आयकर अपीलीय अधिकरण, मुंबई

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES 'L' MUMBAI

सर्वश्री आय.पी. बंसल, न्यायिक सदस्य /**एवं**

BEFORE SHRI I.P. BANSAL, JUDICIAL MEMBER /AND

श्री डी. करूणाकर रावु, लेखा सदस्य

SHRI D.KARUNAKARA RAO, ACCOUNTANT MEMBER

आयकर अपील सं. / **ITA No.8094/MUM/2010**

निर्धारण वर्ष /Assessment Year 2006-07

The DDIT (IT)-2(1), Room No.120, 1st Floor, Scindia House, Ballard Estate, N.M.Road, Mumbai 400 038.	बनाम/ Vs.	M/s. Siemens Aktiengesellschaft, C/o. BSR & Co., 1st Floor, Lodha Excelus, Apollo Mills Compund, MM Joshi Marg, Mahalakshmi, Mumbai 400 011
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AABCS 8516K		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

अपीलार्थी ओर से/ **Appellant by:**	Shri Narender Kumar
प्रत्यर्थी की ओर से/**Respondent by :**	Shri Nitesh Joshi

सुनवाई की तारीख **/ Date of Hearing : 06/05/2014**

घोषणा की तारीख /**Date of Pronouncement : 06/05/2014**

आदेश / O R D E R

PER I.P.BANSAL, J.M:

This is an appeal filed by the Revenue and it is directed against order passed by Ld. CIT(A)-II, Mumbai dated 09/09/2010 for assessment year 2006-07. Grounds of appeal read as under:

"1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in holding that the income of the assessee arising on account of 'Royalty and Fees for Technical Services' is taxable on receipt basis and not on accrual basis as held by the Assessing Officer in the assessment order.

> *2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in holding that value of the software supplied by the assessee to M/s. Siemens Ltd. Cannot be treated as 'Royalty" in the hands of the assessee."*

2. At the outset it may be mentioned here that Ld. AR was required to submit whether or not any appeal was filed by the assessee against the impugned order of Ld. CIT(A). In reply Ld. AR submitted that assessee did not file any appeal against the impugned order of Ld. CIT(A).

2.1 It was further submitted by Ld. AR that both the issues raised by the Revenue are covered in favour of the assessee by the earlier orders of the Tribunal. The issue raised in first ground is also covered by the order of the Hon'ble Bombay High Court.

3. Apropos first ground; assessee was accounting its income arising on account of "Royalty and Fee for Technical Services" on receipt basis. The stand of the assessee has not been accepted by A.O on the ground that Department has taken a consistent view that the income in this regard should be recognized on accrual basis. It is in this manner the income of the assessee was worked out. The action of AO was agitated in an appeal filed before Ld.CIT(A), who relying upon the orders rendered by ITAT in respect of assessment years 1990-91, 1991-92, 1994-95, 1996-97, 1997-98 and 2001-02 has held that Royalty has to be assessed to tax on receipt basis and not on accrual basis. The Department is aggrieved by such findings recorded by Ld. CIT(A) and has raised ground No.1.

4. Before us, apart from aforementioned orders of the Tribunal, reference was also made to the decision of Hon'ble Bombay High Court rendered in respect of assessment year 1996-97, which is an order dated 22/10/2012 in I.T. Appeal No.124 of 2010, copy of order is placed at pages 3 to 4 of the paper

book. Following question was raised by the Revenue before Hon'ble Bombay High Court:

> *"i)Whether on the facts and in the circumstances of the case the Tribunal was right in law in holding that the Royalty and fees for technical services should be taxed on receipt basis without appreciating the fact that the Hon'ble Supreme Court has held in the case of Standard Drum Motors Private Limited V/s. CIT, 201 ITR 391 that the credit entry to the account of the assessee non-resident in the books of the Indian Company amounted to receipt by the non-resident?"*

Their Lordships have decided this issue as per the following observations:

> *"2. As regards first question is concerned, the Income Tax Appellate Tribunal referring to para-1 to 3 under Article IIX-A of the Double Taxation Avoidance Treaty with the Federal Germany Republic as per Notification dated 26th August 1985 held that the assessment of royalty or any fees for technical services should be made in the year in which the amounts are received and not otherwise. Counsel for the Revenue relied upon the Special Bench decision of the Tribunal in the assessee's own case, which in our opinion, has no relevance to the facts of the present case, as it relates to the period prior to the issuance of Notification dated 26t1 August 1985. In this view of the matter the decision of the Income Tax Appellate Tribunal in holding that the royalty and fees for technical services should be taxed on receipt basis cannot be faulted".*

He submitted that subsequently the aforementioned order was followed by Their Lordships in respect of Assessment Years 1997-98, 2001-02 and 2003-04.

5. In this view of the situation after hearing both the parties, we hold that Ld. CIT(A) did not commit any error in accepting the claim of the assessee as the same is in accordance with the decision of Hon'ble Bombay High Court. This ground of the Revenue is dismissed.

6. Apropos Ground No.2, this issue relates to equipments having software which were required for proper running of the equipments sold by the assessee. The A.O segregated the sale amount into two categories; (a) sale of equipments; (b) sale of software and assessed a sum of Rs.236.81 crores on account of supply of software by treating the same as Royalty in the hands of

the assessee company. On the other hand, it is the stand of assessee that software is a part and parcel of equipment sold, therefore, no Royalty is payable. Before, Ld. CIT(A) reference was made to the earlier decision of ITAT on the same issue in which the issue was decided by ITAT in favour of the assessee. These are decisions in ITA No.1957/Mum/2007 & C.O No.187/Mum/2007 dated 8/12/2008 in respect of assessment year 2001-02 and ITA No.2099/Mum/2007 & CO No.188/Mum/2007 dated 10/12/2008 for assessment year 2002-03 and relying on these decisions Ld. CIT(A) has decided the issue in favour of the assessee and deleted the addition, hence, the Department has raised Ground No.2.

7. At the outset it was submitted by ld. AR that this issue is consistently deciding in favour of the assessee by the ITAT and reference was made to the orders of ITAT rendered in respect of assessment year 2001-02, 2002-03 and 2003-04 and 2004-05. Copy of these orders have been enclosed in the paper book from pages 1 to 18. The initial order of the Tribunal is in respect of assessment year 2001-02, copy of which is placed at pages 15 to 18 of the paper book(appeal Nos. have been described in above part of this order). The relevant observations of the Tribunal are as under:

> *"6. We have heard the rival submissions and perused the relevant material on record. There is no dispute on the fact that the Assessee had not separately sold software but it was part and parcel of the equipment supplied to M/s. Siemens Limited. The case of the Assessee is that it should be taken as "Business profits" as per Article-7 of DTAA between India and Germany. On the other hand the Department wants it to be considered as falling under Article-13, being the royalty. We have to decide whether the sum of Rs.5.29 crores is to be considered as "Business profits" or "royalty". The Special Bench of the Tribunal in the case of Motorola Inc. vs. DCIT [(2005) 95 ITD 269(Delhi)(SB)] has considered this aspect and held that "the payment made to the Assessee for use of software in the equipment did not amount to royalty either under the Income-tax Act or the DTAA". The facts involved in the instant case are akin to those considered by the Special Bench in the afore-noted case. The learned Departmental Representative could not point out any distinguishing feature in the facts of the instant case vis-à-vis that decided by the Special Bench. Respectfully following the view taken by the Special Bench on this aspect of the matter, we are of the considered opinion that the amount received by the Assessee towards supply of software cannot be segregated from the supply of equipment and hence that portion cannot be*

considered "royalty". We, therefore, approve the view taken by the learned CIT(A) on this issue."

8. In this view of the situation, after hearing both the parties, we decline to interfere in the relief granted by Ld. CIT(A) as the same in accordance with the orders of Tribunal rendered in the case of assessee for earlier years. This ground of the Revenue is also dismissed.

9. In the result, the appeal filed by the Revenue is dismissed.

Order pronounced in the open court on 06/05/2014
आदेश की घोषणा खुले न्यायालय में दिनांकः 06/05/2014 को की गई ।

Sd/-	Sd/-
(डी. करूणाकर रावु / **D.KARUNAKARA RAO**)	(आय.पी. बंसल **/ I.P. BANSAL**)
लेखा सदस्य **/ ACCOUNTANT MEMBER**	न्यायिक सदस्य **/ JUDICIAL MEMBER**

मुंबई Mumbai; दिनांक Dated 06/05/2014

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**

व.नि.स./*Vm*, Sr. PS

	Details	Date	Initials	Designation
1	Draft dictated on	06/05/2014		Sr.PS/PS
2	Draft Placed before author	07/05/2014		Sr.PS/PS
3	Draft proposed & placed before the Second Member			JM/AM
4	Draft discussed/approved by Second Member			JM/AM
5.	Approved Draft comes to the Sr.PS/PS			Sr.PS/PS
6.	Kept for pronouncement on			Sr.PS/PS
7.	File sent to the Bench Clerk			Sr.PS/PS
8	Date on which the file goes to the Head clerk			
9	Date of Dispatch of order			