

IN THE INCOME TAX APPELLATE TRIBUNAL
"I" BENCH, MUMBAI

SHRI OM PRAKASH KANT, ACCOUNTANT MEMBER
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER

ITA No. 7280/MUM/2018
(Assessment Year: 2014-15)

Micro Focus Software Inc.
(Formerly known as Novell Inc.),
1800, South Novell Palace,
Provo Utah 84606,
United States of America Appellant
[PAN: AABCN5034F]

The Deputy Commissioner of Income Tax Vs
(IT), Range-3(3)(1), Mumbai,
Air India Building, Nariman Point,
Mumbai - 400021 Respondent

Appearances

For the Appellant/Assessee : Shri Ninad Patade
Shri Abdul Kadir Jawadwala

For the Respondent/Department : Shri Soumendu Kumar Dash

Date of conclusion of hearing : 12.07.2022

Date of pronouncement of order : 10.10.2022

Per Rahul Chaudhary, Judicial Member:

1. This appeal is directed against the Assessment Order dated, 18.10.2018 passed under Section 143(3) read with Section 144C(13) read with Section 92CA(3) of the Income Tax Act, 1961 [hereinafter referred to as 'the Act'] for the Assessment Year 2014-15, as per directions issued by Dispute Resolution Panel-3, Mumbai (hereinafter referred to as 'the DRP') under Section 144C(5) of the Act on 28.09.2018. This appeal was disposed off vide order, dated 03.05.2021. Thereafter, in a Miscellaneous Application filed by the Appellant (MA No. 154/Mum/2021), vide order dated 17.05.2022, the appeal was directed to be listed for

hearing for the limited purpose of adjudication on Ground Nos. 1,7,8 and 9 which were not disposed off earlier. Thus, the present appeal come up for hearing before us.

2. Ground No. 1,7,8 and 9 raised by the Appellant in the present appeal read as under:

"1. On the facts and in the circumstances of the case and in law, the Assessing Officer erred in treating the sale of Novell Software Products of Rs.9,04,66,939 as 'Royalties' on substantive basis both under the Income-tax Act, 1961 ("the Act") as well as the Double Taxation Avoidance Agreement entered into between India and USA (India-USA DTAA), In accordance with India USA DTAA, the receipts from sale of Novell Software Products being in the nature of business income and in the absence of Permanent Establishment (PE) of appellant in India, the receipts from sale of Novell Software Products ought to have been considered as not taxable in India.

7. Without Prejudice to the Ground No.1. Ground No.2, Ground No. 3, Ground No. 4, Ground No. 5 and Ground No. 6, on the facts and in the circumstances of the case and in law, the Learned Assessing officer erred in levying interest of Rs.4,39,122 under Section 234A of the Income Tax Act, 1961 despite the Return of Income filed on the due date.

8. Without Prejudice to the Ground No. 1. Ground No.2, Ground No. 3, Ground No. 4. Ground No. 5 and Ground No.6, on the facts and in the circumstances of the case and in law, the Learned Assessing officer erred in levying interest under Section 234B of the Income Tax Act, 1961 of Rs.1,20,75,855 without appreciating the fact that the income/ revenues of the Appellant from Novell Software Products was not taxable as per the provisions of DTAA but was still subjected to the withholding tax under Section 195

of the Act and consequently the Appellant was not legally liable to pay advance tax under the provisions of the Income Tax Act, 1961.

9. Without Prejudice to the Ground No.1. Ground No.2, Ground No. 3, Ground No. 4 Ground No. 5 and Ground No.6, on the facts and in the circumstances of the case and in law, the Learned Assessing officer erred in levying surcharge of Rs.9,95,136 and education cess and higher education cess of Rs.6,26,936 instead of the applicable rates of 2 percent and 3 percent respectively.”

Ground No. 1

3. Ground No. 1 pertains to characterization of sale proceeds of INR 9,04,66,939/- arising from sale of Novel Software Products as 'Royalties' by the Assessing Officer in terms of the provisions of the Act read with the Double Taxation Avoidance Agreement between India and USA ('DTAA' for short) as opposed to Business Profits as contended by the Appellant.
- 3.1 Ld. Authorised Representative for the Appellant submitted that the issue stands decided in favour of the Appellant by the judgment of the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Pvt. Ltd. vs. CIT: [2021] 432 ITR 471 (SC) [02-03-2021] which has been followed by the Tribunal in the case of the Appellant for the Assessment Year 2016-17 (ITA No. 7766/Mum/2019, Pronounced on 31.08.2021). Per contra, Ld. Departmental Representative relied upon the order passed by the DRP.
- 3.2 We have heard the rival contention and perused the material on record including the judicial precedents cited

during the course of hearing. We note that the DRP had rejected the objections raised by the Appellant in relation to characterization of sale proceeds arising from sale of Novel Software Products as 'Royalties' in terms of DTAA by following the decision of the Hon'ble Karnataka High Court in the case of CIT v. Samsung Electronics Co. Ltd. [2011] 16 taxmann.com 141/203 Taxman 477/[2012] 345 ITR 494 (Kar.) which has since been set aside by the Apex Court in the case of Engineering Analysis Centre of Excellence Pvt. Ltd. (supra). The Hon'ble Supreme Court had held that income arising from sale of software is in the nature of business income. The Tribunal has, following the aforesaid judgment of the Hon'ble Supreme Court, decided identical issue in favor of the Appellant in appeal for the Assessment Years 2015-16 (ITA No. 7765, Pronounced on 31.08.2021) and Assessment Year 2016-17 (ITA No. 7766/Mum/2019). Given the identical facts and circumstances, we do not see any reason to depart from the view taken by the Tribunal in the aforesaid decisions and therefore, hold that sale proceeds of INR 9,04,66,939/- arising from sale of Novel Software Products are in the nature of business profits. Accordingly, the Ground No. 1 raised by the Appellant is allowed.

Ground No. 7

4. Ground No. 7 pertains to levy of interest under Section 234A of the Act. The contention of the Appellant is that the return was filed within the time prescribed and therefore, levy of interest under Section 234A of the Act is liable to be deleted. We direct the Assessing Officer to verify whether

the income tax return was filed within the prescribed time (original/extended), and thereafter, levy/compute interest under Section 234A of the Act, if any, as per law. Ground No. 7 is allowed for statistical purposes.

Ground No. 8 & 9

5. Ground No. 8 pertains to levy of interest under Section 234B of the Act whereas Ground No. 9 pertains to levy of cess. Both, Ground No. 8 and 9 are disposed off as being consequential in nature.
6. In view of the above and the order dated, 03.05.2021, passed by the Tribunal, the appeal is partly allowed.

Order pronounced on 10.10.2022.

Sd/-
(Om Prakash Kant)
Accountant Member

Sd/-
(Rahul Chaudhary)
Judicial Member

मुंबई Mumbai; दिनांक Dated : 10.10.2022
Alindra, PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त/अपील (/ The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि ,आयकर अपीलीय अधिकरण ,मुंबई / DR, ITAT,
Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार /(Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai