**IN THE INCOME TAX APPELLATE TRIBUNAL**
**MUMBAI BENCH "L", MUMBAI**

**BEFORE SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER AND SHRI MANJUNATHA, HON'BLE ACCOUNTANT MEMBER**

**ITA NO.1535/MUM/2014 (A.Y: 2010-11)**

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| Intec Billing Ireland<br>C/o S.R.B.C & Associates LLP<br>14th Floor, The Ruby,<br>29 Senapati Bapat Marg,<br>Dadar (West)<br>Mumbai – 400 028 | *v.* | The Assistant Director of Income –Tax<br>(International Taxation),<br>Range 3(1), Scindia House,<br>Mumbai - 400 038 |
| **PAN No: AADCA 7890 E** | | |
| **(Appellant)** | | **(Respondent)** |

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| **Assessee by** | : | **Shri M.P. Lohia**<br>**Shri Nikhil Tiwari** |
| **Department by** | : | **Shri Samuel Darse** |
| **Date of Hearing** | : | **10.10.2017** |
| **Date of Pronouncement** | : | **08.01.2018** |



## O R D E R

**PER C.N. PRASAD (JM)**

1. This appeal is filed by the assessee against the order of the Disputes Resolution Panel – I, Mumbai dated 11.12.2013 for the Assessment Year 2010-11.

2. The following grounds are raised by the assessee: -

*"1. erred in assessing the total income of the Appellant at ₹.11,37,32,921/- as against ₹.6,64,72,920, reported by the Appellant. In its revised Return of Income ('ROI').*

*Supply of off the shelf software treated 'Royalty':*

*2. erred in holding that receipts from Reliance Industries Limited ('RIL') of ₹.4,72.60,001 on account of supply of off the shelf software to be 'royalty' under Section 9(l)(vi) of the Act and Article 12 of the Double Taxation Avoidance Agreement between India and Ireland ('India- Ireland Tax Treaty).*

*3. should have appreciated that in view of beneficial provisions of India-Ireland Tax Treaty, the, impugned payment towards supply of off the shelf software, would not be regarded as Royalty' under the India-Ireland Tax Treaty and hence not chargeable to tax in India.*

*Non granting of credit of Tax Deducted at Source ('TDS'):*

*4. erred in not granting the entire credit of TDS amounting to ₹.1,23,61,709/-, disregarding specific direction of the Hon'ble DRP.*

*Levying interest under Section 234B and 234C of the Act:*

*5. Erred in levying interest amount to ₹.51,17,981/- and ₹.3,22,384/- under sections 234B and 234C of the Act, respectively.*

*6. Should have appreciated the fact that as the Appellant is nonresident and its entire income is liable to tax deduction at source, interest under Section 234B and 234C of the Act cannot be levied.*

*7. alternatively should have appreciated the fact that as taxes were deducted on the receipts, question of payment of advance tax does not arise.*

*Initiating Penalty Proceedings under Section 271(1)(c) of the Act:*

*8. erred in initiating penalty proceedings under Section 271(1)(c) of the Act.*

3. Briefly stated the facts are that, Intec Ireland (the assessee) is a company incorporated in Ireland and is a tax resident of Ireland. During the AY 2010-11 Intec Ireland had inter-alia supplied billing software to Reliance Industries Limited (Reliance') for the purpose of billing their customers. A Copy of Software License Agreement dated 26 February 2002 is placed at Page Nos. 133 to 151 of the paper book. The Software License Agreement has been originally entered into between Reliance and Intec Billing, America a group company of the assessee, earlier known as ADC Software System. America. The said agreement has been subsequently assigned in entirety to Intec Ireland the assessee vide assignment letter dated 08 April 2005. A copy of the assignment letter is placed at Pages 152 and 153 of the paper book. The assessee has licensed the same software to Reliance under the same agreement which was subsequently assigned to the assessee.



4. According to the assessee the software licensed to Reliance under the software licence agreement is an 'off the shelf'/Shrink Wrapped' software which assists telecom companies in billing in an efficient, profitable billing operation with strong focus on customers and Revenue management. The software licensed by assessee is standard products already developed and made available to other customers.

5. However, the Learned Assessing Officer (AO') held that the amounts receivable by Intec Ireland for supply of 'off the shelf' software to Reliance are for grant of 'copyright' and accordingly, the receipts are in the nature of 'Royalty' as per amended Section 9(1)(vi) of the Act and Article 12 of the India-Ireland Tax Treaty.

6. The DRP accepted the view of the learned AO and held that the amount received by the assessee from Reliance was for the 'use of or right to use of copyright' and hence, in the nature of Royalty as defined under Article 12 of the India Ireland Tax Treaty In para 5.4 of the DRP order, the DRP after perusal of the documents submitted by the assessee has accepted the fact that the software supplied by Intec Ireland to Reliance is in the nature of a shrink wrapped/ off the shelf software. Therefore, in the facts of the present case, the DRP accepts that in assessee's case the present software is in the nature of a shrink wrapped/off the shelf software. However, the DRP placing reliance on the Hon'ble Karnataka High Court in the case of Samsung Electronics Co. Ltd [345 ITR 494] and the decision of the Mumbai Bench in the case of DDIT *v.* Reliance Infocomm Ltd held payment made by RIL to the assessee is for the use of or right to use of copyright and is royalty within the meaning of Article 12 of India Ireland DTAA. Aggrieved by the final

order of the learned AO (based on DRP direction), the assessee is in appeal before us.

7. Ld. Counsel for the assessee in regard to ground Nos. 1 to 3 submits that the software licensed to Reliance under the Software license agreement is off-the-shelf software. The software products provided under the said agreement are standard products already developed and made available to other customers. Under the said agreement, Reliance has acquired a license to use a copy of the software for its business purpose. The right to make multiple copies of the software is limited only for the purpose of Reliance's own operations Reliance is not permitted to resell the software products and components or commercially exploit the same. The license is essentially granted for Reliance's own use and Reliance has not been granted any rights in the underlying copyright. It is submitted that Intec Ireland exclusively owns all the Intellectual Property Rights (IPR) in and to the software. Intec Ireland merely grants to Reliance a 'copyrighted article' and not the 'copyright in the article'. Hence, Reliance does not use or have any right to use the copyright in the software products and Intec Ireland merely grants a copyrighted article. Therefore, what is given to Reliance by the assessee is copyrighted article and not copyright in the copyrighted article and hence, the same is not chargeable to as per Article 12 of the India Ireland Tax Treaty.

8. Learned Counsel for the assessee in regard to Copyright vs Copyrighted Article submitted before us that, as per the 'License' clause, para 2(a) of the Agreement, the Assessee grants a perpetual, non-exclusive, irrevocable, royalty-free, non-assignable and non-transferable license to Reliance and its affiliates to use the software in object code form. Further, all software and media on which the software is delivered remain the sole and exclusive property and trade secret of the Assessee/ its licensors. Learned Counsel for the assessee further submits that as per Scope of permitted use clause, para 2(b) of the Agreement, Para 2 (b) (i) provides that Reliance shall have no right to modify, adopt, translate, reverse engineer, decompile, disassemble, or create derivate works based on the software. Para 2(b) (ii) provides that Reliance will use the software only for internal training purposes and to process its own data and that of its affiliates. Further, Reliance will not use the software to offer time sharing, service bureau or other computer based services to third parties. Para 2(b) (iv) provides that Reliance will use the software only on specified equipment and location as agreed between the parties. Para 2(b) (v) provides that the software should be used within a single operating environment as selected by Reliance. Para 2(b) (vi) provides that Reliance will only make copies of the software for specified purposes (such as primary copy for production, training, testing, etc) as mentioned

in the Agreement and for back-up and archival purposes. Learned Counsel for the assessee submits that 'Standard software' clause, para 14(c) of the Agreement as per this clause, the software supplied by the Assessee to Reliance is a standard product already developed and made available to other comparable customers.

9. Learned Counsel for the assessee submits that the payments received by the Assessee is not for the use of or the right to use any patent, trademark, design or model, plan, secret formula or process or information concerning industrial, commercial or scientific experience., but for use of a 'copyrighted article' which emanates from use of the 'copyright'. Ld. Counsel for the assessee referring to paragraph 3(a) of Article 12 (which defines the term 'Royalty' for the purpose of India Ireland Tax Treaty) submitted that it does not include supply of a 'copyrighted article' and only such payments, which have been made for the use of, or the right to use the copyright in the literary, artistic or scientific work will qualify as 'royalty' under the India Ireland Tax Treaty. The relevant extract of Article 12 of India Ireland Tax Treaty is reproduced below for ready reference:

> "3. (a) The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, al* the right to use, any copyright of literary, artistic or scientific work including cinematograph films or films or tapes for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process or for the use of or the right to use industrial,

commercial or scientific equipment, other than an aircraft, or for information concerning industrial. commercial or scientific experience"

10. Learned Counsel for the assessee referring to the above submits that only in a situation where the payments are for the use of 'copyright' in copyrighted article, the said receipts can be treated as "royalty". It is submitted that the payments received by the Assessee is in fact for the sale of a copyrighted article and not for the use of the copyright in the said copyrighted article. As it is evident from the nature of software and the terms of the software licence agreement, Reliance has not made any payments for use of a copyright or right to use a copyright in the software. The Assessee has only supplied copyrighted software to Reliance and not any rights in the said software Accordingly, receipts from Reliance are not taxable as 'Royalty' in the hands of Assessee under Article 12 of India-Ireland Tax Treaty



11. Learned Counsel for the assessee further submitted that the issue of taxability of revenues received from supply of off the shelf/ shrink wrapped software from Reliance under the same agreement has been decided by the Hon'ble Mumbai Income Tax Appellate Tribunal ('Tribunal') in favour of Intec Billing America vide its order dated 5 February 2010 (ITA No 3196/Mum/07 for AY 2002-03) ('Intec America') (formerly known as ADC Software Systems USA). The Hon'ble Tribunal after examining

various clauses of the Software Licence Agreement held that the Intec Amecia has licensed off the shelf/ shrink wrapped software and therefore, it was held that payments from Reliance are not taxable as 'Royalty' under the India USA Tax Treaty. Learned Counsel for the assessee submitted that Intec America has assigned all the rights in the software to Intec Ireland (a group company) vide letter dated 8 April 2005. The said assignment was governed by the terms of Clause 10(b) of the software license agreement signed between Intec America and Reliance. Learned Counsel for the assessee further submitted that Tax Treaty between India America and India Ireland is pari materia with regard to the article on 'Royalty' and more so on taxation of software royalty.

12. He submits that copy of the order of the Hon'ble Tribunal is placed at page Nos. 155 to 160 of the paper book. Learned Counsel for the assessee drew our attention to the fact that the definition of 'Royalty' under the India Ireland Tax Treaty is pari-materia as that under India USA Tax Treaty and copy of the same is placed at Page Nos. 174 to 198 of the paper book. As the above decision of the Hon'ble Mumbai Tribunal has already decided the issue of taxability of supply of software under the same agreement in favour of Intec Ireland, Learned Counsel for the assessee submitted that the receipts from supply of software are not taxable in the hands of Intec Ireland as 'Royalty' under India Ireland Tax

Treaty. Ld. Counsel for the assessee further reiterate that Intec Ireland does not have PE in India. Accordingly, amounts received by Intec Ireland from towards supply of software are not liable to tax in India. Learned Counsel for the assessee submitted that If two views are possible the one which is favorable to the assesse has to be accepted.

13. Ld. Counsel for the assessee placed reliance on the decision of Patspin India Ltd vs DCIT [129 ITD 35] wherein it was held that when the issue is already covered by an earlier order of the Tribunal, that too in assessee's own case, a Co-ordinate Bench of the Tribunal should not differ from the earlier decision of the Bench simply for the reason that a contrary view is possible.

14. Reliance is placed in the ruling of Hon'ble Supreme Court in the case of CIT *v.* Kulu Valley Transport Co. P. Ltd. [77 ITR 518] where it is held that "even if two views are possible the view which is favorable to the assessee must be accepted while construing the provisions of a taxing statute." This principle has been reiterated by various Courts including the Supreme Court in CIT v Vegetable Products Ltd. 88 ITR 192 (SC) wherein it has been held that if two views in regard to interpretation of a provision are possible, the Court would be justified in adopting that construction which favor's the assesse.

15. Ld. Counsel for the assessee submitted that in the following judicial precedents wherein it has been held that payments made for use of a software which does not grant any right to use a copyright, but merely grants a right to use a copyrighted article, are not in the nature of 'royalty' income and hence, should not be taxable in India as royalty.

16. Learned Counsel for the assessee submitted that recently, the Delhi High Court in case of Halliburton Export Inc. (ITA No. 3631 of 2016) which approved the Delhi Tribunal's decision in its own case (152 ITD 803) (copy of the decision is enclosed at pages 213 to 228 of the paper book) has held that the right to use a programme is totally different from the right to use a programme embedded in a software and the payment made for the same cannot be said to be received as consideration for use of or right to use of any copyright to bring it within the definition of 'royalty' under a DTAA. The Hon'ble High Court also held that where the provision of the treaty is more beneficial to the assesse, the treaty would prevail over the Act. The Delhi High Court relied on its own decision in case of DIT vs Infrasoft Limited [220 Taxman 273].



17. He submitted that the Mumbai Tribunal recently in case of Capgemini Business Services (India) Ltd [TS-100-ITAT-2016(Mum)] (copy of the decision is placed at pages 325 to 346 of the paper book)

after considering all the factors, examining all the decisions available on this issue, relevant provisions of the Copyright Act, amended definition of 'royalty' and the definition of 'royalty' under the India-Singapore tax treaty has held that where the payment is made for the copyrighted article, the same cannot be considered as payment for the transfer of the copyright and accordingly, cannot be taxed as "Royalty”. The Mumbai Tribunal has considered the decisions in the cases of Samsung Electronics Company Ltd. & Others [345 ITR 494], Verizon Communication Singapore [361 ITR 575], Reliance Infocom Ltd. [37 CCH 0069], Viacomm 18 Media Pvt. Ltd. [44 taxman.com 1] (which were in favour of department) and has come to a conclusion that payment for use of software could not be treated as 'Royalty' under the India-Singapore tax treaty.

18. Learned Counsel for the assessee submitted that the decision of the jurisdictional Mumbai Tribunal has been rendered after considering all the factors and the same is directly applicable to the case of assessee.

19. He further submitted that the Hon’ble Mumbai Tribunal in case of Galatea Limited v. DCIT [46 ITR (Trib.) 690] (copy of the decision is enclosed at pages 347 to 364 of the paper book) has held that payment for the copyrighted article will not be taxed as "Royalty" as defined under the Article 12(3) of India-Israel tax treaty.

20. Learned Counsel for the assessee submitted that Hon'ble Delhi High Court in the case of DIT *v.* Nokia Networks OY (212 Taxman 68) (copy of the decision is placed at pages 425 to 446 of the paper book) held that the payment for copyrighted article does not fall within the purview of 'Royalty' under the DTAA.

21. Ld. Counsel for the assessee submitted that the Hon'ble Delhi High Court in the case of Ericsson Radio Systems AB (343 ITR 470) held that the consideration paid by the cellular operators can be treated as Royalty' only if the cellular operators had obtained all or any of the copyrights in such software that is protected in India as a literary work. Further, the Hon'ble High Court held that a distinction also needs to be made between acquisition of a 'copyright right' and a 'copyrighted article'.



22. Ld. Counsel for the assessee submitted that the Hon'ble Mumbai Tribunal in case of DDIT vs Solidworks Corporation [17 ITR (Trib) 510] for AY 2006-07, following the decision of Hon'ble Delhi High Court in the case of Ericsson AB, has held that the receipts from supply of software are not taxable as Royalty'.

23. Ld. Counsel for the assessee submitted that in view of the all the above judicial precedence, it can be said that the payments received by the Intec Ireland form Reliance is not for the use of or the right to use any

patent, trademark, design or model, plan, secret formula or process or information concerning industrial, commercial or scientific experience., but for use of a 'copyrighted article' instead of use of the 'copyright'.

24. As per the provisions of Section 90(2) of the Act, a non-resident assessee is eligible to be governed under the provisions of the Act or the Tax Treaty, whichever is more beneficial. As submitted above, Intec Ireland is a tax resident of Ireland and hence is eligible to claim the benefits of the Treaty. During AY 2010-11, Intec Ireland has received revenues of ₹.4,72,60.001 from Reliance for grant of software. The said receipts are not in the nature of 'Royalty' but in the nature of 'Business Profits' and since, Intec Ireland does not have Permanent Establishment ('PE') in India within the meaning of Article 5 of India Ireland Tax Treaty. the said receipts are not taxable as 'Business Profits' in India. Accordingly, the receipt from license of software was not offered to tax by the Appellant in the Return of income. Copy of the acknowledgement of filing income tax return along with the computation of income and notes to return of income is enclosed vide page 72 to page 75 of the paper book. This position of the appellant in the return of income was on the basis of ITAT order in AY 2002-03 while adjudicating the case of Intec Billing America (on the very same agreement) wherein, the said revenue is held to be not taxable.

25. The Ld. Counsel for the assessee further submitted that tax Payer entitle to be governed by Provision of Tax Treaty to the extent beneficial as compared to the Income Tax Act. As submitted above, Intec Ireland is a tax resident of Ireland and hence, is eligible to claim the benefits of the Tax Treaty. Accordingly, as per the provisions of Section 90(2) of the Act, a non-resident assessee is eligible to be governed under the provisions of the Act or the Tax Treaty, whichever is more beneficial



26. It is submitted that paragraph 3(a) of Article 12 (which defines the term 'Royalty' for the purpose of India Ireland Tax Treaty) does not include supply of a 'copyrighted article' and only such payments. which have been made for the use of. or the right to use the copyright in the literary, artistic or scientific work will qualify as 'royalty' under the India Ireland Tax Treaty.

27. It is submitted that in order to fall within the meaning of 'Royalty' under the India Ireland Tax Treaty, whether the consideration is for the 'use' or 'right to use' is not relevant. In either case, the consideration has to be in respect of a 'copyright' of a literary, artistic or scientific work.

28. It is submitted that the consideration paid for 'computer software; has not been specifically included in the definition of royalty under the Act. As the term ‘Royalty' has already been defined under Article 12(3) of the India Ireland Tax Treaty, the provisions of the Article 3(2) would not be

applicable in the present case. Further, Ld. Counsel for the assessee reiterate that since Intec Ireland is a tax resident of Ireland, it is eligible to claim benefits of the India Ireland Tax Treaty. Accordingly, as per provisions of Section 90(2) of the Act, provisions of the Act or India Ireland Tax Treaty, whichever is more beneficial would be applicable.

29. Ld. Counsel for the assessee submitted that, as it is evident from the nature of software and the terms of the software licence agreement. Reliance has not made any payments for use of a copyright or right to use a copyright in the software. The Assessee has only supplied license to use the software which was right to use copyright in the software and not any rights in the said software. Accordingly, receipts from Reliance are not taxable as 'Royalty in the hands of Assessee under Article 12 of India-Ireland Tax Treaty. Issue in appeal in relation to the impugned agreement in the case is covered in Intec Billing America's case for AY 2002-03.



30. The Ld. Counsel for the assessee submitted that the provisions of DTAA will prevail over retrospective amendment made under the Act. The definition of Royalty is provided under Section 9(1)(vi) of the Act and under Article 12(3) of the India Ireland Tax Treaty. In this regard, it is submitted that the Finance Act 2012 has incorporated Explanation 4 to Section 9(1)(vi) of the Act which reads as under:

"Explanation 4—For the removal of doubts, it is hereby clarified that the transfer of all or any rights in respect of any right, property or information includes and has always included transfer of all or any right for use or right to use a computer software (including granting of a licence) irrespective of the medium through which such right is transferred."

31. A comparison of the definition of 'royalty' as provided under the Tax Treaty and the Act shows that the same are not a paramateria with each other. The definition provided under the Tax Treaty is very short and restrictive definition, whereas, the definition of royalty as provided under the Act is very wide and inclusive. Since the definition provided under the royalty in the Tax Treaty is more beneficial to the Appellant. hence as per the provisions of Section 90, the definition of royalty as provided under Tax Treaty is to be considered in the present case. Accordingly, assuming without admitting that the receipts of Intec Ireland are liable to tax as per the amended definition of 'Royalty' in the Act, 'the said revenues would not be so covered by the favorable definition of 'Royalty' in the India Ireland Tax Treaty.

32. However, in the assessment order, the learned AO has not considered submission of the assessee in relation to the impact of applicability of provisions of Tax Treaty to the extent more beneficial to the assessee as per Section 90(2) of the Act. As Intec Ireland is eligible for the benefits under India Ireland Tax Treaty, it is submitted that the

definition of royalty amended vide Explanation 4 cannot be applied to tax treaty. Reliance in this regard, is placed on the following judicial precedents wherein it was held that the amendments made to the Act by the Finance Act 2012 would not have an impact on the positions adopted under the Tax Treaties since there has been no amendment in the Tax Treaties.

33. The Hon'ble Delhi High Court, recently in the decision of New Skies Satellite BV & Ors. (382 ITR 114) (copy of the decision is placed at pages 347 to 364 of the paper book) has also held that the unilateral amendment made by the Parliament of a one state will not automatically amend the DTAA's signed by that state with the other states.

34. Therefore, in view of the above, he submits that assuming without admitting that the revenues from supply of software are chargeable to tax in India under the Act, the Hon'ble High court has held that a unilateral amendment of the definition of "Royalty" in the Act would not automatically amend the definition of "Royalty' in the DTAA. Accordingly, the said revenues would not be taxable as 'Royalty" in India by virtue of Article 12 of the India Ireland Tax Treaty.

35. Ld. Counsel for the assessee further submitted that the Jurisdictional Mumbai ITAT in case of WNS North America [152 TTJ 145]

has held that despite the retrospective amendment to the Act, the amendment will not apply to the treaty per se. It was further observed that if there is some provision in the treaty which is contrary to the provision of the domestic law, then it is the contrary provision of the treaty which shall override the provision in the domestic law in the computation of income as per the treaty. Further, the Hon'ble ITAT held that since the explanation inserted vide retrospective amendment to the Act, making the definition of 'royalty' inclusive in nature, was not a part of 'royalty' definition under the relevant DTAA, such retrospective amendment should not be read in the DTAA also.

36. The Jurisdictional Mumbai ITAT decision in case of B4U International Holdings Limited ('B4U') [181 ITR (Trib.) 62] has held that despite the amendment to the Act (vide the Finance Act 2012), such payment would not be taxable as 'royalty' since there was no change in the treaty between India and USA (in this case payer was USA company).

37. The Jurisdictional Mumbai ITAT decision in case of Baan Global BV (ITA No. 7048/M/2010) has held that one contracting state which is a party to a treaty cannot unilaterally alter its provision and enlarge the scope of any term from the prism of its domestic law. If there is no amendment in

the treaty and if any amendment is carried out under the domestic law then same cannot be read into the treaty.

38. Further, the Hon'ble Delhi High Court, recently in case of New Skies Satellite BV & Ors (382 ITR 114) has also held that the unilateral amendment made by the Parliament of a one state will not automatically amend the DTAA's signed by that state with the other. The Hon'ble Delhi High Court concluded that the amendment vide Finance Act 2012 will not affect Article 12 of the Tax Treaty. it would follow that the first determinative interpretation given to the word royalty' prior to the amendment in the Act will continue to hold the field for the purpose of assessment years preceding the Finance Act. 2012 and in all cases which involve a Tax Treaty unless the said Tax Treaties are amended jointly by both the parties. He submits that the above decisions are squarely applicable to the Intec Ireland, as there is no amendment in the definition of 'Royalty' in India-Ireland Tax Treaty. He submitted that the amendments in the Act cannot be read into India-Ireland Tax Treaty. In light of the above, without prejudice to the Intec Ireland's arguments that its receipts are not taxable under Article 12 of India-Ireland Tax Treaty. In case Intec Ireland is held to be taxable under the Act, it is submitted that under Section 90(2) of the Act, Intec Ireland is eligible to claim treaty

benefits under India-Ireland Tax Treaty. Accordingly, receipts from Reliance are not taxable as 'royalty'.

39. Ld. Counsel for the assessee strongly placed reliance on the following decisions in support of the above contentions that in the case of shrink wrapped/ off the shelf, Software does not amount to Royalty.

(i) Galatea Limited [46 ITR 690] Mumbai Tribunal.
(ii) Capegemini Business Services (India) Ltd [46 CCH 253] Mumbai Tribunal.
(iii) Datamine International Limited [46 CCH 296] Delhi Tribunal.
(iv) Solid Works Corporation [ITA.No. 8721/M/2010] Mumbai Tribunal.
(v) Reliance Industries Ltd & Ors [47 CCH 94 (Mum)]
(vi) Baan global BV [ITA.No.7048/M/2010] Mumbai Tribunal.
(vii) Galatea Limited [47 CCH 325] Mumbai Tribunal.
(viii) Halliburton Export Inc [152 ITD 803 (Del Tribunal) Dated 14 February 2014 approved by (ITA.No. 363/ 2016) Delhi (High Court)]
(ix) Qad Europe B.V. [ITA.Nos. 83 & 84/Mum/2007] Mumbai Tribunal
(x) First Advantage Private Limited [ITA.No. 3031/Mum/2010 & ITA.No. no. 3032/Mum/2010] Mumbai Tribunal
(xi) Dassault Systemes, Mumbai Tribunal [79 taxmann.com 205]
(xii) National Stock Exchange of India, Mumbai Tribunal [ITA.No. 7735/Mum/2011]
(xiii) Mckinsey Knowledgement Centre India Private Limited, New Delhi Tribunal [ TA.No. 407/Del/2013].



40. Ld. DR strongly supported the orders of the DRP. Ld. DR submitted that during the course of hearing, it was argued on behalf of the assesse that the matter was covered in favour of the assessee by Mumbai Tribunal's orders in various cases wherein consideration paid for purchase/supply/licence of software has been held to be not Royalty. In this regard while relying completely on the on the order of the AO, among others, it was submitted that for the reasons given in the foregoing

submissions, the matter may be set aside back to the file of the Ld.CIT(A)/ Assessing Officer and in the alternative it was submitted that in order keep certain issues alive in appeal before the Hon'ble High Court, the following written submissions may kindly be taken on record.

41. In some of its recent decisions like DDIT (IT) Vs Reliance industries Ltd. (2016) 69 Taxamm.com 311 dated: 18/05/20 6, Galatea Ltd. Vs DCIT (IT) dated 29/06/2016, and ADIT(IT) Vs. Baan Global BV dated: 13/06/2016 the Hon'ble Mumbai Tribunal has decided the issue of Purchase/lease/supply of software whether shrink wrapped or embedded software in favour of the assessee by holding the consideration paid for purchase/lease/supply of software as not Royalty under the relevant DTAAs. While holding so the Hon'ble Tribunal has relied on the Delhi High Court decisions in the cases of DIT *v.* Infrasoft Ltd., 264 CTR 0329, dated 22-11-20131 DIT vs Nokia networks OY,', 358 ITR 0259, dated: 7-09-2012 and in the case of DIT vs. Ericson A.B, 343 ITR 0470, dated: 23-12-2011.

42. In all these cases, the High Court/Mumbai Tribunal have held that the consideration involved was not for the use or right but for copyrighted article. The High court/Tribunal have examined the issue of Royalty only under clause (v) of Explanation 2 to section 9(1)(vi) of the Act and corresponding clause of the DTAA (Ref Para 24 of Reliance, (supra) and

para 64 of Infrasoft, (supra) but not under any other clause of Explanation 2 to section 9(1)(vi)/DTAA even though the use of software is covered under clause (iii) of Explanation 2 to section 9(1)(vi) of the Act/DTAA as use of process.

43. It is submitted that the AO in his Assessment Order dated 26.12.2013 has held the consideration received by the assessee for for sale/supply/lease of software as Royalty for the use or right to use of copyright in software under the clause (v) of Explanation to Section 9(1)(vi) of DIAA. The AO in this regard has relied upon the Karnataka High Court decisions in the cases of M/s Synopsis, supra, M/s Samsung supra and M/s Wipro, (supra) and others. The DRP in its order dated: 11.12.2013 has also relied on the aforesaid decisions of the Karnataka High court and on the Mumbai Tribunal Decision in the case of DIT(IT) Vs. Reliance Infocomm Ltd. (Mum Trib.) dated 06.09.2013 in which case the Hon'ble Tribunal in deciding the appeals in favour of various other assessees, though available at the time of passing of orders by AO/DRP was not relied upon in the instant case before the AO/DRP. Therefore, they did not have the occasion to examine whether the ratio of the said case applied to the instant case. Therefore, in my humble submissions, it may not be appropriate to say that the case of the assessee is covered by the favorable decisions of Delhi High Court. Therefore, in my respectful

submissions, the assessee's case needs to be examined afresh on facts and on law before extending it the benefit of favorable decisions. I may also mention here that on similar facts, the Tribunals have set as aside, the appeal of the assessee back to CIT(A) in the following two cases.

1. Global Tele Systems Ltd., Dated 20.04.2016, Mumbai Tribunal
2. Appeal& T Ltd. 152 ITD 0873, Ahmedabad Tribunal

In view of the above submissions, the matter may kindly be set aside back to the file of the AO/DRP.

44. ALTERNATE PLEA: In case, the matter in the present Appeal is treated as covered in favour of the assessee, the following alternate plea may kindly be taken on record so that the issues are kept alive in appeals before the Hon'ble High Court.

45. The main features of the Delhi High Court decisions in the cases of Infrasoft Ltd. (supra), Nokia networks OY, (supra) and Ericson A.B, (supra) and the decisions of the Mumbai Tribunal based on Delhi High Court are as follows:

(i) that the license granted to the licensee permitting him to download the computer programme and storing it in computer for its own use is only incidental to the facility extended to the licensee to make use of the copyrighted product for his internal business purposes. The said process is necessary to make the program functional and to have access to it. Apart from such incidental facility, the licensee has no right to deal with the product just as the owner would be in a position to do.

(ii) there is no transfer of any right in respect of copyright to the assessee and it is a case of transfer of a copyright article. The payment is for a copyrighted article and represents the purchase price of an article and cannot be considered as royalty.

(iii) The Hon'ble Delhi High Court has further held that what is transferred is neither can be right in the software nor the use of copyright in the software, but is the right to use copyrighted material or article which is clearly distinct from the rights in a copyright and the same does not give rise to any Royalty income and would be the 'business income of the non-resident

(iv) The licensees are not allowed to exploit the computer software commercially, they have acquired under licence agreement, only the copyrighted software which by itself is an article and they have not acquired any copyright in the software.

(v) The licensee was allowed to use the software only for its own business as specifically identified and was not permitted to loan/rent/sale/sublicense or transfer the copy of software to any third party without the consent of Infrasoft.

(vi) Amendments (Explanations 4, 5 and 6 to S.9(1)(vi) of the Act) cannot be read into DTAAs.

46. The Karnataka High Court on the other hand has decided the issue in favour of the revenue in the cases of CIT V. Synopsis International Old Ltd., 212 Taxman 0454 (Kar.HC), dated: 03.08.2010 CIT V Samsung Electronics Co. Ltd. & Others, (2011) 345 ITR 0494, Kar HC, dated 15.10.2011, CIT V. Wipro Ltd. (2011),355 ITR 0284(Kar)/ 203 Taxman 621 (Kar.) HC, dated: 15.10.2011 and CIT Vs. CGI information Systems and Management consultants (P) Ltd., (2014) 48 Taxmonn.com 264 (KAR), dated: 9-6-2014. The High court of Karnataka has decided the issue of software Royalty, both before the insertion of Explanations 4, 5 and 6 in Section 9(1)(vi) of the I.T Act by the Finance Act 2012 and even after their insertion. The insertion of these Explanations has not altered the views of Hon'ble High Court of Karnataka and on the contrary the views of the Hon'ble High court have been reaffirmed. The basic features of all these decisions rendered by the Karnataka High Court are as follows:

(i) that the consideration paid is for the rights in respect of copyright and the user of the confidential information embedded in the software/computer programme amounts to royalty both under the Act and under the DTAA.( para 45 of Synopsis, supra)

(ii) that what is transferred is right to use the software, an exclusive right, which the owner of the copyright i.e., the respondent-supplier owns and what is transferred is only right to use copy of the software for the internal business as per the terms and conditions of the agreement (Para 24 of Samsung, supra)

(iii) that right to make a copy of the software and use it for internal business by making copy of the same and storing the same in the hard disk of the designated computer and taking back up copy would itself amount to copyright work under s. 14(1) of the Act and licence is granted to use the software by making copies, which work, but for the licence granted would have constituted infringement of copyright and licensee is in possession of the legal copy of the software under the licence. (Para 24 of Samsung, supra)

(iv) hat what is supplied is the copy of the software of which the respondent supplier continues to be the owner of the copyright and what is granted under the licence is only right to copy the software as per the terms of the agreement, which, but for the licence would amount to infringement of copyright and in view of the licence granted, the same would not amount to infringement under s. 52 of the Copyright Act.

(v) In the case of CGI Information, supra, it has been held by the Karnataka High Court that the Explanations 4, 5 and 6 to S.9(1)(vi) of the Act can be applied to DTAA.

47. In the case of CGI Information, supra, while relying on its decision in the case of Samsung, supra, the Hon'ble Karnataka High court has observed about newly inserted Explanation 4 to section 9(1)(vi) as follows:

*"18. Explanation-4 inserted by the Finance Act, 2012 has puts at rest all the controversies and doubts. It expressly states that transfer of all or any rights in respect of any right, property or information includes and has always included transfer of all or any right for use or right to use a computer software including granting of a licence irrespective of the medium through which such right is transferred.......”*

48. Out of all the High Court decisions discussed above, the latest decision on the issue is by the Karnataka high Court in the case of CGI Information (a June 2014 decision), supra which is in favour of the revenue. The latest decision by the Delhi High court on the issue is in the case of Infrasoft Ltd., supra, a November, 2013 decision.

49. The Jurisdictional Tribunal while dealing with the issue of software royalty in the case of DIT(IT) Vs. Reliance Infocomm Ltd. (Mum Trib.) dated 06.09.2013 has followed the interpretation of royalty given under the Act as well as under the DTAA by the Karnataka High Court in the cases of Synopsis International, supra and Samsung Electronics, supra deciding the issue in favour of the Revenue. This order of the Tribunal has since been recalled by the Tribunal vide an order dated: 18/11/2016 on a MA filed by the assesse. The main grounds for recalling of the aforesaid order of the tribunal were twofold:

(i) The decision of the coordinate bench of the Tribunal in the case of Solid Works Corporation (51 SOT 34) was not considered.

(ii) Misreading of Delhi high court decision in the case of DIT Vs. Ericsson A.B (ITA No. 504/2007 dated 23.12.2007)

50. The department is considering filing of Writ Petition before the Bombay HC against the aforesaid order of the Tribunal recalling its order in the case of Reliance Infocomm.

51. The Finance Act, 2012 has among others, inserted Explanation 4 to Section 9(1)(vi) retrospectively, which reads as follows:

> *"Explanation 4- For the removal of doubts, it is hereby clarified that transfer of all or any rights in respect of any right, property or information includes and has always included transfer of all or any right for use or right to use a computer software (including granting of licence) irrespective of the medium through which such right is transferred."*

"Computer software" has been defined in Explanation 3 to S.9(1)(vi) of the Act.



52. Ld. DR submitted that, the aforesaid Explanation 4 is clarificatory in nature, inserted retrospectively w.e.f 01-06-1976. If this Explanation is applied to the assessee's case, then the consideration received by the assesse is in the nature of Royalty both under the Act and under the DTAA.

53. On the issue whether the Amendments/Explanations inserted in the Income Tax Act can he read into the DTAA or not, in my respectful submissions and with utmost respect, the Delhi High Court in the case of

Infrasoft, supra and other cases which have been followed by the Mumbai Tribunal seem to have misquoted the Bombay High Court while saying that Bombay High court in the case of CIT v. Siemens Aktiongesellschaft, 310 ITR 320) (BOM HC) held that Amendments in the Act cannot be read into the DT AA. While appreciating the Siemens AG, (supra) the following facts may kindly be noted:

(i) The exact question of law before the Hon'ble High Court was NOT that whether Amendments in the I.T. Act can be read into the DTAA or not and therefore the Hon'ble High Court cannot be said to have answered it as claimed.

(ii) In the said case, old DTAA (1960) between India and Germany was under consideration in which 'Royalty" had not been defined (Para 15).

(iii) "Royalty" under the I.T.Act has been defined in Explanation 2 to S.9(1)(vi), inserted by the Finance Act 1976 w.e.f 01-06-1976.

(iv) The agreements under consideration in the case of Siemens AG, supra which gave rise to the impugned income were entered into before 01-06-1976 when there was no definition of "Royalty" both under the I.T.Act and under the DTAA. The A.Y. under consideration in Siemens AG, supra was A.Y.1979-80.

(v) Section 9(1) (vi) upto and including Explanation 2 are substantive provisions as inserted by Finance Act 1976 and thereafter, Explanation 3 to 6 and explanation below S.9(2) are only clarificatory provisions inserted subsequently.

(vi) For the purpose of the present appeal, the definition of "royalty" as applicable has been defined both under the DTAA as well as I.T.Act and the issue is regarding the application of Explanations (clarificatory provisions) inserted in the Act into the DTAA by virtue of article 3(2) of the DTAA.

(vii) The said decision in the case of Siemens AG, supra was rendered in 2008 when the only clarificatory provision by way of Explanation in section 9 was the Explanation below S.9(2) inserted by the Finance Act 2007 doing away with the requirement of PE for Royalty etc.

(viii) In the case of Siemens AG, supra, the basic question before the Hon'ble High Court was whether the definition of "Royalty" as per Explanation 2 to S.9 inserted by the Finance Act 1976 w.e.f. 01-06-1976 could be imported into the old DTAA (1960) when at the relevant point of time of application of treaty, Royalty" had not been defined both under the then DTAA and the I.T. Act and what was the character of payment under the DTAA.

(ix) It is not disputed by the Revenue that the provisions of DTAA, if beneficial to the assesse shall prevail over the provisions of the I.T. Act.



54. Ld. DR submitted that a perusal of Bombay High Court decision in the case Siemens AG. supra would reveal that:

(i) In the operational part (paras 29 to 31) of the judgement in the case of Siemens AG, supra, nowhere it is mentioned that amendments in the I.T. Act cannot be read into DTAA.

(ii) The nature of services rendered in the said case were found to be not Royalty under the DTAA though found to be Royalty under the Act (post 01-06-1976). Those services were found to fall under the expression "commercial or industrial profits' as per the then DTAA (Old) and therefore could not be taxed in India in absence of PE. Thus, the provisions of DTAA being more beneficial to the assesse were preferred over the provisions of the I.T. Act.

(iii) In paras 13, 22 and 28 of its order, the Hon'ble High Court has approved the insertion of Explanation below S.9(2) inserted by the Finance Act 2007, thereby implying that the Clarificatory Explanations could be read into modern DTAAs.

(iv) The Bombay HC has approved ambulatory approach (para 22) to interpretation of treaties against Static approach adopted by the Delhi HC. Klaus Vogel in his commentary has also advocated ambulatory approach.

(v) On the Contrary, the Bombay High has applied and approved the clarificatory Explanation inserted alter section 9(2) by the Finance Act 2007(paras 13, 22 and 28) implying that clarificatory Explanation introduced by way of Amendments in the Act CAN be into the DTAA.

55. Mumbai Tribunal, in the case of Viacom 18 Media (P.) Ltd. [162 TTJ 336] has explained the import of Bombay High Court decision in the case of Siemens AG, supra in the right perspective in paras 16 and 17 of its order while rejecting the assessee’s argument that the High Court has held that Amendments in the Act cannot be read into DTAAs. This decision of the Tribunal has not been over ruled by the High Court so far.

56. Therefore, it is submitted that Bombay High Court in the case of Siemens AG, supra is in favour of the Revenue on the proposition that the clarificatory Amendments by way of Explanations inserted in the Act CAN be read into the DTAAs.

57. We have heard the rival submissions, perused the orders of the authorities below and the case laws relied upon by both parties. The assessee is a company incorporated in Ireland and is a tax resident of Ireland. During the Assessment Year 2010-11 assessee had inter-alia supplied billing software to Reliance Industries Limited for the purpose of billing their customers. The software license agreement has been originally entered into between Reliance and Intec Billing, America a group Company of the assessee which was earlier known as ADC Software System, America. The said assessment has been subsequently assigned to Intec Ireland the Assessee in entirety by assignment letter dated 08.04.2005.

58. The key features of the said software provided by the assessee are that the software provided by Intec Ireland is a comprehensive business solution addressing transaction management, billing and customer care issues related to telecom industry players. It provides solution for efficiently managing high volumes of transactions and keeping audit trails

for all the transactions, thus preventing data loss and frauds. It is a high-end integrated software comprising of number of functional modules/ packages targeted at specific business areas. These modules can be used independently or in conjunction with each other to address specific requirements of the user. These modules support invoice generation, product pricing, product rating accounts receivables and billing operations. Further, they also support localization of language, currency, calendar and regulatory and taxation framework of the user. In simple terms, the said software could be equated to 'Microsoft Excel' - wherein the user feeds the data/ information related to a particular customer or product in a blank worksheet. The data is processed by the modules in order to generate requisite output - an invoice, report, etc. The software's delivered to the users on physical electronic media, ex: compact disk, floppy, paragraph 6 'De iver' clause of the Software Licence Agreement.



59. On perusal of the clauses of the above agreement, it is clear that Intec Ireland exclusively owns all the Intellectual Property Rights (IPR) in the software. Intec Ireland has merely granted a copyrighted article to Reliance and not the 'copyright in the article. Hence, Reliance does not use or have any right to use the copyright in the software products and Intec Ireland merely grants a right to use software for Reliance's own use in India.

60. The very same agreement and the Software supplied by the assessee to Reliance has been subject matter in dispute in the Assessment Year 2002-03 and Coordinate Bench of the Tribunal in ITA.No. 3196/Mum/2007 dated 05.02.2010 held that sale of Software by the assessee to the end customer does not involve any transfer of copyright either in part or in whole and therefore consideration paid by the distributer cannot be said to be a payment for right of use copyright or transfer of use of copyright. In holding so the Coordinate Bench observed as under: -

> *"3. The assessee is engaged in the business of providing software solutions across the globe. The assessee entered into a software licensing agreement on February 26,2002 with Reliance Industries Limited (RIL), a company incorporated under the laws of India. In pursuance of the agreement, the assessee provided certain software products for the business purpose of RIL during the financial year ended March 31, 2002. The software products so provided, was intended to be used by RIL to prepare invoices to be raised on its customers. During the financial year ended March 31,2002, the assessee earned gross revenues amounting to US$ 1,400,000 as consideration for supply of the software to RIL. The assessee filed its original return of income on October 30, 2002 and subsequently filed a revised return of income on November 20, 2002. Under both the returns, the assessee claimed the aforesaid fees as not taxable in India on the following basis: -*
>
> > *• The assessee is a tax resident of US and is accordingly eligible to claim benefits of the double taxation avoidance agreement between India and USA (India-US tax treaty).*
> >
> > *• Considering the restrictive and limited rights granted to RIL under the software licensing agreement, based on the OECD Model commentary and UN Model Commentary, fees earned by the assessee are in the nature of 'business profits' and not 'royalty'.*

> • *The assessee does not have a fixed place of business in India and also has not undertaken any activity in India pertaining to licensing of software. Accordingly, the assessee does not have a Permanent Establishment (PE) in India in terms of Article 5 of India-US tax treaty.*
>
> • *In absence of the assessee's PE in India, the business profits earned by the assessee cannot be taxed in India.*

*However, the Assessing Officer did not accept argument of the assessee and passed the assessment order taxing the income earned from Reliance at 15% on a gross basis as royalty under Article 12 of the India US tax treaty.*

*4. On appeal by the assessee, learned CIT(A) held that the payment in question was not in the nature of royalty and was payment for purchase of copyrighted article. It was in the nature of business profits; and since the assessee did not have a PE in India the same was not taxable, in view of Article-7 of the DTAA between India and USA. Addition made by the Assessing Officer was deleted by the learned CIT(A) giving rise to the present appeal by the revenue before the Tribunal.*



*5. We have heard the rival submissions. Agreement between the assessee and RIL provides only a license to use the software. Clause 2(a)(b) of the ag eement provides for the terms of license and scope of permitted use. Clause (3) provides of confidentiality of information. Para 14.c provides that the software being supplied is a standard software provided to customers by the assessee. Perusal of para 2.a and 2.b of the Agreement clearly provide that RIL has only a perpetual, non-exclusive, irrevocable, non-transferable license to use the software and documentation. RIL is forbidden from modifying, adapting, translating, reverse engineering, decompiling, disassembling, or creating derivative projects based on the software supplied. Agreement also provides that the software can be used for internal training purposes and the processing of the RIL's own data and that of its affiliates. RIL was permitted to duplicate the software, but only for training, testing, and the development purposes and also for backup purposes. Para 2.b does provide that RIL can configure the software packages. However, configure has been defined to mean only to modify, to create interface, to load change or delete data and to tailor the software using the utility built into the software in order to optimize the software for customer in accordance with the* *agreement. Thus, configuration only means that the parameters in the software for making it suitable to the user can be set by the user. Configures does not mean that the user can change the software code. From the rights given to RIL as per agreement, it is apparent that RIL has no power either to decode the machine code of software or to make copies of software for commercial use other than for its internal use or backup purposes. It is therefore obvious that the RIL has right to use software only for its business or personal purposes and has obtained no other rights as per the agreement.*

*6. The Hon'ble Supreme Court in the case of Tata Consultancy Services Pvt. Ltd. Vs. State of Andhra Pradesh (2004) 271 ITR 401 has held as follows: -*

> *"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 sale 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 'good'. We see no different 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 of sale of computer software is clearly a sale of goods within the meaning of the term as defined in the said Act."*

*7. Thus computer software when it is put on to a media and sold has become goods like any other audio cassette or painting on canvas or a book. It is ceases to be transfer of intellectual property right. In fact, Bangalore Bench of the Tribunal in the case of Lucent Technologies Hindustan Ltd. Vs. ITO, 92 ITD 366 (Bang) has also taken the view that in such a situation there is no acquisition of any* *right in software. Definition of 'royalty' is given in section (9)(1) Explanation (2) of the Act and the definition of Royalty in Article 12(3) of the Indo-US DTAA shows that definition of royalty under DTAA is more restrictive than what is provided in section (9)(1) of the Act. Under the definition as contained in DTAA, there should be a transfer of copyright. Sale of software by the assessee to the end user does not involve any transfer of copyright either in part or in whole; therefore consideration paid by the distributor cannot be said to be a payment for right of use copyright or transfer of use of copyright. It has been uniformly held in several decisions of the ITAT that sale of shrink-wrap software does not involve receipt of consideration, which can be said to be royalty. Decisions in this regard are as follows :-*

- *Samsung Electronics Co. Ltd. Vs. ITO, 93 TTJ 658*
- *Motorola Incorporation, 270 ITR (AT) 62*
- *Sonata Information Technologies Ltd., ITA No. 1561 to 1580/Bang/2004 dated 31.1.2006.*

*8. Computer programme cannot also be treated as patent and invention. Computer programme cannot said to be an invention and therefore cannot be said to be covered by the Patient Act. Computer software cannot also be treated as process. End user of the software in the case of shrink-wrap software does not have any access to source code. He has only right to use the software for his personal or business use. For all the above reasons, we are of the view that learned CIT(A) was righ in concluding that payment received by the assessee was not in the nature of royalty and cannot therefore be brought to tax. We uphold the order of learned CIT(A) on this issue and dismiss the appeal by the revenue.*



61. Further, it is the finding of the DRP that in the present case the issue involved is that Shrink Wrapped/off the shelf software recently the Mumbai Tribunal in the case of Capgemini Business Services (India) Ltd (supra) after considering all the decision available on the issue including the one relied on by the Assessing Officer and the Ld.DR in the case of Samsung Electronics Company Ltd. & Others (supra), Verizon Communication Singapore (supra), Reliance Infocom Ltd. (supra) and Viacomm 18 Media

Pvt. Ltd. (supra) held that where the payment is made for the copyrighted article the same cannot be considered as payment for the transfer of the copyright and cannot be taxed as royalty by observing as under:-

> *"49. The provisions of the Copyright Act, as discussed above are clear and unambiguous in this respect. If the assessee has purchased a copy of a computer software programme and he uses the said copy for his business purpose and if the said use falls within the scope and purview of the exceptions of section 52, such as the use of it for the purpose for which it is supplied and to make backup copies for temporary purpose as a protection against loss or damage and doing of any act necessary to obtain information essential for operating the software for the purpose for which it is purchased etc. as provided under section 52, then in that event it cannot be said to be an infringement of copyrights of the author or owner of the work. As held by the Hon'ble Karnataka High Court in the case of "Samsung Electronics Company Ltd. & Others" (supra) while relying upon Article 3 sub section (2) of the DTAA with US as the identically worded article being there in almost all the tax treaties with other countries, that any term not defined in the convention shall, unless the context otherwise requires, have the meaning which it is under the laws of that 'State' concerning the tax to which the convention applies. In view of above, when we see the definition as per the statutory provisions/domestic law of the country i.e. Copyright Act, 1957 of India which is the taxing State in this case, it is apparent that the fair use of the work for the purpose of which it is being purchased and doing of such other acts including making of copy for protection from damage or loss cannot, in any case, said to be any infringement of copyright whether or not any license in this respect has been granted by the author/owner of the work. The right to use or for use of the product accrues to the purchaser by the operation of the statute and as held by the Hon'ble Delhi High Court in the case of "Infrasoft Ltd." (supra), the same would amount to the sale of a goods and the acts done such as downloading of the same to the computer or making backup copies etc. would be the necessary acts for enabling the use of the product and would not amount to the transfer of copyright or right therein, but only the transfer of the copyrighted product and thus will not be covered under the definition of royalty under DTAA. The consideration, thus, paid will be the business income of the non-resident and taxable in accordance with the provisions of DTAA. We may clarify here that even in cases where*

*the owner of the copyrighted work may restrict the use of or right to use the work by way of certain terms of the license/software agreement, the validity or the enforceability of the same may be subject matter in other laws such as Indian Contract Act 1872, Sale of goods Act 1930 or the Consumer Protection Act 1986 etc., but, the same in any way cannot be said to grant of or infringement of copyright in the light of specific statutory provisions of Copyright Act 1957.*

*……..*

*……..*

*52. Even otherwise, the Revenue has not cited any direct case law of the jurisdictional High Court of Bombay before us In the case laws cited by the Revenue of the Hon'ble Karnataka High Court in the matter of "CIT vs. Samsung Electronics Company Ltd." (supra) and "CIT vs. Synopsis International Old Ltd." (supra) though a view in favour of the Revenue has been taken, but, the Hon'ble Delhi High Court in the case of "D1T vs. Infrasoft Ltd." (supra) which is a latter decision and has discussed the Samsung case also has taken the view in favour of the assessee. The Hon'ble Delhi High court has taken the identical view favoring the assessee in the case of "D1T vs Nokia Network" (supra) and in the case of "DIT vs. Ericson A.B." (supra) also. The Hon'ble Bombay High gaud in the case of "The Addl. Commissioner of Sales Tax vs. M/s Ankit international," Sales Tax Appeal No.9 of 2011 vide order dated 15 September, 2011 while relying upon the decisions of the Hon'ble Supreme Court in "The Commissioner of Income Tax V. Vegetable Product Ltd." (1973) 88 ITR 192 and in "Mauri Yeast India Pvt. Ltd. V. State of UP." (2008) 14 VST 259(SC) (2008) 5 S.C. C. 680 has held that, if two views in regard to the interpretation of a provision are possible, the Court would be justified in adopting that construction which favours the assessee. Reliance can also be placed in this regard on the decision of Hon'ble Supreme Court in "Bihar State Electricity Board and another vs. M/s. Usha Martin Industries and another: (1997) 5 SCC 289. We accordingly adopt the construction in favour of the assessee. In view of our discussion made above, this issue is accordingly decided in favour of the assessee."*

62. The Coordinate Bench in the case of Galatea Limited v. DCIT (supra) held that payment for the copyrighted article will not be taxed as

"Royalty" as defined under the Article 12(3) of India-Israel tax treaty. The Bench observed as under: -

> *"35. Thus, the status of the provisions in the treaty is kept same as was in the pre- amended law as contained in the provisions of the Act. According to these provisions of the treaty, as has been explained in various judgments, transfer of copyright is different from transfer of copyrighted article. Thus, in view of the facts before us, even if the payment for software is taxed separately from hardware, on a standalone basis, even then the same would not fall within the scope of Article 12(3) since there was merely transfer of a copyrighted article, and not the copyright or any rights contained therein.")*

63. The Hon'ble Delhi High Court in the case of Nokia Networks OY (supra) held that the payment for copyrighted article does not fall within the purview of 'Royalty' under the DTAA The Hon'ble Delhi High Court observed as under: -

> *"59. Be as it may, in order to qualify as royalty payment, within the meaning of Section 9(1)(vi) and particularly clause (v) of Explanation –II thereto, it is necessary to establish that there is transfer of all or any rights (including the granting of any license) in respect of copy right of a literary, artistic or scientific work. Section 2(o) of the Copyright Act makes it clear that a computer programme is to be regarded as literally work'. Thus, in order to treat the consideration paid by the cellular operator as royalty, it is to be established that the cellular operator, by making such payment, obtains all or any of the copyright rights of such literary work. In the present case, this has not been established. It is not even the case of the Revenue that any right contemplated under Section 14 of the Copyright Act, 1957 stood vested in this cellular operator as a consequence of Article 20 of the Supply Contract. Distinction has to be made between the acquisition of a 'copyright right" and a "copyrighted article.*
>
> *60.......We also find force in the submission of Mr. Dastur that even assuming that the payment made by the cellular operator is regarded as payment made by way of royalty as defined in Explanation 2 below Section 9(1)(vi), nevertheless, it can never be regarded as*

*royalty within the meaning of the said term in article 13, para 3 of the DTAA. This is so because the definition in the DTAA is narrower that the definition in the Act. Article 13(3) brings within the ambit of the definition of royalty a payment made for the use of or the right to use a copyright of a literary work. Therefore, what is contemplated is a payment that is dependent upon user of the copyright and not a Lumpsum payment as is the position in this case."*

64. The Hon'ble Delhi High Court in the case of Ericsson Radio Systems AB (supra) observed as under: -

*"Be as it may, in order to qualify as royalty payment, within the meaning of Section 9(1) (vi) and particularly clause (v) of Explanation-11 thereto, it is necessary to establish that there is transfer of all or any rights (including the granting of any license) in respect of copy right of a literary, artistic or s ientific work. Section 2(o) of the Copyright Act makes it clear that a computer programme is to be regarded as a 'literary work'. Thus, in order to treat the consideration paid by the cellular operator as royalty, it is to be established that the cellular ope ator, by making such payment, obtains all or any of the copyright rights of such literary work. In the presence case, this has not been established, it is not even the case of the Revenue that any right contemplated under Section 14 of the Copyright Act, 1957 stood vested in this cellular operator as a consequence of Article 20 of the Supply Contract. Distinction has to be made between the acquisition of a "copyright right" and a "copyrighted artic e".*

65. The Coordinate Bench in the case of DDIT *v.* Solidworks Corporation (supra) following the decision of Hon'ble Delhi High Court in the case of Ericsson AB held that the receipts from supply of software are not taxable as Royalty'

66. The Hon'ble Delhi High Court in the case of New Skies Satellite BV & Ors. (supra) held as under: -

*"59. On a final note, India's change in position to the OECD Commentary cannot be a fact that influences the interpretation of the words defining royalty as they stand today The only manner in which such change in position can be relevant is if such change is incorporated into the agreement itself and not otherwise. A change in executive position cannot bring about a unilateral legislative amendment into a treaty concluded between two sovereign states. It is fallacious to assume that any change made to domestic law to rectify a situation of mistaken interpretation can spontaneously further their case in an international treaty. Therefore, mere amendment to Section 9(1)(vi) cannot result in a change. It is imperative that such amendment is brought about in the agreement as well. Any attempt short of this, even if it is evidence of the state's discomfort a letting data broadcast revenues slip by, will be insufficient to persuade this Court to hold that such amendments are applicable to the DTAAs.*

*60. Consequently, since we have held that the Finance Act, 2012 will not affect Article 12 of the DTAAs, it would follow that the first determinative interpretation given to word "royalty" in Asia Sate/Ills, when the definitions were in fact pari materia (in the absence of any contouring explanations), will continue to hold the field for the purpose of assessment years preceding the Finance Act, 2012 and in all cases which involve a Double Tax Avoidance Agreement, unless the said DTAAs are amended jointly by both parties to incorporate income from data transmission services as partaking of the nature of royalty, or amend the definition in a manner so that such income automatically becomes royalty. It is reiterated that the Court has not re urned a finding on whether the amendment is in fact retrospective and applicable to cases preceding the Finance Act of 2012 where there exists no Double Tax Avoidance Agreement."*

67. As rightly submitted by the Ld. Counsel for the assessee that the definition of Royalty under the Indo-Ireland Tax Treaty is pari-materia as that under Indo-US Tax Treaty and the Coordinate Bench of the Tribunal had already decided the issue of taxability of supply of software under the same agreement in favour of the Intec- Ireland with reference to the Indo-US Tax treaty for the Assessment Year 2002-03, wherein it has been held

that receipts from supply of software are not taxable in the hands of Intec-Ireland as Royalty. Therefore, since both the treaties are pari-materia with each other, we hold that the receipts from supply of software are not taxable in the hands of Intec–Ireland as Royalty under new Ireland tax treaty. Intec-Ireland does not have PE in India and accordingly amounts received by Intec-Ireland towards supply of software are not liable to tax in India. Therefore, in view of the above discussion and respectfully following the said decisions, we hold that payment received by the assessee was not in the nature of Royalty and cannot be therefore brought to tax.



68. Ground No.4 of the grounds of appeal of the assessee is in respect of not granting the entire credit for TDS amounting to ₹.1,23,61,709/-, disregarding specific direction of the DRP.

69. Ld. Counsel for the assessee submits that a direction may be given to the Assessing Officer for granting credit for TDS as claimed by the assessee. Ld. DR has no serious objection in directing the Assessing Officer to allow credit for TDS, subject to verification.

70. On hearing both the parties, we direct the Assessing Officer to examine this issue and grant credit for TDS as claimed by the assessee, if found in order.

71. In Ground Nos. 5 to 7 of grounds of appeal of the assessee are in respect of charging interest u/s. 234B and 234C of the Act. Charging of interest u/s. 234B and 234C are only consequential and therefore this ground is rejected.

72. Ground No.8 is in respect of initiation of penalty proceedings u/s.271(1)(c) of the Act. This ground is premature and hence dismissed.

73. In the result, appeal of the assessee is partly allowed.

Order pronounced in the open court on the 08th January, 2018.

| | |
|---|---|
| Sd/- | Sd/- |
| **(G. MANJUNATHA)** | **(C.N. PRASAD)** |
| **ACCOUNTANT MEMBER** | **JUDICIAL MEMBER** |

Mumbai / Dated 08/01/2018
*Giridhar, SPS*



**<u>Copy of the Order forwarded to</u>:**

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)

**ITAT, Mum**