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

Before Sh. Kul Bharat, Judicial Member

Dr. B. R. R. Kumar, Accountant Member

(Through Video Conferencing)

ITA No. 6661/Del/2019 : Asstt. Year : 2016-17

Aspect Software Inc. C-56, Nizamuddin (East), New Delhi-110013	Vs	DCIT, Circle-1(1)(1), New Delhi-110002
(APPELLANT)		**(RESPONDENT)**
PAN No. AAGCA7513D		

Assessee by : Ms. Rashmi Chopra, Adv.
Revenue by : Sh. Sunil Kumar, CIT DR

Date of Hearing: 20.09.2021		**Date of Pronouncement: 24.09.2021**

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeal has been filed by the assessee against the order dated 24.06.2019 passed by the AO u/s 143(3) r.w.s. 144C(13).

2. Following grounds have been raised by the assessee:

"***1. General***

1.1 That on facts and circumstances of the case and in law, the order passed by the Ld. AO pursuant to the directions issued by Hon'ble DRP is bad in law in as much as failed to appreciate the facts involved and law thereon.

1.2 That on facts and in law, the Ld. AO/ DRP have erred in not following the decision of Hon'ble Delhi

High Court ('HC') and Hon'ble ITAT in the case of Appellant's own case for earlier years.

1.3 That on facts and circumstances of the case and in law, while passing the assessment order, the Ld. AO has erred in computing the total income of the Appellant at Rs. 12,48,05,161 as against Rs. 65,51,514 income returned by the Appellant and therefore, the order of the Ld. AO is bad in law and needs to be annulled.

2. Revenue earned from supply of Software taxed as 'Royalty' is incorrect

2.1 That on facts and circumstances of the case and in law, the Ld. AO/DRP have grossly erred in taxing the revenue earned by the Appellant amounting to Rs. 11,82,53,647 from supply of software to customers in India as 'royalty' under Article 12 of the Double Taxation Avoidance Agreement between India and United States of America ('India - US tax treaty').

2.2 That on facts and in law, the Ld. AO/ DRP have erred in not following the decision of Hon'ble HC and Hon'ble ITAT in Appellant's own case for earlier years' where the Hon'ble HC and Hon'ble ITAT has held that the consideration received by the Appellant for supply of software is for copyrighted article and is not in the nature of royalty under Article 12 of the India-US tax treaty.

2.3 That on facts and circumstances of the case and in law, Hon'ble DRP has grossly erred in confirming the observation of the Ld AO that software 'made available' a 'process' to customers who used the 'process' while carrying out their business.

2.4 That on facts and circumstances of the case and in law, Ld AO / DRP have erred in relying on nomenclature 'license' written in the agreements rather than the substance of the transaction which was sale of good, i.e. sale of software.

2.5 That on facts and circumstances of the case and in law, the Ld AO has erred in placing reliance on decision of Gracemac Corporation [134 TTJ 257 (Delhi)], which is not a good law in view of various legal and factual inaccuracies in the observations recorded and which has been distinguished by various courts subsequently.

2.6 That on facts and in law, the Hon'ble DRP and Ld. AO have erred in not appreciating that:

2.6.1 the definition of Royalty is different in the Act and the India-US tax treaty;

2.6.2 the benefits available under the India-US tax treaty would still be available to the Appellant as the amendments in the Finance Act 2012 would not impact the treaty interpretation of the term royalty.

2.6.3 That on facts and in law, the Hon'ble DRP and Ld. AO have failed to appreciate that the sale of software is a sale of 'Copyrighted Article' and not 'Copyright' and accordingly, the revenue from sale of software is in the nature of business income not taxable under Article 7 of India-US tax treaty in the absence of the PE of the Appellant in India.

2.7 That on facts and in law, the Ld. AO/ DRP have erred in not relying and distinguishing the decisions relied upon by the Appellant including the Hon'ble Apex Court and the jurisdictional High Court in the cases of Tata Consultancy Services (2004) (271 ITR 401) (SC), ZTE Corporation (2017) (237 DLT 572) (Del HC), Infrasoft Ltd. (264 CTR 239), Ericsson A.B. and Metapath (343 ITR 370) (Del HC), Nokia Networks OY (253 CTR 0417) (Del HC), Alcatel Lucent Canada (2015) (372 ITR 0476) (Del HC) on the one side and rather relying on the decisions of other courts and AAR in the cases of Samsung Electronics [(203 taxman 477) (Kar HC) / (TS-696-HC-2011)], Millenium IT Software [(338 ITR 391) (AAR) / (TS-585-AAR-2011)], ING Vysya Bank Ltd. DDIT (61 DTR 401, ITAT Bangalore), Citrix Systems (343 ITR 1)/ (AAR No. 822 of 2009)) on the other side.

3. Revenue earned from supply of software taxed @ 15% as per India-US tax treaty in the final assessment order, instead of applying beneficial rate of 10% as per the provisions of section 115A of the Act.

Without prejudice to the Ground No. 2, on facts and circumstances of the case and in law, the Ld. AO/ DRP have grossly erred in taxing the revenue from supply of software as 'royalty' @ 15% as per India - US tax treaty in the final assessment order, instead of applying beneficial rate of 10% as per the provisions of section 115A of the Act.

4. Revenue earned from rendering of professional, educational and training services taxed @ 15% as per India-US tax treaty in the final assessment order, instead of applying beneficial rate of 10% claimed by the Appellant in its return of income as per the provisions of section 115A of the Act.

That on facts and circumstances of the case and in law, the Ld. AO has grossly erred in taxing the revenue from rendering of professional, educational and training services @ 15% as per the provisions of India - US tax treaty in the final assessment order, instead of applying beneficial rate of 10% claimed by the Appellant in its return of income as per the provisions of section 115A of the Act.

5. DRP directions are laconic with respect to how TP provisions apply to Appellant

5.1 Without prejudice to our other grounds of appeal, the order issued by the Hon'ble DRP is laconic as the DRP has failed to issue directions to the Ld. AO ascribing cogent and germane reasons for their agreement with the findings of the Ld. AO in the Draft order of assessment under section 144C of the Act.

5.2 That on facts and in the circumstances of the case and in law, the Ld. AO/DRP have erred in holding that the transfer pricing provisions are applicable to the Appellant. The Appellant's transaction of sale of its

products in India directly to third parties or through channel partners does not qualify as an 'international transaction' (defined under the Act) as it does not entail a transaction between two 'associated enterprises'.

5.3 That on facts and in the circumstances of the case and in law, the Ld. AO/DRP have erred by not appreciating that transfer pricing provisions are not applicable in the instant case and therefore, erred in initiating penalty proceedings under section 271BA of the Act for not furnishing the Accountant's Report in Form 3CEB as prescribed under Section 92E of the Act.

6. Levy of interest under section 234C of the Act

That on facts and circumstances of the case and in law, the Ld. AO has grossly erred in charging interest under section 234C of the Act.

7. Initiation of Penalty Proceedings

That on facts and circumstances of the case and in law, the Ld. AO has erred in initiating the penalty proceedings under section 271(1)(c) of the Act holding that the Appellant has furnished inaccurate particulars of income."

3. Aspect Software Inc. is a corporation incorporated in Delaware State, USA. The assessee is engaged in the business of provision of hardware, software and rendering of support services that enable call centre companies, to better manage customer interactions via voice, email, web and fax. The assessee derives its revenue primarily from supply of "contact solutions", software license and provision of services including, installation, maintenance and professional services. The assessee has also provided installation/ implementation and maintenance of the supplied hardware and software.

4. Aspect US had two subsidiaries in India - Aspect Contact Center Software India Pvt. Ltd. (ACC) and (ii) Aspect Technology Center (India) Pvt. Ltd. (ATC). ACC is involved in the business of installation of equipment and providing, marketing support to the assessee. ATC is the R&D entity, which involves as well as provides, testing, providing maintenance support to the assessee.

5. During the year, the assessee received revenues in India during the F.Y. 2015-16 from the following categories which is as under:

a. Supply of hardware (offshore supply) – Rs.474,18,129/-
b. Supply of software (offshore supply) – Rs.1182,53,647/-
c. Maintenance and implementation services – Rs.1834,59,663/-
d. Professional Services (offered to tax) – Rs.65,51,510/-

6. The AO held that the assessee had an Agency PE in India in the form of Aspect Contact Centre Software India Pvt. Ltd. for the supply of hardware in India and proposed 15% attribution of income to Indian PE and also allocated proportionate expenditure of 13.1% out of the amount reimbursed to Aspect India (PE) by the assessee. The AO has also held that the amount received by the assessee on account of software licensing as loyalty u/s 9(1)(vi) & (vii) of the Income Tax Act, 1961 and under the Article 12 of the treaty between India and USA.

7. The ld. DRP has disagreed with the findings of the AO in the draft order and directed that attribution of profits of 15% from the sale of equipment and also the expenditure be scored

through while passing the final Assessment Order, thus, leaving the issue of taxation of the supply of software under royalty. The AO taxed the supply of software @ 15% whereas the assessee contended that the royalty should be taxed at the beneficial rate of 10% as per the provisions of Section 115A(1)[(BA)(B)].

8. During the arguments before us, the ld. AR brought to our notice, the order of the Hon'ble Delhi High Court in the assessee's own case for the earlier year dated 25.04.2017 which reads as under:

"CIT (INTERNATIONAL TAXATION) –1 Vs. ASPECT SOFTWARE INC.

ITA Nos. 909/2015, 28/2016, 861/2016, 944/2016, 4/2017, 6/2017 Page 4 of 7 ITA Nos. 909/2015, 28/2016, 861/2016, 944/2016, 4/2017, 6/2017

3. These are appeals under Section 260A of the Income Tax Act, 1961 („Act") by the Revenue against the impugned Order dated 18th May 2015 passed by the Income Tax Appellate Tribunal („ITAT") in ITA Nos. 04/Del/2012, 1124/Del/2014, 1125/Del/2014, 221/Del/2013, 720/Del/2013, and 82/Del/2011 for the Assessment Years („AYs") 2008-09, 2004-05, 2010- 11, 2003-04, 2009-10 and 2007-08 respectively.

4. While admitting these appeals on 16th January, 2017, this Court passed the following order:

"Admit.

The following questions of law arise for consideration:

(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."

5. Apart from the order as noted above, the Court decided that these present appeals would be considered in light of the judgment to be rendered by the Court in a batch of appeals (The Commissioner of Income Tax International Transaction -2 v. ZTE Corporation – ITA 904-909/2016).

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 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. 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 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.

11. These appeals are accordingly dismissed but in the circumstances of the case, no orders as to costs."

9. Since, the issue of taxability of supply of software as royalty has been ruled in favour of the assessee by the order of the Hon'ble High Court, the appeal of the assessee is hereby allowed.

Order Pronounced in the Open Court on 24/09/2021.

Sd/- Sd/-

(Kul Bharat)
Judicial Member

(Dr. B. R. R. Kumar)
Accountant Member

Dated: 24/09/2021
Subodh Kumar, Sr. PS
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR