

IN THE INCOME TAX APPELLATE TRIBUNAL
“B” BENCH : BANGALORE

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND SHRI GEORGE GEORGE K., JUDICIAL MEMBER

IT(IT)A No.3234/Bang/2018
Assessment year: 2015-16

Autodesk Asia Pte Limited, [3, Fusionopolis Way, # 10-21 Symbiosis, Singapore – 138633.] C/o. Autodesk India Pvt. Ltd. Unit A-4, ‘A’ Wing, 2 nd Floor, Divyasree Chambers, Langford Road, Bangalore. PAN: AAFCA 6398D	Vs.	The Deputy Commissioner of Income Tax (International Taxation), Circle 1(1), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri T. Suryanarayana, Advocate
Respondent by	:	Shri Muzaffar Hussain, CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	12.07.2021
Date of Pronouncement	:	12.07.2021

ORDER

Per Chandra Poojari, Accountant Member

This appeal by the assessee is directed against the order of the Assessing Officer dated 28.11.2017 passed u/s. 143(3) r.w.s. 144C of the Income-tax Act, 1961 [the Act].

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

Sl. No	Grounds of Appeal	Tax effect (in INR)
1	<p>Assessment bad in law and on facts The assessment order dated 28 September 2018 passed by the Deputy Commissioner of Income-tax (International Taxation), Circle-1(1) [the A01 under section 143(3) read with section 144C(13) of the Income-tax Act, 1961 ('the Act'), is bad in law and on facts.</p>	
2	<p>Erroneous demands The AO has erred in: a) Determining the total income of the Appellant at INR 2,875,239,185; b) Determining a tax payable of INR 293,512,480; c) Raising a demand of INR 8,039,645 upon the Appellant.</p>	
3	Erroneous treatment of the consideration received for sale of software as 'royalty'	INR 279,418,171
3.1	The AO and the Dispute Resolution Panel ('DRP') have erred in not holding that consideration received by the Appellant would not qualify as 'royalty' under Article 12 of the Double Taxation Avoidance Agreement between India and Singapore ('the DTAA') and under the provisions of the Act.	
3.2	The AO and the DRP have erred in not holding that the definition of 'royalty' under the DTAA has not undergone any change despite of the retrospective amendment made vide Finance Act, 2012, to section 9(1)(vi) of the Act.	
3.3	The AO and the DRP have erred in holding that the definition of 'royalty' under the Act and the DTAA are pari-materia.	
3.4	The AO and the DRP erred in not holding that the consideration received by the Appellant was not for transfer of copyright to the distributors or end-users but for sale of software product/ copyrighted product.	

3.5	The AO and the DRP erred in not holding that the Appellant does not hold copyright in the software, despite of the fact that it had only distribution/ limited rights of the copyrighted product.	
3.6	The AO and the DRP failed to appreciate that access to software wherein a subject matter of copyright is embedded, without the right to exploit the copyright, does not amount to use or right to use the copyright in the copyrighted work.	
3.7	The AO and the DRP have erred in holding that the Appellant had effectively sold the software to end-users, even where the Appellant had entered into agreement with the distributors/ resellers who in turn had sold the software to the end users.	
3.8	The AO and the DRP have erred in not following certain decisions rendered by the Delhi High Court, the Authority for Advance Ruling and various benches of the Tribunal.	
4	Erroneous treatment of the consideration received for sale of hardware as 'royalty'	INR 7,030,999
4.1	The AO and the DRP have erred in law in treating the consideration received by the Appellant from Indian distributors/ customers for sale of hardware as 'royalty' income taxable in India.	
5	Erroneous conclusion on applicability of Article 24 of the DTAA	INR 5,451,188
5.1	The AO and the DRP have erred in concluding that the provisions of Article 24 of the DTAA are applicable to the facts of the Appellant.	
5.2	Without prejudice to the ground in para 5.1 above, the AO and the DRP have erred in not applying the rate of tax as per the DTAA even though the Appellant had received the entire consideration in Singapore in respect of the invoices raised during the period 1 April 2014 to 31 March 2015.	
6	Initiation of penalty	

6.1	The AO has erred in initiating penalty proceedings under section 274 read with section 271 of the Act.	
7	Relief	
7.1	The Appellant prays that the AO be directed to grant all such relief arising from the preceding grounds as also all relief consequential thereto.	
Total tax effect		INR 291,900,358

3. The assessee is a Singapore based company, a subsidiary of Autodesk US and the headquarters for Asia-Pacific (APAC) region. It is engaged in the business of manufacturing, designing and supporting computer software and related Autodesk products in the APAC region. It performs or manages activities related to Autodesk's products and services including R&D, localization, manufacturing, order processing and distribution operations and sale & marketing activities. It also provides management, marketing, accounting, finance, legal and information technology support services for the Asia Pacific region. The assessee has established regional offices in Malaysia, Thailand, Philippines, Indonesia and Vietnam. The assessee is responsible for all aspects of software duplication, packaging, materials, purchasing, quality control and testing, shipping and warehousing for the Asia-Pacific region. In respect of Autodesk software technology, it licenses the rights to Autodesk US's core product software technology from the parent company and manufactures and sells the product in the Asia-Pacific region.

4. During the year under consideration, the assessee company sold software licenses along with associated hardware to Indian customers and in connection with the same also provided certain ancillary services. The AO treated this income as royalty after the directions from the DRP.

5. We have heard both the parties and perused the material on record. 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 to 170 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 assessee, 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).

168. Given the definition of royalties contained in Article 12 of the DTAA's 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 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 manufacturer/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 (AAR) (supra) is set aside. The appeals from the impugned judgments of the High Court of Delhi are dismissed.”

6. Being so, the issue is squarely covered by the above judgment of Hon'ble Supreme Court. Since the ancillary support services rendered by the assessee are also covered aforesaid judgment of Hon'ble Supreme Court, we are of the opinion that the same does not require any further adjudication.

7. In the result, the appeal by the assessee is allowed.

Pronounced in the open court on this 12th day of July, 2021.

Sd/-
(GEORGE GEORGE K.)
JUDICIAL MEMBER

Sd/-
(CHANDRA POOJARI)
ACCOUNTANT MEMBER

Bangalore,
Dated, the 12th July, 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.