

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'D' : NEW DELHI)**

**BEFORE SHRI ANIL CHATURVEDI, ACCOUNTANT MEMBER
and**

SHRI KULDIP SINGH, JUDICIAL MEMBER

(THROUGH VIDEO CONFERENCE)

**ITA No.5857/Del./2010
(ASSESSMENT YEAR : 1999-2000)**

**ITA No.5858/Del./2010
(ASSESSMENT YEAR : 2000-01)**

**ITA No.4801/Del./2010
(ASSESSMENT YEAR : 2000-01)**

**ITA No.5859/Del./2010
(ASSESSMENT YEAR : 2001-02)**

**ITA No.4802/Del./2010
(ASSESSMENT YEAR : 2001-02)**

**ITA No.4803/Del./2010
(ASSESSMENT YEAR : 2002-03)**

**ITA No.5860/Del./2010
(ASSESSMENT YEAR : 2002-03)**

**ITA No.4804/Del./2010
(ASSESSMENT YEAR : 2003-04)**

**ITA No.5861/Del./2010
(ASSESSMENT YEAR : 2004-05)**

**ITA No.4805/Del./2010
(ASSESSMENT YEAR : 2004-05)**

**ITA No.1404/Del./2012
(ASSESSMENT YEAR : 2005-06)**

ITA No.1405/Del./2012
(ASSESSMENT YEAR : 2006-07)

ITA No.5222/Del./2010
(ASSESSMENT YEAR : 2007-08)

ITA No.4629/Del./2016
(ASSESSMENT YEAR : 2008-09)

ITA No.2138/Del./2017
(ASSESSMENT YEAR : 2009-10)

ITA No.3293/Del./2017
(ASSESSMENT YEAR : 2010-11)

M/s. Raytheon Company,
C/o Authorised Representative
SR Batliboi & Co.,
Golf View Corporate Tower – B,
Sector 42, Sector Road,
Gurgaon – 122 002 (Haryana).
(PAN : AADCR3511P)

vs. ADIT,
International Taxation,
Circle 2 (1),
New Delhi.

ITA No.5353/Del./2010
(ASSESSMENT YEAR : 2000-01)

ITA No.5354/Del./2010
(ASSESSMENT YEAR : 2001-02)

ITA No.5355/Del./2010
(ASSESSMENT YEAR : 2002-03)

ITA No.5357/Del./2010
(ASSESSMENT YEAR : 2004-05)

ITA No.1524/Del./2012
(ASSESSMENT YEAR : 2005-06)

ITA No.1525/Del./2012
(ASSESSMENT YEAR : 2006-07)

ITA No.4838/Del./2016
(ASSESSMENT YEAR : 2008-09)

ITA No.2708/Del./2017
(ASSESSMENT YEAR : 2009-10)

ITA No.3481/Del./2017
(ASSESSMENT YEAR : 2010-11)

<p>ADIT, International Taxation,C/o Circle 2 (1), New Delhi.</p>	vs.	<p>M/s. Raytheon Company, Authorised Representative SR Batliboi & Co., Golf View Corporate Tower – B, Sector 42, Sector Road, Gurgaon – 122 002 (Haryana). (PAN : AADCR3511P)</p>
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(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri Nageshwar Rao, Advocate
Ms. Deepika Agarwal, Advocate
Ms. Anwasha Saha, Advocate
REVENUE BY : Dr. Prabha Kant, CIT DR

Date of Hearing : 25.03.2021
Date of Order : 31.03.2021

ORDER

PER BENCH :

For the sake of brevity, aforesaid cross appeals filed by the taxpayer as well as Revenue containing identical question of law and facts are being disposed off by way of composite order.

2. Appellant, M/s. Raytheon Company (hereinafter referred to as ‘the taxpayer’) by filing the present appeals sought to set aside the impugned orders dated 18.10.2010, 27.12.2006, 18.10.2010, 18.10.2010, 27.12.2006, 27.12.2006, 30.09.2010, 27.12.2006,

30.09.2010, 27.12.2006, 31.12.2007, 18.11.2008, 28.09.2010, 03.02.2011, 01.02.2012 & 07.05.2013 passed by the Assessing Officer (AO) in consonance with the orders passed by the Id. DRP under section 143 (3)/147 read with section 144C of the Income-tax Act, 1961 (for short 'the Act') qua the assessment years 1999-00, 2000-01, 2000-01, 2001-02, 2001-02, 2002-03, 2002-03, 2003-04, 2004-05, 2004-05, 2005-06, 2006-07, 2007-08, 2008-09, 2009-10 & 2010-11 on the identical grounds except the difference in the figures.

3. Appellant, ADIT, International Taxation, Circle 2 (1), New Delhi (hereinafter referred to as 'the Revenue') by filing the present appeal sought to set aside the impugned orders dated 27.12.2006, 27.12.2006, 27.12.2006, 27.12.2006, 31.12.2007, 18.11.2008, 03.02.2011, 01.02.2012 & 07.05.2013 passed by the Assessing Officer (AO) in consonance with the orders passed by the Id. DRP under section 143 (3)/147 read with section 144C of the Income-tax Act, 1961 (for short 'the Act') qua the assessment years 2000-01, 2001-02, 2002-03, 2004-05, 2005-06, 2006-07, 2008-09, 2009-10 & 2010-11 on the identical grounds except the difference in the figures.

4. At the very outset, Id. AR for the assessee by moving an application dated 17.03.2021, brought on record the fact that

pursuant to the application moved by the assessee for Mutual Agreement Procedure (MAP) before the Competent Authority in United States of America qua the issues involved in the aforesaid appeals, settlement has been reached. A formal confirmation dated 02.03.2021 from the Competent Authority in India to this effect is also brought on record, which is extracted for ready perusal as under :-

**F.No.480/04/2007-FTD.1/54
Government of India
Ministry of Finance
Department of Revenue
Central Board of Direct Taxes
Foreign Tax & Tax Research Division-I**

**905, 9th Floor, C Wing,
Hudco Vishala Building,
14, Bhikaji Cama place,
New Delhi-110066
Dated : 02.March, 2021**

**M/s Raytheon Company .
C/o SRBC & Associates LLP,
Golf View Corporate Tower-B
Sector 42, Sector Road,
Gurgaon-122002**

Madam/sir,

Subject: Communication of resolution of dispute under MAP with the U.S.A. in the case of Raytheon Company for AYs 1999-2000 to 2016-17 in accordance with rule 44G(6) of Income Tax Rules, 1962-reg.

Please refer to the subject cited above.

2. In accordance with Rule 44G(6) of the Income Tax Rules, 1962 ('Rules'), I am directed to state that the Indian and USA Competent Authorities (CAs) have agreed to resolve the MAP in the case of Raytheon Company for AYs 1999-2000 to 2016-17. As per the principles adopted for the purposes of settling this MAP case, Raytheon will be assumed to have

established a permanent establishment ("PE") in India as a result of its activities pursuant to the contracts that were the subject of this case. The business profits earned from those contracts will be deemed to be attributed to the assumed PE and taxed in India (at 30 Percent of profits arrived at after applying the global profit margin to the contract receipts). For purpose of settling this case certain contract revenue from software will be characterized as royalties that are not attributable to the PE. More specifically:

- In the case of the contracts that were subject to Authority for Advance Rulings ("AAR") rulings, the allocation will follow the AAR order. According to the AAR ruling, the revenue from software, software maintenance and support, and software documentation, will be taxable as royalties. The revenue from hardware and "Commercial Off-the-Shelf" software ("COTS"), however, will not be taxable in India.
- In the case of contracts not subject to the AAR rulings, where separate consideration was paid for software and its related elements (e.g. software maintenance and support, and the provision of software documentation), the revenue will be characterized as royalties and taxed accordingly. This royalty income will not be attributable to the assumed PE while the revenue from COTS and hardware will be treated as business income attributable to the assumed PE.
- In the case of contracts other than those covered under the AAR rulings (i.e. software, hardware, and other items) where there is a consolidated consideration for software, hardware and other items, all of the revenue will be considered business income attributable to the assumed PE .

3. The details of the revenue taxable as per the MAP settlement is as under:

TABLE 1

Particulars	Amount in (INR Crores)		Amount in (USD Mn)	
	Business Income	Royalty	Business Income	Royalty
Gross Revenue	821.97	243.04	117.42	34.72
Taxable Revenues;	-	128.65	-	18.38
A) As per AAR				

Ruling (please refer Table 2)				
B) Contracts with Split consideration (please refer Table 3)	3.18	114.39	0.45	16.34
C) Consolidated contracts and balance contracts (please refer Table 4)	21.87	-	3.12	-
Total Taxable Revenue (A+B+C)	25.05	243.04	3.57	34.72

TABLE 2 : AAR Rulings

Name of the Contracts	Royalty		Business Income	
	Taxable Income	Tax-ability	Taxable Income	Tax-ability
Software maintenance support contract and amendment to software maintenance	34.92	5.06	0	0
Hardware repair support contract and amendment to hardware repair	0	0	0	0
Replacement of DG servers and related software	70.85	9.87	0	0
S-SDD	0	0	0	0
D3R	22.88	2.56	0	0
Total	128.65	17.49	0	0
Amount in INR crores	128.65	17.49	0	0
Amount in USD Millions	18.38	2.50	0	0

TABLE 3 : Split Consideration

Name of the Contracts	Royalty		Business Income	
	Taxable Income	Tax-ability	Taxable Income	Tax-ability
Supply of Future Air Navigation System (FANS)	0	0	0.37	0.16
MAFI Software	0	0	1.58	0.67
RVSM	8.40	1.26	0	0
AODB Contract*	1.53	0.16	0	0
ASMS	28.71	3.03	0	0
BEL Contract*	0.36	0.04	0.53	0.23
MAAT	7.61	0.80	0.22	0.09
MDER Contract	8.28	0.87	0.43	0.18
BEL Athena Contract*	50.76	6.74	0.04	0.02
M&D Software/ECP*	3.84	0.41	0	0
RASAM	4.90	0.52	0.01	0.004
TOTAL	114.39	13.84	3.18	1.35
Amount in INR Crores	114.39	13.84	3.18	1.35
Amount in USD million	16.34	1.98	0.45	0.19

*These projects are ongoing.

TABLE 4 : Consolidated and Balance Contracts

Name of the contracts	Taxable Business Income	Taxability
GAGAN TDS	1.18	0.50
ATS automation Chennai	0.76	0.32
GAGAN FOP	10.50	4.43
Chennai Contract*	0.54	0.23
Supply of ILS	0.06	0.03
GAGAN FSAT*	1.40	0.60
Field Engineering Services	0.04	0.02

MATS BD Services	0.05	0.03
Supply of spares 2000	0.86	0.41
Rotary Joint Spares	0.01	0.00
Supply of spares 2003	0.68	0.28
Contract for Automation of Spares	0.13	0.06
Hardware Repair Support Contract 2009	1.23	0.52
Amendment No.3 Hardware Repair	2.52	1.08
Radar Spares 2011	0.19	0.08
MAFI Hardware *	1.71	0.74
MAFI Services*	0.01	0.00
Total	21.87	9.33
Amount in INR Crores	21.87	9.33
Amount in USD millions	3.12	1.33

***These projects are ongoing**

4. As per Rule 44G(7) of the Rules, you are requested to communicate your acceptance or non-acceptance of the above resolution in writing to the Competent Authority in India. Further, the said acceptance shall be communicated within thirty days of receipt of this communication under sub-rule(6) of Rule 44G.

5. In the case of acceptance of the above resolution, you are also requested to enclose with it the proof of withdrawal of appeal, if any, pending on the issues that are the subject matter of this resolution, in accordance with sub-rule (8) or Rule 44G. You may also email your response on the following email id: usfttr1-2@gov.in.

Yours Faithfully,

Sd/-

Under Secretary (FT&TR-I), CBDT

Email: usfttr1-2@gov.in"

5. Ld. AR for the assessee sought withdrawal of all the appeals filed by the taxpayer and also sought dismissal of the appeals filed by the Revenue having been become infructuous in view of the settlement reached as per MAP proceedings except ground no.22 in

taxpayer's appeal bearing ITA No.5222/Del/2010 for Assessment Year 2007-08 which needs adjudication by the Tribunal.

6. Ld. DR however, on the other hand, contended that he has no authority to give consent for withdrawal of the Department's appeals as even after the decision of the Competent Authority, certain procedures need to be followed by the Department. Submissions made by the ld. DR are made part of the judicial record.

7. We have heard the ld. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders dated December 21, 2020 passed by the United States Competent Authority, Department of Treasury, Internal Revenue Service, Washington, DC 20224 and the order dated 02.03.2021 of the Competent Authority i.e. Government of India, Ministry of Finance, Department of Revenue, Central Board of Direct Taxes, Foreign Tax & Tax Research Division-I in the light of the facts and circumstances of the case.

8. Bare perusal of the letter dated 02.03.2021 written by the Ministry of Finance, Department of Revenue, Central Board of Direct Taxes, Foreign Tax and Tax Research Division-1 to M/s. Ratheon Company, the taxpayer in this case, apparently goes to prove that all the issues raised by the taxpayer as well as the

Revenue by way of filing aforesaid cross appeals have been settled under MAP, but subject to the acceptance to be conveyed by the taxpayer to the Competent Authority in India within 30 days of the receipt of the communication under Rule 44G (7) of the Income-tax Rules, 1962.

9. In view of the matter, we are of the considered view that when all the issues raised by the taxpayer and the Revenue have been settled under MAP, no purpose would be served by keeping the appeals filed by the taxpayer and Revenue alive just for the sake of some procedural formalities as contended by the Id. DR, because procedural technicalities is handmaid of justice. We wish to bring on record that when Id. CIT DR has failed to controvert the assertions made by the Id. AR for the taxpayer made in the light of the letter dated 02.03.2021 (supra) that “*all the issues pertaining to the appeals filed by the taxpayer as well as Revenue having been settled once for all under MAP*”, he should not stick to his ceremonial contention that he has not received any intimation from the AO concerned to withdraw the appeals filed by the Revenue. Even otherwise, he would have got the matter expedited at the level of AO, being a senior officer of the Department.

10. So, we are of the considered view that Id. CIT DR is not merely a post office to put forward the decision made by the AO

rather being an officer of the court, he is required to assist the Bench on the factual and legal aspects involved in the aforesaid appeals in the interest of speedy disposal of litigation for the ease of business, to which Government of India is committed to.

11. In these circumstances, we are of the considered view that the letter dated 02.03.2021 written by the CBDT to the taxpayer stating therein that since all the issues raised by virtue of the taxpayer's appeals as well as Revenue's appeals have been settled once for all under MAP proceedings, nothing survives and as such, the contentions raised by the Id. DR to keep the appeals filed by the Revenue alive till completion of some formalities are not sustainable. Hence, the aforesaid appeals filed by the taxpayer are liable to be dismissed as withdrawn forthwith and aforesaid cross appeals filed by the Revenue are required to be ordered to be dismissed having been become infructuous, except ground no.22 of appeal bearing ITA No.5222/Del/2010 for Assessment Year 2007-08 filed by the taxpayer, which is extracted as under :-

“On the facts and in the circumstances of the case, the learned Assistant Director of Income Tax, Circle 2 (1), International Taxation, New Delhi :-

22. Erred in levy of interest under section 234B of the Act without appreciating that the appellant doesn't have any advance tax liability in terms of sections 207-209 of the Act.”

12. The taxpayer challenged levy of interests u/s 234B of the Act made by the AO on the ground that AO without appreciating the fact that the taxpayer does not have any advance tax liability in terms of sections 207 – 209 of the Act, levy of interest u/s 234B is not sustainable and relied upon the decision rendered by **Hon’ble Delhi High Court judgement in case of Director of Income-tax, International Taxation vs. GE Packaged Power Inc. (2015) 373 ITR 65 (Delhi).**

13. Undisputedly, the taxpayer is a non-resident company having establish Permanent Establishment (PE) in India and its entire tax was to be deducted at source by the payee on payment and as such, the taxpayer was not under any obligation to make payment of advance tax. In these circumstances, levy of interest u/s 234B from the taxpayer is not sustainable in the eyes of law. Operative part of the judgment passed by the **Hon’ble Delhi High Court in GE Packaged Power Inc.** (supra) is extracted for ready perusal as under :-

“Section 234B, read with sections 195 and 209, of the Income-tax Act, 1961 - Interest, chargeable as (Foreign assessee) - Assessee had a PE in India - Assessing Officer computed taxable income of assessee by attributing some percentage of sale price/consideration received as profits to PE and interest under section 234B for failure to pay advance tax was levied - Whether since assessee were non-resident companies entire tax was to be deducted at source on payments made by payee to it and there was no question of payment of advance tax by assesseees - Held,

yes - Whether, therefore, it would not be permissible for revenue to charge any interest under section 234B from assesseees - Held, yes [Para 23] [In favour of assessee]

22. This Court, therefore, holds that Jacobs Civil Incorporated/Mitsubishi Corporation (supra) applies in such situations; Alcatel Lucent USA Inc. (supra) can be explained as a decision turning upon its facts; its seemingly wide observations, limited to the circumstances of the case. This Court, therefore, holds that the view taken by ITAT was correct; the primary liability of deducting tax (for the period concerned, since the law has undergone a change after the Finance Act, 2012) is that of the payer. The payer will be an assessee in default, on failure to discharge the obligation to deduct tax, under Section 201 of the Act.

23. For the above reasons, this Court finds that no interest is leviable on the respondent assesseees under Section 234B, even though they filed returns declaring NIL income at the stage of reassessment. The payers were obliged to determine whether the assesseees were liable to tax under Section 195(1), and to what extent, by taking recourse to the mechanism provided in Section 195(2) of the Act. The failure of the payers to do so does not leave the Revenue without remedy; the payer may be regarded an assessee-in-default under Section 201, and the consequences delineated in that provision will visit the payer. The appeal of the Revenue is accordingly dismissed without any order as to costs.”

14. So, following the decision rendered by **Hon’ble Delhi High Court in GE Packaged Power Inc.** (supra), we are of the considered view that when undisputedly the taxpayer is a non-resident company and tax has been deducted at source on the entire payment made to it by the payee and it is under no obligation to make payment of advance tax and in these circumstances, levy of tax u/s 234B is not sustainable, hence ordered to be deleted. So, ground no.22 is decided in favour of the taxpayer.

15. Consequently, all the aforesaid appeals filed by the taxpayer are dismissed as withdrawn, however, appeal bearing ITA No.5222/Del/2010 for AY 2007-08 is partly dismissed as withdrawn and partly allowed qua ground no.22 raised by the taxpayer and at the same time, all the cross appeals filed by the Revenue are dismissed having been become infructuous. However, as an abundant caution, it is made clear that Revenue would be at liberty to get the aforesaid cross appeals filed by the Revenue restored, if so required at any point of time.

Order pronounced in open court on this 31st day of March, 2021.

**Sd/-
(ANIL CHATURVEDI)
ACCOUNTANT MEMBER**

**sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

**Dated the 31st day of March, 2021
TS**

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.DRP
- 5.CIT(ITAT), New Delhi.

**AR, ITAT
NEW DELHI.**