

**IN THE INCOME TAX APPELLATE TRIBUNAL,
NEW DELHI 'B' BENCH**

BEFORE SH. H. S. SIDHU, JUDICIAL MEMBER AND
SH. SANJAY ARORA, ACCOUNTANT MEMBER

I.T.A. No. 678/Del/2013
Assessment Year: 2009-10

Elektrobit Automotive GmbH AM, Wolfsmantel, 46 91058, Erlangen, Germany [PAN: AACCE 4655N]	Vs.	Deputy DIT, Circle 1(2), International Taxation, New Delhi
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(Appellant)

(Respondent)

Appellant by : Sh. Sparsh Bhargava (Adv.)	
Ms. Ishita Farsaiya (Adv.)	
Respondent by: Sh. D. K. Dhall	CIT-DR

Date of Hearing: 22.02.2018

Date of Pronouncement: 22.05.2018

ORDER

Per Sanjay Arora, AM:

This is an Appeal by the Assessee, agitating its assessment under section 143(3) r/w s. 144C of the Income Tax Act, 1961 ('the Act' hereinafter) for Assessment Year (AY) 2009-10 vide order dated 21.11.2012.

2. The assessee is a company incorporated in and a tax resident of Germany. It is engaged in supplying software products, software consultation programming services and software solutions, particularly in the field of 'embedded systems' for the automotive industry. The principal issue arising in the instant case is whether the receipt earned by it from grant of user rights in software by the name of 'EB

Guide Studio’ from Robert Bosch Engineering & Business Solutions Ltd. (‘Robert Bosch India’ for short, at Rs.131.01 lacs) and Tata Consultancy Services Ltd. (TCSL) (Rs.36.08 lacs) for the relevant year qualify as ‘Royalty’, as contended by the Revenue, or as ‘business income’, as claimed by the assessee. The assessee-company, a foreign company, with no business presence/permanent establishment (PE) in India, its’ business income is not taxable in India under the Indo-German Double Tax Avoidance Agreement (DTAA), while the ‘royalty income’ would attract tax at the rate of 10% under Article 12 thereof.

3.1 The background facts are that the appellant is a manufacturer of automotive software and offers flexible and innovative software solutions for connected car infrastructure, human machine interface (HMI) technologies, navigation, driver assistance, electronic control units (ECUs), and software engineering services. The Appellant for the relevant year licensed its software to two Indian customers, as afore-noted, which the Revenue contends to be royalty and, hence, taxable, refuted by the assessee.

3.2 The relevant provisions (in the relevant part) of the domestic law and DTAA, defining the term ‘royalty’, are as under:

Domestic Law

‘Income deemed to accrue or arise in India.

9. (1) The following incomes shall be deemed to accrue or arise in India:—

(vi) income by way of royalty payable by —

(a) the Government ; or

(b) a person who is a resident, except where the royalty is payable in respect of any right, property or information used or services utilized for the purposes of a business or profession carried on by such person outside India or for the purposes of making or earning any income form any source outside ; or

(c) a person who is a non-resident, where the.....

Explanation 2.— For the purposes of this clause, “royalty” means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head “Capital gains”) for—

- (i) the transfer of all or any rights (including the granting of a licence) in respect of a patent, invention, model, design, secret formula or process or trade mark or similar property ;
- (ii) the imparting of any information concerning the working of, or the use of, a patent, invention, model, design, secret formula or process or trade mark or similar property ;
- (iii) the use of any patent, invention, model, design, secret formula or process or trade mark or similar property ;
- (iv) the imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill ;
- (iva) the use or right to use any industrial, commercial or scientific equipment but not including the amounts referred to in section 44BB;
- (v) the transfer of all or any rights (*including the granting of a licence*) in respect of any *copyright*, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, but not including consideration for the sale, distribution or exhibition of cinematographic films ; or
- (vi) the rendering of any services in connection with the activities referred to in sub-clauses (i) to (iv), (iva) and (v).

Explanation 3.— For the purposes of this clause, “computer software” means any computer programme recorded on any disc, tape, perforated media or other information storage device and includes any such programme or any customized electronic data.

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.

Explanation 5.— For the removal of doubts, it is hereby clarified that the royalty includes and has always included consideration in respect of any right, property or information, whether or not—

- (a) the possession or control of such right, property or information is with the payer;
- (b) such right, property or information is used directly by the payer;
- (c) the location of such right, property or information is in India.’

Indo German (DTAA)

As per article 12 of the Double Taxation Avoidance Agreement (DTAA) between India and Germany:-

"ARTICLE 12 - Royalties and fees for technical services –

1. Royalties and fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, such royalties and fees for technical services may also be taxed in the Contracting State in which they arise and according to the laws of that State, but if the recipient is the beneficial owner of the royalties, or fees for technical services, the tax so charged shall not exceed 10 per cent of the gross amount of the royalties or the fees for technical services.

3. The term royalties as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work, including cinematograph films or films or tapes used 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, or for information concerning industrial, commercial or scientific experience.

4. The term fees for technical services as used in this Article means payments of any amount in consideration for the services of managerial, technical or consultancy nature, including the provision of services by technical or other personnel, but does not include payments for services mentioned in Article 15 of this Agreement.

5. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the royalties or fees for technical services, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties or fees for technical services arise, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the right, property or contract in respect of which the royalties or fees for technical services are paid is effectively connected with such permanent establishment or fixed base. In such case, the provisions of Article 7 or Article 14, as the case may be, shall apply.

6. Royalties and fees for technical services shall be deemed to arise in a Contracting State when the payer is that State itself, a land or a political subdivision, a local authority or a resident of that State. Where, however, the person paying the royalties or fees for technical services, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the liability to pay the royalties or fees for technical services was incurred, and such royalties or fees for technical services are borne by such permanent establishment or fixed base, then such royalties or fees for technical services shall be deemed to arise in the State in which the permanent establishment or fixed base is situated.

7. Where, by reason of special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of royalties or fees for technical services paid exceeds the amount which would have been paid in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In

such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Agreement.”

3.3 We may at this stage set out the respective cases of both the sides. The assessee’s case, firstly, is that the computer software is not a copyright. Reference to the Copyright Act, 1957 by the Revenue is not valid as the term ‘royalty’, as defined in the Indo German Tax Treaty, does not include reference to use of the computer programme/software. The inclusion of ‘computer software’ (per *Explanations* 3 and 4 of section 9(1)(vi)) expands the scope of the term ‘royalty’, which cannot be taken into account as the narrower definition of ‘royalty, i.e., as per DTAA, shall prevail. Specifically in relation to the license agreement with Robert Bosch India (RBI), the development license granted is a non-exclusive, non-transferable fees based license to use the software ‘EB Guide Studio’ for developing and configuring its own software – interface products/licensed products. The grant of development license is thus a mere limited right to use the said software in business process. The same is not for commercial exploitation. There is no reverse engineering or modification right, nor the right to make copies/derivatives of the products. The source code is not shared, and what is transferred is the object code. Surely, there is no right to sell the same or make the copies thereof for licensing/sub-licensing. Similarly, the sale of ‘EB Auto Care with EB Tresos Suite’ to TCSL, again, only entitles the licensee non-exclusive user rights in the said software products, i.e., for its internal business purposes, with no right to commercially exploit the same. The ld. counsel for the assessee, Sh. Sparsh Bhargava, Advocate, was during hearing specifically asked by the Bench to explain the working of the assessee’s software by its customers, viz. RBI. The assessee, per its written submissions dated 22.02.2018, explained EB Guide to be an end-to-end java based Human Man Interface (HMI) development platform, which helps customers in developing and testing HMIs, providing them a tool to

develop, design and test HMIs and deploy them onto target devices/hardware. That is, provides capabilities to develop user interface of all modalities, i.e., voice, touch and graphical interface. Instead of developing with detailed codes, prototyping facility allows multiple persons to simulate/design and develop HMI in parts at the same time, viz., as for example developing user interface work flow mapping and providing 3D visualization (which is a rapid prototyping technique). In other words, the software enables the user to design/simulate, prototype and deploy. HMI model can then be used by the customers by integrating it in its final product. Example was given to us of navigation system being now-a-days increasingly found in cars, which include graphics as well. The customer, it was explained, has no right to use the EB Guide Software in its own products, though can be used as a tool for developing HMI or HMI based product, i.e., licensed products, by its customers. It is similar to preparing a 'word document' using the commonly used software 'Microsoft Word'; the word document belongs to the user, while the copyright in Microsoft Word vests in Microsoft Corporation. Likewise, the HMI model developed by RBI belongs to it, while the copyright in EB Guide Studio belongs to the assessee.

The Revenue's case is that the development license is a full-blown agreement, allowing the user to internally develop, configure and adapt the software, so that the same can be used in the products manufactured which may be sold or licensed ('the licensed product') by it. Sub-licensing right allows the user to further sub-license the right to reproduce and distribute the licensed product to third parties. The restriction on the reverse engineering is subject to the rights granted under the license, viz. for copying, integration and compilation of the software into licensed products. The user is further obliged to furnish a monthly statement of all the licensed products supplied by the user to its' customers, and is to pay fee and royalty on the basis of the invoice raised by the assessee.

3.4 We may now advert to the decision by the Hon'ble jurisdictional High Court in the case of *DIT v. Infrasoftware Ltd.* [2013] 39 taxmann.com 88 (Delhi), the relevant part of which, also read out during hearing, is as under:

'87. In order to qualify as royalty payment, it is necessary to establish that there is transfer of all or any rights (including the granting of any licence) in respect of copyright of a literary, artistic or scientific work. In order to treat the consideration paid by the Licensee as royalty, it is to be established that the licensee, by making such payment, *obtains all or any of the copyright rights of such literary work*. Distinction has to be made between the acquisition of a "copyright right" and a "copyrighted article". Copyright is distinct from the material object, copyrighted. Copyright is an intangible incorporeal right in the nature of a privilege, quite independent of any material substance, such as a manuscript. Just because one has the copyrighted article, it does not follow that one has also the copyright in it. It does not amount to transfer of all or any right including licence in respect of copyright. Copyright or even right to use copyright is distinguishable from sale consideration paid for "copyrighted" article. This sale consideration is for purchase of goods and is not royalty.

88. *The license granted by the Assessee is limited to those necessary to enable the licensee to operate the program.* The rights transferred are specific to the nature of computer programs. Copying the program onto the computer's hard drive or random access memory or making an archival copy is an essential step in utilizing the program. Therefore, rights in relation to these acts of copying, where they do no more than enable the effective operation of the program by the user, should be disregarded in analyzing the character of the transaction for tax purposes. Payments in these types of transactions would be dealt with as business income in accordance with Article 7.

89. There is a clear distinction between royalty paid on transfer of copyright rights and consideration for transfer of copyrighted articles. Right to use a copyrighted article or product with the owner retaining his copyright, is not the same thing as transferring or assigning rights in relation to the copyright. The enjoyment of some or all the rights which the copyright owner has, is necessary to invoke the royalty definition. Viewed from this angle, a non-exclusive and non-transferable licence enabling the use of a copyrighted product cannot be construed as an authority to enjoy any or all of the enumerated rights ingrained in Article 12 of DTAA. Where the purpose of the licence or the transaction is only to restrict use of the copyrighted product for internal business purpose, it would not be legally correct to state that the copyright itself or right to use copyright has been transferred to any extent. *The parting of intellectual property rights inherent in and attached to the software product in favour of the, licensee/customer is what is contemplated by the Treaty.* Merely authorizing or enabling a customer to have the benefit of data or instructions contained therein *without any further right to deal with them independently* does not, amount to transfer of rights in relation to copyright or conferment of the right of using the copyright. The transfer of rights in or over copyright or the conferment of the right of use of copyright implies that the transferee/licensee should acquire rights either in entirety or partially co-extensive with the owner/transferor who divests himself of the rights he possesses *pro tanto*.

90. The license granted to the licensee permitting him to download the computer programme and storing it in the computer for his own use is only incidental to the facility extended to the licensee to make use of the copyrighted product for his internal business purpose. The said process is necessary to make the programme functional and to have access to it and is qualitatively different from the right contemplated by the said paragraph because it is only integral to the use of copyrighted product. 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.

91. There is no transfer of any right in respect of copyright by the Assessee and it is a case of mere transfer of a copyrighted article. The payment is for a copyrighted article and represents the purchase price of an article and cannot be considered as royalty either under the Income-tax Act or under the DTAA.

92. 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. In the case of the assessee company, the licensee to whom the assessee company has sold/licensed the software were allowed to make only one copy of the software and associated support information for backup purposes with a condition that such copyright shall include Infracsoft copyright and all copies of the software shall be exclusive properties of Infracsoft. Licensee was allowed to use the software only for its own business as specifically identified and was not permitted to loan/rent/sale/sub-licence or transfer the copy of software to any third party without the consent of Infracsoft.

93. The licensee has been prohibited from copying, decompiling, de-assembling, or reverse engineering the software without the written consent of Infracsoft. The licence agreement between the assessee company and its customers stipulates that all copyrights and intellectual property rights in the software and copies made by the licensee were owned by Infracsoft and only Infracsoft has the power to grant licence rights for use of the software. The licence agreement stipulates that upon termination of the agreement for any reason, the licensee shall return the software including supporting information and licence authorization device to Infracsoft.

94. The incorporeal right to the software *i.e.* copyright remains with the owner and the same was not transferred by the Assessee. The right to use a copyright in a programme is totally different from the right to use a programme embedded in a cassette or a CD which may be a software and the payment made for the same cannot be said to be received as consideration for the use of or right to use of any copyright to bring it within the definition of royalty as given in the DTAA. What the licensee has acquired is only a copy of the copyright article whereas the copyright remains with the owner and the Licensees have acquired a computer programme for being used in their business and no right is granted to them to utilize the copyright of a computer programme and thus the payment for the same is not in the nature of royalty.

95. We have not examined the effect of the subsequent amendment to section 9 (1)(vi) of the Act and i also whether the amount received for use of software would be royalty in terms

thereof for the reason that the Assessee is covered by the DTAA, the provisions of which are more beneficial.

96. The amount received by the Assessee under the licence agreement for allowing the use of the software is not royalty under the DTAA.

97. What is transferred is neither the copyright in the software nor the use of the copyright in the software, but what is transferred is the right to use the copyrighted material or article which is clearly distinct from the rights in a copyright. The right that is transferred is not a right to use the copyright but is only limited to the right to use the copyrighted material and the same does not give rise to any royalty income and would be business income.'

[emphasis, by italics, ours]

3.5 The question therefore that arises for being determined is the true nature of what stands acquired through the development license, in the context of the computer software, by the assessee's customer, RBI. That is, is it a right in a copyright, a copyright right, as the Hon'ble Court puts in, including the right to use the same, or a copyrighted article. The tests laid down for the purpose in several jurisdictions; copyright law being a law with international ramifications and significance, also noted – and, in fact, at more than one place (para 65 and para 67) by the Hon'ble Court in *Infrasoft Ltd.* (supra), is captured in four rights, as under, the grant of any one or more of which implies that the user acquires a right in a copyright (and not a copyrighted article):

'(i) The right to make copies of the computer programme for purposes of distribution to the public by sale or other transfer of ownership, or by rental; lease, or lending

(ii) The *right to prepare derivative computer programmes based upon the copyrighted computer programme*

(iii) The right to make a public performance of the computer programme.

(iv) The right to publically display the computer programme.'

[emphasis, ours]

It is these tests that stand adopted by the Hon'ble Court and, on factual analysis, considering the terms of the agreement, found them as being not satisfied, and

toward which it observes some indications and facts, which find mention in the operative part of the judgment, reproduced hereinabove. The rights granted in that case, it concluded, were limited to those necessary to enable the licensee to operate the program. It was therefore a case of a limited right to use the copyrighted article, and not a copyright in the software or a right to use the same (copyright).

3.6 The question that therefore arises next for considering and answering is whether the licensed product/s developed by using the assessee's software EB Guide Studio is a derivative program, or not. This is as the other rights afore-stated (at para 3.5) are clearly not applicable in the instant case, nor are claimed to be so by the Revenue. *A derivative is something which has been developed or obtained from something else.* The matter, it may be appreciated, thus, given the clear law laid down by the binding decision afore-referred, is essentially one of fact. The question to be asked in this regard is if the HMIs developed using the software EB Guide Studio could be so developed independent of the latter. The answer, surely, is in the negative; the same admittedly providing the platform for the development of a HMI model. The assessee regards its' said software only as a tool. Surely, any software, designed as it is to achieve a particular function or obtain a particular result, is a tool, as the MS Word, the example of which the assessee cites. Preparing a word document using the same does not in any manner give the user any right in the software, being a clear case of its' user as a tool, for the user's internal purposes. Copying the same, where so, would be an infringement of the copyright. Continuing further, in a particular case, a software may enable creating or modifying another software/computer program. Enabling the writing of another programme would qualify the program being used for writing it as a tool. It could, in that case, be written using any other software. Further, the same does not necessarily provide the environment and, in any case, *does not form the basis, the*

foundation, on which the software being created is built/rests, forming its' edifice as it were, which is so in the present case. Further, beginning with its' design, followed by testing, simulation, prototyping and, finally, deployment (onto target devices), a HMI model/system requires, and cannot be created without using, the EB Guide Studio, which thus is its base program, beyond being only a tool. The programming logic and its attributes, and thereby the intelligence embedded therein, clearly flow into, and it is this that is/are adapted and configured to create the new software (HMI), which is thus a derived product, embodying the same. There is a user and, thus, parting of the intellectual property rights embedded in the assessee's software, which get transmitted to the HMI developed. *The software being created could in such a case only be said to be derived from the former.*

The matter being factual, i.e., whether the HMI model/s developed, as by RBI, is a derivative, which we have found as so, our reference to the different clauses of the agreement is only *qua* their being supportive of or as enabling the development of the licensed products. Clause 2.5 (clause 2 defining the various license terms) of the License Agreement defines 'EB Intellectual Property Rights' as: 'means those IPRs other than trade and service marks that are owned or licensed by EB at the effective date and that are embodied in or practiced in the use of Deliverables by the licensee as permitted thereby'. 'Deliverable' is defined to mean the EB Product under customization as applicable (cl. 2.8). However, even if a standard software, delivered without any customization, could EB Guide Studio possibly be regarded as *sans* any IPR? Why, any program is a product of human intelligence and, thus, has inherent IPRs? Customization only means the changes, extension or adaptations to the EB products as carried out by EB (assessee) pursuant to requisition therefor by a customer, formalized through an agreement (cl. 2.4). Not surprisingly, the license agreement itself employs the word 'royalties' in conjunction with the license fee (cls. 6.1 & 6.2), even as the Revenue points out.

Significantly, the supply of the licensed products by the assessee's customer (RBI) using EB Guide Studio, statement of which it is under the license terms obliged to furnish to EB on a monthly basis, is taken into account, raising the invoice on RBI on that basis (cl. 6.5). This itself establishes the license fee for the same to be a royalty. *Further, if the supply of the licensed product so created/produced for consideration to its' customers by the user is not commercial exploitation by the assessee's customers (as RBI), what we wonder is?* How could, further, it be regarded as use of software for internal purposes? We have not considered it necessary to reproduce the development license agreement, the principal terms of which were gone through and read in detail by both the sides during hearing, so as to avoid burdening this order further and, further, principally for the reason that we observe no dispute on the primary/principal facts of the case. In fact, the manner of working / using the EB Guide Studio, on which in fact both sides before us rely on, stands provided by the assessee itself.

3.7 The assessee argument of the computer software being not a copyright is negated by its' own case of EB Guide Studio being an off-the-self software, and its supply being one of a copyrighted article. The several decisions relied upon by either side, i.e., for and against the license fee being, in the facts of a case, royalty (or not), are again largely *qua* computer software. Further, all the authorities, as the decisions by the Hon'ble High Courts; the OECD commentaries referred to therein, or by the tribunal, regard computer software as a copyright of literary/scientific work. We do not wish to enter into the controversy as to whether the same could be regarded as a literary work, as stated in some decisions (including *Infrasoft Ltd.* (supra)), or as scientific work. Again, in-as-much as we have followed the law as explained by the Hon'ble jurisdictional High Court in *Infrasoft Ltd.* (supra), binding on us, we do not consider it necessary to consider the several other

decisions cited before us (without going into their specific facts); the matter, as afore-stated, given the law as explained, being principally factual. We may though, if only to demonstrate our consideration of their facts, as well as that a difference on facts obtains, draw a comparison with reference to the decision in *Infrasoft Ltd.* (supra), principally relied upon before us. Clause 4.1.2 (of the Agreement) grants the right to *execute* and *use* the deliverables for the purpose of internally developing, configuring and adapting the licensed product. A deliverable signifies customization of a standard software, so that the IPR in the former implies that in the latter. The agreement further allows the right to modify, reverse engineer or decompile to create derivative works of any of them (clause 4.5). Even if, as contended, there is a restriction on reverse engineering – being allowed on a case to case basis – the licensor being certainly entitled to know the purpose for which its licensed software, and the information, viz. object codes, being shared, is to be used, it is of little consequence. This is all the rights necessary to develop the HMI have been or are to be allowed. Why, for all we know, reverse engineering may not be required for the same. If anything, it gets clarified from the said clause that derivative works are in contemplation on the basis of the development license. It is in fact upon considering all these aspects that we have – in the preceding part of this order, found the licensed product/s (HMI/s) are developed only on the basis/edifice of the software licensed, and is thus a derived program, on the supply of which therefore EB keeps tab. The sale/license (or sub-license) of the licensed product by the customer is only a commercial exploitation of the assessee's software. These rights do not obtain in the case of *Infrasoft Ltd.* (supra), in which case the Hon'ble Court found the rights granted to be limited to those necessary for operating the program. Why, as afore-noted, the parties have in the instant case themselves regarded the consideration (license fee) as royalty, implying a grant of right to use the Intellectual Property Rights (IPRs) embedded in the software

inasmuch as it gets transmitted/embodied in the licensed products, with the user (RBI) being invoiced on the basis of the licensed products supplied. The decision in *Infrasoft Ltd.* (supra), rather, on facts, supports the case of the Revenue.

Conclusion

4. The license fee from RBI in respect of software EB Guide Studio earned by the assessee, in our view, in view of the fore-going, qualifies to be royalty. Further, we may clarify that we have as yet considered only the said license fee there-from, from RBI. As regards the software licensed to TCSL, we do not find any specific agreement on record, nor was the same referred to during hearing. In fact, no specific arguments were advanced by the parties in relation thereto. We are therefore unable to issue any definite findings with regard to the license fee from TCSL. The matter therefore shall accordingly have to travel back to the file of the Assessing Officer (AO) for a decision on merits consistent and in accordance with the findings/observations made herein, of-course after allowing the assessee a reasonable opportunity to state its case in the matter. We may though clarify that if the development agreement on record is also applicable to TCSL (as the index to the paper-book, at paper-book pages 49-93, states), our findings would be equally applicable to the license fee from TCSL as well. The AO shall proceed accordingly. We decide accordingly.

5. The next and the only other issue arising in the instant appeal is as to whether 'education cess' could be charged over and above the tax rate, levied at 10%, i.e., as stipulated in the Indo-German DTAA, on the royalty income. The assessee before us relies on the orders in *Dy. DIT v. BOC Group Ltd.* [2016] 156 ITD 402 (Kol) and *Osram India Pvt. Ltd. v. Dy. CIT* (in ITA No. 4052/Del/2015, dated 29.12.2015). In both these decision it stands held that 'education cess' being only a 'surcharge' (for the purpose of the Union), the same cannot be levied to

increase the effective rate of tax agreed to between the two contracting states. Reference therein is also made to other decisions by the tribunal, stating to cover the issue. No contrary decision stands brought to our notice by the Revenue. In fact, that 'education cess' is only a 'surcharge' is clarified by the relevant Finance Act itself. Further, that surcharge is only a tax, stands clarified by the Apex Court in *CIT v. K. Srinivasan* [1972] 83 ITR 346 (SC). We, accordingly, have no hesitation in, accepting the assessee's plea, directing the non-imposition of the 'education cess' or any other 'surcharge', so that the tax rate per the DTAA only shall apply. We decide accordingly.

6. In the result, the assessee's appeal is partly allowed and partly allowed for statistical purposes.

Order pronounced in the open court on May 22, 2018

Sd/-
(H. S. Sidhu)
Judicial Member

Sd/-
(Sanjay Arora)
Accountant Member

Date: 22.05.2018

/GP/Sr. Ps.

Copy of the order forwarded to:

- (1) The Appellant: Elektrobit Automotive GmbH AM, Wolfsmantel, 46 91058, Erlangen, Germany
- (2) The Respondent: Deputy DIT, Circle 1(2), International Taxation, New Delhi
- (3) The DRP-1, New Delhi
- (4) The CIT concerned
- (5) The CIT-DR, ITAT

True Copy

By Order