform 3D models into interactive walkthrough and for producing, validating and documenting complete digital prototypes. The assessee has entered into a Software License and Distribution Agreement("Agreement") with Autodesk Inc., an US Company which has granted Autodesk the right to license and distribute computer software products and related services in India and other territories. The assessee makes a margin by selling the computer software and related services to the third party distributors. The Assessee pointed out that there is a license agreement between the Assessee and Autodesk Inc., USA. Under Article II - License Grant of the Agreement with Autodesk Inc., USA and the Assessee is reproduced below for reference (Autodesk in this agreement refers to Autodesk Inc., USA and Licensee refers to the assessee).

> *ARTICLE II — LICENSE AGREEMENT Autodesk hereby grants to License and Licensee accepts from Autodesk, under all of Autodesk's Intellectual Property Rights and Confidential Information, an exclusive right and license to:*
>
> *1. Use, reproduce (as provided in Article II.0 below), distribute, support, modify and create derivative works, translated and localized versions of the Software Products and Documentation and subcontract to Third Parties to perform such activities;*
>
> ***2. Grant sublicenses to Third parties to use and distribute the software products (in object** code form only) **and** documentation by sublicensing directly to end users or indirectly through other third parties which may be granted similar rights, including the right to distribute by sublicensing directly or indirectly to end users; provided that any such grant/sublicense shall be subject to a written agreement with terms no less protective than those set forth herein for the protection of Autodesk's Intellectual Property and confidential Information.*

3. Use, solely for the purposes specified herein, the trademarks, service marks, trade names, logos and other trade designation ("Marks") which Autodesk may at any time own, adopt, use or register with respect to the Software Products or is business. Any such use of the marks shall be in accordance with Autodesk's quality control policies and procedures as communicated by Autodesk to Licensee from time to time.

4. Market the services and subcontract Third Parties to perform such activities.

In the same agreement Article — I contains the definitions of various terms used in the agreement. The term 'End-user' is defined as under:

"End-user shall mean the customers of the Licensee or Third Parties who are granted a sublicense that includes the limited right to use the software Products and Documentation for Internal business purposes only."

The term "Services" in the Agreement is defined as under:

"Services" shall mean the training, installation, configuration, consulting, hosting and technical support services provided to customers in the Territory and which contain, embody or utilize Autodesk's confidential Information and/ or Intellectual Property Rights. "

The term "Net Revenue" is defined as under:

"H. Net Revenue shall mean the licensing revenue accrued by Licensee for the software products, net of shipping, indirect taxes (GST, VAT, consumption taxes or sales taxes), duties, insurance, credits and refunds for returns and allowances. Net Revenue and any other financial measure herein shall be determined by U.S GAAP and Autodesk's internal accounting policies.

5. It was submitted by the Assessee before the AO that on perusal of "Software License and Distribution Agreement" it is evident that Autodesk Inc., USA has granted the Assessee only license to:

- *Use, reproduce, distribute, support, modify and create derivative works of the Autodesk Software products and Documentation and subcontract to Third Parties to perform such activities.*

- *Grant sublicenses to Third parties to use and distribute the software products and documentation by sublicensing directly to end users or indirectly through other third parties which may be granted similar rights, including the right to distribute by sublicensing directly or indirectly to end users.*

- *Use, the trademarks, service marks, trade names, logos and other trade designation ("Marks") of Autodesk Inc. with respect to the Autodesk Software Products or its business.*

- *Market the services and subcontract Third Parties to perform such activities.*

6. The assessee submitted that there was no right to use the software. Therefore, the receipts by the assessee cannot be taxed in India. Assessee also submitted that it has no physical presence in India and the sums were received outside India and therefore no income is taxable in India.

7. The AO and the DRP did not agree with the submissions of the assessee and the DRP in doing so followed the orders in assessee's own case for Assessment Year 2011-12 to 2013-14 on identical issues. Against the final Order of Assessment, the assessee is in appeal before the Tribunal.

8. At the time of hearing, learned Counsel for the assessee brought to our notice that the Tribunal decided identical issues in Assessment Years

2010-11 to 2013-14 in IT(TP)A No.1758/Bang/2013, 294/Bang/2015, 489/Bang/2016, 191/Bang/2017 by its order dated 14.06.2021. The Tribunal held as follows:

> *"11. Admittedly, the issue involved in present appeals has been set at rest by the decision of Hon'ble Supreme Court in a recent case of Engineering Analysis Centre of Excellence Pvt. Ltd. vs CIT reported in 2021 SCC online SC 159. Hon'ble Supreme Court while considering the issue of royalty on sale of software have considered the decision of Hon'ble Karnataka High Court in case of CIT vs Samsung Electronics Co Ltd. (supra) and various other decisions.*
>
> *12. We have perused the submissions advanced by both sides in light of records placed before us. We note that Hon'ble Supreme Court considered the issue by observing as under:-*
>
> > *"3. One group of appeals arises from a common judgment of the High Court of Karnataka dated 15.10.2011 reported as CIT v. Samsung Electronics Co. Ltd., (2012) 345 ITR 494, by which the question which was posed before the High Court, was answered stating that the amounts paid by the concerned persons resident in India to non-resident, foreign software suppliers, amounted to royalty and as this was .so, the same constituted taxable income deemed to accrue in India under section 9(1)(vi) of the Income Tax Act, 1961 ["Income Tax Act"], thereby making it incumbent upon all such persons to deduct tax at source and pay such tax deductible at source ['I'DS"] under section 195 of the Income Tax Act. This judgment dated 15.10.2011 has been relied upon by the subsequent impugned judgments passed by the High Court of Karnataka to decide the same question in favour of the Revenue.*
> >
> > *The appeals before us may be grouped into four categories:*
> > *i) The first category deals with cases in which computer software is purchased directly by an end-user, resident in India, from a foreign, non- resident supplier or manufacturer.*
> > *ii) The second category of cases deals with resident Indian companies that act as distributors or resellers, by purchasing computer software from foreign, non-resident suppliers or*

manufacturers and then reselling the same to resident Indian end-users.
iii) The third category concerns cases wherein the distributor happens to be a foreign, non-resident vendor, who, after purchasing software from a foreign, non-resident seller, resells the same to resident Indian distributors or end-users.
iv) The fourth category includes cases wherein computer software is affixed onto hardware and is sold as an integrated unit/ equipment." Hon'ble Supreme Court, considered various arguments advanced by the Revenue as well as the assessee's and came to the conclusion as under:

CONCLUSION

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 Ta Act (section 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.
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.
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 (AJAR) (supra) is

set aside. The appeals from the impugned judgments of the High Court of Delhi are dismissed."

13. We note that case of present assessee falls within the second and forth category analysed by Hon'ble Supreme Court. Respectfully following the above view by Hon'ble Supreme Court in case of Engineering Analysis Centre of Excellence Pvt. Ltd. Vs. CIT (Supra). We hold that purchase of software in the present facts does not amount to give rise to any taxable income in India as a result of which provisions of sec.195 of the Act are not attracted. The assessee does not have any obligation to deduct tax at source. Therefore, provisions of sec.9(1)(vi) along with Explant6ion 2 is not applicable to present assessee's.
Accordingly we allow the appeal in terms of Ground No.3. All other grounds becomes academic.

13. The above view is applied mutatis mutandis to the other assessment years under consideration."

9. Learned DR however submitted that the issues needs to be remanded to AO to examine the terms of the agreement between the parties.

10. We have considered the submissions of the learned DR and are of the view that the terms of licence agreement were already examined by the DRP and from reading of the terms of the agreements, it is clear that there was no right to use the computer software. In other words, the terms of agreement are identical to the case decided by the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Pvt. Ltd. (supra). The overriding effect to the DTAA vis-à-vis provisions of the Act have also been discussed in the submissions of the Assessee before AO and DRP and in the order of the AO and the DRP. In these circumstances, we are of the view that the plea for remanding of the case to the AO/TPO cannot be accepted in the facts and circumstances of the present case. Accordingly, following the

earlier orders of the Tribunal, we hold that income of the assessee which was brought to tax by the Revenue authorities cannot be brought to tax and the same is directed to be deleted.

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

Pronounced in the open court on the date mentioned on the caption page.

Sd/-	Sd/-
(CHANDA POOJARI)	**(N. V. VASUDEVAN)**
ACCOUNTANT MEMBER	**VICE PRESIDENT**

Bangalore,
Dated : 20.09.2021.
/NS/*

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

By order

Assistant Registrar
ITAT, Bangalore.