

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

BEFORE SHRI A. K. GARODIA, ACCOUNTANT MEMBER AND
SMT. BEENA PILLAI, JUDICIAL MEMBER

ITA No. 1304/Bang/2018
Assessment year : 2013 – 14

M/s Kaseya Software India Private Limited, C/o M/s Suresh & Co., Chartered Accountants, #43/16, ‘Srinidhi’, 1 st Floor, Surveyor Street, Basvangudi, Bangalore – 560004 PAN : AADCK3905A	VS.	DCIT Circle – 4 (1) (1), Bengaluru
APPELLANT		RESPONDENT

Assessee by	:	Shree D. S. Vivek, C. A.
Revenue by	:	Shree Priyadarshi Mishra, JCIT DR
Date of hearing	:	05.10.2020
Date of Pronouncement	:	.10.2020

O R D E R

PER ARUN KUMAR GARODIA, A. M.:

This appeal is filed by the assessee and the same is directed against the order of learned CIT (A) – 12 Bengaluru dated 22.02.2018.

2. The Grounds raised by the assessee are as under:-

1. *The CIT(A) has erred in stating that TDS u/s 195 was applicable on the software expenses of Rs. 2,13,03,772/- without appreciating the fact that appellant was merely acting as a distributor and not having right to have a copy of the software.*
2. *The CIT (A) has erred in upholding the order of the Assessing Officer in making disallowance u/s 40(a)(ia) of the Income Tax Act for non-deduction of TDS u/s 195 by rejecting the contention of the assessee that payments for purchase of software, with prejudice to Ground No 1, may get covered under royalty only by insertion of Explanation 4 of section 9(1)(vi).*
3. *CIT(A) has placed reliance on Karnataka HC decision in the case of Synopsis International and other cases and has erred in not passing a speaking order as to why the reasons stated by the Appellant differentiating the said decision was not applicable or not being considered.*
4. *The appellant reserves the right to add additional grounds to, or elaborate on the above grounds during the appeal hearing as long as it is in relation to the above subject matter under dispute.*

3. On 05.10.2020, learned AR of the assessee has filed additional written submissions and also raised the following additional ground:-

"Ground No.5: The Learned CIT(A) has erred in passing the appellate order and has consider the appellant as a purchaser of software without appreciating the fact that the appellant is an intermediary of product not

having any right over the software and the payment made by the intermediary is only payment made after retaining the intermediary margin and not for purchase of software".

4. We find that this additional ground is not signed by the assessee but it is signed by the learned AR of the assessee only and moreover, it is seen that this ground is nothing but an additional argument in support of the grounds already raised and therefore, we hold that it is not admissible as an additional ground but we will consider it as an argument while deciding the main grounds raised by the assessee.

3. In course of hearing, learned AR of the assessee submitted that the AO in para 3.1 of the assessment order has noted that the assessee company has filed letter dated 29.12.2015 in reply to the queries raised by the AO and has reproduced this letter in the same para of the assessment order. He pointed out that as per para 1 & 2 of the said letter dated 29.12.2015 reproduced by the AO, this was the submission of the assessee that the assessee company is only a distributor of the products and enables the transaction and the assessee does not purchase any software from KIL directly. He pointed out that in the same letter, this is further pointed out by the assessee that the amount debited by the assessee company as purchase of software licence is just the price being payable to KIL, an AE of the assessee company after retaining its applicable margin. At this juncture, the bench wanted to see the agreement of the assessee company with its AE in this regard and in reply, he submitted that there is no agreement but there is a letter only dated 03.01.2009, copy available on page 28 of the paper book and he pointed out that in this letter, it is stated by the AE that the assessee is eligible for a margin of 15% on the cost

and it should be retained by the assessee company and the AE will reimburse all expenses incurred by the assessee company on Salary including Directors' Remuneration, Advertisement, Travelling and travelling related expenses, Business Promotion Expenses, Communication Expenses, Marketing Expenses, public relation cost, seminar and sponsorship expenses etc. He submitted that this shows that the arrangement between the assessee company and its AE is not that of a buyer and seller but the assessee company is acting as an intermediary and is eligible to retain 15% margin on cost of AE and is also eligible to get reimbursement of various expenses as specified in this letter. At this juncture, the bench wanted to see the audited P & L Account of the assessee company to see as to whether these conditions laid out in this letter are being followed actually. In reply, he submitted that it is not made part of the paper book but he will file the same on the date of hearing itself after the hearing is completed. Accordingly, learned AR of the assessee has filed a copy of the audited accounts of the assessee company for the year ended as on 31.03.2013.

4. He made arguments that in spite of this specific objection raised by the assessee before the AO and CIT (A) that the assessee company is only an intermediary and not a purchaser of the software, this aspect was not specifically decided by the AO or CIT (A) and hence, the order of the AO should be reversed or the matter be restored to the AO for a fresh decision. Thereafter, he submitted that in para 3.3 of the assessment order, the AO has noted about the judgment of Hon'ble Karnataka High Court rendered in the case of CIT vs. Samsung Electronics Co. Ltd. as reported in 345 ITR 494/245 CTR 481. He pointed out that in the same para, another judgment of Hon'ble Karnataka High Court rendered in the case of Synopsis International Ltd. Vs. CIT as reported in 28 Taxman.com 162 was also noted by the AO. He further

pointed out that in the same para, a tribunal order rendered in the case of M/s Kalki Communication Technologies Limited vs. ITO in ITA Nos. 1401 to 1403/B/2013 dated 15.04.2015 was also noted by the AO and by following these judicial pronouncements, the AO held that deduction is not allowable in respect of Rs. 213,03,772/- and he disallowed the same u/s 40 (a) (ia). He submitted that in the present case, the facts are different because there is no Distribution Agreement between the assessee company and its AE and therefore, none of these judicial pronouncements is applicable in the present case.

5. As against this, learned DR of the revenue supported the orders of the lower authorities and placed reliance on the judgment of Hon'ble Karnataka High Court rendered in the case of CIT vs. Samsung Electronics Co. Ltd. (Supra). He also pointed out that in para 3.1 of the assessment order, it is noted by the AO that the assessee has purchased licences for two computer software i.e. Virtual System Administrative (VSA) Rs. 161,20,135/- and Subscription XSP Rs. 51,83,637/. He also pointed out that in the same para of the assessment order, the AO has reproduced the relevant contents of the letter dated 29.12.2015 written by the assessee to the AO in which, the assessee also has admitted that the amount debited by the assessee company is on account of purchase of software licence and it is just the price being payable to the AE of the assessee company after retaining the applicable margin. He submitted that the assessee has itself debited the amount in question as purchase of software licence and therefore, these judgments followed by the AO and CIT (A) are squarely applicable and the issue is covered against the assessee company by these judgments.

6. We have considered the rival submissions. First, we decide about the additional ground reproduced above. We find that the assessee has not signed the same and only the learned AR of the assessee has signed it. Moreover, it is seen that this ground is nothing but an argument in support of the grounds already raised and therefore, we hold that it is not admissible as an additional ground but we will consider it as an argument while deciding the main grounds raised by the assessee.

7. Now we decide this aspect as raised by the learned AR of the assessee before us that in spite of this specific objection raised by the assessee before the AO and CIT (A) that the assessee company is only an intermediary and not a purchaser of the software, this aspect was not specifically decided by the AO or CIT (A). In this regard, we find that in para 3.1 of the assessment order, the AO has reproduced the contents of the letter dated 29.12.2015 filed by the assessee before him in which this contention was raised that the assessee company is only an intermediary and not a purchaser of the software and in para 3.3 of the assessment order, the AO held that the assessee's contention is not acceptable and thereafter, the AO decided the issue on merit by following various judicial pronouncements. Hence, this contention is not correct that this aspect of the matter was not decided by the AO. Before CIT (A), the assessee has raised five grounds out of which, Ground Nos. 1 and 5 are general and in Ground Nos. 2 to 4, the issue has been raised about applicability of section 9 (1) (vii), section 195 and section 40 (a) (i) and there is no ground in this regard that there is no purchase of software and therefore, this argument is rejected because it has no merit.

8. The main issue in dispute is this as to whether this amount of Rs. 213,03,772/- debited by the assessee company to its P & L Account as

Software expenses is purchase of software by the assessee company or it is mere reimbursement by the assessee company to its AE being the cost incurred by the AE after retaining 15% of cost incurred by the AE. In this regard, we reproduce the contents of the letter dated 03.01.2009 from page 28 of the paper book. It reads as under:-

“This is to confirm that Kaseya International Limited (KIL) is the licensed owner of the software product “Kaseya VSA”.

Kaseya Software India Private Limited (KSIPL) a wholly owned subsidiary of KIL has been authorized to sell the product “Kaseya VSA” within the geographical territory of India at a margin of 15% retained by KSIPL on the cost.

KSIPL is also entrusted with the scope of advertising and marketing the product by organising and conducting events, exhibitions, seminars, sponsorship, etc.

To achieve the selling and marketing objective KIL undertakes to reimburse all expenses incurred by KSIPL on account of Salary including Director’s Remuneration, Advertisement, Travelling and travelling related expenses, Business Promotion Expenses, Communication Expenses, Marketing Expenses, Public Relation Cost, Seminar and sponsorship expenses.

KIL will be sending you funds required for these expenses in advance so as to enable you to facilitate process.”

8. In our considered opinion, as per this letter written by the AE of the assessee company to the assessee company, the assessee company is

authorised to sell the product “Kaseya VSA” within India and it is specified that the assessee company will retain a margin of 15% on the cost. In our considered opinion, this is the manner of fixing purchase price of the assessee company as per which, the price to be paid by the assessee company to its AE will be such which will result in a margin to the assessee company to the extent of 15% of cost and this manner of price fixation will not alter the nature of the transaction. As per the audited P & L Account of the assessee company for the year ended as on 31.03.2013, sales is reported of Rs. 185,38,155/- for VSA and Rs. 59,61,183/- for XSP Total Rs. 244,99,338/-. The P & L Account is debited by Rs. 161,20,135/- on account of purchase of VSA and by Rs. 51,83,637/- on account of purchase of XSP, Total Purchase Rs. 213,03,772/- being the amount in dispute. If we work out the margin by reducing the purchase from sales, it is Rs. 31,95,566/- and it is 15% of total purchases Rs. 213,03,772/- whereas, the letter dated 03.01.2009 talks about margin being 15% of cost. We fail to understand as to how the net payment made by the assessee company to its AE is cost of AE and even if it is so, it means that the AE will get only cost reimbursement from the assessee company and will reimburse various expenses also. We also find that Rs. 390,12,618/- is debited by the assessee company on account of Employees’ Benefit Expenses whereas, the letter dated 03.01.2009 says that the assessee’s AE will reimburse all expenses incurred by the assessee company on account of salary including Director’s Remuneration. It may be that the Employees’ Benefit Expenses debited by the assessee company to its P & L Account is on account of salary not related to this activity and it is net of reimbursement of salary paid by the assessee incurred in respect of this activity but there is no such disclosure in the audited accounts and no such detail is made available to us. In respect of reimbursement of other expenses such as Advertisement,

Travelling and Travelling related expenses, Business Promotion Expenses, Communication Expenses, Marketing Expenses, public relation cost, seminar and sponsorship expenses etc, we find that there is debit of Rs. 437,954/- on account of travelling expenses, Rs. 23,23,698/- on account of Conveyance Charges which is travelling related expenses, Rs. 15,93,322/- on account of Communication Charges and there is no clarification that these are after reimbursement. Hence, it is not established that the contents of letter date 03.01.2009 are being acted upon.

9. We also feel that even if it is being acted upon, these conditions of this letter about reimbursement of various expenses to the assessee company by its AE such as Salary including Directors' Remuneration, Advertisement, Travelling and travelling related expenses, Business Promotion Expenses, Communication Expenses, Marketing Expenses, public relation cost, seminar and sponsorship expenses etc. will also not alter the nature of the transaction. In fact, the assessee company also has debited the amount in question to its P & L Account as Purchase of Software Licences and as per the difference in the amount of sale proceeds Credited in the P & L Account and purchase expenses debited to P & L Account, it is not established that the amount debited in the P & L Account as purchase of Software i.e. Rs. 213,03,772/- is equal to 15% of cost. Rather it is seen that it is 15% of such purchase amount debited to P & L Account and it cannot be accepted that it is cost to AE or cost to the assessee because it depends on the realisation of sale price. For the same product, price realised may differ on day to day basis and customer to customer basis in view of difference in timing or payment terms and hence, we have to accept that cost of the same product is different. Hence, it is not established that the letter dated 03.01.2009 is being acted upon by the assessee company and its AE. About reimbursement of various expenses as per this

letter also, no detail is brought on record that this condition of this letter is being acted upon by the assessee company and its AE. As per this letter dated 03.01.2009, the assessee company is authorised by its AE to sell "Kaseya VSA" within the geographical territory of India and no one can sell any thing if it is not purchased or produced by that person. This product is produced by the AE of the assessee company and not by the assessee company and therefore, the amount payable by the assessee company to its AE in this regard is nothing but purchase price of the computer software and various judgments followed by the lower authorities are applicable and simply because specific detailed Distribution Agreement is not executed between the assessee company and its AE, it cannot be said that these judgments are not applicable when the understanding between the assessee company and its AE is similar. Because in that case also, computer software was imported by the assessee without deducting TDS and it was held that it is payment of Royalty and therefore, the assessee should have deducted TDS. Para 5 of the Statement of facts (SOF) filed by the assessee before CIT (A) as available on page 12 of the paper book reads as under:-

"5. Kaseya Software India Private Limited acts as a Distributor (or Intermediary) for distributing keys of certain IT monitoring software products of Kaseya International Limited. The appellant, Kaseya India, obtains a Purchase Order from the Indian customers and raises a purchase request on Kaseya International Limited, Jersey as per the agreed price."

10. As per this para of SOF, it comes out that the assessee company obtains the purchase order from the Indian Customers in respect of certain IT Monitoring Software Products of Kaseya International Limited, Jersey as per agreed price for which the assessee company is acting as a distributor for

distributing keys of such software. Under these facts, in our considered opinion, the arrangement of the assessee company with its AE is of purchase of computer software at agreed price i.e. sale price to the Indian customers minus margin of the assessee company equal to 15% of cost as specified in letter dated 03.01.2009 available on page 28 of the paper book although we have seen that actually, it is 15% of the purchase price paid by the assessee company to its AE..

11. In view of the above discussion, we have no hesitation in holding that this fact that the assessee company is a distributor does not change the nature of the transaction and it is still a purchase as accounted for by the assessee company and these judgments followed by the AO and CIT (A) are applicable and the issue is covered against the assessee by these judgments and respectfully following the same, we decline to interfere in the order of CIT (A).

12.. In the result, this appeal of the assessee is dismissed.

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

Sd/-

(BEENA PILLAI)
Judicial Member

Bangalore,

Dated: 27th October, 2020.

/NS/*AKG

Sd/-

(A.K. GARODIA)
Accountant Member

Copy to:

1. Appellants	2. Respondent	3. CIT
4. CIT(A)	5. DR, ITAT, Bangalore.	6. Guard file

By order

Assistant Registrar,
ITAT, Bangalore.