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

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND
SHRI B.R. BASKARAN, ACCOUNTANT MEMBER

ITA No.2012/Bang/2016
Assessment Year: 2011-12

M/s. UKN Properties Pvt. Ltd. No.12, St. Patricks Arcade Residency Road, Richmond Town Bangalore 560 025. **PAN NO : AAACU3584A**	**Vs.**	DCIT Circle-7(1)(1) Bangalore
APPELLANT		**RESPONDENT**

Appellant by	**:**	Shri Narendra Sharma, A.R.
Respondent by	**:**	Shri Kannan Narayanan, D.R.

Date of Hearing	**:**	24.06.2021
Date of Pronouncement	**:**	02.07.2021

O R D E R

PER B.R. BASKARAN, ACCOUNTANT MEMBER:

The appeal filed by the assessee is directed against the order dated 31.8.2016 passed by Ld. CIT(A)-7, Bengaluru and it relates to the assessment year 2011-12.

2. The grounds urged by the assessee give rise to the following issues:-

a) Disallowance made u/s 14A of the Act.

b) Disallowance made u/s 40(a)(ia) of the Act

c) Addition of rental income due to the difference found out in form no.26-AS

3. The assessee is engaged in the business of development of Real Estate.

4. The first issue urged by the assessee relates to disallowance u/s 14A of the Act. The A.O. noticed that the assessee has received share income from partnership firm to the extent of Rs.1.63 crores and claimed the sum as exempt u/s 10(2A) of the Act. The assessee did not make any disallowance u/s 14A of the Act. Accordingly, the A.O. computed disallowance by applying the provisions of rule 8D of the I.T. Rules. The A.O. disallowed a sum of Rs.13.56 lakhs out of interest expenditure under Rule 8D(2)(ii) of the Act and also disallowed a sum of Rs.6.91 lakhs out of general expenses under Rule 8D(2)(iii) of the Act. Thus, the aggregate disallowance made by the A.O. u/s 14A of the Act was Rs.20.47 lakhs. The Ld. CIT(A) also confirmed the same.

5. The Ld. A.R. submitted that own funds and interest free funds available with the assessee during the year under consideration has exceeded the value of investments made in the partnership firm and hence no disallowance out of interest expenditure under Rule 8D (2)(ii) is warranted, as per the decision rendered by Hon'ble jurisdictional Karnataka High Court in the case of CIT Vs. Micro Labs Ltd. 383 ITR 490. With regard to the disallowance out of general expenses, the Ld. A.R. submitted that the assessee has received share income from one partnership firm only and the assessee has not incurred any expenditure for earning share income. Accordingly, he submitted that no disallowance under Rule 8D(2)(iii) is called for. In the alternative the Ld. A.R. submitted that the A.O. should have considered only those investments which have yielded exempt income for the purpose of computing average value of investments, while computing disallowance u/r 8D(2)(iii) of I T Rules. For this proposition the Ld.

A.R. placed his reliance on the decision rendered by Special bench of Tribunal in the case of ACIT Vs. Vireet Investments Pvt. Ltd. (50 ITR (Trib.) 313).

6. The ld. D.R., on the contrary, submitted that the disallowance u/s 14A of the Act is called for, since the assessee has earned exempt income.

7. We heard rival contentions on this issue and perused the record. The assessee is contending that it is having own funds and interest free funds exceeding the value of investments and hence the decision rendered by Hon'ble jurisdictional High Court in the case of Micro Labs Ltd. (supra) is applicable. The assessee is also placing reliance on the decision rendered by Special bench of Tribunal in the case of Vireet Investments Pvt. Ltd. (supra). The above said contentions urged before us require verification of facts prevailing in this case. Accordingly, we are of the view that this issue requires fresh examination at the end of the A.O. Accordingly, we set aside the order passed by Ld. CIT(A) on this issue and restore the same to the file of the A.O. for examining it afresh by following the decision rendered in the case of Micro Labs Ltd. (supra) and Vireet Investments Pvt. Ltd. (supra).

8. The next issue relates to disallowance made u/s 40(a)(ia) of the Act. The A.O. noticed that the assessee has made payments for purchase of software without deducting tax at source. The A.O. noticed that assessee has capitalized the value of software and accordingly claim depreciation of Rs.3,72,465/-. Since the assessee has not deducted tax at source from the payment made for purchase of software, the A.O. took the view that the depreciation claimed on software is not allowable, as per provisions of section 40(a)(ia) of the Act. Accordingly, he disallowed the claim of

depreciation u/s 40(a)(ia) of the Act. The Ld. CIT(A) took the view that the payment made for purchase of software is in the nature of royalty as per the decision rendered by Hon'ble Karnataka High Court in the case of Samsung Electronics Company Ltd. (2011) 203 Taxmann 477. Accordingly, he directed the A.O. to treat the software purchases as revenue expenditure in the nature of payment of royalty. Since the assessee has not deducted tax at source from the payment made for purchase of software, the Ld. CIT(A) directed the A.O. to disallow entire purchase cost of software u/s 40(a)(ia) of the Act.

9. We heard the parties on this issue and perused the record. We notice that the coordinate bench of Tribunal has held in the case of DCIT Vs. Sangeeta Mobiles Pvt. Ltd. (ITA No.715/Bang/2017 dated 15.6.2018) that the provisions of section 40(a)(i) of the Act cannot be invoked for making disallowance of depreciation. In this regard, the coordinate bench has followed the decision rendered by Bangalore bench of Tribunal in the case of Kawasaki Mcro Electronics Inc. – India branch Vs. DDIT. (ITA No.1512/Bang/2010 dated 26.6.2015). For the sake of convenience, we extract below the decision rendered by the coordinate bench in the case of Sangeeta Mobiles Pvt. Ltd. (supra).

> *"6.3.1 We have heard the rival contentions, perused and carefully considered the material on record; including the judicial pronouncement cited. On an appraisal of the facts on record, it is not in dispute that the assessee had expended an amount of Rs.2,26,381 for acquiring 'computers and softwares', which were capitalized and depreciation @ 60% was claimed thereon. The Assessing Officer proceeded to disallow the depreciation claimed by the assessee by invoking the provisions of section 40(a)(i) of the Act in respect of the aforesaid payments made for purchase of computer and software which was capitalized by the assessee. We find that the similar issue was considered and adjudicated in favour of the assessee and against revenue by a co-ordinate bench of this Tribunal in the case of Kawasaki Microelectronics Inc - India Branch V. DDIT (IT), Circle 1(1), Bangalore in its order IT(IT)A No.1512/Bang/2010 dt.26.6.2015. In this regard, at paras 3 to 8 of its order (supra), the co-ordinate bench has held as under :-*

" 3. The only issue raised for our consideration and adjudication is regarding disallowance of depreciation by invoking the provisions of section 40(a)(i) of the Act in respect of the payments made for purchase of software and capitalized by the assessee. The Assessing Officer found that the assessee made the payment of Rs.49,42,300 for purchase of software ITA No.715/Bang/2017 from Cadence Systems Ireland Limited (in short 'Cadence'). The software so purchased has been capitalized by the assessee under the block of computer and depreciation was claimed by the assessee. The Assessing Officer further noted that the assessee has not deducted the tax at source while making payment to Cadence and accordingly asked the assessee as to why the payment should not be disallowed under Section 40(a)(i) of the Act. The assessee objected to the proposed disallowance under Section 40(a)(i) of the Act. The Assessing Officer did not accept the contention of the assessee that the depreciation cannot be allowed under Section 40(a)(i) of the Act. The Assessing Officer has held that the payment was made by the assessee to a non-resident on which the TDS is to be deducted at source but the assessee has not deducted the tax nor has been paid. The payment which was in the nature of royalty is chargeable under the Act and therefore covered under Section 40(a)(i) of the Act. Accordingly, the Assessing Officer proposed to disallow the depreciation of Rs.17,49,680 claimed by the assessee in respect of the software purchased which was capitalized. The assessee raised the objection against the depreciation proposed to be disallowed by the Assessing Officer before the DRP, but could not succeed.

4. Before us, the learned Authorised Representative of the assessee has submitted that since the expenditure is capitalized by the assessee, therefore, the provisions of section 40(a)(i) cannot be invoked for disallowance of the depreciation on the capitalized amount. It is not the case of the claim of any expenditure by the assessee but the expenditure which has already capitalized and consequently the provisions of section 40(a)(i) has no role to play. In support of his contention, he has relied upon the decision of Mumbai Bench, ITAT in the case of SKOL Breweries Ltd. Vs. ACIT 142 ITD 49 (Mum) as well as the decision of the Delhi Bench of ITAT in the case of SMS Demang (P.) Ltd. V DCIT (2010) 38 SOT 496. The learned Authorised Representative has contended that the issue of disallowance of depreciation by applying the provisions of section 40(a)(i) of the Act is covered in favour of the assessee by the above said decisions of the Tribunal.

5. On the other hand, the learned Departmental Representative has submitted that there is no dispute that the assessee has made the payment for purchase of software which is in the nature of royalty and therefore the provisions of section 195 are applicable on such payment for deduction of tax at source. He has further submitted that it is also not in dispute that the assessee has not deducted the

TDS in respect of the payment in question and therefore the assessee has violated the provisions of section 195 of the Act and consequently, the provisions of section 40(a)(i) of the Act are applicable in the case under consideration. The learned Departmental Representative has contended that there is an intricable link between the provisions of sections 40, 195 & 201 of the Act. Once the assessee has failed to comply with the provisions of section 195, the provisions of section 40(a)(i) of the Act are applicable. Has relied on the orders of the authorities below.

6. We have considered the rival submissions as well as relevant the material on record. The issue before us is limited only with respect to the disallowance of depreciation by invoking the provisions of section 40(a)(i) of the Act. There is no dispute that the assessee has made the payment in question to a non-resident for purchase of software and the said payment has been capitalized by the assessee in the block of computer asset. Once the assessee capitalized the payment and has not claimed the same as an expenditure against the profits of the business of the assessee, then, the question arises whether the depreciation which is a statutory deduction as per the section 32 of the Act can be disallowed by invoking the provisions of section 40(a)(i) of the Act. At the outset, it is to be noted that on the similar set of facts an identical issue has been dealt by the ITAT, Mumbai Bench in the case of SKOL Breweries Ltd. (supra), wherein it was held in paras 16.1 to 16.4 as under :-

" 16.1 As regards the alternative plea of the ld Sr counsel for the assessee that since the assessee has not claimed the entire amount as revenue expenditure; but has capitalized the same and claimed only depreciation u/s 32(1)(ii); therefore, provisions of sec. 40(a)((i) shall not apply. Section 40(a)(i) contemplates that any interest, royalty, fee for technical services or other sum chargeable under this act, which is payable outside India as it is relevant for the case in hand on which tax is deductible at source under Chapter XVII -B and such tax has not been deducted or, after deduction, has not been paid, the amount of interest, royalty, fee for technical services and other sum shall not be deducted in computing the income chargeable under the head "profits & gains of business or profession". This condition of deductibility has been stipulated u/s 40 notwithstanding anything to the contrary in section 30 to 38 of the Act. Sec. 40 begins with non-obstante clause; therefore, it is an overriding effect t the provisions of sec. 30 to 38 of the I T Act. The question arises is whether any amount paid outside India or to the Non Resident without deduction of tax at source and the assessee has capitalized the same in the fixed assets and claimed only depreciation is subjected to the provisions of sec. 40(a)(i) or not ?. We quote the provisions of sec. 40(a)(i) as under: 40. Notwithstanding anything to the contrary in sections 30 to 38, the following amounts shall not be deducted in computing the income

chargeable under the head "Profits and gains of business or profession",--

in the case of any assessee--

[(i) any interest (not being interest on a loan issued for public subscription before the 1st day of April, 1938), royalty, fees for technical services or other sum chargeable under this Act, which is payable outside India; or in India to a non-resident, not being a company or to a foreign company, on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction, has not been paid during the previous year, or in the subsequent year before the expiry of the time prescribed under sub-section (1) of section 200 :

Provided that where in respect of any such sum, tax has been deducted in any subsequent year or, has been deducted in the previous year but paid in any subsequent year after the expiry of the time prescribed under subsection (1) of section 200, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid.

Explanation.--For the purposes of this sub-clause,--

"royalty" shall have the same meaning as in Explanation 2 to clause (vi) of sub-section (1) of section 9;

"fees for technical services" shall have the same meaning as in Explanation 2 to clause (vii) of sub-section (1) of section 9;

16.2 It is manifest from the plain reading of provisions of sec. 40(a)(i) that an amount payable towards interest, royalty, fee for technical services or other sums chargeable under this Act shall not be deducted while computing the income under the head profit and gain of business or profession on which tax is deductible at source; but such tax has not been deducted. The expression 'amount payable' which is otherwise an allowable deduction refers to the expenditure incurred for the purpose of business of the assessee and therefore, the said expenditure is a deductible claim. Thus, section 40 refers to the outgoing amount chargeable under this Act and subject to TDS under Chapter XVII-B. There is a difference between the expenditure and other kind of deduction. The other kind of deduction which includes any loss incidental to carrying on the business, bad debts etc., which are deductible items itself not because an expenditure was laid out and consequentially any sum has gone out; on the contrary the expenditure results a certain sums payable and goes out of the business of the assessee. The sum, as contemplated under sec. 40(a)(i) is the outgoing amount and therefore, necessarily refers to the outgoing expenditure.

Depreciation is a statutory deduction and after the insertion of Explanation 5 to sec. 32, it is obligatory on the part of the Assessing Officer to allow the deduction of depreciation on the eligible asset irrespective of any claim made by the assessee. Therefore, depreciation is a mandatory deduction on the asset which is wholly or partly owned by the assessee and used for the purpose of business or profession which means the depreciation is a deduction for an asset owned by the assessee and used for the purpose of business and not for incurring of any expenditure.

16.3 The deduction u/s 32 is not in respect of the amount paid or payable which is subjected to TDS; but is a statutory deduction on an asset which is otherwise eligible for deduction of deprecation. Depreciation is not an outgoing expenditure and therefore, the provisions of sec. 40(a)(i) of the Act are not attracted on such deduction. This view has been fortified by the decision of the Hon'ble Punjab & Haryana High Court in the case of Mark Auto Industries Ltd. (supra) in pars 5 & 6 as under:

"5. Adverting to questions (ii) and (iii), the issue which arises for consideration is whether the assessee could be disallowed claim for depreciation under Section 40(a)(i) of the Act on the ground that the payments made for technical know-how which had been capitalized, no tax deduction at source has been made thereon. The Tribunal while accepting the plea of the assessee, in para 3, had noticed as under:

"3. Ground no. 4 is against deletion of an addition of Rs. 6,88,1751- made by the AO on account of deduction of depreciation on technical know-how as the assessee failed to deduct tax in accordance with the provision contained in section 40(a)(i). The finding of the learned CIT(A) was that the assessee had incurred, expenditure by way of technical know-how, which was capitalized amount as made in the return of income. Since the assessee had not claimed deduction for the amount paid, the provisions contained in section 40(a) (i) were not attracted. The learned DR could not find any fault with this direction of the CIT(A) also although she referred to page 4 of the assessment order, where it was mentioned that the tax deducted in respect of the payment was made over to the Government in the subsequent year and, therefore, depreciation could not be deducted on the capital expenditure incurred by the assessee. In reply, the learned counsel pointed out that the expenditure by way of technical know-how was capitalized and it was not claimed as revenue expenditure. Therefore, there was also no reason to disallow depreciation on such capitalized amount as the aforesaid provision does not deal with deduction of depreciation. Having considered arguments from both the sides, we are of the view that there is no error in the order of the learned

CIT(A) which requires correction from us. Thus, this ground is also dismissed."

6. Learned counsel for the revenue was unable to substantiate that in the absence of any requirement of law for making deduction of tax out of the expenditure on technical know how which was capitalized and no amount was claimed as revenue expenditure, the deduction could be disallowed under Section 40(a)(i) of the Act. Accordingly, no infirmity could be found in the order passed by the Tribunal which may warrant interference by this Court. Thus, both the questions are answered against the revenue and in favour of the assessee."

16.4 In view of the above discussion as well as following the decision of the Hon'ble Punjab & Haryana High Court, we decide this issue in favour of the assessee and against the revenue."

7. As it is clear from the above decision that the Tribunal has discussed and analysed the provisions of section 40(a)(i) in detail in the context of disallowance of depreciation. The learned D.R. has submitted that once the assessee has violated the provisions of section 195, then, even the expenditure is capitalized by the assessee, the provisions of section 40(a)(i) are applicable for disallowance of depreciation on such capitalized expenditure. We do not agree with the contention of the learned D.R, because a remedy for violation of provisions of section 195 is available with the Assessing Officer under Section 201 & 201A of the Act. The provisions of section 40(a) is only an additional measure to enforce the compliance of Chapter XVIIB of the Act, by disallowing an expenditure which is otherwise allowable under the provisions of the Act. Therefore, the question of disallowance under Section 40(a) arises only when an expenditure is claimed by the assessee without deducting the tax at source as per the provisions of Chapter-XVIIB of the Act, 1961. In the case on hand, when the assessee has not claimed, the said payment as an expenditure then the question of disallowance under Section 40(a)(i) does not arise. The only remedy which might have been resorted to by the Assessing Officer is the action under Section 201 and 201A of the Act. A similar view has been taken by the Delhi Bench of the Tribunal in the case of SMS Demang (P) Ltd. (supra) in para 8 as under :-

"8. As regards the claim of assessee for depreciation on assets capitalized, depreciation cannot be disallowed on the ground that at the time of remittance, no tax was deducted at source. Provisions of section 40(a)(i) are not applicable for claim for deduction under section 32 of the Act. Accordingly, in our considered opinion, the AO was not justified in disallowing 50 percent of depreciation on the ground that provisions of section 40(a)(i) were applicable.

However, the AO will verify the fact whether the assets in respect of which expenditure has been capitalized have been used in business for period more than 180 days. If the assets have been used for more than 180 days, the AO will allow full depreciation, as claimed by the assessee. The AO is directed accordingly". "

6.3.2 Following the aforesaid decision of the co-ordinate bench of this Tribunal in the case of Kawasaki Microelectronics Inc - India Branch V.DDIT (IT), Circle 1(1), Bangalore (supra), which is on similar facts as those in the case on hand, we are of the opinion and hold that once the assessee has capitalized the payment in question though the assessee has not deducted tax at source on such payment, the provisions of Sec.40(a)(i) cannot be invoked for disallowance of depreciation.

10. Following the above said decision of coordinate bench, provisions of section 40(a)(i) cannot be invoked for making disallowance of depreciation on software purchase.

11. The Ld. CIT(A) has followed the decision rendered by Hon'ble Karnataka High Court in the case of Samsung Electronics Company Ltd. (supra) and accordingly held that the software purchase cost is in the nature of royalty and hence allowable as revenue expenditure. Accordingly, he has directed the A.O. to disallow the entire cost of software purchase u/s 40(a)(i) of the Act for non-deduction of tax at source. The ld. A.R. submitted that the year under consideration is assessment year 2011-12 and decision in the case of Samsung Electronics Ltd., has been rendered on 15.10.2011 i.e. subsequent to the completion of the transaction of purchase of software. Prior to the decision rendered by Hon'ble Karnataka High Court in the above said case, certain rulings were available holding that the software purchases are not in the nature of royalty payments. Hence the assessee has not deducted the tax at source. Since the transactions have already been completed prior to the ruling given by Hon'ble Karnataka High Court in the above said case, the assessee should not be burdened with the liability of TDS for the past transactions. Under the identical set of facts, coordinate bench has held in the case of M/s. Teekays

Interior Solutions Pvt. Ltd. Vs. DCIT (ITA No.400/Bang/2017 dated 15.2.2019) that the disallowance u/s 40(a)(ia) of the Act should not be made since the assessee cannot be fastened with the liability to deduct tax at source retrospectively.

12. We find merit in these contentions of Ld. A.R. For the sake of convenience, we extract below the decision rendered by coordinate bench in the case of Teekays Interior Solutions Pvt. Ltd. (supra).

> *11. We heard the learned DR and perused the record. We noticed that an identical issue was considered by the co- ordinate bench in the case of Allegis Services India Pvt. Ltd. (2017)(51 CCH 0083) and identical disallowance made was deleted by the co-ordinate bench on the reasoning that the TDS liability cannot be fastened upon the assessee retrospectively. For the sake of convenience, we extract below the operating portion of the order passed by the co-ordinate bench:-*
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> *"4. Ground Nos.2 to 5 are regarding disallowance under Section 40(a)(ia) of the Income Tax Act, 1961 (in short 'the Act') of payment towards software licenses treated by the Assessing Officer as royalty for want of TDS. The assessee has also raised additional grounds which are as under :*
>
> *Corporate tax matters*
>
> *21. " Without prejudice to the grounds 2 to 4, the Learned CIT(A) has failed to appreciate that during the Financial Year 2008-09 relevant to the Assessment Year 2009-10, the Appellant was not liable to withhold tax on the payments made as there was no provision under the Act mandating the deduction of tax at source on the payments made on purchase of computer software and there were many favorable judicial precedence including the jurisdictional tribunal rulings.*
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> *22. Without prejudice to the grounds 2 to 4, the learned CIT(A) erred in not appreciating the fact that explanation 5 to Section 9(1)(vi) was inserted vide Finance Act, 2012 with effect from 1 June 1976 and was hit by the doctrine of 'impossibility of performance'."*
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> *The additional grounds raised by the assessee are not new issues but an additional plea/argument raised by the assessee regarding the disallowance made by the Assessing Officer under Section 40(a)(ia) of the Act. Therefore in view of the fact that the substantial issue has been raised in the main ground, the additional grounds raised by the assessee on the same issue are admitted for consideration and adjudication along with the Ground Nos.2 to 5.*

5. The learned Authorised Representative of the assessee has submitted that prior to the decision of Hon'ble jurisdictional High Court in the case of CIT Vs. Samsung Electronics Co. Ltd. 320 ITR 209, the assessee was under the bona fide belief that the payment on account of software licenses does not fall under the definition of royalty and therefore the assessee was under no obligation to deduct tax at source on the said payment for software license. He has further submitted that there were number of judicial precedents on this issue wherein this Tribunal has held that the payment made for purchase of software does not fall under the definition of royalty provided under Section 9(1)(vi) of the Act. Thus he has submitted that a subsequent amendment or a decision cannot be thrust upon the assessee for deduction of tax in respect of a transaction completed much prior to the said decision. In support of his contention, he has relied upon decision of the co-ordinate bench of this Tribunal dt.23.11.2016 in the case of ACIT Vs. Aurigene learned Authorised Representative has submitted that disallowance made by the Assessing Officer is not justified when there was no such law or declaration of law at the time of payment made by the assessee to cast the duty on the assessee to deduct tax.

6. On the other hand, the learned Departmental Representative has submitted that the decision of Hon'ble jurisdictional High Court in the case of CIT Vs. Samsung Electronics Co. Ltd. (supra) though was subsequent to the transaction in question however, the said decision has not brought into statute any new law but it is only a declaration and interpretation of existing law. He has relied upon the orders of the authorities below.

7. We have considered the rival submissions as well as the relevant material on record. There is no dispute that the transaction in question regarding payment of purchase of software was completed in the F.Y.2008-09 whereas the decision of Hon'ble jurisdictional High Court in the case of CIT Vs. Samsung Electronics Co. Ltd. (supra) was passed on 15.10.2011 much later than the time of transaction carried out by the assessee. It is also not in dispute that this issue of considering the payment for purchase of software as royalty is a highly debatable issue and various High Courts have taken divergent views on this issue. The co-ordinate Bench of this Tribunal in the case of ACIT Vs. Aurigene Discovery Technologies (P) Ltd. (supra) has considered an identical issue in paras 3 to 5 as under :

" 03. We heard the rival submissions and gone through the relevant orders. The assessee resubmitted the plea taken before the lower authorities and placed on the ruling of the Hon'ble Bangalore ITAT in Sonata Information Technology Ltd v. ACIT (103 ITD 324) which had held that payments for software licenses do not constitute royalty under the provisions of the Act and hence disallowance under section40(a) (ia) of the Act would not be applicable. The change in the legal position on taxation of computer software was on account of the ruling of the Karnataka High Court in CIT v. Samsung Electronics Co. Ltd. (320 ITR 209), which was pronounced on 15.10.11 that is much later than the closure of the FY 2010-11. Subsequently, the Finance Act 2012 also introduced, retrospectively,

Explanation 4 to section 9(1 (vi) of the Act to clarify that payments for, inter alia. license to use computer software would qualify as royalty. During the FY 10-11, the assessee did not have the benefit of clarification brought by the respective amendment. As such, for the FY 2010-11, in light of the provisions of section 9(1)(vi) of the Act read with judicial guidance on the taxation of computer software payments, tax was not required to be deducted at source. Given the practice in prior assessment years, the assessee was of the bona fide view that the payment of software license fee was not subject to tax deduction at source under section194J/195 of the Act. It is submitted that liability to deduct tax at source cannot be fastened on the assessee on the basis of retrospective amendment to the Act (Finance Act 2012 amendment the definition of royalty with retrospective effect from 01.04.1976) or a subsequent ruling of a court (the Karnataka HC in CIT v Samsung Electronics Co. Ltd. (16 taxmann.com 141) was passed on October 15,2011). Courts have consistently upheld this principle as seen in:

- *ITO v. Clear Water Technology Services (P.) Ltd. (52 taxmann.com115)*
- *Kerala Vision Ltd v. ACIT (46 taxmann.com 50)*
- *Sonic Biochem Extractions (P.) Ltd v. ITO (35 taxmann.com 463)*
- *Channel Guide India Ltd v. ACIT (25 taxmann.com 25)*
- *DCIv. Virola International (20 14(2) TMI 653)*
- *CIT v. Kotak Securities Ltd. (20 taxmann.com 846).*

04. The relevant portion of the CIT(A) order is extracted as under :

" Disallowance of expenses under 40(a)(i) / 40(a)(ia) :
5.1. As regards disallowance of expenses under 40(a)(i)/40(a)(ia), it has been submitted that the company had determined the rate of tax to be deducted and following the judgments that were prevalent at the time of tax deduction, Supreme Court in the case of Tata Consultancy Services and jurisdictional Tribunal in the case of Samsung Electronics Co. Ltd, the appellant submitted that the said judgment shall not be applicable since it was pronounced on 15/10/2011 and Velankani Mauritius Ltd., whereas the liability to deduct tax for the appellant was the F.Y. 2010-11. The appellant has relied on the judgment of Cochin Tribunal in the case of Kerala Vision Ltd and Agra Tribunal in the case of Virola International, wherein it was held that -

"The law amended was undoubtedly retrospective in nature but so far as tax withholding liability is concerned, it depends on the law as it existed at the point of time when payments, from which taxes ought to have been withheld, were made. The tax-deductor cannot be expected to have clairvoyance of knowing how the law will change in future."

Further, software payment was included in definition of royalty only vide Explanation to section 9(1)(vi)inserted retrospectively vide Finance Act, 2012 and when the purchase was made, the appellant did not have the benefit of clarification brought by the retrospective amendment. It is

impossible to fasten liability for deducting tax at source retrospectively as tax is to be deducted at source at the time when the payment is credited or made. This view has been upheld by the Bangalore Tribunal in the case of DCIT vs M/s WS Atkins India Pvt L td (ITA No 14671Bang12014 and the Mumbai Tribunal in the case of Channel Guide India Ltd. vs ACIT ([2012] 25 taxmann.com 25).

5.2 The ITAT 'C' Bench in the case M/s WS Atkins India Pvt. Ltd and in the case of Infotech Enterprises Ltd of the Hyderabad Bench of the Tribunal wherein it has been held that section 40(a)(ia) would not apply to disallow payments when TDS was not d o n e a n d subsequently become taxable on account of a retrospective legislation. It has also referred to in the case of Sonic Biochem Extractions Pvt. Ltd. (supra), identical issue was considered and decided by the Mumbai Tribunal. Following were the relevant observations:-

"The assessee purchased software, capitalized the payment to the computers account as the software came along with the hardware of computers and claimed depreciation. On the ground that purchase of software is essentially purchase of copyright which attracts tax deduction at source under section 194J, the Assessing Officer involved the provisions o f section 40(a (ia) and disallowed the depreciation claimed. The Commissioner (Appeals), confirmed the action of theAssessing Officer on the ground that the purchase of software amounted to acquisition of intangible asset and therefore, the payment was royalty and disallowable.

On appeal:

Held, (i) that mere purchase of software, a copyrighted article, for utilisation of computers cannot be considered as purchase of copyright and royalty. The assessee did not acquire any rights for making copies, selling or acquiring which generally could be considered within the definition of "royalty". Explanation 2 to section 9(1)(vi) cannot be applied to purchase of a copyrighted software, which does not involve any commercial exploitation thereof. The assessee simply purchased software delivered along with computer hardware for utilization in the day-to-day business."

5.3 Relying on the above decision, the ITAT `C'Bench, Bangalore upheld the order of the CIT(A) who had observed that the assessee did not have the benefit of the clarification brought brought about by the retrospective amendment that the payments tantamount to payment for royalty and consequently tax was to be deducted u/s 194J. The law as extant on the date when the payment for obtaining the software was made, has not categorically laid down that tax is required to be deducted. It is impossible to fasten liability for deducting tax at source retrospectively.

5.4 In view of the above decisions, it is correct to say that it is not possible to fasten liability for deducting tax at source retrospectively as tax is to be deducted at source at the time when the payment is credited or made. When

purchase of software was made the assessee did not have the benefit of t h e clarification brought about by the retrospective amendment. The contention of the appellant is correct that the software payment disallowed by the AO did not warrant withholding of the tax u/s 40(a)(ia) and 40(a)(ia) (by an order of corrigendum dt 20.11.2015) of the Ac t. Therefore disallowance made by the AO on account of software payment want of withholding of tax is hereby deleted."

05. The CIT(A) followed the decision of this Tribunal in M/s WS Atkins India Pvt. Ltd, supra, which referred the decisions of Hyderabad Bench of the Tribunal in Infotech Enterprises Ltd in ITA 115/HYD/2011 wherein it has been held that section 40(a)(ia) would not apply to disallow payments when TDS was not d o n e a n d s u b s e q u e n t l y b e c o m e t a x a b l e o n a c c o u n t o f a retrospective legislation. It has also referred to the decisions of the Delhi & Mumbai Tribunal in SMS Demag Pvt Ltd , 132 ITJ 498 & Sonic Biochem Extractions Pvt. Ltd. 23 ITR (Trib) 447, respectively. We uphold the decision of the CIT(A) and dismiss the grounds raised by the Revenue."

Thus it is clear that the co-ordinate Bench of this Tribunal while deciding this issue has taken note of various decisions in favour of the assessee on the point that the payment for purchase of software does not fall in the definition of royalty. Respectfully following the decision of co-ordinate Bench of this Tribunal, we delete the disallowance made by the Assessing Officer."

12. Consistent with the view taken on the above case, we also hold that the assessee cannot be fastened with the liability to deduct tax at source retrospectively and accordingly, we set aside the order passed by the learned CIT(A) on this issue and direct the A.O. to delete the impugned addition."

13. Since the transactions of purchase of software has been completed prior to rendering of decision by Hon'ble Karnataka High Court and since there were decisions which have held that TDS is not required to be made out of payment made for software purchases, following the above said decision we hold that the TDS liability cannot be fastened upon the assessee retrospectively and accordingly disallowance u/s 40(a)(i) is not called for even if the software purchases is treated as revenue expenditure. Accordingly, we are of the view that there is no reason to treat the cost of software capitalized by the assessee as revenue expenditure. Accordingly we set aside the order passed by Ld. CIT(A) and direct

the AO to treat the cost of software as capital expenditure and delete the disallowance made on this issue.

14. The next issue relates to addition made by the AO due to difference in the income reported by the assessee under form No.26AS.

15. The AO noticed that there was difference between the income reported by the assessee in the profit & loss account and form No.26AS and accordingly added the difference of Rs.2,62,761/-. Before Ld. CIT(A), the assessee got partial relief and the Ld. CIT(A) confirmed the addition to the extent of Rs.1,65,375/-. The Ld. A.R. submitted that the assessee has offered the above said amount of Rs.1,65,375/- in the succeeding assessment year i.e. in assessment year 2012-13, since it was received in the succeeding year. Accordingly, he submitted that addition of Rs.1,65,375/- made in this year may be directed to be deleted as the same is revenue neutral. In this regard, he placed his reliance on the decision rendered by Hon'ble Supreme Court in the case of Excel Industries (299 ITR 1). He also submitted that the addition made in this year results in double taxation of same item of income.

16. The Ld. D.R., however, submitted that the claim of the assessee requires examination at the end of the A.O

17. We heard the rival contentions on this issue and perused the record. We find merit in the submission made by Ld. D.R. Accordingly, we restore this issue to the file of the AO for examining the explanations furnished by the assessee. After affording adequate opportunity of being heard to the assessee, the A.O. may take appropriate decision in accordance with law.

18. In the result, the appeal filed by the assessee is treated as allowed for statistical purposes.

Order pronounced in the open court on 2nd July, 2021.

Sd/-	**Sd/-**
(N.V. Vasudevan)	**(B.R. Baskaran)**
Vice President	**Accountant Member**

Bangalore,
Dated 2nd July, 2021.
VG/SPS

Copy to:

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

By order

Asst. Registrar, ITAT, Bangalore.