

THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 30.03.2021

CORAM:

THE HON'BLE MR. JUSTICE M.DURAIWAMY
AND
THE HON'BLE MRS.JUSTICE T.V.THAMILSELVI

T.C.A.Nos.758 of 2013 & 443 of 2017

The Commissioner of Income Tax,
Chennai ... Appellant in both TCAs

v.

M/s. Dasault Systems Sumulia Pvt. Ltd.,
10th Floor, ASV N Ramana Tower,
37 & 38 Venkatnarayana Road,
T. Nagar,
Chennai - 600 017. ... Respondent in TCA. No.758/2013

M/s. Dasault Systems Sumulia Pvt. Ltd.,
(Formerly known as ABAQUS INC)
Rising Sun Mills, 166, Vally Street,
Providence, USA
PAN AADCD 3705D ... Respondent in TCA. No.443/2017

T.C.A.No.758 of 2013 : Appeal preferred under Section 260A of the Income Tax Act, 1961, against the order of the Income Tax Appellate Tribunal, Chennai, "C" Bench, dated 22.01.2013 in I.T.A.No.323/Mds/2012 for the Assessment Year 2008-2009.

Appeal against the order of the Commissioner of Income Tax (Appeals)-IX, Chennai-34, made in ITA No.68/11-12 dated 19.12.2011, assessment year 2008-09.

Appeal against the order of the Assistant Commissioner of Income Tax, Company Circle-I(4), Chennai, dated 31.12.2010 made in PAN:AAACF4457B.

T.C.A.No.443 of 2017 : Appeal preferred under Section 260A of the Income Tax Act, 1961, against the order of the Income Tax Appellate Tribunal, Chennai, "D" Bench, dated 30.11.2016 in I.T.A.No.1399/Mds/2014 for the Assessment Year 2010-2011.

Appeal against the order of the Commissioner of Income Tax (Appeals)-VII, 121, Mahatma Gandhi Road, Chennai-34 made in ITA No.877/13-14 dated 03/03/2014, Assessment Year 2010-11

Appeal against the order of the Deputy Director of Income Tax, International Taxation-(I), 121, Mahatma Gandhi Road, Aayakar Bhavan, Room No.204, Annexe Building, 2nd floor, Chennai-34 made in PAN:AADCD3705D order dated 29.01.2013, assessment year 2010-11.

For Appellant : Mr. S. Rajesh,
(in both TCA) Standing Counsel

For Respondent : Mr. Sandeep Begmar R.
(in both TCA) and Dwarakesh Prabhakaran

COMMON JUDGMENT

(Judgment was delivered by M. DURAISWAMY, J.)

Challenging the orders passed in I.T.A.No.323/Mds/2012 in respect of the Assessment Year 2008-2009. on the file of the Income Tax Appellate Tribunal, Chennai, "C" Bench and I.T.A.No.1399/Mds/2013 in respect of the the Assessment Year 2010-2011, on the file of the Income Tax Appellate Tribunal, Chennai, "D" Bench, the Revenue has filed the above appeal.

2. The appellant has raised the following questions of law in TCA. No.758 of 2013:-

"(i) Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in deleting the disallowance made u/s.40(a)(i) of the Act for non deduction of tax at source for the payment made by the assessee to Abaqus Inc., USA?

(ii) Whether the finding of the Tribunal is proper since the payments made were royalty falling under section 9(1)(vi) of the I.T. Act and the assessee was obliged to deduct TDS as per provisions of Sec. 195 since payments were made to nonresident?

(iii) Whether the finding of the Tribunal was proper in holding that the assessee acquired only right to use a copy right software and not copy right in a software especially when the clauses in the agreement clearly show that it would fall within the definition of royalty?"

3.The appellant has raised the following questions of law in TCA. No.443 of 2017:-

"(i) Whether on the facts and in the circumstances of the case, the Tribunal was right in deleting the addition made on account of royalty income which was taxable as per provision of section 9(1)(vi) of the I.T. Act?"

(iii) Is not the finding of the Tribunal bad especially when as per Explanation (2) to section 9(1)(vi) royalty income is deemed to accrue or arisen in India?"

4. We have heard Mr. S. Rajesh, learned Standing Counsel appearing for the appellant and Mr. Sandeep Begmar R. learned counsel appearing for the respondent.

5. Mr. S. Rajesh, learned Standing Counsel appearing for the appellant fairly submitted that the questions of law involved in the above appeals were already decided by the Hon'ble Supreme Court of India against the revenue and in favour of the assessee in the Judgment reported in 2021 SCC OnLine SC 159 [Engineering Analysis Centre of Excellence Private Limited v. Commissioner of Income Tax and Another] wherein the Hon'ble Supreme Court held as follows:-

" 4. The appeals before us may be grouped into four categories:

i) The first category deals with cases in which computer software is purchased directly by an end-user, resident in India, from a foreign, non-resident supplier or manufacturer.

ii) The second category of cases deals with resident Indian companies that act as distributors or resellers, by purchasing computer software from foreign, nonresident suppliers or manufacturers and then reselling the same to resident Indian end-users.

iii) The third category concerns cases wherein the distributor happens to be a foreign, non-resident vendor, who, after purchasing software from a foreign, nonresident seller, resells the same to resident Indian distributors or end-users.

iv) The fourth category includes cases wherein computer software is affixed onto hardware and is sold as an integrated unit/equipment by foreign, non-resident

suppliers to resident Indian distributors or end-users.

7. An appeal was made from the order of the ITAT to the High Court of Karnataka by the Revenue. The Division Bench of the High Court of Karnataka heard a batch of appeals and framed nine questions, of which question nos. 8 and 9 are important and are set out as follows:

"8. Whether the Tribunal was correct in holding that since the assessee had purchased only a right to use the copyright i.e. the software and not the entire copyright itself, the payment cannot be treated as Royalty as per the Double Taxation Avoidance Agreement and Treaties, which [are] beneficial to the assessee and consequently section 9 of the Act should not take into consideration.

.....

171. The Revenue, therefore, when referring to "royalties" under the DTAA, makes a distinction between such royalties, no doubt in the context of technical services, and remittances for supply of computer software, which is then treated as business profits, taxable under the relevant DTAA depending upon whether there is a PE through which the assessee operates in India. This is one more circumstance to show that the Revenue has itself appreciated the difference between the payment of royalty and the supply/use of computer software in the form of goods, which is then treated as business income of the assessee taxable in India if it has a PE in India.

CONCLUSION

172. Given the definition of royalties contained in Article 12 of the DTAAAs mentioned in paragraph 41 of this judgment, it is clear that there is no obligation on the persons mentioned in section 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 (section 9 (1)(vi), along with explanations 2 and 4 thereof), which deal with royalty, not being more beneficial to the assessees, have no application in the facts of these cases.

173. Our answer to the question posed before us, is that the amounts paid by resident Indian end-users/distributors to non-resident computer software manufacturers/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.

174. 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. Mr. Sandeep Begmar R., learned counsel appearing for the respondents submitted that in view of the ratio laid down by the Hon'ble Supreme Court in the Judgment reported in 2021 SCC OnLine SC 159 [cited supra] the questions of law may be decided against the revenue and in favour of the assessee.

7. On a reading of the Judgment of the Hon'ble Supreme Court, it is clear that the substantial questions of law, which were raised in the present appeals, were already decided by the Hon'ble Supreme Court against the revenue.

8. Following the ratio laid down by the Hon'ble Supreme Court in the Judgment reported in 2021 SCC OnLine SC 159 [cited supra] the questions of law are decided against the revenue and in favour of the assessee. In view of the same, the Tax Case Appeals preferred by the appellant are liable to be dismissed. Accordingly, the Tax Case Appeals are dismissed. No costs.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

RJ

To

1. The Income Tax Appellate Tribunal,
Chennai, 'C' Bench
2. The Income Tax Appellate Tribunal,
Chennai, 'D' Bench,
3. The Commissioner of Income Tax,
Chennai
4. The Commissioner of Income Tax(Appeals)-VII
121, M.G.Road, Chennai 34
5. The Deputy Director of Income Tax,
International Taxation-(I), 121,
M.G Road, Aayakar Bhavan,
Room No.204, Annexe Building, 2nd floor, Chennai-34
6. The Commissioner of Income Tax(Appeals)-IX
Chennai-34
7. The Assistant Commissioner of Income Tax,
Company Circle-I(4), Chennai-34

+2cc to Mr.R.Sandeep Begmar, Advocate, S.R.No.20873, 20872

T.C.A.Nos.758 of 2013 & 443 of 2017

SR-II(CO)
KM(30/04/2021)

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