**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.5591/Del/2017
Assessment Year: 2012-13
**And**
ITA No. 5592/Del/2017
Assessment Year: 2013-14
**And**
ITA No. 5593/Del/2017
Assessment Year: 2014-15

| | | |
|---|---|---|
| DCIT,<br>Circle-1(1)(1), International Taxation,<br>New Delhi | **Vs.** | Alcatel Lucent, France,<br>3, Avenue Octave Greard,<br>Paris, France |
| | | **PAN :AABCC4864E** |
| **(Appellant)** | | **(Respondent)** |

**And**
ITA No. 6273/Del/2017
Assessment Year: 2014-15

| | | |
|---|---|---|
| DCIT,<br>Circle-1(1)(1), International Taxation,<br>New Delhi | **Vs.** | Alcatel Lucent International, France,<br>3, Avenue Octave Greard,<br>Paris, France |
| | | **PAN :AABCC4864E** |
| **(Appellant)** | | **(Respondent)** |

| | |
|---|---|
| Assessee by | Sh. Prashant Meharchandani, Adv.<br>Sh. Divyansh Singh, Adv. |
| Department by | Sh. Bhuvnesh Kulshreshtha, CIT |

| | |
|---|---|
| Date of hearing | 30.09.2021 |
| Date of pronouncement | 30.09.2021 |

## ORDER

**PER O.P. KANT, AM:**

These appeals by the Revenue, bearing ITA Nos. 5591, 5592 & 5593/Del/2017 for assessment years 2012-13, 2013-14 & 2014-15 respectively are directed against the order of Commissioner of Income-tax (Appeals)- 42, New Delhi, each dated 27.06.2017 and the appeal, bearing ITA No. 6273/Del/2017, for assessment year 2014-15 is directed against the order dated 21.07.2017. Since identical issues are involved in these appeals, they were heard together and disposed off by way of this consolidated order for the sake of convenience.

**2.** Being identical issues in all the appeals, the grounds raised in ITA No. 6273/Del/2017 for AY 2014-15 are reproduced as under for the sake of brevity:

*1.1 That in the facts and circumstances of the case, and in law, the Ld. CIT(A) erred In deleting the addition made by the AO, and in holding that the revenue received by the assessee from supply of software is not taxable in India as royalty/s 9(l)(vi) of the Income Tax Act, as well as Article 13(3) of the India - France DTAA.*

*1.2 That in the facts and circumstances of the case, and in law, the Ld. CIT(A) erred deleting the addition made by the AO, without considering Explanation 5 and 6 to section 9(l)(vi), which have been inserted by clarificatory amendments with retrospective effect.*

*1.3 That in the facts and in circumstances of the case, and in law, the Ld. CIT(A) erred in deleting the addition made by the AO, after erroneously considering the claimed adequacy of compensation of Alcatel Lucent India while determining the income of the assessee, and in wrongly applying the ratio of Morgan Stanley 292 ITR 416 (SC).*

*1.4 That in the fact and in circumstance of the case, and in law, the Ld, CIT(A) erred in deleting the addition made by the AO by erroneously stating that he has relied on the assessee's own*

*case, whereas the first scrutiny assessement of Alcatel Lucent International was for 2013-14.*

*2. The appellant craves leave to add, modify, amend or alter any ground of appeal at the time of, or before, the hearing of*

**3.** At the very outset, the learned counsel for the assessee submitted that the issues raised by the Revenue have already been adjudicated in favour of the assessee by the order of the Tribunal in the case of DCIT, International Taxation, New Delhi Vs. Alcatel Lucent International France (ITA No.6272/Del/2017 for AY 2013-14, order dated 30.06.2021).

**4.** The Ld. DR did not object to the above arguments of the learned counsel.

**5.** We have heard both the parties through Video Conferencing and perused the relevant material on record, especially the orders of the Tribunal referred by the learned counsel.

**6.** On perusal, we find that identical issues has been decided by this Tribunal in favour of the assessee in ITA No. 6272/Del/2017 (supra). The relevant findings of the order of the Tribunal (supra) read as under:

*"8. A similar quarrel was decided by the Tribunal in favour of the assessee and against the Revenue in a bunch of appeals in ITA Nos.4866/Del/2010 and others vide order dated 04.04.2014. This order of the Tribunal was confirmed by the Hon'ble High Court of Delhi in ITA Nos.119 to 157/2015 vide order dated 27.02.2015. The relevant findings of the Hon'ble High Court of Delhi read as under:*

*"4. Re-assessment proceedings were initiated for the year under consideration. The assessee claimed that the income declared originally m the assessment proceedings be treated as return filed in the assessment proceedings. In the re-assessment order, the AO observed that the assessee. a company incorporated in France and other concerned*

*countries used to manufacture, trade and supply equipments and services for GSM Cellular Radio Telephones Systems. The assessee had supplied hardware and software to various entities m India. Software licenced by the assessee embodies the process which is required to control and manage the specific set of activities involved in the business use of its customers. Software also made available the process to its customers, who used it to carry out their business activities. In this view of the matter, the AO felt that the consideration of supply of software amounted to royalty under Sect 9(l)(vi) of the Income Tax Act. The CTT( Appeals) - to whom the asses appealed and later the ITAT to whom the Revenue appealed concurred held that the supply of embedded software (which was part of the hardware supplied to the assessee's customers by it) under consideration did constitute royalty and. therefore. Section 9(l)(vi) was not attracted and the same reasons. Article 13(3) of the DTAA was not involved.*

*5. We have noticed, at the outset, that the ITAT had relied upon ruling of this Court in Director of Income Tax V Ericsson A.B. (2012) 3 ITR 470 wherein identical argument with respect to whether consideration paid towards supply of software along with hardware - rather software embedded in the hardware amounted to royalty. After noticing several contentions of the revenue, this Court held in Ericsson A.B. (supra) follows:-*

> *"54. It is difficult to accept the aforesaid submissions in the facts of the present case. We have already held above that the assessee did not have any business connection in India. We have also held that the supply of equipment in question -was in the nature of supply of goods. Therefore, this issue is to be examined keeping in view these findings. Moreover, another finding of fact is recorded by the Tribunal that the Cellular Operator did not acquire any of the copyrights referred to in Section 14 (b) of the Copyright Act. 1957.*
>
> *55. Once we proceed on the basis of aforesaid factual findings, it is difficult to hold that payment made to the assessee was in the nature of royalty either under the Income-Tax Act or under the DTAA. We have to keep in mind what was sold by the assessee to the Indian customers -was a GSM which consisted both of the hardware as well as the software, therefore, the Tribunal is right in holding that it M as not permissible for tin Revenue to assess the same under two different articles. Tin software that was loaded on the hardware did not*

*have any independent existence. The software supply is an integral part of the GSM mobile telephone system and is used by the cellular operator for providing the cellular services to its customers There could not be any independent use of such software. Tin software is embodied in the system and the revenue accepts that it could not be used independently. This software merely facilitates the functioning of the equipment and is an integral part thereof. On these facts, it would be useful to refer to tin judgment of the Supreme Court in TATA Consultancy Service Vs. State of Andhra Pradesh (2004) 271 ITR 401 (SC), wherein the Apex Court held that software which is incorporated on media would be goods and, therefore, liable to sales tax Following discussion in this behalf is required to be noted:-*

> *"In our view the term "goods" as used in Article S66(12) of the Constitution of India and as defined under the said Act are very wide and include all types of movable properties, whether those properties be tangible or intangible. We are in complete agreement with the observations made by this Court in Associated Cement Companies Ltd. (supra). A software programme may consist of various commands which enable the computer to perform a designated task. The copyright in that programme may remain with the originator of the programme. But the moment copies are made and marketed, it becomes goods, it 'Inch are susceptible to sales tax.*
>
> *Even intellectual property, once it is put on to a media, -whether it be in the form of books or canvas (In case of painting) or computer discs or cassettes, and marketed would become "goods". We see no difference between a sale of a software are programme on a CD floppy disc from a sale of music on a cassette CD or a sale of a film on a video cassette CD. In all such cases, the intellectual property has been incorporated on a media for purposes of transfer. Sale is not just of the media which by itself has very little value. The software are and the media cannot be split up. What the buyer purchases and pays for is not the disc or the CD. As in the case of paintings or books or music or films the buyer is purchasing the intellectual property and not the media i.e. the paper or cassette or disc or CD. Thus a transaction sale of computer software is clearly a sale of "goods" within the meaning of the*

*term as defined in the said Act. The term "all materials, articles and commodities" includes both tangible and intangible incorporeal property which is capable of abstraction, consumption and use and which can be transmitted, transferred, delivered, stored, possessed etc. The software programmes have all these attributes……*

*In Advent Systems Ltd. v. Unisys Corpn, (925 F. 2d 6~0 f3rd Cir. 1991 n. relied on by Mr. Sorabjee, the court w as concerned with interpretation of uniform civil code which "applied to transactions in goods". The goods therein were defined as "all things (including specially manufactured goods) which are moveable at the time of the identification for sale". It was held:*

*"Computer programs are the product of an intellectual process, but once implanted in a medium are widely distributed to computer owners. An analogy can be draw n to a compact disc recording of an orchestra] rendition. The music is produced by the artistry of musicians and in itself is not a "good," but when transferred to a laser-readable disc becomes a readily merchantable commodity. Similarly, when a professor delivers a lecture, it is not a good, but, when transcribed as a book, it becomes a good.*

*That a computer program may be copyrightable as intellectual property does not alter the fact that once in the form of a floppy disc or other medium, the program is tangible, moveable and available in the marketplace. The fact that some programs may be tailored for specific purposes need not alter their status as "goods" because the Code definition includes,; "specially manufactured goods. "*

*56. A Fortiorari when the assessee supplies the software which is incorporated on a CD. it has supplied tangible property and the payment made by the cellular operator for acquiring such property cannot be regarded as a payment by way of royalty."*

*6. This Court also noticed that the ITAT had in addition relied upon other judgment of this Court i.e. Director of Income Tax Vs. Ms. Nokia Networks. (2013) 358 ITR 259 (Delhi).*

> *7. In view of this settled position, this court is of the opinion that no substantial question of law arises. The appeal is accordingly dismissed.*

*9. This order of the HonTole High Court of Delhi has been upheld by the Hon'ble Supreme Court in a bunch of appeals in the case of Engineering Analysis Centre of Excellence Private Limited vide order dated 02.03.2021 and in the bunch of appeals the assessee is at Civil appeal No. 10674 of 2016, 010673 of 2016 and SLP (C) No.28868 of 2016. The relevant findings of the Hon'ble Supreme Court read as under:-*

> *"168. Given the definition of royalties contained in Article 12 of the DTAAs mentioned in paragraph 41 of this judgment, it is clear that there is no obligation on the persons mentioned in section 195 of the Income Tax Act to deduct tax at source, as the distribution agreements'/EULAs in the facts of these cases do not create any interest or right in such distributors/end-users, which would amount to the use of or right to use any copyright. The provisions contained in the Income Tax Act (section 9(1 )(vi), along with explanations 2 and 4 thereof), which deal with royalty, not being more beneficial to the assessees, have no application in the facts of these cases.*
>
> *169.Our answer to the question posed before us, is that the amounts paid by resident Indian end-users/distributors to non-resident computer software manufacturers/suppliers, as consideration for the resale/use of the computer software through EULAs/distribution agreements, is not the payment of royalty for the use of copyright in the computer software, and that the same does not give rise to any income taxable in India, as a result of which the persons referred to in section 195 of the Income Tax Act were not liable to deduct any TDS under section 195 of the Income Tax Act, The answer to this question will apply to all four categories of cases enumerated by us in paragraph 4 of this judgment.*
>
> *170.The appeals from the impugned judgments of the High Court of Karnataka are allowed, and the aforesaid judgments are set aside. The ruling of the AAR in Citrix Systems (AAR) (supra) is set aside. The appeals from the impugned judgments of the High Court of Delhi are dismissed.*

*10. Considering the facts of the case in the light of the decisions mentioned here in above we do not find any merit in this appeal by the revenue and the same is accordingly dismissed.*

*11. In the result, the appeal filed by the revenue is accordingly dismissed."*

**7.** In view of above, respectfully following the decision of the Tribunal mentioned herein above, we do not find any infirmity in the orders of the learned CIT(A), therefore, we uphold the same.

**8.** In the result, all the appeals of the Revenue are dismissed.

***Order pronounced in the open court.***

| | |
|---|---|
| ***Sd/-*** | ***Sd/-*** |
| **(KUL BHARAT)** | **(O.P. KANT)** |
| **JUDICIAL MEMBER** | **ACCOUNTANT MEMBER** |

Dated: 30th September, 2021.
RK/-
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi