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

BEFORE SHRI G.S. PANNU, HON'BLE PRESIDENT
AND
SHRI SAKTIJIT DEY, JUDICIAL MEMBER

ITA No.9823/Del/2019
Assessment Year: 2016-17

M/s. Moogsoft Inc., 1265, Battery Street, 2nd Floor, San Francisco, California, United State of America.	**Vs.**	The Commissioner of Income Tax (Appeals) -43, New Delhi
PAN :AAKCM8595P		
(Appellant)		**(Respondent)**

Appellant by	Sh. Nageshwar Rao, Advocate Ms. Deepika Aggarwal, Advocate
Respondent by	Sh. Sanjay Kumar, Sr. DR

Date of hearing	31.01.2023
Date of pronouncement	17.02.2023

ORDER

PER SAKTIJIT DEY, JM:

This is an appeal by the assessee against order dated 31.10.2019 of learned Commissioner of Income Tax (Appeals)-43, New Delhi, pertaining to assessment years 2016-17.

2. The solitary issue arising for consideration is whether the amount received by the assessee towards sale of software is in the nature of royalty under Article 12 of the India – USA Double Taxation Avoidance Agreement (DTAA).

3. Briefly the facts are, the assessee is a non-resident corporate entity, incorporated in United States of America (USA) and tax resident of USA. As stated by the Assessing Officer, the assessee is engaged in developing technology for enterprise IT operations and development operations and provides operational intelligence solutions. In the year under consideration, the assessee sold software to HCL Technology Ltd. and Infosis Ltd. for their internal use and received licence fee aggregating to Rs.1,42,73,856/-. In course of assessment proceeding, the assessee pleaded that the amount received by the assessee was from sale of software products which are copyrighted articles. Referring to Article 12(3) of India –USA DTAA defining royalty, the assessee contended that the amount received was not for the use of or right to use of any copyright, literary, artistic or scientific work or any secret formula or process. The Assessing Officer, however, did not accept assessee's claim. Initially, the Assessing Officer passed an order under section 143(3) read with section 144C(3) of the Act on 15.02.2019 treating the amount received as royalty. However, finding that various mistakes have crept into the assessment order, on the very same date, the Assessing Officer passed an order purportedly under section 154 read with section 143(3) of

the Act holding that the amount received by the assessee towards sale of software is in the nature of royalty under Article 12(3) of India – USA DTAA. While coming to such conclusion, the Assessing Officer heavily relied upon the decision of the Hon'ble Karnataka High Court in case of CIT Vs. Samsung Electronics Co. Ltd. [TS-696-HC-2011 (Ker.)] and another decision of the Hon'ble Karnataka High Court in case of CIT Vs. Synopsis International Old Ltd. (ITA No.15&17 of 2008). He did not apply the ratio laid down in the decision of the Hon'ble Jurisdictional High Court in case of Infrasoft Ltd. (264 CTR 329) on the reasoning that the department has not accepted the decision and has filed SLP. Thus, ultimately, he brought to tax the amount received from sale of software. Contesting the addition made in the rectification order the assessee preferred appeal before learned Commissioner (Appeals). However, learned Commissioner (Appeals) upheld the addition.

4. We have considered rival submissions and perused the materials on record. It is evident, in course of assessment proceeding as well as before learned first appellate authority, the assessee had furnished documentary evidences, including copies of invoices to demonstrate the nature of transaction. It is

observed, in the year under consideration, the assessee had sold certain software to two Indian entities for their internal use. As observed by learned Commissioner (Appeals), software sold by the assessee is for introducing a definite set of processes which are real time substitute of the existing process carried on by the entity. Thus, the materials on record clearly demonstrate that the assessee has sold copyrighted articles and has not transferred use or right to use of any copyright. Though, creation of software might have involved certain formula or process, but what the customers in India have purchased is the software and not the process. Thus, in sum and substance, the assessee has sold copyrighted articles and not the copyright in the software.

5. It is further observed, the departmental authorities, while treating the amount received from sale of software as royalty, have heavily relied upon the decision of the Hon'ble Karnataka High Court in case of Samsung Electronics Ltd. (supra). However, the issue is no more *res intera* in view of the authoritative ratio laid down by the Hon'ble Supreme court in case of Engineering Analysis Centre of Excellence Pvt. Ltd. Vs. CIT (2021) 432 ITR 471, wherein, the Hon'ble Supreme Court after interpreting the meaning of royalty as defined in the Income Tax Act and various

treaties as well as under the Copyright Act, has concluded that where the consideration received is for sale of a copyrighted Article, it cannot be treated as royalty. While so concluding, the Hon'ble Apex Court has reversed the decision of Hon'ble Karnataka High Court in case of CIT Vs. Samsung Electronics Co. Ltd. Whereas, the decision of the Hon'ble Jurisdictional High Court in case of Infrasoft Ltd. (supra) and Sony Ericsson have been affirmed.

6. Thus, in our considered opinion, the ratio laid down by the Hon'ble Supreme Court in case of Engineering Analysis Centre of Excellence Pvt. Ltd. (supra) would squarely apply to assessee's case. We may further add, when the decision of the Hon'ble Delhi High Court was available before the Assessing Officer, which is binding on the Assessing Officer, as he was functioning within the territorial jurisdiction of the Hon'ble Delhi High Court, he should have followed the decision of Hon'ble Jurisdictional High Court and not the decision of any non-jurisdictional High Court. Thus, respectfully following the decision of the Hon'ble Supreme court and Hon'ble Jurisdictional High Court, as referred to above, we hold that the amount received by the assessee from sale of software is not in the nature of royalty under Article 12(3) of India

–USA DTAA. Accordingly, we direct the Assessing Officer to delete the addition. Grounds are allowed.

7. In the result, the appeal is allowed.

Order pronounced in the open court on 17th February, 2023

Sd/-	***Sd/-***
(G.S. PANNU)	**(SAKTIJIT DEY)**
PRESIDENT	**JUDICIAL MEMBER**

Dated: 17th February, 2023.
RK/-
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi