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IN THE HIGH COURT OF DELHI AT NEW DELHI

32
+ **ITA 909/2015**

COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION) – 1 ..... Appellant
Through: Mr. Ashok K. Manchanda, Senior standing counsel with Mr. Raghvendra Singh, Junior standing counsel.

versus

ASPECT SOFTWARE INC. ..... Respondent
Through: Ms. Rashmi Chopra with Ms. Asiya, Advocates.

With

33
+ **ITA 28/2016**

COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION) – 1 ..... Appellant
Through: Mr. Ashok K. Manchanda, Senior standing counsel with Mr. Raghvendra Singh, Junior standing counsel.

versus

ASPECT SOFTWARE INC. ..... Respondent
Through: Ms. Rashmi Chopra with Ms. Asiya, Advocates.

With

40
+ **ITA 861/2016**

COMMISSIONER OF INCOME TAX (INTERNATIONAL

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TAXATION) – 1 ..... Appellant
Through: Mr. Ashok K. Manchanda, Senior standing counsel with Mr. Raghvendra Singh, Junior standing counsel.

versus

ASPECT SOFTWARE INC. ..... Respondent
Through: Ms. Rashmi Chopra with Ms. Asiya, Advocates.

With

41
+ **ITA 944/2016**

COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION) – 1 ..... Appellant
Through: Mr. Ashok K. Manchanda, Senior standing counsel with Mr. Raghvendra Singh, Junior standing counsel.

versus

ASPECT SOFTWARE INC. ..... Respondent
Through: Ms. Rashmi Chopra with Ms. Asiya, Advocates.

With

42
+ **ITA 4/2017**

COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION) – 1 ..... Appellant
Through: Mr. Ashok K. Manchanda, Senior standing counsel with Mr. Raghvendra Singh, Junior standing counsel.

versus

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ASPECT SOFTWARE INC. ..... Respondent
Through: Ms. Rashmi Chopra with Ms. Asiya, Advocates.

With

43
+ **ITA 6/2017**

COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION) – 1 ..... Appellant
Through: Mr. Ashok K. Manchanda, Senior standing counsel with Mr. Raghvendra Singh, Junior standing counsel.

versus

ASPECT SOFTWARE INC. ..... Respondent
Through: Ms. Rashmi Chopra with Ms. Asiya, Advocates.

CORAM: JUSTICE S.MURALIDHAR
JUSTICE CHANDER SHEKHAR

ORDER

% **25.04.2017**

CM APPL 44805/2016 (delay) in ITA 861/2016
CM APPL 44866/2016 (delay) in ITA 944/2016
CM APPL 678/2017 (delay) in ITA 4/2017
CM APPL 709/2017 (delay) in ITA 6/2017

1. For the reasons stated therein, these applications are allowed. The delay in re-filing the appeals is condoned.

CM APPL 677/2017 (exemption) in ITA 4/2017
CM APPL 708/2017 (exemption) in ITA 6/2017

2. Allowed, subject to all just exceptions.

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.**
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> The following questions of law arise for consideration:
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> (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.
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> (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 CIT-DR 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.
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> 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.

S.MURALIDHAR, J

CHANDER SHEKHAR, J

APRIL 25, 2017
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