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Cit Vs. Alcatel Lucent Canada

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Court : Delhi

Decided On : Feb-27-2015

Judge : S.Ravindra Bhat

Appellant : Cit

Respondent : Alcatel Lucent Canada

Judgement :

$~2 to 32 and 37 to 43 * IN THE HIGH COURT OF DELHI AT NEW DELHI Decided on 27th February, 2015 + ITA1192015 CIT ..... Appellant versus + ALCATEL LUCENT CANADA ..... Respondent ITA1202015 CIT-1 ..... Appellant versus ALCATEL LUCENT ENTERPRISE + ITA1212015 CIT-1 ..... Respondent ..... Appellant versus + ALCATEL LUCENT SHANGHAI BELL ..... Respondent ITA1222015 CIT-1 ..... Appellant versus + ALCATEL LUCENT FRANCE USA INC ..... Respondent ITA1232015 CIT-1 ..... Appellant versus ALCATEL LUCENT FRANCE ITA1192015 & conn. ..... Respondent Page 1 + ITA1242015 CIT-1 ..... Appellant versus + ALCATEL LUCENT SHANGHAI BELL ..... Respondent ITA1252015 CIT-1 ..... Appellant versus + ALCATEL LUCENT FRANCE ..... Respondent ITA1262015 CIT-1 ..... Appellant versus + ALCATEL LUCENT ENTERPRISE ..... Respondent ITA1272015 CIT-1 ..... Appellant versus + ALCATEL LUCENT ENTERPRISE ..... Respondent ITA1282015 CIT ..... Appellant versus + ALCATEL LUCENT CANADA ..... Respondent ITA1292015 CIT-1 ..... Appellant ITA1192015 & conn. Page 2 versus + ALCATEL LUCENT FRANCE USA INC ..... Respondent ITA1302015 CIT-1 ..... Appellant versus + ALCATEL

LUCENT ITALIA SPA ..... Respondent ITA1312015 CIT-1 ..... Appellant versus + ALCATEL LUCENTFRANCEUSA INC ..... Respondent ITA1322015 CIT-1 ..... Appellant versus + ALCATEL LUCENT ENTERPRISE ..... Respondent ITA1332015 CIT-1 ..... Appellant versus + ALCATEL LUCENT SHANGHAI BELL ..... Respondent ITA1342015 CIT-1 ..... Appellant versus ITA1192015 & conn. Page 3 + ALCATEL LUCENT DEUTSCHLAND AG ..... Respondent ITA1352015 CIT-1 ..... Appellant versus + ALCATEL LUCENT SHANGAHI BELL ..... Respondent ITA1362015 CIT ..... Appellant versus + ALCATEL LUCENT CANADA ..... Respondent ITA1372015 CIT-1 ..... Appellant versus + ALCATEL LUCENT FRANCE ..... Respondent ITA1382015 CIT ..... Appellant versus + ALCATEL LUCENT BELL NV ..... Respondent ITA1392015 CIT-1 ..... Appellant versus ALCATEL LUCENT BELL NV + ... Respondent ITA1402015 ITA1192015 & conn. Page 4 CIT-1 ..... Appellant versus + ALCATEL LUCENT ITALIA SPA ..... Respondent ITA1412015 CIT-1 .... Appellant versus + ALCATEL LUCENT FRANCE ..... Respondent ITA1422015 CIT-1 ..... Appellant versus + ALCATEL LUCENT BELL NV ..... Respondent ITA1442015 CIT-1 ..... Appellant versus + ALCATEL LUCENT BELL NV ..... Respondent ITA1452015 CIT ..... Appellant versus + ALCATEL LUCENT CANADA ..... Respondent ITA1462015 CIT ..... Appellant versus ITA1192015 & conn. Page 5 + ALCATEL LUCENT BELL NV ..... Respondent ITA1472015 CIT ..... Appellant versus + ALCATEL LUCENT CANADA ..... Respondent ITA1482015 CIT ..... Appellant versus + ALCATEL LUCENT BELL NV ..... Respondent ITA1492015 CIT ..... Appellant versus + ALCCATEL LUCENT BELL NV ..... Respondent ITA1502015 CIT-1 ..... Appellant versus + ALCATEL LUCENT SHANGHAI BELL ..... Respondent ITA1512015 CIT-1 ..... Appellant versus ALCATEL LUCENT FRANCE ITA1192015 & conn. ..... Respondent Page 6 + ITA1522015 CIT-1 ..... Appellant versus ALCATEL LUCENT ENTERPRISE + + ... Respondent ITA1532015 CIT-1 ..... Appellant ALCATEL LUCENT ITALIA SPA ..... Respondent ITA1542015 CIT ..... Appellant versus ALCATEL LUCENT FRANCE + ... Respondent ITA1552015 CIT ..... Appellant versus ALCATEL LUCENT ENTERPRISE + ... Respondent ITA1562015 CIT ..... Appellant versus ALCATEL LUCENT FRANCE + ... Respondent ITA1572015 CIT ITA1192015 & conn. ..... Appellant Page 7 versus ALCATEEL LUCENT ITALIA SPA Presence : ..... Respondent Mr. Nitin Gulati, jr. standing counsel for the

revenue Mr. Prakash Kumar, Adv. for the assessee CORAM: HON'BLE MR. JUSTICE S. RAVINDRA BHAT HON'BLE MR. JUSTICE R.K.GAUBA MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT) % CM Nos.3050/2015, 3052/2015, 3185/2015, 3187/2015, 3189/2015, 3197/2015, 3199/2015, 3201/2015, 3209/2015, 3211/2015, 3213/2015, 3221/2015, 3224/2015, 3226/2015, 3234/2015, 3236/2015, 3481/2015, 3489/2015 and 3536/2015 3054/2015, 3191/2015, 3203/2015, 3215/2015, 3228/2015, 3483/2015, 3056/2015, 3193/2015, 3205/2015, 3217/2015, 3230/2015, 3485/2015, 3183/2015, 3195/2015, 3207/2015, 3219/2015, 3232/2015, 3487/2015, Exemption is allowed subject to all just exceptions. The applications are disposed of. CM Nos.3049/2015, 3051/2015, 3053/2015, 3184/2015, 3186/2015, 3188/2015, 3190/2015, 3196/2015, 3198/2015, 3200/2015, 3202/2015, 3208/2015, 3210/2015, 3212/2015, 3214/2015, 3220/2015, 3223/2015, 3225/2015, 3227/2015, 3233/2015, 3235/2015, 3480/2015, 3482/2015, 3488/2015, 3490/2015 and 3535/2015 3055/2015, 3192/2015, 3204/2015, 3216/2015, 3229/2015, 3484/2015, 3182/2015, 3194/2015, 3206/2015, 3218/2015, 3231/2015, 3486/2015, Delay is condoned. Applications are disposed of. ITA Nos.119/2015, 120/2015, 121/2015, 122/2015, 123/2015, 124/2015, 125/2015, 126/2015, 127/2015, 128/2015, 129/2015, 130/2015, 131/2015, 132/2015, 133/2015, 134/2015, 135/2015, 136/2015, 137/2015, 138/2015, ITA1192015 & conn. Page 8 139/2015, 140/2015, 141/2015, 142/2015, 144/2015, 145/2015, 146/2015, 147/2015, 148/2015, 149/2015, 150/2015, 151/2015, 152/2015, 153/2015, 154/2015, 155/2015, 156/2015 and 157/2015 1. Issue notice 2. Notice is accepted by Mr. Prakash Kumar, Advocate.

3. The Revenue claims to be aggrieved by the order dated 04.04.2014 of the Income Tax Appellate Tribunal (hereinafter referred to as the ITAT) in several connected appeals preferred by it, all of which were rejected by the ITAT. It argues that the ITAT erred in law in not considering that the income from supply of software embedded in the hardware equipment or otherwise to customers in India amounts to royalty under Section 9(1)(vi) of the Income Tax Act and under Article 13(3) of the Double Taxation Avoidance Agreement (DTTA) between India and France, Canada, Germany, China etc.

4. Re-assessment proceedings were initiated for the year under consideration. The assessee claimed that the income declared originally in 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 in 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. ITA1192015 & conn. In this view of the matter, the AO felt that the Page 9 consideration of supply of software amounted to royalty under Section 9(1)(vi) of the Income Tax Act. The CIT(Appeals) - to whom the assessee appealed and later the ITAT to whom the Revenue appealed concurrently held that the supply of embedded software (which was part of the hardware supplied to the assessees customers by it) under consideration did not constitute royalty and, therefore, Section 9(1)(vi) was not attracted and for 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 the ruling of this Court in Director of Income Tax V. Ericsson A.B. (2012) 343 ITR470wherein 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) as 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 ITA1192015 & conn. Page 10 Tribunal is right in holding that it was not permissible for the Revenue to assess the same under two different articles. The 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. The 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 the judgment of the Supreme Court in TATA Consultancy Services Vs. State of Andhra Pradesh (2004) 271 ITR401(SC), wherein the Apex Court held that software which is incorporated on a 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 366(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, which 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 ITA1192015 & conn. Page 11 difference between a sale of a software 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 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 670 (3rd Cir. 1991)), relied on by Mr. Sorabjee, the court was 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 drawn to a compact disc recording of ITA1192015 & conn. Page 12 an orchestral 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 V. M/s. Nokia Networks, (2013) 358 ITR259(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. S. RAVINDRA BHAT, J R.K.GAUBA, J FEBRUARY27 2015 vld ITA1192015 & conn. Page 13

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