IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH 'B' NEW DELHI

BEFORE : SHRI H.S. SIDHU, JUDICIAL MEMBER &
SHRI L.P. SAHU, ACCOUNTANT MEMBER

ITA No. 3988/Del./2016
Asstt. Year : 2010-11

ACIT (Intl. Taxation), Circle 1(2)(1), New Delhi.	vs.	M/s. Comptel OYJ, C/o Price Water House Coopers (P) Ltd., 1st Floor, Sudheta Bhawan, 11-A, Vishnu Digamber Marg, New Delhi. (PAN: AADCC 5974F)
(Appellant)		Respondent)

Appellant by	:	Sh. Anuj Arora, CIT/DR
Respondent by	:	Sh. Ravi Sharma, Advocate & Ms. Poonam Ahuja, CA
Date of hearing	:	01.02.2017
Date of pronouncement	:	03.02.2017

ORDER

Per L.P. Sahu, Accountant Member:

This is an appeal filed by the Revenue against the order dated 25.04.2016 of learned CIT(A) for the assessment year 2010-11 in relation to order passed u/s 143(3)/144C(13) of the Income Tax Act, 1961 (hereinafter called 'the Act'). Following ground has been raised by Revenue :

> *"1. On the facts and in the circumstances of the case, whether the Ld. CIT(A) was not justified in deleting the addition made by the AO treating sale of "Standard Software" in the nature of Royalty."*

2. Briefly stated, the facts of the case are that the assessee company is a Finnish Software Company incorporated and registered in Finland and is listed on the Helsinki Stock Exchange. It is a tax resident of Finland as per the provisions of Double Taxation Avoidance Agreement between India and Finland (DTAA/Treaty). The assessee is stated to develop, manufacture and deliver off the shelf mediation, charging and fulfillment solutions and software. The company's solution and software are being sold to the telephone operators who maintain and provide services in the Telecommunication Networks. The assessee company is stated to be a Global Market Player in providing convergent mediation software solutions. Comptel Solutions support the core business processes of operators and service providers by generating concrete savings that allow for new business models and sustained customer loyalty. The Comptel link product portfolio includes Comptel Event Link for event mediation and usage data management, Comptel Instant Link for automated user provisioning and service activation and Comptel Online Link for online and pre-delivery charging for non-voice services. For the year under consideration, the return of income was filed declaring nil income. The core issue involved in this assessment year is whether the consideration received by the assessee from its licensors, amounted to royalty within the meaning of the expressions under section

9(1)(vi) and Article 12 of the Indo-Finland Double Taxation Avoidance Agreement(DTAA) as considered by the AO or not.

3. It is borne out on records that that during the assessment proceedings for AY 2007-08, 2008-09 & 2009-10, the AO had held that the assessee's receipts constituted royalty income taxable in India under the provisions of the Act and the DTAA and the orders of the AO were confirmed by the DRP. The said orders were followed by Assessing Officer for AY under consideration. However, these orders were set aside by the Tribunal in appeals for the assessment years 2007-08, 2008-09 and 2009-10 vide order dated 12.04.2016. In first appeal, preferred by the assessee, the ld. CIT(A) deleted the additions made by AO after following the aforesaid decision of the Tribunal vide impugned order. The Revenue was not satisfied by the impugned order, hence, this appeal by the department on the ground mentioned hereinabove.

4. The ld. DR relied upon the order of the AO and submitted a written synopsis on the issue, which reads as under :

SUBMISSIONS OF REVENUE ON SPECIFIC ASPECTS

1. The Revenue emphatically relies on the assessment order.

2. Without prejudice to these, following additional submissions are made.

3. These submissions below are only on specific aspects. On balance aspects, oral submissions during the hearing, the Assessment Order is relied upon.

Regarding Reliance of assessee on HC decision in the case of Infrasoft

4. The earlier order dated 12.04.2016 of the Hon'ble ITAT in the assessee's own case for AYs 2007-08, 2008-09, 2009-10 has been provided by the assessee in a paper book (pages 3 - 48). It heavily relies on the Infrasoft decision of the Hon'ble Delhi HC.

(It is a separate issue that the decision of Hon'ble HC in case of Infrasoft has not been accepted by the Department. This aspect is not being dwelled in the submissions below.)

5. However, perusal of the said ITAT order dated 12.04.2016 (in the assessee's own case) shows that it states certain facts (at internal page 13) of the assessee's case (highlighted / underlined below) which go against the very 'basis' and the 'grain' of the principles laid down in decision relied upon (that of Hon'ble HC in Infrasoft):

"0.8. Intellectual Properly
8.1 Work made for hire
All Developed Works, if any, belong exclusively lo Buyer or Customer and are works made for hire. If any Developed Works are not considered works made for hire owned by operation of law, supplier assigns the ownership of copyrights in such works to buyer or customer.

8.2 Preexisting materials
Supplier will not include any Preexisting Materials in any Deliverable unless they are listed in the relevant SOW. For the sole purpose of supporting the Customer as expressly specified in the relevant SOW, Supplier grants Buyer a nonexclusive, worldwide, perpetual, irrevocable, paid-up, license to prepare and have prepared derivative works of such Preexisting Materials as have been prepared by it and to use, have used, execute, reproduce, transmit, display, perform, transfer,

distribute, and sublicense such Preexisting Materials or their derivative works and to grant others the rights in this sublicense all to the extent as is necessary to support the relevant customer as aforesaid.

8.3 Tools
Supplier will not include Tools in Deliverable^ unless they are listed in the relevant SOW, For the sole purpose of supporting the Customer as expressly specified in the relevant SOW, Supplier grants Buyer nonexclusive, worldwide, perpetual, irrevocable, paid-up, license to prepare and have prepared derivative works of such Tools as have been prepared by it and to use, have used, execute, reproduce, transmit, display, perform, transfer, distribute, and sublicense such Tools or their derivative works, and to grant others the rights granted in this Subsection all to the extent as is necessary to support the relevant Customer as aforesaid.

8.4 Invention Rights
Supplier owns Inventions. Supplier grants to Customer an irrevocable, nonexclusive, worldwide, perpetual, paid-up license under Inventions (including any patent applications filed on or patents issued claiming Inventions) to use the relevant Deliverable in accordance with and subject to the End. User License Agreement, for the sole purpose of supporting the Customer as expressly specified in the relevant SOW, Supplier grants Buyer a nonexclusive, worldwide, paid-up, license to use Inventions to this extent as is necessary Customer as aforesaid.

8.5 Joint Invention Rights
The parties will jointly own all joint Inventions and resulting patents. Either party may license others under joint Inventions (including any patent applications filed on or patents issued claiming Joint Inventions) without accounting to or consent from the other.
8.6 Perfection of Copyrights
Upon request, Supplier will provide to Buyer a "Certificate of Originality" or equivalent documentation to verify authorship of Developed Works. Supplier will confirm assignment of copyright for developed works (if any) using the "Conformation of Assignment of Copyright "from and will assist Buyer in perfecting such copyrights. For the avoidance of any doubt, supplier will not transfer any copyrights or other intellectual property rights to its program products. "

6. The highlighted / underlined portions signify that these facts in the case of the assessee (assessee is the "Supplier" in above quoted paras) either directly contradict or are distinguishable from the material facts in the case of Infrasoft decision (copy submitted to the bench). It is important to note that these facts (available in the said IT AT order itself) have not been discussed in the said decision of the Hon'ble ITAT. Instead, the contentions of the assessee have been merely listed / stated at Para 15 of the order without testing the facts (facts as highlighted / underlined above) against the facts and principles laid down by the Infrasoft decision.

7. These highlighted facts remain the same even in the present appeal of AY 2010 - 11 as can be seen from page 6 of the Assessment Order.

8. In the above regard, it is humbly submitted that the Hon'ble SC has held in Distributors (Baroda) (P.) Ltd [1985] 22 Taxman 49 (SC) that:

"2. We have given our most anxious consideration to this question, particularly since one of us, namely, P.N. Bhagwati, J. as a party to the decision in Cloth Traders (P.) Ltd.'s case (supra). But having regard to various considerations to which we shall advert in detail when we examine the arguments advanced on behalf of the parties, we are compelled to reach the conclusion that Cloth Traders (P.) Ltd.'s case (supra), must be regarded as wrongly decided. The view taken in that case in regard to the construction of section 80M must he held to be erroneous and it must be corrected. To perpetuate an error is no heroism. To rectify it is the compulsion of judicial conscience. In this we derive comfort and strength from the wise and inspiring words of Justice Bronson in Pierce v. A.M.Y. Delameter at page 18 :

> *"a Judge ought to be wise enough to know-that he is fallible and therefore everready to learn: great and honest enough to discard all mere pride of opinion and follow truth wherever it may lead : and courageous enough to acknowledge his errors. "*

9. These admitted facts of the case point out that the case is distinguishable from that in the case of Infrasoft which has formed the substantial basis of the earlier decision of ITAT (supra). It is evident that the assessee is allowing copyrights and other precious / intellectual

rights to be exploited (which directly contradicts the very 'basis' and principles laid out by the Infrasoft decision), it is humbly prayed that the above facts & submission may be taken on record for deciding the matter.

10. The undersigned is committed to provide any further clarification that the Hon'ble Bench may desire."

5. Repudiating the contentions of the ld. DR, the learned AR of the assessee has also submitted a written synopsis in counter, which reads as under :

"1. That the captioned appeal has been filed by the revenue against the order passed by Ld CIT(A) dated 19.04.2016 for AY 2010-11. While deciding the said appeal, the Ld CIT (A) took a note of the fact that the issue under consideration has been decided by the Hon'ble ITAT in Assessee's own case for AYs 2007-08, 2008-09 & 2009-10. (Para 6.2 of the CIT(A) order).

Ground raised in the revenue appeal is as hereunder:
On the facts and in the circumstances of the case, whether the Ld CIT(A) was not justified in deleting the addition made by the AO treating sale of "Standard Software" in the nature of royalty.

2. That subsequently against the orders of Hon'ble ITAT for AYs 2007-08, 2008-09 and 2009-10 revenue filed appeals before the Hon'ble High Court of Delhi and the Hon'ble High Court vide judgement dated December 19, 2016 dismissed the appeals filed by the revenue. While coming to this conclusion, the Hon'ble High Court observed as hereunder (Please refer to page 2 of Paper Book):
Quote
The questions which the Revenue seeks to urge in these appeals under section 26oA of the Income Tax Act, 1961 ('the Act') are common, i.e., whether the amounts paid to the assessee by its licensors, amounted to royalty within the meaning of the expressions under Section g(i)(vi) and Article 12 of the Indo-Finland Double Taxation Avoidance Agreement (DTAA). The Income Tax Appellate Tribunal (ITAT) followed the previous judgements of this Court including the judgement in DIT Vs Infrasoft Ltd, 264 CTR 329 and also the judgement-

DIT(International Taxation) Vs Nokia Networks Oy, 25 Taxman.com 255 (Delhi). The later decision had an occasion to interpret the same provision in the context of very same treaty.

Since, the ITAT has followed the previous binding judgment of this Court, the present appeals do not raise a substantial question of law. The Court is also satisfied that the application of law by the ITAT was sound and proper. The appeals are therefore dismissed.

Unquote

3. It is pertinent to mention here that in AYs 2011-12 and 2012-13, the Hon'ble ITAT while allowing the appeals of the Assesssee observed as hereunder (Please refer to page 61 of Paper Book):

Quote

"5.1 On identical set of facts, respectfully following the decision of the co-ordinate bench of the ITAT in the assessee's own case for AYs 07-08, 08-09 and 09-10, we hold that for AYs 11-12 and 12-13, the sale of software by the asssessee is the sale of standard software which is chargeable to tax under Article 7 of DTAA as business income of the assessee and not under Article 12 as 'Royalty'. In the result, ground nos 1, 2 and 3 for both the years under appeal are allowed."

Unquote

Therefore, in all circumstances the issue under consideration is covered by the judgements of Hon'ble Delhi High Court as well as ITAT in Assessee's own case for various years, and be allowed accordingly.

4. It is pertinent to mention here that the Ld. DR has filed a submission before the Hon'ble Bench on 31.01.2017 contending that the Hon'ble ITAT in its order dated 12.04.2016 has mentioned certain facts (on page 13 of the order) (Please refer to page 15 of Paper Book) which go against the very basis of the decision of the Hon'ble High Court in the case of Infrasoft. It is most humbly submitted that on page 13 of the order certain clauses of agreement have been mentioned which are standard clauses and are not applicable during the course of the years under consideration. This fact was brought to the notice of the Hon'ble ITAT by the Assessee as mentioned in Para 15 of the ITAT order (Please refer pages 31-34 of Paper Book) and after hearing both the parties, the

> *ITAT has taken a conscious decision and accordingly, it cannot be said that the facts of the instant case are different from Infrasoft.*
>
> *Therefore, the arguments of the revenue are devoid of any legal merits and accordingly, it is prayed that the appeal of the revenue should be dismissed."*

6. We have heard the rival submissions and have perused the material on record. A perusal of the impugned order reveals that the AO has given a categorical finding that there was no change in the facts or the business model during assessment year under consideration as compared to earlier assessment years 2008-09 & 2009-10 and, therefore, the findings made and conclusions arrived at in earlier assessment years would also apply with equal force in the assessment years in question. It has been stated by the AO that there has been admittedly no change in the factual matrix or the business model of the assessee from earlier years and as such there was no reason to arrive at a different conclusion other than that as an earlier assessment years on the question as to whether the sale of software was to be charged as business income or as royalty. The Ld. AR has placed reliance on the decision of the ITAT Delhi 'B' Bench in its own case for A.Ys. 2007-08, 2008-09 and 2009-10 on this issue and a perusal of the aforesaid order reveals that the reliance of the Ld. AR is well placed as the issue is squarely covered in favour of the assessee by the order of the ITAT, wherein the coordinate bench has

discussed the issue at great length and has thereafter held in Paragraph 27 of the said order as under:

> *"27. In view of this we allow ground no. 1 to 3 of the appeal of the assessee holding that sale of software by the assessee is a standard software which is chargeable to tax under Article 7 of DTAA as business income of the assessee and not under Article 12 as 'Royalty'."*

The Revenue challenged the above order of Tribunal before Hon'ble High Court in ITA Nos. 898, 899 & 900/2016 and the Hon'ble Jurisdictional High Court vide order dated 19.12.2016 has confirmed the order of the Tribunal observing as under :

> *"The questions which the Revenue seeks to urge in these appeals under Section 260A of the Income Tax Act, 1961 ('the Act') are common, i.e., whether the amounts paid by the assessee to its licensors, amounted to royalty within the meaning of the expression under Section 9(1)(vi) and Article 12 of the Indo-Finland Double Taxation Avoidance Agreement (DTAA). The Income Tax Appellate Tribunal (ITAT) followed the previous judgments of this Court including the judgment in DIT v. Infrasoft Ltd. 264 CTR 329 and also the judgment - DIT (International Taxation) vs. Nokia Networks OY 25 Taxman.com 255 (Delhi). The later decision had an occasion to interpret the same provision in the context of the very same treaty.*
>
> *Since the ITAT has followed the previous binding judgments of this Court, the present appeals do not raise a substantial question of law. The Court is also satisfied that the application of law by the ITAT was sound and proper. The appeals are therefore dismissed."*

In the subsequent assessment years 2011-12 and 2012-13 also, the ITAT (B) Bench, New Delhi have decided the issue in favour of the assessee vide order

dated 03.10.2016 In ITA Nos. 726/Del./2015 and 1686/Del./2016 after following the earlier decision of the Tribunal for A.Y. 2007-08 to 2009-10.

7. Therefore, respectfully following the decisions of the coordinate benches of the ITAT in the assessee's own case for A.Ys. 2007-08 to 2009-10 and 2011-12 to 2012-13 and the decision of Hon'ble jurisdictional High Court, we conclude that the sale of software by the assessee is the sale of standard software which is chargeable to tax under Article 7 of DTAA as business income of the assessee and not under Article 12 as 'Royalty' in the year under consideration. Accordingly, the appeal of the Revenue is found to have no merits and is liable to fail.

8. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open court on 03.02.2017.

Sd/-
(H.S. SIDHU)
Judicial Member

Sd/-
(L.P. SAHU)
Accountant Member

Dated : 03.02.2017
*aks/-

Copy of order forwarded to:

(1) The appellant
(2) The respondent
(3) Commissioner
(4) CIT(A)
(5) Departmental Representative
(6) Guard File

By order

Assistant. Registrar
Income Tax Appellate Tribunal
Delhi Benches, New Delhi