IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'C' BENCH, NEW DELHI [THROUGH VIDEO CONFERENCE]

BEFORE MS. SUSHMA CHOWLA, VICE PRESIDENT
SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER

ITA No. 7698/DEL/2017 [A.Y 2014-15]
ITA No. 8276/DEL/2018 [A.Y 2015-16]

Aspect Software Inc Rashmi Chopra & Associates C- 56, Nizamuddin [East] New Delhi	Vs.	The Dy. C.I.T Circle – 1(1)(1) International Taxation

PAN: AAGCA 7513 D

(Applicant) (Respondent)

Assessee By : Ms. Rashmi Chopra, Sr. Adv
Shri Aditya Vohra, Adv
Shri Arpit Goyal, CA

Department By : Shri Satpal Gulati, Sr. DR

Date of Hearing : 18.06.2020
Date of Pronouncement : 25.06.2020

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER,

The above two appeals by the assessee are preferred against two separate orders framed u/s 143(3) r.w.s 144C of the Income-tax Act,

1961 [hereinafter referred to as 'The Act'] dated 31.10.2017 and 30.10.2018 pertaining to assessment years 2014-15 and 2015-16. Since both these appeals pertain to same assessee involving common issues and were heard together, we are disposing them off by this common order for the sake of convenience and brevity.

2. We have heard the facts of Assessment Year 2014-15. Having heard the rival contentions, we have carefully perused the orders of the authorities below and all the decisions relied upon by the ld. counsel for the assessee.

3. Ground No. 1 is general in nature and needs no separate adjudication.

4. Ground No. 2 relates to revenue earned from supply of soft ware taxed as ‘royalty’.

5. Briefly stated, the facts of the case are that the assessee is engaged in the following activities:

- Hardware sale revenue
- Software licensing revenue
- Professional services revenue
- Implementation services revenue and
- Maintenance services

6. Out of the above revenues received, the assessee has offered to tax only receipts on account of professional services in the tax return filed by it to be taxed @ 15% in terms of Article 12 of the DTAA between India and USA. All the receipts have not been offered to tax by the assessee.

7. Considering the past history of the assessee and taking a leaf out of the past assessment orders, the Assessing Officer treated the Revenue earned from supply of software as ‘royalty’.

8. This issue was the bone of contention between the assessee and the revenue in the past Assessment Year, so much so that the quarrel travelled upto the Hon'ble High Court of Delhi wherein the Revenue was in appeal against the order of the Tribunal, where the Tribunal has

held that the Revenue from supply of software to customers in India is not taxable as royalty under the treaty.

9. The Tribunal in assessee's own case in ITA Nos. 1124/DEL/2014 & 1125/DEL/2014 & Ors dated 18.05.2015 has held as under:

> "41. Before us, the learned counsel for the Assessee as well as the learned D.R. relied on several decisions of the High Court and Tribunal rendered on the subject. These decisions are not being considered as the issue is extensively dealt by the Hon'ble Jurisdictional High court in the cases of M/s Ericsson 42 A.B. and Infrasoft Ltd (supra) which are binding on this Tribunal. We observe that all the arguments put forth by the Revenue and the assessee are considered and answered in these decisions. Further, the Delhi High Court in Infrasoft has expressed its disagreement with the view taken by the Karnataka High Court in the case of Samsung Electronics Co Ltd. Hence, the decisions relied by the learned CIT-DR in the case of Samsung Electronics and Gracemac Corporation (supra) does not help the case of the Revenue, as we are under the Jurisdiction of the Hon'ble Delhi High Court. 42. In view of the above, respectfully following the decision of Hon'ble Jurisdictional High Court in the case of Ericsson A.B. (supra) and Infrasoft Ltd. (supra), we hold that the consideration received by the Assessee for supply of product along with license of software to End user is not royalty under Article 12 of the Tax Treaty. Even where the software is separately licensed without supply of

> hardware to the end users (i.e. eight out of 63 customers), we are of the view that the terms of license agreement is similar to the facts of Infrasoft Ltd (Supra). Accordingly, we hold that there was no transfer of any right in respect of copyright by the assessee and it was a case of mere transfer of a copyrighted article. The payment is for a copyrighted article and represents the purchase price of an article. Hence, the payment for the same is not in the nature of royalty under Article 12 of the Tax Treaty. The receipts would constitute business receipts in the hands of the Assessee and is to be assessed as business income subject to assessee having business connection/ PE in India as per adjudication on Ground No 5.

10. As mentioned elsewhere, the quarrel travelled upto the Hon'ble High Court and the Hon'ble High Court of Delhi in ITA No. 909/2015 and Ors was seized with the following substantial question of law:

> "(i) Did the ITAT fall into error in holding that the transaction in question, i.e., supply of customized software was not "royalty" under Article 12 (4) of the Indo-US Double Taxation Avoidance Agreement (DTAA) read with Section 9 (1) (vii) of the Income Tax Act, 1961, in the circumstances of the case.

(ii) Did the ITAT fall into error in its interpretation of Section 234 (B) of the Income Tax Act, 1961, in the circumstances of the case."

11. The relevant findings of the Hon'ble High Court read as under:

"6. That batch of appeals has been decided by the Court by its decision in The Commissioner of Income Tax International Transaction -2 v. ZTE ITA Nos. 909/2015, 28/2016, 861/2016, 944/2016, 4/2017, 6/2017 Page 5 of 7 Corporation 237 (2017) DLT 572 (DB). The questions that arose in the aforementioned batch of appeals also involved the questions that arise in the present batch of appeals. The questions were answered in favour of the Assessee and against the Revenue. 7. The first issue is whether the payment for supply of customized software would be treated as "royalty" under Article 12(3) of the Indo-US Double Taxation Avoidance Agreement (DTAA) read with Section 9(1)(vi) of Act. In ZTE Corporation (supra), the Assessee being a resident of Republic of China the transactions were governed by the Indo-China DTAA containing identical clauses as the Indo-US DTAA. Relying on the decision of this Court in Director of Income Tax v. Ericsson AB (2012) 343 ITR 470, this Court in ZTE Corporation (supra) held in para 22 as under: "22. In the present case, the facts are closely similar to Ericson. The supplies made (of the software) enabled the use of the hardware sold. It was not disputed that without the software, hardware use was not possible. The mere fact that separate invoicing was done for purchase and other transactions

did not imply that it was royalty payment. In such cases, the nomenclature (of license or some other fee) is indeterminate of the true nature. Nor is the circumstance that updates of the software are routinely given to the Assessee"s customers. These facts do not detract from the nature of the transaction, which was supply of software, in the nature of articles or goods. This Court is also not persuaded with the submission that the payments, if not royalty, amounted to payments for the use of machinery or equipment. Such a submission was never advanced before any of the lower tax authorities; moreover, even in Ericson (supra), a similar provision existed in the DTAA between India and Sweden."
8. The ITAT has, in its impugned order dated 18th May 2015, also relied upon the decision in Ericson (supra) and Director of Income Tax v. ITA Nos. 909/2015, 28/2016, 861/2016, 944/2016, 4/2017, 6/2017 Page 6 of 7 Infrasoft Limited (2014) 220 Taxman 273 (Del) and held as under: 41. Before us, the learned counsel for the Assessee as well as the learned D.R. relied on several decisions of the High Court and Tribunal rendered on the subject. These decisions are not being considered as the issue is extensively dealt by the Hon'ble Jurisdictional High court in the cases of M/s Ericsson A.B. and Infrasoft Ltd. (supra) which are binding on this Tribunal. We observe that all the arguments put forth by the Revenue" and the Assessee are considered and answered in these decisions. Further, the Delhi High Court in Infrasoft has expressed it~ disagreement with the view taken" by the Karnataka High Court in the case of Samsung Electronics Co Ltd. Hence, the decisions relied by the learned CITDR in the case of Samsung Electronics and Gracemac Corporation (supra) does not help the

case of the Revenue, as we are under the Jurisdiction of the Hon'ble Delhi High Court. 42. In view of the above, respectfully following the decision of Hon'ble Jurisdictional High Court in the case of Ericsson A.B. (supra) and Infrasoft Ltd. (supra), we hold that the consideration received by the Assessee for supply of product along with license of software to End user is not royalty under Article 12 of the Tax Treaty. Even where the software is separately licensed without supply of hardware to the end users (i.e. eight out of 63 customers), we are of the view that the terms. of license agreement is similar to the facts of Infrasoft Ltd' (supra). Accordingly, we- hold' that there was no transfer of any right in respect of copyright by the Assessee and it was a case of mere transfer of a copyrighted article. The payment is for a copyrighted article and represents the purchase price of an article. Hence, the payment for the same is not in the nature of royalty under Article 12 of the Tax Treaty. The receipts would constitute business receipts in the hands of the Assessee and is to be assessed as business income subject to assessee having business connection/PE in India as per adjudication on Ground No.5." 9. With the ITAT having followed the decisions of this Court and this Court having reiterated the legal position in Commissioner of Income Tax, International Taxation -2 v. ZTE Corporation (supra), the Court answers ITA Nos. 909/2015, 28/2016, 861/2016, 944/2016, 4/2017, 6/2017 Page 7 of 7 Question (i) in the negative and holds that the impugned order of the ITAT suffers from no legal infirmity. Question (i) is, therefore, answered in favour of the Assessee and against the Revenue. 10. Turning to Question (ii) regarding the interpretation of Section 234B of the Act, the Court

finds that in Commissioner of Income Tax, International Taxation - 2 v. ZTE Corporation (supra), the question has been answered in favour of the Assessee and against the Revenue following the decision in Director of Income Tax v. GE Packaged Power Inc. 373 ITR 65. Consequently, this issue is also answered against the Revenue and in favour of the Assessee'"

12. On finding party that there is no change in the factual matrix in Assessment Year under consideration as compared to earlier years, which has also been accepted by the lower authorities, respectfully following the findings of the co-ordinate bench, being upheld by the Hon'ble High Court of Delhi, we are of the considered view that receipts would constitute business receipts and is to be assessed as such, subject to the assessee having business connection/PE in India. Ground No. 2 is, accordingly, allowed.

13. Next grievance relates to the allegation that the assessee is having installation and dependent agent/PE in India.

14. This issue is also no more res Integra, as the same has been considered and decided by the co-ordinate bench in a bunch of appeals relating to Assessment Years 2003-04 to 2010-11 in ITA No.

1124/DEL/2014 and Ors. Relevant findings of the co-ordinate bench read as under:

> "91. We have considered the rival contentions and the material on record. The existence of PE in India is the matter of dispute in this ground. Revenue has contended that the assessee has fixed PE, installation PE and Dependent Agent PE in India. Our finding in respect of each of the forms of PE is as under: Fixed PE: As per Article 5(1) of the India –USA DTAA, the term 'permanent establishment' means a fixed place of business through which the business of an enterprise is wholly or partly carried on. Article 5(2) deals with various instances resulting in PE. Article 5(3) deals with cases or facts which do not result in PE. One of the exceptions under Article 5(3) is maintenance of a fixed place of business solely for the purpose of advertising, for the supply of information, for scientific research or for other activities which have a preparatory or auxiliary character, for the enterprise. The assessee has contended that its activities in India are of preparatory or auxiliary character and, hence, there is no PE in India. The revenue, on the other hand, has contended that the business of the assessee is already set up in India and, hence, there cannot be any 'preparatory' and the sale activity undertaken is the main business activity and cannot be regarded as 'auxiliary' nature. As regards the fixed place of business in India, it is contended by the assessee that the business place of Aspect India is not under the control or at the disposal of the assessee and, hence, there is no fixed PE. The revenue, on the other hand, has

contended that since the employees of the assessee were in India, the assessee has carried on business in India. After considering the material on records, we are of the view that neither the assessee nor the revenue has been able to conclusively demonstrate the absence or presence of the assessee's fixed place of business in India under Article 5 of the India – 64 USA Treaty. The revenue has, further, contended that the assessee has not submitted the information on visit reports submitted by the employees and information on e- mails of these visiting employees. We, therefore, set aside the matter and remitted to the assessing officer for proper verification regarding existing of PE in India. The assessee also shall submit the details as called for by the assessing officer. Installation PE: The revenue contends that since installation and support services are provided by Aspect India, there exists an installation PE of the assessee in India. As per Article 5(2) of India – USA Treaty, the term 'Permanent Establishment' includes especially the following: (i) Clause (j): An installation or structure used for the exploration or exploitation of natural resources, but, only if so used for a period of more than 120 days in any twelve-month period; (ii) Clause (k): A building site or construction, installation or assembly project or supervisory activities in connection therewith, where such site, project or activities (together with other such sites, projects or activities, if any) continue for a period of more than 120 days in any twelve-month period. There is no dispute that clause (j) above is not applicable. The dispute is with regard to existence of PE under clause (k) above. As per Article 5(2)(k), a building site or construction, installation or assembly project or supervisory

activities in connection therewith is regarded as PE is such project or activities (together with other such sites, projects or activities, if any) continue for a period of more than 120 days in any twelve-month period. Article 5(2)(k) should be read as a whole. The term 'in connection therewith' would apply for the entire preceding words viz., a 'building site or construction, installation or assembly project or supervisory activities'. The term installation project cannot be read de-hors the words accompanying it. Thus, when the entire clause is 65 red as a whole, it would be evident that the installation or assembly project or supervisory activities should be in connection with the building site or construction. In the present case, there is no dispute that the assessee does not carry on business in India through a building site or construction. Consequently, we are of the view that there is no installation PE of the assessee in India. Dependent Agent PE: Article 5(4) of India – USA Treaty deals with the Dependent Agent PE. It reads as under: Notwithstanding the provisions of paragraphs 1 and 2 where a person-other than an agent of an independent status to whom paragraph 5 applies –is acting in a Contracting State on behalf of an enterprise of the other Contracting State, that enterprise shall be deemed to have a permanent establishment in the first-mentioned State, if: (a) He has and habitually exercises in the first-mentioned State an authority to conclude on behalf of the enterprise, unless his activities are limited to those mentioned in paragraph 3 which, if exercised through a fixed place of business, would not make that fixed place of business a permanent establishment under the provisions of that paragraph; (b) He has no such authority but habitually maintains in the first mentioned

State a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the enterprise, and some additional activities conducted in the State on behalf of the enterprise have contributed to the sale of the goods or merchandise; or (c) He habitually secures orders in the first-mentioned State, wholly or almost wholly for the enterprise 66 The first and foremost requirement under Article 5(4) is that the said Article will apply to a person other than an agent of an independent status to whom paragraph 5 applies. Paragraph 5 of Article states as under: "5. An enterprise of a Contracting State shall not be deemed to have a permanent establishment in other Contracting State merely because it carries on business in that other State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business. However, when the activities of such an agent are devoted wholly or almost wholly on behalf of that enterprise and the transactions between the agent and the enterprise are not made under arm's length conditions, he shall not be considered an agent of independent status within the meaning of this paragraph." Paragraph 5 lays down conditions as to when can an agent; broker is regarded as dependent agent or independent agent. If the agent is devoted wholly or almost wholly on behalf of the enterprise and the transactions between the agent and the enterprise are not made under arm's length conditions, the agent is not considered as agent of 'independent status'. In such circumstances, the agent would be regarded as 'dependent agent'. Further, the dependent agent has to satisfy any of the tests laid down in (a), (b) or (c) above in order to constitute a dependent

agent PE of the non-resident. Coming to the facts of the present case, the assessee has argued that Aspect India neither secures orders nor habitually exercises an authority to conclude on behalf of the assessee. It is, therefore, contended that there is no dependent agent PE in India. The revenue, on the other hand, has argued that the assessee has not submitted proper facts to substantiate its contention. It is submitted that the assessee has not submitted information on sale of equipment and licensing of software that are done directly by Aspect India to customers and those done 67 through channel partners. It is contended that the assessee has not demonstrated that it identifies customers and make sales. The statement recorded from the Director, sales of Aspect India is stated to be contrary to the claim of the assessee that Aspect India only acts as a communication channel between the assessee and the customers. Similarly, the assessee's claim that majority of sales are made to channel partners is stated to be factually incorrect since information on all the channel partners, date of agreement and sales made through them is not submitted. It is argued that copy of 'I Approve' system has not been submitted by the assessee for factual verification. Considering these facts, we are of the view that both the revenue and the assessee have not been able to demonstrate the existence or otherwise of the 'dependent agent PE'. In the absence of proper information in this regard, we are unable to decide whether the assessee has a 'dependent agent PE' in India. We accordingly, set aside the issue of 'dependent agent PE' and restore to the assessing officer for fresh consideration.

15. As mentioned elsewhere, the above mentioned bunch of appeals was subject matter before the Hon'ble High Court, but this finding of the Tribunal was not questioned before the Hon'ble High Court of Delhi and therefore, in our considered view, the same has attained finality.

16. Referring to the findings of the co-ordinate bench by which the Tribunal has set aside the issue of dependent agent/PE, the ld. DR vehemently stated that the other inter-related issues relating to attribution of income and claim of remuneration to be at arms length need to be re-examined by the Assessing Officer after examining the issue relating to dependent agent/PE.

17. We find force in this contention of the ld. DR. The Assessing Officer is directed to decide the issue relating to dependent agent/PE in line with the direction of the co-ordinate bench [supra] and thereafter should decide attribution of income and the issue relating to transactions being at arms length price. Thus, Ground Nos 3 to 6 are treated as allowed for statistical purposes.

18. In respect of the issue related to grant of TDS credit, the Assessing Officer is directed to give credit of TDS as per provisions of law. The other issue relating to initiation of penalty proceedings is premature and is dismissed accordingly.

19. As mentioned elsewhere, the grounds of appeal in Assessment Year 2015-16 are identical to grounds in Assessment Year 2014-15 though the quantum may differ. For our detailed discussion given hereinabove, the appeal is according disposed off.

20. In the result, both the appeals of the assessee in ITA No. 7698/DEL/2017 and ITA No. 8276/DEL/2018 are allowed in part for statistical purposes.

The order is pronounced in the open court on 25.06.2020.

Sd/-	**Sd/-**
[SUSHMA CHOWLA] **VICE PRESIDENT**	**[N.K. BILLAIYA]** **ACCOUNTANT MEMBER**

Dated: 25th June, 2020.

VL/

Copy forwarded to:

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

Asst. Registrar,
ITAT, New Delhi

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Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
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Date on which the file goes to the Head Clerk	
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