

IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "C", PUNE

BEFORE SHRI R.S. SYAL, VICE PRESIDENT AND
SHRI S.S. VISWANETHRA RAVI, JUDICIAL MEMBER

ITA No.331/PUN/2015

निर्धारण वर्ष / Assessment Year : 2010-11

Cummins Inc., C/o. Cummins India Office Campus, 5 th Floor, Survey No.21, Balewadi, Pune PAN : AABCC6225D	Vs.	DCIT (International Taxation), Circle-1, Pune
Appellant		Respondent

Assessee by
Revenue by

Shri Ketan Ved
Shri T. Vijaya Bhaskar Reddy

Date of hearing

06-01-2020

Date of pronouncement

07-01-2020

आदेश / ORDER

PER R.S.SYAL, VP :

This appeal by the assessee is directed against the final assessment order dated 15-01-2015 passed by the Assessing Officer (AO) u/s.143(3) r.w.s.144C(13) of the Income-tax Act, 1961 (hereinafter called 'the Act') in relation to the assessment year 2010-11.

2. Ground Nos.1 & 2 are against the treatment of amount received by the assessee for providing users a right in off-the-

shelf software and use of standard facilities and support services as 'Royalty'.

3. Briefly stated, the facts of the case are that the assessee is a Foreign company which filed its return declaring total income of Rs.33,18,32,305/-. The Assessing officer (AO) taxed the amount received by the assessee on providing users right in off-the-shelf software as 'Royalty' which was treated by the assessee as not chargeable to tax. This was held so by applying the provisions of section 9(1)(vi) of the Act read with Article 12(3) of the DTAA between India and USA. Similarly, the assessee had also received certain amount towards standard facilities and support services which was claimed as not chargeable to tax. The AO treated the same also as 'Royalty' under the Act as well as Article 12(3) of the DTAA and included it in the total income. The assessee is aggrieved by the additions.

4. Having heard both the sides and gone through the relevant material on record, it is observed that similar issue came up for consideration before the Tribunal in assessee's own case for earlier years. In its order dated 07-08-2019 for the assessment

year 2008-09 (ITA No.2506/PUN/2012), the Tribunal, following its earlier orders for the assessment years 2004-05 and 2006-07, has held that such amount cannot be treated as 'Royalty' chargeable to tax. A copy of such order has been placed on record. Relevant discussion has been made in para 17 of the Tribunal's order. Both the sides are in agreement that the facts and circumstances of the instant year are *mutatis mutandis* similar to those of the earlier year. Respectfully following the precedent, we delete the additions.

5. Ground No.3 is against the addition of Rs.3,38,37,109/- towards reimbursement of cost from Cummins India limited by treating the same as 'Fees for Technical services (FTS)'.

6. The facts apropos this issue are that the assessee received Rs.1.40 crore and odd from Cummins India Limited as 'Payment for Expat cross charges' and Rs.1.97 crore and odd as 'Payment for Regional cross charges' totaling Rs.3.38 crore. The said amount was not offered for taxation on the ground that it was in the nature of reimbursement of costs. The AO taxed the same as 'Royalty' or 'Fees for Technical services' under the DTAA on the ground that the assessee did not submit any

documentary evidence to prove that the above amount was reimbursement of cost and did not have any profit element.

7. Having heard both the sides and gone through the relevant material on record, it is noticed that the AO taxed Rs.3.38 crore as chargeable to tax by rejecting the assessee's contention that no evidence was furnished to prove that the same was in the nature of reimbursement of costs. The ld. AR contended that ample evidence was available to prove the case and one chance be given to the assessee to place on record the necessary evidence to the satisfaction of the AO. In view of the facts as obtaining in the instant case, we are of the considered opinion that the ends of justice would meet adequately if the impugned order on this issue is set-aside and the matter is restored to the file of the AO. We order accordingly and direct him to decide this issue afresh as per law after allowing reasonable opportunity of hearing to the assessee. Needless to say, the assessee will be at liberty to lead any fresh evidence in support of its case.

8. Ground No.4 is against the addition of Rs.16,84,833/-, being, the difference as per Form No.3CEB of Cummins India

Limited and the receipt shown by the assessee towards off-the-shelf software charges.

9. The facts concerning this ground are that the AO noticed that the amount of technical services payment as per Form 3CEB of Cummins India Limited was at variance with the amount shown to have been received by the assessee from Cummins India Limited to the tune of Rs.16,84,833/-. He treated the same as 'Royalty'/'Fees for Technical services' under the Act as well as under the DTAA and accordingly charged the same to tax at 15%, against which the assessee has approached the Tribunal.

10. After considering the rival submissions and perusing the relevant material on record, we find the assessee showed the receipt from Cummins India Ltd. at a figure lower by Rs.16,84,833/-. In the absence of the assessee showing any reconciliation of the two amounts, it has to be held that the assessee reflected lower receipt. However, in view of the off-the-shelf software receipts and support services charges etc. not chargeable to tax in view of our decision on ground nos. 1 & 2,

we hold that the said sum of Rs.16.84 lakh, though includible in the receipts, cannot be charged to tax.

11. In the result, the appeal is partly allowed.

Order pronounced in the Open Court on 07th January, 2020.

Sd/-
(S.S. VISWANETHRA RAVI)
JUDICIAL MEMBER

Sd/-
(R.S.SYAL)
VICE PRESIDENT

पुणे Pune; दिनांक Dated : 07th January, 2020
सतीश

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to:

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. The CIT(A)-13, Pune
4. The Pr. CIT -5, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे
“सी” / DR ‘C’, ITAT, Pune
6. गार्ड फाईल / Guard file

आदेशानुसार/ BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune

		Date	
1.	Draft dictated on	06-01-2020	Sr.PS
2.	Draft placed before author	06-01-2020	Sr.PS
3.	Draft proposed & placed before the second member		JM
4.	Draft discussed/approved by Second Member.		JM
5.	Approved Draft comes to the Sr.PS/PS		Sr.PS
6.	Kept for pronouncement on		Sr.PS
7.	Date of uploading order		Sr.PS
8.	File sent to the Bench Clerk		Sr.PS
9.	Date on which file goes to the Head Clerk		
10.	Date on which file goes to the A.R.		
11.	Date of dispatch of Order.		

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