

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'B' NEW DELHI**

**BEFORE SHRI G.D. AGRAWAL, VICE PRESIDENT
&
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER**

**ITA No. 726/Del/2015
(Assessment Year: 2011-12)**

Comptel Oyj Post Box No. 1000, 00181 Helsinki, Finland. AADCC5974F	vs	DCIT Circle 1(2)(1), International Taxation New Delhi.
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**ITA No. 1686/Del/2016
(Assessment Year: 2012-13)**

Comptel Oyj Post Box No. 1000, 00181 Helsinki, Finland. AADCC5974F	vs	DCIT (International Taxation) Circle 1(2)(1), International Taxation New Delhi.
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Assessee by	Sh. Piyush Chawla, CA Ms. Poonam Ahuja, CA
Revenue by	Sh. Anuj Arora, CIT DR

Date of Hearing	20.07.2016
Date of Pronouncement	03.10.2016

ORDER

PER BENCH:

Both these appeals have been preferred by the assessee.
ITA No. 726/Del/2015 pertains to the AY 2011-12 and has

been filed against the order dated 25/11/2014 passed u/s 143(3)/144C(13) of the Income Tax Act, 1961 (hereinafter called 'the Act'). ITA No. 1686/Del/2016 pertains to AY 2012-13 and has been filed against the order dated 25/01/2016 passed u/s 143(3)/144C (1) of the Act. Since both these appeals were heard together, for the sake of convenience, the same are being disposed of together.

2. 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.

2.1 For AY 2011-12, 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 fell into the category of royalty under the provisions of the Act as well as under the provisions of India – Finland (DTAA).

2.2 For AY 2012-13 the return of income was filed declaring income from 'Fee from Technology Services' (FTS) at Rs. 20,92,31,368/- and offering it for taxation under the provisions of DTAA. In this year also, the core issue of contention is as to whether the consideration received by the

assessee fell in the category of royalty under the provisions of the Act as well as under the provisions of the India – Finland DTAA.

2.3 From the records, it is seen that during the assessment proceedings for AY 2008-09, the AO had held that the assessee's receipts constituted royalty income taxable in India both under the provisions of the Act and the DTAA. The same was followed for AY 09-10 and 10-11 also. The orders of the AO were also confirmed by the Hon'ble DRP. Now, in AY 11-12 also the AO has followed the orders for earlier assessment years. In A.Y. 12-13 also, the AO followed the findings in his orders of earlier years.

2.4 The assessee has now preferred appeals before the ITAT and has raised the following grounds of appeal:

Grounds of ITA No. 726/Del/15 for AY 2011-12:

1. *“That on the facts and circumstances of the case and in law, the impugned order passed by the Deputy Commissioner of Income Tax, Circle 1(2)(1), International Taxation, New Delhi u/s*

143(3) read with section 144C of the Income-tax Act, 1961 is bad in law and void ab-initio.

- 1.1 That the Ld. AO grossly erred in assessing the income of the Appellant at Rs. 81,26,22,784/- as against the nil income declared by the Appellant in the return of income.*
- 2. That on the facts and circumstances of the case and in law, the Ld. AO/DRP erred in not appreciating the fact that the case of the Appellant is squarely covered by the judgment of the jurisdictional High Court in the case of *Infrasoft Ltd. vs. ADIT* [125 TTJ 53] wherein the Hon'ble High Court while interpreting a similar agreement held that the payment made for the supply of software to be used by the assessee in its own business would not amount to royalty.*
- 3. That on the facts and circumstances of the case and in law, the Ld. AO/DRP erred in holding that the receipts in the hands of the Appellant from sale of "standard software" are in the nature of royalty u/s 9(1)(vi) clauses (i), (iii), (iva) and (v) of the Act and under Article 13(3)(a) and 13(3)(b) of the Double Taxation Avoidance Agreement (DTAA) between India and Finland.*

- 3.1 *That the Ld. AO/DRP erred in holding that the Appellant is receiving the payment for conferment of a right in the nature of a copyright.*
- 3.2 *That the Ld. AO/DRP erred in holding that the Appellant is receiving the payment for transfer of right to use the process embedded in the software to the customer who use such process while carrying out their business.*
- 3.3 *That the Ld. AO/DRP erred in holding that consideration received by the Appellant from the sale of standard software is for the use of commercial cum scientific equipment.*
4. *That on the facts and in the circumstances of the case and in law, the Ld. AO/DRP erred in applying the retrospective amendment introduced by the Finance Act, 2012 in the definition of Royalty under section 9(1)(vi) of the Act without appreciating that there is no corresponding amendment in the definition of royalty under the DTAA.*
5. *That on the facts and circumstances of the case and in law, the Ld. AO/DRP erred in not allowing the TDS credit of Rs. 6,40,81,778/- ignoring the TDS certificates submitted before the AO/DRP.*
6. *That on the facts and circumstances of the case and in law, the Ld. AO erred in applying the tax*

rate of 15% on all the receipts without appreciating that the agreements entered with Tech Mahindra and statements of work with IBM Global Services India Private Limited and IBM India Private Limited were post June, 2005 and accordingly receipts, even if treating the same as royalty thereof ought to be taxed at the rate of 10% in view of the provisions of section 115A of the Act.

- 6.1 That on the facts and circumstances of the case and in law, the Ld. AO erred in grossing up the receipts without appreciating that the same can be done only in the hands of the payer for the purpose of deduction of taxes and not for computing the income.*
- 7. That on the facts and circumstances of the case and in law, the Ld. AO/DRP erred in levying the interest u/s 234B of the Act.*

The above grounds of appeals are without prejudice to each other.

That the appellant craves the leave to add, alter, amend or withdraw all or any ground of objections either before or at the time of hearing of these objections.”

Grounds of ITA No. 1686/Del/16 for AY 2012-13

1. *“That on the facts and circumstances of the case and in law, the impugned order passed by the Ld. DCIT, Circle 1(2)(1), Intl. Taxation, New Delhi u/s 143(3) read with section 144C of the Income Tax Act, 1961 is bad in law and void ab-initio.*
 - 1.1 *That the Ld. AO grossly erred assessing the income of the Appellant at Rs. 37,59,28,211/- as against the income of Rs. 20,92,31,368/- declared by the appellant in the return of income.*
2. *That on the facts and circumstances of the case and in law, the Ld. AO/DRP erred in not appreciating the fact that the case of the Appellant is squarely covered by the judgment of the jurisdictional High Court in the case of Infrasoftware Ltd. vs. ADIT [264 CTR 329 (Del)] wherein the Hon’ble High Court while interpreting a similar agreement held that the payment made for the supply of software to be used by the assessee in its own business would not amount to royalty.*
3. *That on the facts and circumstances of the case and in law, the Ld. AO/DRP erred in holding that the receipts in the hands of the Appellant from sale of “standard software” are in the nature of royalty as defined in section 9(1)(vi) of the Act and*

under Article 12(3) of the Double Taxation Avoidance Agreement between India and Finland.

- 3.1 That the Ld. AO/DRP erred in holding that the Appellant is receiving the payment for conferment of a right allowing the use of a copyright.*
- 3.2 That the Ld. AO/DRP erred in holding that the Appellant is receiving the payment for transfer of right to use the process embedded in the software to the customer who use such process while carrying out their business.*
- 3.3 That the Ld. AO/DRP erred in holding that the consideration for supply of software shall qualify as 'Royalty' by virtue of retrospective amendment introduced in the definition of royalty under the DTAA.*
- 3.4 That the Ld. AO/DRP erred in holding that there is no conflict in the interpretation between section 9(1)(vi) and DTAA so far as taxation of income from sale of software as royalty is concerned.*
- 4. That the Ld. AO/DRP erred in placing reliance on Article 3 of the DTAA or section 90(3) of the Act to conclude that receipts from sale of software are royalty without identifying the undefined term of the DTAA for which definition of the Act is proposed to be used.*

5. *That on the facts and circumstances of the case and in law, the Ld. AO/DRP erred in grossing up the receipts without appreciating that the same can be done only in the hands of the prayer for the purpose of deduction of taxes and not for computing the income.*
 - 5.1 *Without prejudice to the aforesaid, where in case of net of tax contracts, grossing up is done assuming taxes have been duly withheld by the payer, additional tax credit for taxes withheld on account of grossing up ought to have been given by the Ld. AO/DRP.*
6. *That the Ld. AO/DRP erred in charging interest u/s 234B and 234D of the Act.*
7. *The Appellant craves leave to alter, amend or withdraw all or any of the grounds of objections contained herein or add any further grounds as may be considered necessary either before or during the hearing of the objections.”*

3. At the outset, the Ld. AR submitted that the issue that the sale of software by the assessee was chargeable to tax under Article 7 of DTAA as business income and not under Article 12 as royalty has already been settled in favour of the assessee by the ITAT Delhi 'B' Bench in assessee's own case

in ITA Nos. 5411/Del/2010, 5587/Del/2011 and ITA No. 699/Del/2013 for A.Ys. 07-08, 08-09, 09-10 respectively. The Ld. AR submitted a copy of the said order and pointed out that the issues under appeal in the present appeals were identical to the issues decided by the ITAT as aforesaid and submitted that in view of the decision of the coordinate bench of the ITAT, the issue was squarely covered in favour of the assessee. The Ld. AR pointed out that ground nos. 1, 2 and 3 were similar in both the present appeals and were covered in favour of the assessee by the order of the ITAT.

4. The Ld. CIT DR placed extensive reliance on the order of the lower authorities and vehemently argued that the receipts were taxable as royalty and not as business income.

5. We have heard the rival contentions 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 years 11-12 and 12-13 as compared to earlier assessment years 08-09, 09-10 and 10-11 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. 07-08, 08-09 and 09-10 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'.”

5.1 On identical set of facts, respectfully following the decision of the coordinate bench of the ITAT in the assessee's own case for A.Ys. 07-08, 08-09 and 09-10, we hold that for A.Ys. 11-12 and 12-13, 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 result, ground nos. 1, 2 and 3 for both the years under appeal are allowed.

5.2 In A.Y. 11-12, the assessee has raised ground no. 5 which challenges the action of not allowing the TDS credit of Rs. 64,081,778/-. Similarly, ground no. 5 in AY 12-13 challenges the action of grossing up of the receipts for the purpose of computation of income. Both the issues are set aside to the file of the AO with the direction to grant the credit of TDS, if found in accordance with the law and also to re-compute the gross receipts for the purpose of taxation. Hence, these grounds are allowed for statistical purposes.

5.3 All other grounds are consequential in nature and are, therefore, dismissed.

6. In the final result, both the appeals of the assessee are partly allowed.

Order is pronounced in the open court on 03.10.2016

Sd/-
(G.D. AGRAWAL)
VICE PRESIDENT

Dated: 03.10.2016

**Kavita Arora*

Sd/-
(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI