IN THE ITAT DELHI BENCH 'D'

Deputy Director of Income-tax, Circle-3(1), International Taxation

v.

Lucent Technologies International Sales Ltd.*

G.D. Agrawal, Vice-President

And I.C. Sudhir, Judicial Member

IT Appeal No. 4054 (Delhi) of 2011

[Assessment year 2002-03]

August 24, 2012

ORDER

I.C. Sudhir, Judicial Member - The revenue has questioned first appellate order on the ground that the Ld. CIT (A) has erred in holding that interest u/s 234 B is not chargeable on the short payment of advance tax by the assessee.

2. The relevant facts are that the assessee's company registered in United States of America belongs to Alcatel Lucent (ALU) Group which is a leading manufacturer of telecom equipments in the world. ALU group has a substantial presence in India. The Group provides services in the areas of GSM and CDMA infrastructure, 3G, Broadband, IP Multimedia Sub-system (IMS), Transmission Equipment, development and implementation of IN Platform and other applications, EPABX, Space Equipment and Telecom Infrastructure projects with Railways (DMRC), Roads, Defence and Aviation to various clients in India. This group started its Indian operations in the year 1982 when it entered into an agreement with Indian Telecom Industries Ltd. (ITI). During the year under consideration, the assessee supplied telecom equipments to various companies such as Bharat Sanchar Nigam Ltd. and Bharti Airtel Ltd. etc. One of the group entity is Alcatel-Lucent France which is a tax resident of France. This entity is the flagship entity of ALU group which has been regularly filing its return of income in India. In its return of income for A.Y. 2006-07 the income from services rendered in India was offered to tax. However, income from offshore supplies made to Indian customers was not offered to tax.

3. A survey u/s 133 A of the Act was carried out on 22.2.2009 at the office premises of Alcatel Lucent India Ltd. (including its predecessors) located at New Delhi and Gurgaon. Based upon the documents found, statement recorded during and after the survey and subsequent discussions, it was held in the assessment order of Alcatel Lucent France, for assessment year 2006-07 that various Alcatel Lucent Overseas entities including the assessee had a permanent establishment (PE) in India. Subsequently, a notice u/s 148 of the Act was issued upon the assessee. In response the assessee filed a return of income declaring "Nil" income. Based upon the findings made in the assessment order in the case of Alcatel Lucent France, for the assessment year 2006-07, it was held by the AO that the facts in the assessee's case for the assessment year 2004-05 to 2007-08 are similar to that in the case of Alcatel Lucent France, for

the assessment year 2006-07 and the assessee had a business connection as well as a PE in India having the fixed place of business and installation and agency (PE) in the form of ALIL. The AO determined net income chargeable to tax as attributable to PE in India @ 2.5% of the sales made by the assessee in India. Accordingly, assessment was framed at an income of Rs.6,55,033/- and also levied the interests u/s 234 A, 234 B and 234 C.

4. Before the Ld. CIT (A) the assessee questioned the levy of interest u/s 234 B by the AO at Rs. 3,46,360/-. The Ld. CIT (A) being convinced with the contention of the assessee has deleted the interest levied u/s 234 B following the decision of Hon'ble Jurisdictional High Court of Delhi in the case of *DIT* v. *Jacabs Civil Incorporated/Mitsubishi Corpn.* [2011] 330 ITR 578/[2010] 194 Taxman 495. This action of the Ld. CIT (A) has been questioned before the Tribunal.

5. In support of the grounds the Ld. DR has basically placed reliance on the assessment order. He contended that the Ld. CIT (A) has failed to appreciate that AO had levied interest u/s 234 B of the Act since the short advance tax payment was made by the assessee. He submitted that the scheme of advance tax places primary responsibility of the assessee for payment of tax. A conjoint reading of various provisions u/s 207 onward would make it clear that the Act makes assessee responsible for estimation of its current income and also for payment of advance tax. He submitted that the assessee have not filed regular return of income and the assessment order has been passed pursuant to notice u/s 148 after recording the reasons. He submitted that Section 195 of the Act puts an obligation on the payer that any person responsible for paying to a non-resident to deduct income tax at source at the sake in force. Once it is found that the liability was that of payer and the said payer has defaulted in taking the tax at source the department is having no option but to take action under the provision of Section 201 of the Act. He submitted that on the one hand assessee at the time of receipt of payment from resident has taken a stand that it does not have PE or taxable presence in India and therefore, provisions of Section 195 were not attracted and on the other hand now at the time of appellate proceedings they have accepted the existence of PE in India. Thus the assessee should not be allowed to take the plea that since its income was chargeable to tax and as per Section 195 it was responsibility of payer to deduct the tax and for default of payer the company should not be visited with liability u/s 234 B of the Act.

6. The Ld. AR on the contrary tried to justify the first appellate order and referred the provisions laid down u/s 209(1)(d) of the Act. He submitted further that the decision of Hon'ble Jurisdictional High Court of Delhi in the case of *Jacabs Civil Incorporated Mitsubishi Corpn.* (*supra*) is squarely applicable in the case of assessee. Informed further that on an identical issue in a batch of nine appeals in the case of group companies i.e. *ITAT* v. *Alcatel Lucent USA Inc* ITA No. 3821 and 3824 Delhi 2011 and *Asstt. DIT* v. *Alcatel Lucent World Services Inc*. ITA Nos. 3825 to 3829 Delhi 2011, the Coordinate bench of the Tribunal at Delhi has been pleased to delete the interest levied u/s 234 B of the Act, vide its order dated 21.10.2011, a copy whereof has been made available at page no. 143 to 155 of the paper book filed on behalf of the assessee. The Ld. AR has also placed reliance on the following decisions:

(*i*) *Jacabs Civil Incorporated/Mitsubishi Corpn.* (*supra*)

(*ii*) *Motorola Inc*. v. *Dy. CIT* [2005] 95 ITD 269/147 Taxman 39 (Delhi) (Mag.) (SB)

(*iii*) *Samsung Heavy Industries Co. Ltd.* v. *Asstt. DIT* [2011] 133 ITD 413/13 taxmann.com 14 (Delhi)

(*iv*) *CIT* v. *Sedco Forex International Drilling Co. Ltd.* [2003] 264 ITR 320/[2004] 134 Taxman 109 (Uttaranchal)

(*v*) *Mitsui Engg. & Ship Building Co. Ltd.* v. *Asstt. CIT* [2001] 79 ITD 481 (Delhi)

(*vi*) *Dy. CIT* v. *Metapath Software International Ltd.* [2006] 9 SOT 305 (Delhi).

(*vii*) *Dy. CIT* v. *Pride Foramer SAS* [2008] 24 SOT 59 (Delhi)

7. After considering the above submissions in view of the orders of the authorities below and the decisions relied upon, there is no dispute that combined reading of the provisions of Section 209(1)(d) with the provisions of Section 234B of the Act makes it clear that the liability to pay interest u/s 234B would arise only if advance tax is payable after making the necessary adjustment for tax deductible at sources. The amount of (Tax deductable) would obviously mean the tax as was required to be deducted in respect of a particular income and not the tax which has actually being deducted at source. Responsibility of an assessee to pay advance tax arises under the provisions of Section 208 read with Section 209 and 210 the mode of computation of advance tax is given in Section 209 of the Act. As long as the assessee has discharged its obligation to pay advance tax as per the provisions of Section 208 read with Sections 209 and 210 he cannot be held liable for defaulting in payment of advance tax. Section 234B and Section 234C only provide a method of computation of interest in case of default by an assessee to pay advance tax as stipulated in Sections 208, 209 and 210 of the Act. The undisputed fact in the present case remained that the tax on the entire income received by the assessee was required to be deducted at appropriate rates by the respective payers u/s 195(2) of the Act. Had the payer made the deduction of tax at the appropriate rate, the net tax payable by the assessee would have been Nil. Thus there was no liability to pay advance tax by the assessee. Under similar facts, the Hon'ble High Court of Delhi in the case of *Jacabs Civil Incorporated/ Mitsubishi Corpn.* (*Supra*) has been pleased to hold that Section 195 puts an obligation on the payer i.e. any person responsible for paying any tax at source at the rates in force from such payments and if payer has defaulted in deducting tax at source, the department can take action against the payer under the provisions of Section 201. In such a case, the non-resident is liable to pay tax but there is no question of payment of advance tax and therefore, it cannot be held liable to pay interest u/s 234B on account of default of the payer in deducting tax at source from the payments made to the appellant. The contents of para no. 9 of the said decisions of Hon'ble Delhi High Court are being reproduced hereunder for a ready reference:

"This clause categorically uses the expression "deductible or collectible at source" and it is this clause which is incorporated by the Uttaranchal High Court in the said judgment (*Supra*) in the manner already pointed above. The scheme of the Act in respect of non-residents is clear. Section 195 of the Act puts an obligation on the payer, i.e., any person responsible for paying to a non-resident, to deduct income-tax at source at the rates in force from such payments excluding those incomes which are chargeable under the head 'Salaries'. Therefore, the entire tax is to be deducted at source which is payable on such payments made by the payee to the non-resident. Section 201 of the Act lays down the consequences of failure to deduct or pay. These consequences include not only the liability to pay the amount which such a person was required to deduct at source from the payments made to a non-resident but also penalties, etc. Once it is found that the liability was that of the payer and the said payer has defaulted in deducting the tax at source, the Department is not remedy-less and, therefore, can take action against the payer under the provisions of section 201 of the Income-tax act and compute the amount accordingly. No doubt, if the person (payer) who had to make payments to the non-

resident had defaulted in deducting the tax at source from such payments, the non-resident is not absolved from payment of taxes thereupon. However, in such a case, the non-resident it liable to pay tax and the question of payment of advance tax would not arise. This would be clear from the reading of section 191 of the Act along with section 209 (1) (d) of the Act. For this reason, it would not be permissible for the revenue to charge any interest under section 234 B of the Act."

Respectfully following the above decision of Hon'ble Jurisdictional High Court in the case of *Jacabs Civil Incorporated/Mitsubishi Corpn.* (*Supra*) the Ld. CIT (A) has deleted the interest charged u/s 234 B in question. Since the issue raised in the ground of the present appeal is squarely covered by the decision of Hon'ble Jurisdictional High Court in the case of *Jacabs Civil Incorporated/Mitsubishi Corpn.* (*Supra*) followed by the Ld. CIT (A), we do not find infirmity in the first appellate order in this regard. The same is affirmed. The ground is accordingly rejected.

8. Consequently appeal is dismissed.