

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "G" NEW DELHI**

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER  
AND  
SHRI B.R.R. KUMAR, ACCOUNTANT MEMBER**

I.T.A. No.1852/DEL/2016  
Assessment Year: 2009-10

DCIT, Circle-1(1)(1), International Taxation, New Delhi.	vs.	M/s. Alcatel Lucent France (Now known as Alcatel Lucent International)
TAN/PAN: AABCC4864E		
(Appellant)		(Respondent)

CO No.214/DEL/2016  
(Arising out of ITA No.1852/DEL/2016)  
Assessment Year: 2009-10

M/s. Alcatel Lucent France (Now known as Alcatel Lucent International)	vs.	DCIT, Circle-1(1)(1), International Taxation, New Delhi.
TAN/PAN: AACCR 9241D		
(Appellant)		(Respondent)

Appellant by:	Shri S.K. Dhall, CIT-DR		
Respondent by:	S/Shri Shashi Matthews & Abhishek Bow, Adv.		
Date of hearing:	17	09	2019
Date of pronouncement:	09	12	2019

**ORDER**

**PER AMIT SHUKLA, JM:**

The aforesaid appeal has been filed by the Revenue and Cross Objection by the assessee against the impugned order dated 28.10.2016 passed by Commissioner of Income Tax (Appeals)-XLII, New Delhi for the quantum of assessment

passed u/s.143(3) r.w.s. 144C. The grounds raised by the Revenue read as under:

*“1. Whether the CIT(A) was not justified in law and on facts of the case by not treating embedded software as Royalty income of the assessee as per Explanation 4 to Section 9(i)(vi) of the Income Tax Act, 1961.”*

Whereas in the Cross Objection, assessee has raised the following grounds:-

*“1. That the ld. CIT(A) erred in not concluding that interest under section 234B of the IT Act is not leviable in the facts of the present case ignoring the fact that the entire consideration in the hands of the assessee was subject to deduction of tax at source under Section 195 of the Act and hence the assessee was not liable to pay any advance tax.”*

2. At the outset, it has been submitted that the issue raised in Revenue's Appeal is now squarely covered by the decision of the Tribunal in assessee's own case which has also been confirmed by the Hon'ble High Court. Further in the case of issue of interest as raised in Cross Objection, same is also covered by the decision of Hon'ble Jurisdictional High Court in the case of DIT vs. GE Packaged Power Inc., (2015) 373 ITR 65 (Del.)

3. The facts in brief are that the assessee is a company incorporated under the laws of France and is a tax resident of France in terms of Article 4 of the Double Taxation Avoidance Agreement (“DTAA”) entered between Indian and France.

Further, ALU is a group company of the Alcatel Lucent Group. Alcatel Lucent Group is a leading telecommunication group and infrastructure supplier. The assessee is a leading enterprise of the group for this purpose. In February of 2009, a survey was conducted by the Assistant Director of Income Tax, Circle-1 at the office of the assessee. Post the survey, assessment order was passed, *inter alia*, holding that the supply of software made by the assessee was to be treated as “Royalty” and thus, taxable in terms of Section 9(i)(vi) of the Act. Further, on the same basis, show cause notice dated 06.02.2013 was issued to the assessee as to why assessment for the year 2009-10 (“period of dispute”) should not be completed on the basis of the findings in the assessment order. Thereafter, Assessment Order dated 19.03.2013 was passed by following the earlier Assessment Order for AY 2006-07 holding that the software supplies are taxable as “Royalty” under Section 9(1)(vi) and Article 13 of the DTAA.

4. Ld. CIT (A) has deleted the addition made by the Assessing Officer, following the earlier order for the Assessment Year 2006-07, wherein the Tribunal vide order dated 04.04.2014 in ITA No.4866/Del/2006 has confirmed the order of the Ld. CIT (A), following the judgment of Hon’ble Delhi High Court in the case of DIT vs. Ericsson AB (2012) 343 ITR 470. Further, the said order of the Tribunal has also been confirmed by the Hon’ble Delhi High Court vide order dated 27.02.2015. It is an undisputed fact that the facts are

similar to those in Assessment Year 2006-07 in assessee's own case.

5. In so far as taxability of software is concern, wherein it has been held that the consideration received by the assessee for implying of embedded software is to be treated as supply of goods, and therefore, taxable as business income and not as royalty, the Hon'ble Delhi High Court in the case of assessee as well as similar group companies had confirmed the order of the Tribunal and also held that now this issue stands covered by certain decisions of the Hon'ble Delhi High Court, like in the case of DIT vs. Nokia Networks, OY, (2013) 358 ITR 259 (Del.). Respectfully following the binding judicial precedents of the Hon'ble Delhi High Court, the grounds raised by the Revenue is dismissed.

6. Similarly in so far as issue of interest u/s.234B is concern, as raised in the Cross Objection, it is an undisputed fact that the entire consideration in the hands of the assessee was subject to TDS u/s.195, therefore, principle laid down by Hon'ble Delhi High Court in the case of DIT vs. GE Packaged Power Inc. (supra) is squarely applicable wherein it has been held that if the tax is deductible by the Indian Customer u/s.195 on all the payments then no advance tax is payable and in absence of any liability to pay the advance tax the provision of Section 234B are not applicable. Accordingly, Cross Objection filed by the assessee is allowed.

7. In the result, the appeal of the Revenue is dismissed and the Cross Objection of the assessee is allowed.

**Order pronounced in the open Court on 9<sup>th</sup> December, 2019.**

Sd/-  
**[B.R.R. KUMAR]**  
**[ACCOUNTANT MEMBER]**  
DATED: 9<sup>th</sup> December, 2019

Sd/-  
**[AMIT SHUKLA]**  
**JUDICIAL MEMBER**