

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 Nos.524/PUN/2016, 889/PUN/2017, 2978/PUN/2017,
1555/PUN/2018 and 1639/PUN/2019

निर्धारण वर्ष / Assessment Years : 2011-12 to 2015-16

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

Assessee by
Revenue by

Shri Ketan Ved
Shri T. Vijaya Bhaskar Reddy

Date of hearing

08-01-2020

Date of pronouncement

09-01-2020

आदेश / ORDER

PER BENCH :

These five appeals by the assessee relating to the assessment years 2011-12 to 2015-16 involve some common issues. We are, therefore, proceeding to dispose them off by this consolidated order for the sake of convenience.

A.Y. 2011-12 :

2. The first two grounds of the appeal are against the treatment of amount received by the assessee from providing users a right in off-the-shelf software and use of standard facilities and support services as 'Royalty'.

3. We have heard both the sides and gone through the relevant material on record. Both the sides are in agreement that the facts and circumstances of these two grounds are *mutatis mutandis* similar to those of the preceding years including the immediately preceding year, namely, the assessment year 2010-11, which has been recently disposed of by the Tribunal vide its order dated 07-01-2019 (ITA No.331/PUN/2015). Both such grounds have been allowed by the Tribunal following the orders of the earlier years. In view of the above, we allow these two grounds.

4. Ground No. 3 is against the rate of tax at which software and standard facility income should be charged to tax. The Assessing Officer charged the tax @ 40%.

5. In view of our decision on grounds nos. 1 & 2 about non-taxability of these amounts, this ground has been rendered infructuous. Since the income itself is not chargeable to tax, there can be no question of rate of tax at which such income should be charged.

6. The last ground is against the inclusion of Surcharge and Education Cess in the amount of tax charged by the AO under the Double Taxation Avoidance Agreement (DTAA).

7. The Assessing Officer included Surcharge and Education Cess in the amount of tax determined by him under the DTAA, against which the assessee has come up in appeal before the Tribunal.

8. We have heard the rival submissions and perused the relevant material on record. From the computation of income, it can be seen that the income of the assessee which has been charged to tax under the regular provisions has also been subjected to Surcharge and Education Cess. In so far as the taxability of income under the DTAA is concerned, there are specific rates on which such incomes are chargeable to tax.

Such rates cannot be further enhanced by Surcharge and Education Cess as has been held in the several decisions including the one dated 30-11-2015 relied by the Id. AR in *DDIT (IT) Vs. The BOC Group Limited (ITA No.571/Kol/2013)*. We, therefore, overturn the impugned order and direct not to charge Surcharge and Education Cess on the rates of tax under the DTAA. This ground is allowed.

9. The last ground about the levy of interest u/s 234B is consequential.

10. In the result, the appeal is allowed.

A.Y. 2012-13 :

11. The first two grounds are against the treatment of amount received by the assessee from providing users a right in off-the-shelf software and use of standard facilities and support services as 'Royalty'.

12. We have heard both the sides and gone through the relevant material on record. These two grounds are admitted to be *mutatis mutandis* similar to ground nos. 1 & 2 for the

assessment year 2011-12 dealt with *supra*. Following the view taken hereinabove, we allow these two grounds on the taxability of off-the-shelf software and Fees for standard facilities.

13. Ground No.3 is against the addition on account of Expat cross charges by treating the same as Royalty.

14. The Id. AR fairly submitted that similar issue came up for consideration before the Tribunal in its order for the assessment year 2010-11 and the matter has been restored to the file of AO with certain directions.

15. We have gone through the order passed by the Tribunal for the assessment year 2010-11. Relevant discussion has been made in para 7 through which the matter has been restored to the AO with certain directions. Following the precedent, we set-aside the impugned order on this score and remit the matter to the file of the AO for deciding it afresh in the light of the directions given by the Tribunal in the aforementioned order.

16. Ground No.4 is against the levy of Surcharge and Education Cess on the amount of income charged under the DTAA.

17. Both the sides are in agreement that the facts and circumstances of this ground are similar to those of ground no.4 of the assessee's appeal for the assessment year 2011-12. Following the view taken hereinabove, we direct not to load surcharge and education cess on the amount of tax as determined under the DTAA.

18. Ground No.5 is against levy of interest u/s.234D. The ld. AR submitted that the assessee was not granted any intimation of refund u/s. 143(1) of the Income-tax Act, 1961 (hereinafter also called 'the Act'), which ultimately turned out to be not refundable. The Assessing Officer is directed to verify the factual scenario in this regard and decide the issue afresh as per law.

19. Ground No. 6 is against allowing lesser credit of TDS. The Assessing Officer is directed to examine the correct

amount of TDS as per certificates and grant necessary credit as per law after allowing reasonable opportunity to the assessee.

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

A.Y. 2013-14 :

21. The first two grounds are against the treatment of amount received by the assessee from providing users a right in off-the-shelf software and use of standard facilities and support services as 'Royalty'.

22. Here again, these two grounds are admittedly *mutatis mutandis* similar to ground nos. 1 & 2 for the assessment year 2011-12. Following the view taken hereinabove, we allow these two grounds on the taxability of off-the-shelf software and Fees for standard facilities.

23. Ground No.3 is against the erroneous levy of interest u/s.234A. The case of the assessee is that the return was filed on due date and hence there should not have been any levy of interest u/s.234A.

24. We find from the recording in the assessment order that the assessee filed its return of income on 30-11-2013. The Assessing Officer is directed to verify if the due date is different from the date on which the assessee filed the return. In case the assessee filed its return before the due date u/s. 139(1) of the Act, then no interest u/s.234A should be charged.

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

A.Y. 2014-15 :

26. The first two grounds are against the treatment of amount received by the assessee from providing users a right in off-the-shelf software and use of standard facilities and support services as 'Royalty'.

27. These two grounds are admittedly *mutatis mutandis* similar to ground nos. 1 & 2 for the assessment year 2011-12. Following the view taken hereinabove, we allow these two grounds in favour of the assessee.

28. Ground No.3 is against allowing short credit of TDS/TCS.

The Assessing Officer is directed to verify the facts and allow necessary credit as per law.

29. Ground No.4 is against erroneous levy of interest u/s. 234B of the Act. This ground has been claimed as consequential and accordingly allowed.

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

A.Y. 2015-16 :

31. The first two grounds are against the treatment of amount received by the assessee from providing users a right in off-the-shelf software and use of standard facilities and support services as 'Royalty'.

32. These two grounds are again admittedly *mutatis mutandis* similar to ground nos. 1 & 2 for the assessment year 2011-12. Following the decision taken for the A.Y. 2011-12, we allow these two grounds in favour of the assessee.

33. Ground No.3 is against allowing short credit of TDS/TCS. The Assessing Officer is directed to verify and allow necessary credit to the assessee as per law.

34. Ground No.4 is against the erroneous levy of interest u/s.234D. This ground is similar to the ground no.5 for the assessment year 2012-13. Following the view, the Assessing officer is directed to carry out necessary verification in terms of direction given above.

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

Order pronounced in the Open Court on 09th January, 2020.

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

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

पुणे Pune; दिनांक Dated : 09th 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	08-01-2020	Sr.PS
2.	Draft placed before author	08-01-2020	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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