

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES: 'D', NEW DELHI**

**BEFORE SHRI R.K.PANDA, ACCOUNTANT MEMBER
AND SMT. BEENA A PILLAI, JUDICIAL MEMBER**

**ITA No. 5285/Del/2010
A.Y. 2007-08**

Landmark Graphics Corporation C/o Nangia & Company, CA Suite 4 A, Plaza M 6 Jasola New Delhi 110 025 PAN: AABCL1012F	vs.	ADIT International Taxation Subhash Road Dehradun 248 001
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(Appellant)

(Respondent)

Appellant by	Shri Amit Arora and Sh. Vishal Misra, CAs
Respondent by	Sh. GK Dhall, CIT,DR
Date of Hearing	11.01.2018
Date of Pronouncement	18.01.18

ORDER

PER BEENA A PILLAI, JUDICIAL MEMBER

The present appeal has been filed by assessee against order dated nil passed by Ld.ADIT, International Taxation-13-A, under section 143(3)/144C(13) of the Income Tax Act, 1961 (the Act) Act for assessment year 2007-08 on the following grounds of appeal :

“Addition qua business revenues against sale of software

1. That the Assessing Officer erred on facts and in law in holding that revenue of Rs.7,135,735 received by the assessee on account of sale of software, are taxable in India as 'royalty payments' both u/s 9(1)(vi) of the Income Tax Act, 1961 (the Act) as well as under Article 12 of the Indo-US Double Taxation Avoidance Agreement.

"Addition qua business revenues against installation and commissioning of software

2. That the Assessing Officer erred on facts and in law in holding that revenue of Rs.1,083,809 received by the assessee on account of installation and commissioning of software, are taxable in India as 'fees for included services' both u/s 9(1)(vi) of the Income Tax Act, 1961 (the Act) as well as under Article 12 of the Indo-US Double Taxation Avoidance Agreement.

Addition qua business revenues against maintenance of software

3. That the Assessing Officer erred on facts and in law in holding that revenue of Rs.29,976,186 received by the assessee on account of maintenance of software, are taxable in India as 'fees for included services' both u/s 9(1)(vi) of the Income Tax Act, 1961 (the Act) as well as under Article 12 of the Indo-US Double Taxation Avoidance Agreement.

Levy of interest

4. That the Assessing Officer erred on facts and in law in levying interest u/s 234B and 234C of the Act especially when there was no liability on the assessee to pay advance tax u/s 209(1)(d) of the Act.

The appellant craves leave to add to, alter, amend or vary from the above grounds of appeal at or before the time of hearing."

2. At the outset Ld.AR submitted that the entire issue revolves around:

- whether sale of software would be taxable in India as 'royalty payments' under section 9(1)(vi) of the Act as well as under

Article 12 of Indo US Double Taxation Avoidance Agreement;
and

- whether, money is received for installation and commissioning of software as well as maintenance of software are taxable in India as 'fees for included services' under Article 12 of Indo US Double Taxation Avoidance Agreement.

2.1. Ld.A.R. submitted that assessee is a tax resident of United States and has received revenues on account of contracts entered into with various parties in India. Ld.A.R. submitted that during the year, assessee received revenues towards sale of software as well as installation and commissioning of software and maintenance of software. He submitted that assessee does not have Permanent Establishment (PE) in India and is entitled to benefits of double taxation avoidance agreement (DTAA) between India and United States in accordance with provisions of article 7(1).

2.2. Ld.A.R. submitted that issue stands covered vide order dated 12/07/17 passed by this Tribunal in ITA numbers 573/del/2006 for assessment year 2002-03, 2486/del/2006 for assessment year 2003-04, 2952/del/2007 for assessment year 2004-05, 4615/del/2007 for assessment year 2005-06, 1180/del/2012 for assessment year 2006-07 and 1179/del/2012 for assessment year 2008-09. He submitted that this Tribunal vide order dated 12/07/17 held that assessee did not have a PE in India and accordingly in the absence of PE, business profits from sale of software could not be brought to tax in India.

2.3. He further submitted that payments received by assessee for installation and commissioning as well as maintenance of software has been held to be taxable u/s.44 BB of the Act, since it is used for prospecting and/or exploration and/or production of mineral oil in India. Ld.AR placed reliance upon the decision of *Hon'ble Supreme Court* in the case of *ONGC Ltd vs. CIT reported in (2015) 376 ITR 306*. He placed reliance upon paragraph 9 and 10 of the order passed by this Tribunal in assessee's own case (supra), which is reproduced hereunder:

"9. We have heard both the parties and perused the records. The assessee filed its return of income claiming that it is not taxable in India by virtue of the Double Taxation Avoidance Agreement (DTAA) between India & USA as it does not have any permanent establishment in India as defined under Article 5(2). As per the records and the submissions before us by the Ld. AR, the assessee has not participated in the activities for a period more than 10 to 15 days in India. The same was not refuted by the Ld. DR at any point of time while arguing about the status of permanent establishment of the Assessee. The CIT(A) also held that admittedly the assessee does not have any office in India and its activities are not covered by the deeming fiction of Article 5(2) of the Indo-US DTM which is to be considered project-wise. The CIT(A) further observed that the Assessing Officer has not considered the issue as to whether the assessee had or did not have a permanent establishment. Therefore, the CIT(A) for the Assessment Year 2002-03 held that the assessee did not have a permanent establishment in India during the previous

year relevant to Assessment Year 2002-03. Accordingly, the CIT(A) held that in terms of Article 7(1) of the Indo-US DTAA the sale of software which are "off the shelf software", are not taxable in India. Thus, the assessee has succeeded in establishing that there is no permanent establishment.

10. The assessee has engaged in installation and commissioning of software and training to the employees of the Indian entities as well as rental of software. For payment made on account of software supply to the foreign company the CIT(A) relied on ITAT Delhi Bench in case of Motorola Inc Vs. DCIT 95 ITD 269 wherein it is held that the payment made on account of software supply to the foreign company cannot be taxed as royalty. Thus, the CIT(A) deleted the addition made by the Assessing Officer. For software related to training which was provided by the assessee, the CIT(A) held that the software facilitates the exploration/extraction of mineral oils. As per the Instruction No. 1862 of the Board, the CIT(A) held that on account of provision for training to employees on software was held taxable under section 44BB. It is pertinent to note that the issue related to taxability of Revenue pertaining to supply of software in India for Assessment Year 2002-03, 2003-04 the issue is squarely covered as supply of software is not royalty as per Article 12 of the DTAA and also the decision of Special Bench in case of Motorola Inc Vs. DCIT (2005) 95 ITD 269 which was subsequently affirmed in cases of DIT Vs. Nokia Networks (2013) 358 ITR 259 (Delhi), DIT Vs. Ericsson AB, New Delhi (2012) 343 ITR 470, DIT Vs. Infracsoft Ltd. (2014) 220 Taxman 273, Data mine International Vs. Addl DIT (2016) 48 ITR (Trib.) 229. The

issue that of contract for training is covered by decision of the Hon'ble Supreme Court in case of ONGC Ltd. Vs, CIT (2015) 376 ITR 306. In this particular case, the assessee claimed that these services have been provided in connection with the exploration, and the extraction of mineral oils in India and these revenues should be tax in terms of provisions of Section 44BB of the Income Tax Act, 1961. Though the CIT(A) deleted the additions made by the Assessing Officer and held that the said additions should be as per the provisions of Section 44BB of the Act, but since there is no Permanent Establishment in India, the assessee cannot be taxed in India at least in A.Y. 2002-03. This issue has not arose in subsequent years wherein the CIT(A) has rightly held that the same should be taxed as per provisions of Section 44BB of the Act. As regards to the rental of software which was in connection with the exploration/extraction of mineral oils in India, the Assessing Officer was not right by applying 15% of rate by applying decision of Advance Authority Ruling in case of Ishikawajima Harima Heavy Industries Co. Ltd Vs. DIT 271 ITR 193 as the facts of the said case is different from that of the present appeals. Thus, for subsequent years the issue of permanent establishment is not in question and hence the applicability of the judgement of ONGC is very much necessary as all these activities which assessee took are coming under the purview of Section 44BB.”

2.4. On the contrary Ld.CIT, DR supported the orders of the authorities below.

3. We have perused the submissions advanced by both the sides in the light of the records placed before us. We have also perused

the order passed by this Tribunal in the preceding assessment years in assessee's own case.

3.1. On perusal of the same we observe that the facts are identical and similar to this year under consideration before us.

3.2. In our considered view Ground No. 1 raised by assessee regarding revenue received on account of sale of software stands covered by decision of *Hon'ble Delhi High Court* in the case of *DIT vs. Infrasoftware Ltd.*, reported in (2014) 220 Taxman 273, *Hon'ble Court* held as under:

"In order to qualify as a royalty payment under Article 12(3) of the India-USA DTAA, it is necessary to establish that there is a transfer of all or any rights (including the granting of any licence) in respect of a copyright of a literary, artistic or scientific work. There is a clear distinction between royalty paid on transfer of copyright rights and consideration for transfer of copyrighted articles. Right to use a copyrighted article or product with the owner retaining his copyright, is not the same thing as transferring or assigning rights in relation to the copyright. The enjoyment of some or all the rights which the copyright owner has, is necessary to invoke the royalty definition. Viewed from this angle, a non-exclusive and non-transferable licence enabling the use of a copyrighted product cannot be construed as an authority to enjoy any or all of the enumerated rights ingrained in Article 12 of DTAA."

3.3. In the facts of the present case the authorities below have not been able to establish that sale of software was merely a right to use copyrighted article or product with the owner retaining its

copyright. We therefore respectfully following the decision of Hon'ble Delhi High Court in the case of DIT vs. Infrasoftware Ltd., hold that revenue received by assessee on sale of software cannot be construed as Royalty under Article 12 of Indo US Double Taxation Avoidance Agreement.

Further as it has been already held by DRP that assessee do not have a PE in India, therefore, section 9(1)(vi) of the Act would also be not applicable. In our considered view sale of software is merely sale of a product off the shelf which is not liable for being taxed in India.

4. Ground No. 2 and 3 are in respect of revenue received by assessee for installation and commissioning of software and maintenance of software.

4.1. It is observed that in the preceding assessment year in assessee's own case this Tribunal has held that the income is taxable under section 44 BB of the Act by placing reliance upon the decision of *Hon'ble Supreme Court* in the case of *ONGC vs. DDIT (supra)*. Relevant extract of the Tribunal's decision has been reproduced hereinabove.

4.2. Respectfully following the same we hold that for the year under consideration revenue received for the purpose of installation and commissioning of software and maintenance of software would be taxed as per section 44 BB of the Act. Ld.AO is directed to recompute the income in the hands of the assessee as per the provisions of section 44 BB. Accordingly these grounds raised by assessee stands allowed for statistical purposes.

5. In the result appeal filed by the assessee stands allowed for statistical purposes.

Order pronounced in the Open Court on 18.01.2018.

Sd/-

(R.K.PANDA)
ACCOUNTANT MEMBER

Sd/-

(BEENA A PILLAI)
JUDICIAL MEMBER

Dated: 18th January, 2018

*mv

Copy of the Order forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR
6. Guard File

By Order

Asst. Registrar
ITAT, Delhi Benches, New Delhi

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S.No.	Details	Date	Initials	Designation
1	Draft dictated on Dragon			Sr. PS/PS
2	Draft placed before author			Sr. PS/PS
3	Draft proposed & placed before the Second Member			JM/AM
4	Draft discussed/approved by Second Member			AM/AM
5	Approved Draft comes to the Sr. PS/PS			Sr. PS/PS
6	Kept for pronouncement			Sr. PS/PS
7	File sent to Bench Clerk			Sr. PS/PS
8	Date on which the file goes to Head Clerk			
9	Date on which file goes to A.R.			
10	Date of Dispatch of order			