

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 5TH DAY OF JANUARY, 2015

PRESENT

THE HON' BLE MR. JUSTICE N. KUMAR

AND

THE HON' BLE MR. JUSTICE B. VEERAPPA

INCOME TAX APPEAL No. 648/2008

BETWEEN:

1. THE COMMISSIONER OF INCOME-TAX,
C.R. BUILDING, QUEENS ROAD,
BANGALORE
2. THE ASST. COMMISSIONER OF INCOME-TAX
CIRCLE-12(2),
C.R. BUILDING, QUEENS ROAD,
BANGALORE

.. APPELLANTS

(BY SRI K V ARAVIND, ADVOCATE)

AND:

M/S. RATIONAL SOFTWARE CORPORATION
INDIA PVT., LTD.,
NO.12, SUBRAMANYA ARCADE,
BANNERGHATTA MAIN ROAD,
BANGALORE-34

... RESPONDENT

(BY SRI T. SURYANARAYANA FOR KING & PARTRIDGE
ADVOCATES)

This ITA is filed under Section 260-A of the Income Tax Act, 1961, arising out of Order dated 11.01.2008 passed in ITA No.172/Bang/2007, for the assessment year 2003-04, praying to formulate the substantial questions of law stated therein and to allow the appeal and set aside the order passed by the ITAT Bangalore in ITA No.172/Bang/2007, dated 11.01.2008 confirming the order of the Appellate Commissioner and confirm the order passed by the Deputy Commissioner of Income Tax, Circle-12(2), Bangalore.

This Income Tax Appeal coming on for Hearing this day, N. Kumar, J., delivered the following:

JUDGMENT

The revenue has preferred this appeal against the order passed by the Tribunal holding that the remittances towards the cost of the software products imported from foreign suppliers is not royalty and hence there was no liability for deduction of tax under Section 195 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') and accordingly the provisions of Section 40(a)(i) of the Act are not attracted.

2. This Court had an occasion to consider the assessee's case itself and the order passed by the Tribunal holding that the remittances towards costs of the software products purchased/imported from foreign suppliers is not royalty, was set aside by this Court in ITA No.261/2006 following the judgment of this Court in the case of **COMMISSIONER OF INCOME TAX AND ANOTHER v. SAMSUNG ELECTRONICS PRIVATE LIMITED in ITA No. 2808/2005 and connected cases (D.D. 15.10.2011)**.

3. It is submitted by the learned counsel for the assessee that the assessee has preferred an appeal against the said order in ITA No.261/2006 before the Apex Court and it is pending consideration in Special Leave Petition (Civil) No. 19092/2012. In the event, the assessee succeeds before the Apex Court, then Section 40(a)(i) of the Act is not attracted and therefore, a

consequent order is to be passed. Even if the assessee does not succeed before the Apex Court and Section 40(a)(i) of the Act is attracted, still its claim in terms of Article 24(4) of DTAA between India and the Netherlands that a similar disallowance was not provided under the Act under Section 40(a)(ia) if the payment was made to a resident, is to be considered and a proper order is to be passed.

4. Per contra, learned counsel for the revenue submits that the said question was not raised before any of the authorities and for the first time it is being raised before this Court.

5. In view of the judgment of this Court in '**Samsung Electronics Private Limited**' case, as already the earlier order of the Tribunal is set aside by this Court, the impugned order passed, which is running counter to the said judgment, requires to be set

aside and therefore, the appeal is allowed and the substantial question of law is answered in favour of the revenue and against the assessee.

6. However, in the event, the assessee succeeds before the Apex Court, it is clear that this order also cannot come into effect. The assessing authority shall therefore pass an order under Section 260(1A) of the Act, based on the outcome of the assessee's appeal before the Apex Court. If the assessee loses his battle before the Apex Court, then before giving effect to this order, the assessing authority shall consider the application of Article 24(4) of the DTAA between India and the Netherlands. Though the said question is not raised by the assessee before the authorities, the same being purely a question of law and the said DTAA being a beneficial piece of delegated legislation, if the assessee is entitled to the benefit of the same, that cannot be

denied to it. Accordingly, the appeal is allowed with the aforesaid observations.

Ordered accordingly.

Sd/-
JUDGE

Sd/-
JUDGE

Sbs*