

IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH “C”, PUNE – VIRTUAL COURT

BEFORE SHRI R.S. SYAL, VICE PRESIDENT AND
SHRI PARTHA SARATHI CHAUDHURY, JUDICIAL MEMBER

ITA No.2048/PUN/2019

निर्धारण वर्ष / Assessment Year: 2010-11

BMC Software Asia Pacific Pte Ltd., 600, North Bridge Road, 20-01/10 Park View Square, Singapore – 188778 PAN : AAECB0642A	Vs.	ACIT (International Tax), Circle-1, Pune
Appellant		Respondent

Assessee by
Revenue by

Shri Farokh Irani
Shri Subhakant Sahu

Date of hearing

08-09-2021

Date of pronouncement

08-09-2021

आदेश / ORDER

PER R.S.SYAL, VP :

This appeal by the assessee is directed against the final assessment order dated 24-10-2019 passed u/s.143(3) r.w.s. 144C(13) of the Income-tax Act, 1961 (hereinafter referred to as ‘the Act’) in relation to the assessment year 2010-11.

2. Briefly, the facts of the case are that the assessee is a Singapore based company, which did not file its return of income for the year under consideration. On verification of certain details on the tax

portal, the Assessing Officer (AO) observed that the assessee earned income from sale of Software Licenses and income from Support, Maintenance and Training services rendered in relation to such software licenses sold either directly or indirectly through third parties in India during the previous year relevant to the assessment year under consideration, for which no return of income was filed. He initiated re-assessment proceedings by means of a notice u/s 148 of the Act. On being show caused as to why income from sale of software was not offered for taxation, the assessee submitted that it was not the owner of the software licenses rather it was only permitted to distribute such software licenses in the Asia Pacific region. Relying on the judgment of Hon'ble Karnataka High Court in *CIT Vs. Samsung Electronics Co. Ltd. (2010) 320 ITR 209* and host of other decisions, the AO canvassed a view that the payment received by the assessee for supply of software and rendition of software related services constituted 'Royalty' under the Act as well as the Double Taxation Avoidance Agreement between India and Singapore (hereinafter called 'the DTAA'). That is how, the AO computed the total income at Rs.48,01,58,318/-. Aggrieved thereby, the assessee raised objections before the Dispute Resolution Panel (DRP)

urging that it sold software licenses and the receipt was not in the nature of Royalty. The DRP, taking note of the aforementioned judgment of *Samsung Electronics (supra)* held that the action of the AO in taxing the amount was as per law. Aggrieved thereby, the assessee has come up in appeal before the Tribunal.

3. We have heard both the sides through Virtual Court and gone through the relevant material on record. It has been noticed above that the assessee did not file any return of income for the year and the AO initiated re-assessment proceedings by means of notice u/s.148 and thereafter held the amount of consideration received by the assessee from sale of software licenses and support, maintenance services rendered in relation to such software licenses, as chargeable to tax as Royalty. The assessee has raised two issues in this appeal, viz., non-taxability of the amount and wrong initiation of reassessment.

4. Firstly, we take up the issue on merits. It can be seen from the draft order that there is no dispute about the nature of receipts which the assessee earned from sale of software licenses and income from support, maintenance and training services rendered in relation to such software licenses sold. The AO has also accepted that the assessee earned the income in question on sale of

software etc. The DRP, too, recorded the nature of receipt as sale of software and related services in connection with the sale of software. Thus, the only point which arises for our consideration is as to whether the revenue earned from sale of software and rendering of the related services *qua* the software is chargeable to tax as 'Royalty' under the Act as well as the DTAA.

5. The assessee is a resident of Singapore and hence governed by the DTAA. Article 12 of the DTAA defines the term 'Royalties' in para 3 as under:

'The term "royalties" as used in this Article means payments of any kind received as a consideration *for the use of, or the right to use:*

(a) *any copyright of a literary, artistic or scientific work, including cinematograph film or films or tapes used for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience, including gains derived from the alienation of any such right, property or information*

(b) *any industrial, commercial or scientific equipment, other than payments derived by an enterprise from activities described in paragraph 4(b) or 4(c) of Article 8'*

6. The above paragraph clearly indicates that the Royalty means consideration for use or right to use any copyright of a literary, artistic or scientific work etc. The question whether the sale of computer software would partake of the character of Royalties or Business Profits, recently came up for consideration before the

Hon'ble Supreme Court in *Engineering Analysis Centre of Excellence Pvt. Ltd. Vs. CIT (2021) 432 ITR 472 (SC)*. After analyzing the identical issue in the backdrop of similar expression as used in Article 12(3) of the DTAA, it has been held that ownership of copyright in a work is different from the ownership of the physical material in which the copyrighted work may happen to be embodied. Parting with copyright entails parting with the right to do any of the acts mentioned in section 14 of the Copyright Act. Where the core of a transaction is to authorize the end-user to have access to and make use of the "licensed" computer software product over which the licensee has no exclusive rights, no copyright is parted with. Adverting to the facts of the extant case, it is seen that the receipts of Rs.48.01 crore are on account of sale of Software/license and rendition of services in connection with the software and not for parting with the copyright of the software. Since facts of the present case are similar to those considered and decided by the Hon'ble Supreme Court in the case of *Engineering Analysis Centre of Excellence Pvt. Ltd. (supra)*, respectfully following the precedent, we hold that the amount cannot be brought within the ambit of 'Royalties' under Article 12 of the DTAA.

7. The taxability of the amount under the Act can be considered only in hue of section 9(1)(vi) defining the term 'royalty'. Explanation 4 clarifies that 'the transfer of all or any rights in respect of any right, property or information includes and has always included transfer of all or any right for use or right to use a computer software (including granting of a licence) irrespective of the medium through which such right is transferred'. The Hon'ble Supreme Court in *Engineering Analysis (supra)* has further held that Explanation 4 to section 9(1)(vi) inserted vide the Finance Act 2012 is not clarificatory as it expands the scope and hence prospective. The assessment year under consideration is 2010-11 and hence the Explanation cannot apply to the facts of the case.

8. Once it is held that the receipt in the hands of the assessee does not bear the character of 'Royalty', it will obviously be in the nature of 'Business Profits' under the DTAA. In order to bring 'Business profits' of a resident of the other country to tax in India within the ambit of Article 7, it is *sine qua non* that the foreign enterprise must have a Permanent Establishment (PE) in India in terms of Article 5 of the DTAA. In the absence of a PE, the taxability under Article 7 does not trigger. Reverting to the facts of the extant case, we find that it is not the case of the authorities

below that the assessee has any permanent establishment in India.

In that view of the matter, the income ceases to be taxable in India.

The issue is thus decided in the assessee's favour.

9. Notwithstanding our view on the non-chargeability of the amount received by the assessee as 'Royalty', we also proceed to dispose of the assessee's ground on initiation of re-assessment, which the Id. AR pressed for adjudication. Before embarking upon this issue, it would be befitting to take note of the reasons recorded by the AO before initiating reassessment, as have been reproduced in the draft order, reading as under:

“M/s. Wipro Ltd. is an Indian company engaged in the business of providing software development services. It has purchased software from M/s. BMC Software Asia Pacific Pte Ltd. (hereinafter called 'assessee') for its business of software development in India. From the details collected during the proceedings u/s.201 of Income Tax Act 1961 for the F.Y. 2009-10 relevant to A.Y. 2010-11 it is noticed that assessee has received Rs.5,52,80,239/-, as consideration for sale of software/licenses relating to development of software from Wipro Ltd.

On thorough scrutiny of the nature of the transaction, it is found that the consideration received by the assessee for the sale of software licenses are in the nature of royalty. It is to be noted that the Hon'ble High Court of Karnataka in the case of *CIT Vs. Samsung Electronics Ltd.* (320 ITR 209) has held that any consideration received on sale of software licenses is royalty. In these circumstances the said amount received by the assessee is the income deemed to accrue or arise in India as per section 9(1)(vi) of the Act & DTAA and chargeable to tax in terms of Section 5(2)(b) of the Act.

However, as verified from records, the assessee has not filed the income tax return for A.Y. 2010-11. Therefore I have the reason to believe that the income mentioned above has escaped assessment within the meaning of section 147 of the Income Tax Act, 1961.”

10. A bare perusal of the reasons deciphers that the assessee sold software to Wipro Ltd., an Indian company. The AO opined that the consideration received from sale of software license is in the nature of ‘Royalty’. For reaching this opinion, he relied solely on the judgment of Hon’ble Karnataka High Court in *Samsung Electronics Co. Ltd. (supra)* in which it has been held that the consideration received on sale of software license amounts to ‘Royalty’. This judgment of the Hon’ble Karnataka High Court, along with a batch of others, came up for consideration before the Hon’ble Supreme Court in the case of *Engineering Analysis Centre of Excellence Pvt. Ltd. Vs. CIT (supra)*. After carrying out a detailed analysis, the view taken by the Hon’ble Karnataka High Court has been overturned by the Hon’ble Supreme Court. Thus, it becomes overt that the sole reason taken by the AO at the time of initiation of reassessment for holding the amount as chargeable to tax, based on *Samsung Electronics Co. Ltd. (supra)*, now ceases to exist. The reversal of *Samsung (supra)* by the Hon’ble Supreme

Court has rendered the reasons for re-assessment as unfounded and invalid. There is no gainsaying that the Courts declare the law and do not legislate. With the advent of *Engineering Analysis (SC)* (*supra*), the law since inception has to be presumed as not treating the sale of software licenses as 'Royalty' in terms of section 9(1)(vi) read with Article 12 of the DTAA insofar as the year under consideration is concerned. Thus, the re-assessment pursuant to such reasons is hereby set-aside.

11. In the result, the appeal is allowed.

Order pronounced in the Open Court on 8th September, 2021.

Sd/-
(PARTHA SARATHI CHAUDHURY)
JUDICIAL MEMBER

Sd/-
(R.S.SYAL)
VICE PRESIDENT

पुणे Pune; दिनांक Dated : 8th September , 2021
Satish

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to:

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. The CIT(IT), Circle-1, Pune
4. The DRP-3, Mumbai-3
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे “C” / DR ‘C’, ITAT, Pune
6. गार्ड फाईल / Guard file

आदेशानुसार/ BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune

		Date	
1.	Draft dictated on	08-09-2021	Sr.PS
2.	Draft placed before author	08-09-2021	Sr.PS
3.	Draft proposed & placed before the second member		JM
4.	Draft discussed/approved by Second Member.		JM
5.	Approved Draft comes to the Sr.PS/PS		Sr.PS
6.	Kept for pronouncement on		Sr.PS
7.	Date of uploading order		Sr.PS
8.	File sent to the Bench Clerk		Sr.PS
9.	Date on which file goes to the Head Clerk		
10.	Date on which file goes to the A.R.		
11.	Date of dispatch of Order.		

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