IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D" NEW DELHI

BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

I.T.As. No.3410/DEL/2015
Assessment Years: 2003-04

DCIT, Circle-1(1)(1), New Delhi.	vs.	Alcatel Lucent Portugal SA, C/o PWC, 11A, Vishnu Digamber Marg, Sucheta Bhawan, New Delhi.
TAN/PAN: AADCA 1677R		
(Appellant)		(Respondent)

Appellant by:	Shri Surender Pal, Sr.D.R.		
Respondent by:	Shri Shagun Mahajan, CA		
Date of hearing:	28	08	2018
Date of pronouncement:	31	08	2018

O R D E R

PER AMIT SHUKLA, J.M.:

The aforesaid appeal has been filed by the Revenue against the impugned order dated 18.03.2015, passed by Commissioner of Income Tax (Appeals)-XLII, New Delhi for the quantum of assessment passed u/s.147 r.w.s. 144C(1) for the Assessment Year 2003-04. In the grounds of appeal, the Revenue has challenged the order of the ld. CIT (A) holding that royalty income of the assessee is a business income.

2. The facts in brief are that the assessee, Alcatel Lucent Portugal SA, is a non resident company incorporated under the Laws of Portugal. The assessee is one of the Alcatel

Lucent Entity which had supplied telecom equipment comprising of both hardware and software to customers in India during the period under consideration. It had opened a project office in India with the approval of Reserve Bank of India with effect from 27.06.2001 for executing local portion of contract awarded to it by Delhi Metro Rail Corporation on 09.03.2001. The assessee has filed its return of income on 02.12.2013 declaring total income of Rs.48,63,110/-. Thereafter, in February 2009, a survey was conducted at the premises of the Alacatel-Lucent India Ltd. and based on such survey; notice u/s.148 was issued for reopening the said assessment. The assessee's case before the Assessing Officer was that no income had accrued or received by the assessee in respect of off-shore supplies which can be said to be taxable in India as it was made from outside India. Learned Assessing Officer held that assessee has a PE in India and 3.75% of the total equipment supplies are attributable to the PE in India. Further, on the issue of taxability of software component in telecom equipments supplies which has been treated as 'royalty' by the Assessing Officer, the Assessing Officer has relied upon by the assessment order for the Assessment Year 2006-07 in the case of Alcatel-Lucent France wherein it has been held that software component of the telecom equipment is supplied as taxability in Royalties.

3. Ld. CIT (A) has reversed the said findings by observing and holding as under:

10.1 I have considered the submission made by the

appellant. The Ld. AO while relying upon the assessment order dated 23.03.2010 in the case of Alcatel Lucent France for AY 2006-07 held that software component of the telecom equipment supplied is taxable as 'Royalties'. It has been seen that said order has been adjudicated in favour of the appellant by CIT(A) and Hon'ble ITAT. Accordingly, I hold that consideration for embedded software component in telecom equipment supplies is not in nature of 'Royalties'.

10.2 Further/ it has been held by CIT (A) in appellate order in case of Alcatel Lucent France, in accordance with the ruling of Hon'ble Delhi High Court in the case of Ericsson AB, that the consideration received by the appellant for the supply of embedded software was to be treated as consideration received for supply of goods and therefore taxable as business income & not as royalty. It is undisputed that the appellant has PE in India. It has been held in para 7.2 supra that net profit chargeable to tax as attributable to PE in India is @ 3.75% of the hardware sales. Therefore, AO is directed to tax the total consideration received by the appellant for integrated supply of hardware and software on the same basis as adopted for hardware sales. The ground of appeal is disposed off according."

4. Before us, the learned counsel submitted that, now this issue stands covered by the judgment of the Tribunal in assessee's own case for the Assessment Year 2008-09 which has also been affirmed by the Hon'ble Delhi High Court, since reported in **(2015) 372 ITR 476**.

5. Learned Department Representative also admitted that the issue stands covered by the judgment of Hon'ble Delhi High Court.

6. After considering the relevant findings given in the impugned order as well as the argument placed by the learned counsel, we find that the only issue raised before us is, whether the royalty income can be taxed as business income or not. In assessee's own case for the earlier years this issue has been decided in favour of the assessee on similar set of facts by the Hon'ble Delhi High Court in the case of CIT vs. Alcatel Lucent Canada, after observing and holding as under:

> *"5. We have noticed, at the outset, that the ITAT had relied upon the ruling of this Court in Director of Income Tax V. Ericsson A.B. (2012) 343 ITR 470 wherein identical argument with respect to whether consideration paid towards supply of software along with hardware - rather software embedded in the hardware amounted to royalty. After noticing several contentions of the revenue, this Court held in Ericsson A.B. (supra) as follows:-*
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> *"54. It is difficult to accept the aforesaid submissions in the facts of the present case. We have already held above that the assessee did not have any business connection in India. We have also held that the supply of equipment in question was in the nature of supply of goods. Therefore, this issue is to be examined keeping in view these findings. Moreover, another finding of fact is recorded by the Tribunal that the Cellular*

Operator did not acquire any of the copyrights referred to in Section 14 (b) of the Copyright Act,1957.

55. Once we proceed on the basis of aforesaid factual findings, it is difficult to hold that payment made to the assessee was in the nature of royalty either under the Income-Tax Act or under the DTAA. We have to keep in mind what was sold by the assessee to the Indian customers was a GSM which consisted both of the hardware as well as the software, therefore, the ITA 119/2015 & conn. Page 10 Tribunal is right in holding that it was not permissible for the Revenue to assess the same under two different articles. The software that was loaded on the hardware did not have any independent existence. The software supply is an integral part of the GSM mobile telephone system and is used by the cellular operator for providing the cellular services to its customers. There could not be any independent use of such software. The software is embodied in the system and the revenue accepts that it could not be used independently. This software merely facilitates the functioning of the equipment and is an integral part thereof. On these facts, it would be useful to refer to the judgment of the Supreme Court in TATA Consultancy Services Vs. State of Andhra Pradesh (2004) 271 ITR 401 (SC), wherein the Apex Court held that software which is incorporated on a media would be goods and, therefore, liable to sales tax. Following discussion in this behalf is required to be noted:-

"In our view, the term "goods" as used in Article 366(12) of the Constitution of India and as defined under the said Act are very wide and include all types of movable properties, whether

those properties be tangible or intangible. We are in complete agreement with the observations made by this Court in Associated Cement Companies Ltd. (supra). A software programme may consist of various commands which enable the computer to perform a designated task. The copyright in that programme may remain with the originator of the programme. But the moment copies are made and marketed, it becomes goods, which are susceptible to sales tax.

Even intellectual property, once it is put on to a media, whether it be in the form of books or canvas (In case of painting) or computer discs or cassettes, and marketed would become "goods". We see no ITA 119/2015 & conn. Page 11 difference between a sale of a software programme on a CD/floppy disc from a sale of music on a cassette/CD or a sale of a film on a video cassette/CD. In all such cases, the intellectual property has been incorporated on a media for purposes of transfer. Sale is not just of the media which by itself has very little value. The software and the media cannot be split up. What the buyer purchases and pays for is not the disc or the CD. As in the case of paintings or books or music or films the buyer is purchasing the intellectual property and not the media i.e. the paper or cassette or disc or CD. Thus a transaction sale of computer software is clearly a sale of "goods" within the meaning of the term as defined in the said Act. The term "all materials, articles and commodities" includes both tangible and intangible/incorporeal property which is capable of abstraction, consumption and use and which can be transmitted, transferred, delivered, stored, possessed etc. The software programmes have all these attributes...

In Advent Systems Ltd. v. Unisys Corpn, (925 F. 2d 670 (3rd Cir. 1991)), relied on by Mr. Sorabjee, the court was concerned with interpretation of uniform civil code which "applied to transactions in goods". The goods therein were defined as "all things (including specially manufactured goods) which are moveable at the time of the identification for sale". It was held :

"Computer programs are the product of an intellectual process, but once implanted in a medium are widely distributed to computer owners. An analogy can be drawn to a compact disc recording of ITA 119/2015 & conn. Page 12 an orchestral rendition. The music is produced by the artistry of musicians and in itself is not a "good," but when transferred to a laser-readable disc becomes a readily merchantable commodity. Similarly, when a professor delivers a lecture, it is not a good, but, when transcribed as a book, it becomes a good. That a computer program may be copyrightable as intellectual property does not alter the fact that once in the form of a floppy disc or other medium, the program is tangible, moveable and available in the marketplace. The fact that some programs may be tailored for specific purposes need not alter their status as "goods" because the Code definition includes "specially manufactured goods."

56. A fortiorari when the assessee supplies the software which is incorporated on a CD, it has supplied tangible property and the payment made by the cellular operator for acquiring such property cannot be regarded as a payment by way of royalty."

6. This Court also noticed that the ITAT had in addition relied upon other judgment of this Court i.e. Director of Income Tax V. M/s. Nokia Networks, (2013) 358 ITR 259 (Delhi).

7. In view of this settled position, this court is of the opinion that no substantial question of law arises. The appeal is accordingly dismissed."

7. Thus, respectfully following the aforesaid judgment of the Hon'ble High Court, we are deciding this issue in favour of the assessee and consequently the ground raised by the Revenue is dismissed.

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

Order pronounced in the open Court on 31st August, 2018.

Sd/-	Sd/-
[PRASHANT MAHARISHI]	**[AMIT SHUKLA]**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

DATED: 31st August, 2018
PKK: