

IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH: 'D' NEW DELHI

BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER
AND
SHRI O.P. KANT, ACCOUNTANT MEMBER
[Through Video Conferencing]

ITA No.1003/Del/2018
Assessment Year: 2011-12

Raytheon Company C/o SR Batliboi & Co. Golf view Corporate Tower Sector- 42, Sector Road, Gurgaon-122002	Vs.	DCIT Circle - 2 (1) (1) International Taxation, New Delhi
(Appellant)		(Respondent)

ITA No.1067/Del/2018
Assessment Year: 2011-12

DCIT Circle - 3 (1) (1) International Taxation, New Delhi	Vs.	Raytheon Company C/o SRBC & Associates Golf view Corporate Tower -B Sector- 42, Sector Road, Gurgaon-122002
(Appellant)		(Respondent)

Appellant by	Ms. Anwasha Saha, Advocate
Respondent by	Sh. Bhaskar Goswami, CIT

Date of hearing	29.07.2021
Date of pronouncement	30.07.2021

ORDER

PER O.P. KANT, AM:

These cross appeals by the assessee and the revenue are directed against order dated 27/11/2017 passed by the Ld .Commissioner of Income-tax (Appeals)-43, New Delhi [in short the Ld. CIT(A)] for assessment year 2011-12. Both the appeals being arising from the same order, both were heard together and disposed off by way of this consolidated order for convenience.

2. The ground raised by the assessee in its appeal are reproduced as under:

1. The order of learned Commissioner of Income Tax (Appeals) - 43, New Delhi [‘CIT (A)’] is bad in law to the extent prejudicial to the interest of the Appellant.

Taxation of contract for ‘Amendment to Software Maintenance Support Contract’

2. The CIT (A) erred in concluding that the revenues earned from Amendment to Software Maintenance contracts (in relation to MATS-BD equipment) were in the nature of Fee for Included Services (‘FIS’) as per Article 12(4) (a) of the India-USA Double Taxation Avoidance Agreement (‘India-USA DTAA’).

3. The CIT (A) has grossly erred in concluding that since the embedded software in the MATS-BD contract was in the nature of Royalty, hence the revenues from Amendment to Software Maintenance Contract partake the nature of FIS as per Article 12(4)(a) of the India-USA DTAA.

4. The CIT(A) has erred in relying on the Advance Ruling obtained by the customer under the subject contract to which the appellant was not a party for taxing the receipts under the Amendment to Software Maintenance contract as FIS.

5. Without prejudice to ground no’s 2 & 3, the CIT (A) erred in not appreciating that the revenues earned by the Appellant under the Amendment to Software Maintenance Contracts partook the nature of business income which was not taxable in India when the CIT (A) had deleted the constitution of PE of the Appellant in India.

Taxation of receipts under DG Servers and related software ('DG Servers') and Surveillance Situation Display Data ('S-SDD')

6. The CIT (A) erred in treating the revenues earned under the DG Servers and S-SDD contract in the nature of Royalty under Article 12(3)(a) of the India-US DTAA.

7. The CIT (A) erred in not appreciating that the revenues earned were only on account of "right to use of a copyrighted article" being software and "no right in the copyright" was granted by the Appellant to the Indian customer.

8. The CIT(A) erred in not appreciating the fact that the software supplied in respect of subject contract is embedded in hardware and is in the nature of hardware only.

9. Without prejudice to ground no's 6, 7 & 8, the CIT (A) erred in not appreciating that the revenues earned by the Appellant partook the nature of business income which were not taxable in India when the CIT (A) had deleted the constitution of PE of the Appellant in India.

Taxation of contract for Automation Software Maintenance Services ('ASMS')

10. The CIT (A) erred in concluding that the revenues earned from Software Maintenance under ASMS contract (in relation to the equipment supplied under DG-Servers contract) were in the nature of Fee for Included Services ('FIS') as per Article 12(4) (a) of the India-USA DTAA.

11. The CIT (A) has grossly erred in concluding that since the embedded software in the DG Servers contract was in the nature of Royalty, hence the revenues from Amendment to Software Maintenance Contract partake the nature of FIS as per Article 12(4)(a) of the India-USA DTAA.

12. Erred in relying on the Advance Ruling obtained by the customer under other contract i.e. the Amendment to Software Maintenance contract to which the appellant was not a party for taxing the receipts under the ASMS contract as FIS.

13. Without prejudice to ground no's 10, 11 & 12, the CIT (A) erred in not appreciating that the revenues earned by the Appellant under the ASMS Contract partook the nature of business income which was not taxable in India when the CIT (A) had deleted the constitution of PE of the Appellant in India.

Taxation of receipts under Airport operation Data Base (AOBD) Interface for Delhi & Mumbai Airports

14. The CIT(A) erred in holding that the revenues from supply of documentation are taxable as Royalty income under Article 12 of India-USA DTAA without appreciating that it's a case of documentation which has been supplied along with the equipment, for the limited purposes of use to operate the equipment and not for any commercial exploitation.

15. *The CIT (A) erred in not appreciating that the revenues earned were only on account of “right to use of a copyrighted article” being documentation and “no right in the copyright” was granted by the Appellant to the Indian customer.*

16. *Without prejudice to ground no’s 14 & 15, the CIT (A) erred in not appreciating that the revenues earned by the Appellant partook the nature of business income which were not taxable in India when the CIT (A) had deleted the constitution of PE of the Appellant in India.*

All of the above grounds of appeal are without prejudice and notwithstanding each other.

3. The ground raised by the revenue in its appeal are reproduced as under:

(i) Whether on the facts and in the circumstances of the case the CIT(A) has erred in holding that the assessee had no PE in India ignoring the findings of fact marshaled by the AO.

(ii) Whether on the facts and in the circumstances of the case the CIT(A) has erred in holding that receipts of the assessee from contract for Automation Spares, from Hardware Repair Support Contract, Amendment for Hardware Repair Support Contract (2006 & 2009), were not taxable in India by holding these to be 100% in the nature of business income which was not taxable in India in the absence of PE ignoring the detailed findings of the AO that the assessee constitutes a PE in India.

(ii) Whether on the facts and in the circumstances of the case, the CIT (A) has erred in holding that part receipts of the assessee from Chennai contract for supply of Automations System, from RASAM contract, from Gagan - FOP contract & from Airport Operation

Database Interface (AODB) between Delhi & Mumbai Airports, were not taxable in India by holding these to be in the nature of business income which was not taxable in India in the absence of PE ignoring the detailed findings of the AO that the assessee constitutes a PE in India.

(iii) Whether on the facts and circumstances of the case, the CIT(A) has erred in holding that all receipts were business income, ignoring the Ruling by the AAR regarding taxability of royalty and FIS components of these contracts, in assessee's own case albeit on ruling sought by Airport Authority of India Vs DIT 185 Taxmann 494.

(iv) Whether on the facts and circumstances of the case, the CIT(A) has erred in allowing relief by deleting additions made by the AO taxing part receipts of assessee Gagan - FOP, AODB, D3R, RASAM and Chennai contracts as Royalty in India, ignoring AO's detailed findings to how that right to use software was conferred under software component of these contracts which was covered by Article 12(4)(a) of the treaty being ancillary to enjoyment of right conferred.

(vi) Whether on the facts and circumstances of the case, the CIT(A) has erred in holding that the embedded software component cannot be taxed in absence of PE.

(vii) Whether on the facts and circumstances of the case CIT(A) has erred in holding that interest U/s 234B was not chargeable in this case by relying upon the decision of Hon'ble Delhi High Court in the

case of Jacobs Civil Incorporated/Mitsubishi Corporation where as the department has contested the issue and its review petition before the Apex Court stands admitted.

(viii) The appellant prays for leave to add, amend, modify or alter any grounds of appeal at the time or before the hearing of the appeal.

4. At the outset, the Ld. Counsel of the assessee submitted that the assessee has opted for settlement of its disputes through Mutual Agreement Procedure (MAP) and the Central Board of Direct Taxes (CBDT), New Delhi has duly allowed the application of the assessee for settlement under MAP. The Ld. Counsel referred to the letter of the CBDT dated 02/03/2021 issued to the assessee. In view of the settlement of dispute under the MAP, the Ld. Counsel of the assessee submitted that the assessee wishes to withdraw its appeal. The Ld. Counsel also submitted that issue in dispute involved in the appeal of the Department are also covered by the MAP and therefore appeal of the Department is also rendered infructuous.

5. The Ld. DR though could not controvert the fact of MAP settlement, however sought time for verification of facts.

6. We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. The

contention of letter issued by the CBDT directing settlement of disputes under MAP is reproduced as under:

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;				
A) As per AAR Ruling (please refer Table 2)	-	128.65	-	18.38
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	Taxability	Taxable Income	Taxability
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	Taxability	Taxable Income	Taxability
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 44 G (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) of Rule 44G. You may also email you response on the following email id : [usftr1-2@gov.in.](mailto:usftr1-2@gov.in) (emphasis supplied externally)

7. In compliance to the direction of the CBDT, the assessee has requested for withdrawal of its appeal. Accordingly, the appeal of the assessee is dismissed as withdrawn. As common issues are involved in the appeal of the revenue, the appeal of the revenue is also rendered infructuous and same is dismissed, with liberty to

make a request for recall of the appeal in case any of issue raised in the grounds of the appeal is not covered under MAP.

8. In the result, both the appeals of assessee and revenue respectively are dismissed.

Order pronounced in the open court on 30.07.2021.

**Sd/-
(KUL BHARAT)
JUDICIAL MEMBER**

**Sd/-
(O.P. KANT)
ACCOUNTANT MEMBER**

Dated: 30th July, 2021

Neha

Copy forwarded to:

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

Asst. Registrar, ITAT, New Delhi

Sl. No.	Particulars	Date
1.	Date of dictation:	30.07.2021
2.	Date on which the draft of order is placed before the Dictating Member:	30.07.2021
3.	Date on which the draft of order is placed before the other Member:	30.07.2021
4.	Date on which the approved draft of order comes to the Sr. PS/PS:	30.07.2021
5.	Date of which the fair order is placed before the Dictating Member for pronouncement:	30.07.2021
6.	Date on which the final order received after having been signed/pronounced by the Members:	30.07.2021
7.	Date on which the final order is uploaded on the website of ITAT:	30.07.2021
8.	Date on which the file goes to the Bench Clerk	
9.	Date on which files goes to the Head Clerk:	
10.	Date on which file goes to the Assistant Registrar for signature on the order:	
11.	Date of dispatch of order:	