

IN THE INCOME TAX APPELLATE TRIBUNAL
[DELHI BENCH "D" NEW DELHI]

BEFORE SHRI G. S. PANNU, PRESIDENT
A N D
SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER
(Through Video Conferencing)

आ.अ.सं./I.T.A Nos.4138 & 4139/Del/2015
निर्धारणवर्ष/Assessment Years: 2002-03 & 2003-04

Alcatel Lucent Portugal, SA 14 th & 15 th Floor, Tower : C, DLF Cyber Green, Gurgaon - 122 002.	बनाम Vs.	DCIT (International Taxation) Circle : 1 (1)(1) New Delhi.
PAN : AADCA1677R		
अपीलार्थी /Appellant		प्रत्यर्थी/Respondent

निर्धारितीकीओरसे /Assessee by :	Shri Deepak Chopra, Advocate; & Shri Ankul, Advocate;
राजस्वकीओरसे /Revenue by :	Shri Sukesh Kumar Jain, [CIT] - D.R.;

सुनवाईकीतारीख/ Date of hearing :	30/12/2021
उद्घोषणाकीतारीख/Pronouncement on :	30/03/2022

आदेश / O R D E R

PER C. N. PRASAD, J. M. :

1. These two appeals are filed by the assessee against common order of the Ld. CIT (A)-42, New Delhi, dated 18.03.2015 for the assessment years 2002-03 and 2003-04.
2. The assessee raised the following common grounds of appeal in both these appeals:-

“1. That on the facts and circumstances of the case and in law, the Ld. CIT (A) erred in not holding that the order under Section 147 of the Income Tax Act, 1961 (‘the Act’) passed by the Assistant Director of Income Tax, Circle 1(1), New Delhi (‘Ld. AO’) is beyond jurisdiction, bad in law and void ab initio.

2. That on the facts and in the circumstances of the case and in law, the Ld. CIT (A) erred in upholding the attribution of profit to the Permanent Establishment (‘PE’) in India by the Ld. AO at 3.75% of turnover without any cogent basis.

2.1 That on the facts and in the circumstances of the case and in law, the Ld. CIT (A) has erred in not appreciating that the income earned by Project Office has been already offered to tax in its Return of Income.

3. That the Learned AO erred in law in initiating penalty proceedings under section 271 (1)(c) of the Act.“

3. At the outset the Ld. Counsel for the assessee submits that no other ground is pressed except ground Nos.2 and 2.1 which relates attribution of profits to the Permanent Establishment (PE) in India by the A.O at 3.75% of the turnover as against 2.5% agreed by the assessee. In view these submissions ground Nos.1 and 3 are dismissed as not pressed.

4. Coming to ground Nos.2 and 2.1 relating to attribution of profits to PE in India briefly the facts are the assessee Alcatel-Lucent Portugal S.A is one of the Alcatel-Lucent Group entity which has supplied telecom equipment to customers in India during the years under consideration including both hardware and software. Assessee is a company incorporated in Republic of Portugal and is a tax resident of Portuguese Republic and entitled to be governed by the provisions of the Double Taxation Avoidance Agreement (DTAA) between India and Portuguese Republic. During the assessment years under consideration the assessee

did not have any office, premises or other place of business in India except a project office (PO) in India opened with the permission of Reserve Bank of India for execution of local portion of contract which was awarded to the assessee by Delhi Metro Rail Corporation on 9th March 2001.

5. During the assessment years under consideration the assessee PO earned interest income which was offered to tax in the return filed for the assessment years 2002-03 and 2003-04. The assessments were reopened by issue of notice U/s 148 of the Act and the reassessments were completed on 24.09.2010 by making addition towards profit attributable to PE i.e., Project Office of the assessee for both these assessment years. The Assessing Officer in the assessment order passed for the assessment year 2002-03 at para 2.7 observed as under:-

“2.7 Attribution of Profits

For the purpose of attributing profits to the PE, it is held that the assessee has a dependent agent PE in India. Since the attribution earlier done by this office at 2,5% in the case of Alcatel-Lucent France (one of the group entities) for AY 2006-07 was only on account of activities performed by the project office, the attribution need to be increased in wake of additional facts and evidence found on record pursuant to the survey. Thereby, it would be appropriate to increase the profit attributed to Indian PE from 2.5% to 3.75%.

The above basis of attribution of profits was elaborately discussed in detail in the assessee's own case for AY 2007-08 by my predecessor wherein it was held that net income chargeable to tax attributable to PE is 3.75% of the sale price. Relying on the same and considering Rule 10 of the Income Tax Rules 1962 and Article 7 of the tax treaty it is held that net income chargeable to tax as attributable to PE is worked out at 3.75% of the sale price.”

6. For the above reasons the assessing officer added 3.75% of the turnover in respect of sale of Hardware as net income chargeable to tax

as profit attributable to PE of the assessee and computed the income accordingly. On appeal the Ld. CIT (A) sustained the action of the Assessing Officer in attributing the profit at 3.75% of sale of Hardware to the PE of the assessee observing that assessee has PO in India and whereas Alcatel-Lucent India Ltd., was held to be dependent agency PE and the PO of the assessee performs much more functions/operations are carried out and therefore the profit attribution at 3.75% to assessee PE is quite reasonable.

7. Before us the Ld. Counsel for the assessee submits that year after year the assessee was filing income tax returns showing income earned by PO. The Ld. Counsel submits that during the assessment years under consideration Alcatel-Lucent Portugal S.A had directly supplied certain goods/equipment to the Indian customers engaged in telecom business. The sales of these goods were made from outside of India and the payments for the same were also received outside of India. The Ld. Counsel submits that the PO of the assessee in India played no role in the supplies so made and hence no portion of its business profits are taxable in India.

8. The Ld. Counsel further referring to para 2.6 of the assessment order for Asst. Year 2002-03, submits that the assessing officer while making profit attribution to PE of assessee in India, reference was made to all the finds in the case of Alcatel-Lucent France and there is no independent finding in the case of the assessee so as to arrive at a conclusion that the assessee earned any profit from the supplies made directly to the Indian customers by Alcatel-Lucent Portugal S.A. He submits that all the findings relied on by the assessing officer are from France entity and related to assessee PO in India. The Ld. Counsel for the assessee therefore submits that since there is no independent finding of fact in assessee's case and all the findings relied on are from France

entity the matter may be restored to the Assessing Officer for giving a fresh look.

9. On the other had the Ld. DR submits that there was a survey in assessee group and based on the survey the assessment for A.Y 2007-08 was completed wherein profit attribution to PE of the assessee in India was made at 3.68% and this was accepted by the assessee and no appeal is preferred.

10. We have heard rival contentions, perused the orders of the authorities below. In the assessment order passed for AY 2002-03 at para 2.6 the AO has observed as under:-

“2.6 That one of the Alcatel-Lucent Group entity is Alcatel-Lucent France (which is a tax resident of France). This entity is the flagship entity of Alcatel-Lucent group which has been regularly filing it's return of income in India. In it's return of income for Assessment Year 2006-07, the entity only offered to tax income from services rendered in India, however it did not offered to tax offshore supplies made to Indian customers. In a recent assessment order passed by me, the issue of taxability of offshore supplies in India and existence of Permanent Establishment in the case of Alcatel-Lucent France for Assessment Year 2006-07 was analysed in detail after taking into account in detail the survey documents, statements recorded during and post survey and submissions filed by Alcatel-Lucent France. After looking into totality of facts involved, it was held by me that Alcatel-Lucent Overseas entities including Alcatel-Lucent France have Permanent Establishment in India. All the objections raised by Alcatel-Lucent France have been discussed in detail in the assessment order.

As a result of detailed analysis following inferences can be drawn.

- i) That Alcatel-Lucent Overseas entities have business connection in India under the provisions of the Act.
- ii) That Alcatel-Lucent Overseas entities have Fixed Place PE in the form of office premises of ALIL on account of the following reasons:
 - a) The expatriates of ALU group were having specific rooms allotted to them and they were occupying the same,

therefore, the office space was at their constant disposal, which in turn means at the disposal of the enterprise. This space is also occupied by the employees of ALIL,

b) Expatriates employees were working for overseas entities by promoting their products in India.

c) Indian company and its team are interface with customer in India not only for Indian company but entire Alcatel Lucent Group.

d) Indian employees identify the customer, obtain the RFP from customer, analyse the RFP and makes presentations for products (to be later on sold by Alcatel Lucent Foreign Entity) and take active & critical part in negotiations.

e) ALU India identifies that which product/component is to be obtained from which ALU Group company overseas, relevant part of RFQ is forwarded to respective entity overseas and a business case is obtained from each Alcatel Lucent Foreign Entity (which may be equivalent to buying from them by ALU India). These are coordinated, & consolidated with others and a one piece overall Offer/Bid is prepared by ALU India.

f) Indian employees make & submit the bid to the Indian customers and possibly to some overseas customers also. The bids include the services & equipments to be supplied by Alcatel Lucent Overseas Entities and ALU India.

g) Separate Agreements between customer & Alcatel Lucent Overseas Entities are entered into later on.

h) Indian employees coordinate the supply, delivery from various Alcatel Lucent Foreign Entities in relation to their direct contracts with the Indian customers and inform Alcatel Lucent Foreign Entities when a particular product of theirs is needed in India.

i) ALU India does entire payment management for Alcatel Lucent Foreign Entities.

j) Purchase Orders are received by ALU India who in turn forwards them to respective Alcatel Lucent Foreign Entity,

k) The fact which emerged from the survey is that these employees and other personnel acting for conduct of business of ALU group in India have at their disposal "fixed place" through which the business of assessee Company and other entities of the group are being carried out, These persons had free access to various office premises and have

access to the establishment for the purposes of carrying out various operations on behalf of ALU group.

l) It is to be mentioned that the employees and the persons under control of the foreign entities have free access to various office premises and have access to the establishment for the purpose of carrying out various operations on behalf of the foreign entities.

m) Activities of ALIL cannot be characterized as preparatory and auxiliary in nature.

iii) That Alcatel-Lucent Overseas entities have Agency PE in the form of office premises of ALIL on account of the following:

a) ALU India habitually exercises the function of negotiating the prices of the supply made from overseas and concludes the same.

b) Teams in India were performing lot of marketing activities including price negotiation, promotion, administration, concluding agreements, functions related to manufacturing timings and inventory management, payment monitoring and representing ALU group in India.

c) Sales and marketing team and bids and proposal team constituted in ALIL managed, negotiated and followed up and concluded the contracts for the ALU group in India and it was involved in functions relating to inventory management, payment management and manufacturing timings.

d) None of the business decisions are being taken by the Indian entity on its own and thus ALIL is economically dependent on the ALU group

e) ALIL was not an agent of independent status as it does not work for any other entity similar to its working for ALU group,

f) Activities of ALIL were not of preparatory and auxiliary in nature.

iv) That Alcatel-Lucent Overseas entity has Installation PE in India.

Since the assessee is part of Alcatel-Lucent Group, it was issued a show cause notice on 16.3.10 as to why it should not be held that there exists a PE in India and that the ratio of the order passed by this office for Alcatel-Lucent France for AY 2006-07 should not be

applied. In response to the show cause notice, assessee submitted that facts for the entity and the year under consideration are significantly similar to the assessment concluded in the case of Alcatel-Lucent France for AY 2006-07, The assessee in support of its contention, relied upon the factual and legal submissions made by it from time to time during the course of assessment proceedings for the AY 2006-07 on non-existence of the PE and no attribution of profits.

In view of the above, since the facts are similar, the findings made in the assessment order passed for the AY 2006-07 will apply with equal force in the assessment under consideration. In view of the same, I hold that assessee is having business connection as well as PE in India in form of fixed place, installation and agency PE in form of ALIL. Satisfaction is hereby recorded that the assessee had concealed the particulars of its income inter-alia by furnishing inaccurate particulars of its income. Penalty proceedings u/s 271(l)(c) of the Income-Tax Act 1961 initiated; separately. "

11. On reading of the above para from the assessment order we find force in the submissions of the Ld. Counsel for the assessee that profit attribution in case of PO of the assessee was made merely on the basis of the findings in the case of Alcatel-Lucent France. It is also evident from the above para in the assessment order that since the assessee is part of Alcatel-Lucent group and has PE in India the assessing officer proposed as to why the ratio of the order passed in the case of Alcatel-Lucent France for AY 2006-07 should not be applied to the assessee also. We have observed that the assessing officer has not given any independent finding based on the facts of the assessee's case as to why there should be any profits attributable to PO of the assessee. The assessing officer merely relied on the findings of fact in the case of Alcatel-Lucent France and attributed the profits to the PO of the assessee Alcatel-Lucent Portugal S.A. In the circumstance we have no agitation in restoring the entire assessment to the assessing officer for de novo adjudication. Thus we set aside the order of the Ld. CIT (A) and restore the assessment to the Assessing Officer for de novo assessment in accordance with law after providing adequate opportunity to the assessee. Ground Nos.2 and 2.1 are allowed for statistical purpose.

12. In the result appeal of the assessee is partly allowed for statistical purpose.

Order pronounced in the open court on : 30/03/2022.

Sd/-
(G. S. PANNU)
PRESIDENT

Sd/-
(C. N. PRASAD)
JUDICIAL MEMBER

Dated : 30/03/2022.

MEHTA

Copy forwarded to

1. Appellant;
2. Respondent;
3. CIT
4. CIT (Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi.

Date of dictation	23.03.2022
Date on which the typed draft is placed before the dictating member	24.03.2022
Date on which the typed draft is placed before the other member	30.03.2022
Date on which the approved draft comes to the Sr. PS/ PS	30.03.2022
Date on which the fair order is placed before the dictating member for pronouncement	30.03.2022
Date on which the fair order comes back to the Sr. PS/ PS	30.03.2022
Date on which the final order is uploaded on the website of ITAT	30.03.2022
Date on which the file goes to the Bench Clerk	30.03.2022
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the order	