IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'A' : NEW DELHI)

BEFORE SHRI J.S. REDDY, ACCOUNTANT MEMBER
and
SHRI A.T. VARKEY, JUDICIAL MEMBER

ITA No.6355/Del./2013
(ASSESSMENT YEAR : 2003-04)

DDIT, Circle 1 (1), International Taxation, New Delhi.	vs.	M/s. Americom Asia Pacific LLC, C/o PWC, Sucheta Bhawan, 11A, Vishnu Digamber Marg, 4, Parliament Street, New Delhi – 110 002.
		(PAN : AAECA4117B)
(APPELLANT)		(RESPONDENT)

ASSESSEE BY : S/Shri Pawan Kumar and
Arvind Rajan, CA
REVENUE BY : Shri S.K. Jain, DR

O R D E R

PER A.T. VARKEY, JUDICIAL MEMBER :

This is revenue's appeal against the order of the CIT (Appeals)-XXIX, New Delhi dated 07.09.2013 for the assessment year 2003-04.

2. The sole ground of the revenue is against the order of the CIT (A) quashing the reopening u/s 147/148 of the Act.

3. The brief facts of the case as noted by the CIT (A) are as under :-

3.1. Americom Asia Pacific LLC (hereinafter referred to 'the assessee') is a tax resident of the USA. AAP provides "transmission services" through satellites under contracts entered into with various parties around the world. During the year under consideration, assessee was the legal owner of a satellite AAP-l which is a high-power, all Ku-Band FSS satellite with coverage of China, North-East Asia, the Philippines and South Asia including India.

3.2. During the year under consideration, the assessee provided data transmission services to Antrix Corporation Limited (' Antrix '), the commercial arm of Indian Space Research Organisation ('ISRO'), a Government of India company. Antrix sells these services to VSAT operators. For providing the service, the assessee has entered into a 'Satellite Transponder Service Agreement" with Antrix. Under the present policy of the Government of India, VSA T operators in India cannot hire transponder space on foreign satellites directly; however, the bandwidth can be purchased from Antrix under an independent arrangement which needs to be entered into between the end customer and Antrix. The assessee company does not enter into agreement directly with the VSAT operators, but Antrix enters into the contract with them.

3.3. For the captioned assessment year, assessee filed its return of income declaring 'NIL' income on October 25, 2003 (however the date mentioned in assessment order is 25.11.2003) contending that its revenue being in the nature of business profits were not subject to tax in India in accordance with Article 7

of the India-USA Double Tax Avoidance Agreement ("DT AA"). The case was picked up for scrutiny assessment and an order U/S 143(3) of the Act dated 23.03.2006 was passed accepting NIL income. Thereafter, proceedings U/S 263 of the Act were initiated by the Ld. CIT and vide order dated 27.03.2008, ld CIT cancelled the assessment order dated 23.03.2006 with a direction to pass a fresh order. Accordingly, an order U/S 143(3) r.w.s. 263 of the Act dated 19.12.2008 was passed holding that the receipts earned by the assessee from provision of satellite transmission services are liable to tax in India as royalties for use of process as well as equipment falling within the ambit of section 9(1)(vi) of the Act and article 12 of the India-USA DTAA. It was further held that the assessee has a fixed place PE in India in the form of an office in New Delhi and a master control facility at Hassan in South India. Furthermore, that the customer of the assessee constitutes dependent agent PE of AAP in India as per the provisions of Article 5(4) of India US DTAA. Consequently, income was assessed at Rs. 7,05,24,639/- taxable under Article 12 of the India-USA DTAA as being royalties. On the aspect of income attributable to PE, it was held that income would be such on which tax would come to be 15% of gross receipts. Hence, the total income was subject to tax on a gross basis at the rate of 15%. The assessee preferred an appeal against this assessment order before the Ld. CIT(A).

3.4. Subsequently, a notice dated 31.03.2010 U/S 148 of the Act was issued by the Ld. AO for the purported reason of taxing the royalty income at a higher rate of tax of 20% as being attributable to the PE of the assessee in India. The reasons to belief are reproduced below:

> "The assessee is a company incorporated under the laws of United States of America and is engaged in the business of operating satellites and related communication equipments. The Assessee provides transmission services through satellite under contract entered into with various parties around the world. During the relevant year, the assessee has entered into contracts with Antrix Corporation limited and Bharti BT limited for provision of data transmission services through the use of satellite and received payments from various parties. In the notes to the return of income, the assessee has claimed that the above payments received by it are neither in the nature of 'Royalty' under Article 12(3) of DTAA nor in the nature of 'Fees for Included services' as defined under Article 12(4) of the DTAA. The subject payments received by it are therefore in the nature of normal business income, which are not taxable in India in terms of Article 7 of the DTAA since the assessee does not have a PE in India. On this basis the return of Income was filed at NIL income.
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> The assessment order in this case was passed on 19.12.2008 under section 143(3) read with section 263 of the IT Act, 1961 wherein the Assessing Officer has held that the payment received by the assessee is covered by the provision of Royalty income as defined both under the Act and the DTAA. The assessee has a fixed place permanent establishment in India and income of the assessee would also be taxed as business income under Article 7(2) of the DTAA. And in the absence of the figure attributable to the PE a tax @ 15% on the gross receipts was levied. It is perused from the record that while deciding the tax rate the date of execution of the agreement with the PE was not taken into account which resulted into an underassessment of the income of the assessee for the AY 2003-04.
>
> This also satisfies the pre-requisite condition stated under explanation 2 to section I47. Relevant portion of section 147 of the Act reads as below:
>
> "Explanation 2.-For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely:-
>
> (a) where no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax;

(b) where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return ;

(c) Where an assessment has been made, but- (i) Income chargeable to tax has been under assessed; or

(ii) Such income has been assessed at too low a rate; or

(iii) Such income has been made the subject of excessive relief under this Act; or

(iv) Excessive loss or depreciation allowance or any other allowance under this Act has been computed"

In view of the above, I have reason to believe that the income of the assessee for the AY 2003-04 chargeable to tax has escaped assessment. In this case, not more than 6 years have elapsed from the end of the relevant Asstt. Year (i.e. AY 2003-04) and income of more than 1 Lakh has escaped assessment, therefore, the notice under section 148 read with section 147 of the IT Act, 1961 satisfies the time limit for issue of notice as provided in section 149 of the Act. "

3.5. In response to the above reasons recorded, the assessee filed its objections vide letter dated 19.12.2011 which were disposed off vide an order dated 23.12.2011. Subsequently, a draft assessment order was passed retaining the conclusions regarding the characterization of receipts in the hands of the assessee as 'royalties' and that the assessee has PE in India as held vide order u/s 263 r.w.s. 143(3) dated 19.12.2008. However, it was held that since the agreement between the assessee and Antrix Corporation was entered on 21.08.2001, therefore, as per the provisions of section 44D r.w.s. 115A of the Act, such assessed income is chargeable to tax at 20% on a gross basis. Subsequently, the said draft assessment order was finalized on 27.02.2012.

4. Aggrieved, the assessee preferred an appeal before the ld.CIT (A) who was pleased to quash the reopening u/s 147/148 and subsequent reassessment.

5. The revenue being aggrieved is in appeal before us.

6. The ld. DR submitted that the assessee had a fixed place of permanent establishment in India and while deciding the tax rate the date of execution of the agreement with the PE was not taken into account which resulted into an under assessment of the income of the assessee for the relevant AY 2003-04, so the AO has rightly issued the notice u/s 147/148, which is legally valid and so the quashing of reassessment is bad in law and need to be set aside.

7. On the other hand, the ld. AR relied on the order of the CIT (A) and submitted that the very same AO had issued similar notice u/s 147/148 to reopen a number of reassessments which has been quashed by the Hon'ble High Court of Delhi and cited the case of Alcatel-Lucent France dated 15.05.2012 in WP (C) 8739/2011. The ld. AR pointed out that in the present case, scrutiny assessment was done u/s 143(3) and u/s 263 by the CIT and the reopening notice was issued after four years after end of the relevant assessment year and, therefore, the twin condition as envisaged as per the 1st Proviso to section 147 need to be satisfied before issuance of the notice u/s 147/148 of the Act, which is absent in this case, so the ld. CIT (A) has rightly quashed the reassessment proceedings being one initiated by the AO without satisfying the jurisdictional

requirement before initiating the reassessment itself. So he does not want us to interfere in the impugned order of the ld. CIT (A).

8. We have heard both the parties and perused the records. Further, there is no dispute as to the fact that notice for reopening was issued four years after end of the relevant assessment year, so 1st Proviso to section 147 needs to be satisfied before issuance of notice u/s 147/148. For ready reference, 1st Proviso to section 147 is reproduced below :-

> "Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return u/s 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary (or his assessment, (or that assessment year"

From the perusal of the aforesaid section it can be seen that, in order to assume jurisdiction u/s 147, in a case where assessment has already been made u/s 143(3) of the Act, two conditions are required to be satisfied, viz.:

(i) The AO must have reason to believe that income chargeable to tax has escaped assessment; and

(ii) He must also have a reason to believe that such escapement occurred by reason of failure on the part of the assessee either:

  (a) to make a return of income U/S 139 or in response to notice issued under sub-section (1) of section 142 or section. 148; or

  (b) to disclose fully and truly all material facts necessary for his assessment for that purpose.

Thus, the ld. CIT (A) has rightly interpreted the law that in cases where assessment has been made u/s 143(3) of the Act and action u/s 147 is sought to be taken after the expiry of four years from the end of the relevant assessment year, it is necessary that conditions no.(i) and either of conditions no.(ii)(a) or (ii)(b) must co-exist. In case, any of the said two conditions is not satisfied, the very initiation of proceedings u/s 147 of the Act shall be wholly without jurisdiction. There are a plethora of judgments on this issue.

8.1 We concur with the ld. CIT (A) that there is no whisper / allegation that there was any failure on the part of the assessee to disclose truly and fully all material facts necessary for assessment. The AO himself admits that while perusing the records of the relevant assessment year, he came across the date of execution of agreement with the PE and that he has not taken into consideration that fact while deciding the original assessment u/s 143(3) r.w.s. 263 of the Act, that means assessee had disclosed everything during the original assessment proceedings. Thus, there was no failure on the part of the assessee not to disclose fully and truly all material facts necessary for the original assessment. We take note of the fact that while passing the order u/s 263 r.w.s. 143(3) of the Act, the clauses of the agreement with the customer was examined in detail to hold that the revenues earned under the said agreement falls within the taxable ambit of royalty as defined under section 9(1)(vi) of the Act as well as Article 12 of the India USA DTAA. Therefore, such royalty income was subject to tax @ 15% and even though PE was also alleged and Article 7 read with section

44D was not invoked. This fact in itself makes it clear that it was well within the knowledge of the Ld. AO that the said agreement has been entered before 31.03.2003 for invoking section 44D of the Act. For this reason alone, initiation of reopening of assessment U/S 147 of the Act for this assessment year beyond four years is not found to be sustainable both in facts and law as the case falls within the first proviso to section 147 of the Act. The conclusion is also supported by the decision relied on by the assessee of the jurisdictional High Court in Alcatel - Lucent France & Another Vs. ADIT, Circle 1(1) (2012) [W.P.(C) 8739/2011] where, on similar facts, their lordships have quashed notice u/s 148 of the Act. We also concur with the view of CIT (A) that in this case, the AO n the same records before him had a change of opinion which cannot give jurisdiction to him to reopen the assessment. Therefore, we do not find any infirmity in the order of the CIT (A), so we uphold the same and dismiss the revenue's appeal.

9. In the result, the appeal of the revenue is dismissed.

Order pronounced in open court on this 4th day of March, 2016.

Sd/-	**sd/-**
(J.S. REDDY)	**(A.T. VARKEY)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated the 4th day of March, 2016
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Copy forwarded to:

1.Appellant
2.Respondent
3.CIT
4.CIT(A)- XXIX, New Delhi.
5.CIT(ITAT), New Delhi.

AR, ITAT
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