IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'C' NEW DELHI)

BEFORE SHRI U.B.S. BEDI, JUDICIAL MEMBER
AND
SHRI J.S. REDDY, ACCOUNTANT MEMBER

I.T.A. No.5209/Del/2011
Assessment year: 2008-09

M/s Halliburton Export Inc. C/o Nangia & Co., CA Suite 4A, Plaza M6, Jasola, New Delhi PAN No. AABCH 9692 R (Appellant)	Vs.	Asstt. D.I.T., Circle-1(2), International Taxation, New Delhi (Respondent)

Appellant by : S/Shri Ashutosh Jain & Amit Arora. CA
Respondent by : Shri D.K. Gupta, CIT- DR

ORDER

PER U.B.S. BEDI, JM:

This appeal of the assessee emanates from the order passed by Assessing Officer u/s 144C(1) read with section 143(3) dated 23rd September, 2011 relevant to assessment year 2008-09 whereby besides challenging action of the Assessing Officer in holding that payment received by the assessee from sale of software and provisions of maintenance and other supports services to customers in India were taxable as "Royalty", in terms of section 9(1)(vi) of the Income-tax Act, 1961 as well in Article 12 of India US Double Taxation Avoidance Agreement, assessee has also challenged charging of interest u/s 234B of the Act.

2. Facts indicate that assessee had filed original return of income for the relevant assessment year on 29.09.2008 declaring nil income and claimed a refund of Rs.61,58,059/-. Thereafter, the return was revised on 19.02.2010 wherein the assessee declared nil income and claimed a refund of Rs.121,24,329/-. Notice u/s 143(2) along with questionnaire issued was duly served upon the assessee. In response thereto representative of the assessee appeared before the Assessing Officer from time to time, filed requisite details and case was discussed with him by the Assessing Officer.

2.1 Assessing Officer noted in the assessment order that M/s Halliburton Export Inc., (hereinafter referred to as the assessee) is a company incorporated in the USA and is engaged in the business of supplying pre-packaged software and providing maintenance and other support services associated with it. The assessee has entered into agreements with various customers in India for rendering the above services.

2.2 The Assessing Officer further noted that assessee is a tax resident of USA and it has filed a tax return relying on the provisions of DTAA between India and USA. In the return of income, assessee has claimed that it does not have a permanent establishment in India in terms of Article 5 of the India US DTAA and accordingly, the income received from the aforesaid supply/maintenance of software is not taxable in India. During the assessment proceedings a letter was written by the Assessing Officer on 9.12.2010 stating therein that assessee has received a gross amount of Rs. 6,03,64,143/- for sale and maintenance of software from its Indian customers in relation the agreements entered into by it. During the course of assessment proceedings, assessee was asked to show cause as to why receipt in sale of software should not be regarded as royalty and receipt in lieu of provision of maintenance services associated with it should not be regarded as royalty/fee for technical services in terms of the provisions of Income Tax read with article 12 of the Indian US DTAA and taxed accordingly.

2.3 Assessee filed reply in response to above show cause notice and while elaborately discussing requisite of section 9(1)(vi) of the Act and also article 12 of the DTAA and relying upon various case law as noted by the Assessing Officer, it was observed that receipt from sale of software cannot be construed as income in the nature of royalty and thus concluded as under:-

> *"Therefore, in view of the facts and the circumstances above, and in the light of the decision of the Tribunal in the case of Gracemac, the consideration received by the assessee is taxable as royalty within the meaning of Explanation 2 to section 9(1)(vi) of the Act and under the Double Taxation Avoidance Agreement between India and USA. Considerations received as a result of maintenance of software are also taxable as royalty as these are the services in connection with the activities with respect to the transfer of rights including the granting of a license.*
> *As per section 115(1)(b)(A), (AA) of the Income-tax Act, 1961,*
> *(1) Where the total income of –*
>
> *(b) a non-resident (not being a company) or a foreign company, includes any income by way of royalty or fees for technical services other than income referred to in sub-section (1) of section 44DAJ received from Government or an Indian concern in pursuance of an agreement made by the foreign company with Government or the Indian concern after the 31st day of March, 1976, and where such agreement is with an Indian concern, the agreement if approved by the Central Government or where it relates to a matter included in the industrial policy, for the time being in force, of the Government of India, the agreement is in accordance with that policy, then, subject to the provisions of sub-sections (1A) and (2), the income-tax payable shall be the aggregate of,-*
>
> *(A)the amount of income-tax calculated on the income by way of royalty, if any, included in the total income, at the rate of thirty per cent if such royalty is received in pursuance of an agreement made on*

or before the 31st day of May, 1997 and twenty per cent where such royalty is received in pursuance of an agreement made after the 31st day of May, 1997 (but before the 1st day of June, 2005);

(AA)the amount of income-tax calculated on the income by way of royalty, if any, included in the total income, at the rate of ten per cent if such royalty is received in pursuance of an agreement made on or after 1st day of June, 2005:)
Since the date of the agreements are not verifiable from the agreements, so, in order to safeguard the interest of revenue, the gross amount of `6,03,54,143/- received by the assessee is held to be taxable as royalty at the rate of 15%."

2.3.1 Draft order in this case was passed on 24.12.2010 in which income was proposed to be assessed at Rs.6,03,54,143/-. Subsequently, an order dated 18.01.2011 u/s 154/144C(1) of the Act was passed wherein the income was computed at Rs.11,08,72,926/-. On receipt of the draft order, the assessee filed its objections with the DRP. The order of the DRP was received in this office on 28.09.2011, in which no adverse inference was drawn and the variations made by the assessee ewer confirmed. Therefore, in view of the above, the taxable income of the assessee is computed as under:

Particulars	Amount (Rs.)
Gross amount received by the assessee company as Royalty	11,08,72,926
Total income rounded off	11,08,72,930
Income tax payable @ 15%	1,66,30,940

Hence, the income of the assessee is assessed at RS.11,.08,72,930/-. Charge Interest u/s 234A, 234B and 234C as applicable.

2.4 Aggrieved by the order of the Assessing Officer, assessee has come up in appeal and raised following grounds:-

> *"1.That the Assessing Officer has erred on facts and in law in holding that the payments received by the appellant from sale of software and provision of maintenance and other support services to customers in India, were taxable as "Royalty", in terms of section 9(1)(vi) of the Income-tax Act, 1961 (the "Act") as well as Article 12 of the India-US Double Taxation Avoidance Agreement ("DTAA").*
> *1.1 On the facts and circumstances of the case, the Assessing Officer failed to appreciate that sale of software and provision of maintenance/other support services by the appellant has not resulted in transfer of any rights in relation to a 'copyright' embedded in the said software and, therefore, the payments, received by the appellant do not constitute 'royalty' either in terms of the Act or the DTAA.*
> *1.2 The Assessing Officer has erred in law and on facts in applying the tax rate of 15% to the receipts of the appellant, in terms of the DTAA, as against the tax rate of 10 percent under the Act, being more favourable to the appellant alleging that the appellant failed to substantiate that the relevant agreements with the customers with entered into on or after 1st June, 2005."*
> *2. That the Assessing Officer, while holding as above, has failed to appreciate that the payments received by the appellant constitute business profits and cannot be brought to tax in India, as per provisions of Article 7 (read with Article 5) of the DTAA, in absence of a permanent establishment in India.*
> *3. That the Assessing Officer has erred in charging interest u/s 234B of the Act.*
>
> *The appellant craves leave to add, alter, vary, omit, substitute or amend the above grounds of appeal and/or the relief claimed, at any time before or at the time of hearing of the appeal, so as to enable the Tribunal to decide this appeal according to law."*

2.5 As regards ground No.1, 1.1 and 2 are concerned, same relate to sale of software and maintenance services and learned counsel for the assessee while reiterating the submission as made before the Assessing Officer has laid stress on the following, out of earlier submissions and submitted that:

"Halliburton Export Inc. (hereinafter referred to as the 'assessee") is engaged in the business of supplying pre-packaged software and providing maintenance/support services associated with it.

As per the agreements entered into between the assessee and its customer, the assessee grants to its customers (the end-users) a non-exclusive and non-transferable license to use the software for the purpose of its business. The mode of use of the license by the customers has been mutually agreed upon between the parties under the above contracts. It is pertinent to mention that the copyright in the software licensed to the customers shall, at all times, vest with the assessee. Further, all support services related to the use of the software are provided remotely and no personnel of the assessee visit India.

In view of the above factual background, the taxability of the income of the assessee in India is discussed in the following paragraphs"

Relevant provisions of the Act

The taxability or otherwise, of the income of the assessee in India as per the Act is governed by the provisions of section 5 read with section 9(1) of the Act.

Explanation 2 to section 9(1)(vi) defines "royalty" to include any consideration for transfer of all or any rights in respect of any copyright, literary, artistic or scientific work.

The expression 'copyright' is not defined in the Act it musty be understood in accordance with the law governing copyright in India, i.e. the Copyright Act, 1957 (hereinafter referred to as the "ICA"). In terms of the ICA, a copyright subsists in literary work, which includes computer programme.

It is submitted that only those payments in relation to supply of software, which result in transfer of any rights in relation to a copyright, can be said to be taxable as royalty under the provisions of the Act.

Relevant provisions of the India-US Double Taxation Avoidance Agreement.

In terms of the provisions of India-US Double Taxation Avoidance Agreement (hereinafter referred to as the "DTAA" or the "Tax Treaty"), the income of the assessee may be taxed in India in either of the following ways:

- *As royalty under Article 12 or*

- *As business profits under Article 7 (read with Article 5)*

Article 12 defines royalty to include consideration received for the use of, or the right to use, any copyright or a literary, artistic, or scientific work. A plain reading of the definition shows that when the assessee transfers the rights over a copyright, the same shall be said to be in the nature of royalty.

In case the income of the assessee is not in the nature of royalty, then the same may be taxed under Article 7 as business income if the assessee has a Permanent Establishment (hereinafter referred to as the "PE") in India and the above income is attributable to such PE.

<u>The income of the assessee is not in the nature of "Royalty"</u>

As submitted above, the requisite condition for any payment in relation to supply of software to be classified a royalty-both in terms of the Act and the DTAA, it is necessary that the right in relation to the 'copyright' and not the 'copyrighted article' must be transferred.

Your good self would appreciate that, passing on a right to use and facilitating the use of a product for which the assessee has a copyright is not the same thing as transferring or assigning rights in relation to the copyright. The enjoyment of some or all the rights of a copyright is necessary to trigger the royalty. However, non-exclusive and non-transferable license enabling the use of a copyrighted product cannot be construed as an authority to enjoy any or all of them enumerated rights ingrained in a copyright. Rather such a transfer of software license tantamount to sale of 'copyrighted article' as laid down by the Apex Court in the case of ***Tata Consultancy Services V. State of Andhra Pradesh (2004) 271 ITR 401.***

Reliance in this regard may also be placed on the Authority for Advance Ruling decision in the case of ***Dassault Systems K.K. vs. DIT 322 ITR 125*** *wherein it has been emphasized that the right to download and store a computer programme for internal business purpose is use of the copyrighted product and payments made in this regard cannot be considered as 'royalties' taxable under the provisions of the Act or under the tax treaty. Accordingly, the Authority held that payments received from sale of licensed software would be characterized as 'business profits', which in the absence of PE shall not be taxable in India.*

In the present case, the purpose of the license or the transaction is only to establish access to the copyrighted product for internal business purpose. Thus it cannot be said that the copyright itself has been transferred to any extent. It does not make any difference even if the computer programme passed on to the use is a highly specialized one. The parting of intellectual property rights, inherent in and attached to the software product, in favour of the licensee/ customer is mandatory requirement by the Act and the tax treaty to consider it as 'royalty'.

Accordingly, merely authorizing or enabling a customer to have the benefit of the instructions/ programme 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.

Your good self would appreciate that the principle that the payments from sale of licensed software, being sale of a copyrighted article, cannot be regarded as 'royalty' has been time and again emphasized by various Courts. An illustrative list of such cases is given below:

- ***Motorola Inc. v. DCIT (2005) 95 ITD 269 (SB)***
- ***DDIT v. Alcatel USA International Marketing Inc. (2009-+ITOL-733-ITAT-MUM)***
- ***Infrasoft Limited v. ADIT (2009) 28 SOT 179 (Del)***
- ***Lucent Technologies Hindustan Ltd. v. ITO (2009) 28 SOT 98 (Del)***
- ***Rational Software Corpn. (India) Ltd. v. ITO ITA Nos. 608 to 610/Bang/2008***
- ***Sonata Information Technology Ltd. v. ACIT (2006) 103 ITD 324 (Bang)***
- ***Hewlett-Packard (India) (P) Ltd. v. ITO (2006) 5 SOT 660 (Bang)***
- ***Wipro Ltd. v. DCIT (2006) 5 SOT 508 (Bang)***
- ***FactSet Research Systems Inc. (2009) 317 ITR 169 (AAR)***

In view of the above, it is submitted that the receipts of the assessee are not in the nature of royalty and are not taxable as per the provisions of the Act as well as the DTAA.

The income of the assessee is not in the nature of 'Business Profits'

As submitted above, the receipts in relation to use of a copyright shall constitute business profits and can be brought to tax in India only in cases where the assessee has a Permanent Establishment (hereinafter referred to as the "PE") in the country.

It is further submitted that the assessee does not have any business presence in India and all services in relation to supply and/or maintenance of pre-packaged software are rendered outside India. Thus the assessee cannot be said to be having a PE in India.

"In the present case, the assessee has entered into agreements with its customers for supplying pre-packed software. As per terms of the said agreements, the assessee grants to its customers (the end-users) a non-exclusive and non-transferable license to use the software for the purpose of their business. The mode of use of the license by the customer has been mutually agreed upon between the parties under the above agreements.

"Royalty is defined under Explanation 2 to section 9(1)(vi) of the Act, to include any consideration for transfer of all or any rights in respect of copyright, literary, artistic or scientific work.

For the purpose of this discussion, it is relevant to consider whether the sale of software by assessee amount to transfer of any 'copyright' so as to be taxable as 'royalty'.

Copyright has not been defined under the Act and thus, the definition provided under the law governing copyright in India i.e. the Copyright Act, 1957 (the "ICA") may be referred. In terms of the ICA, computer programme is considered as a literary work and is a subject matter of copyright.

Royalty has been defined in a similar manner under Article 13 of the DTAA to include consideration received for the use of, or the right to use, any copyright or a literary, artistic, or scientific work.

From the above, it may be inferred that the requisite condition for any payment in relation to supply of software to be classified as royalty- both in terms of the Act and the DTAA, is that the rights in relation to the 'copyright' and not the 'copyrighted article' must be transferred. Rights in relation to a copyright would include right to reproduce work, issue copies to public, etc. In other words, when the assessee transfers only the rights over the use of copyright, the same cannot be said to be in the nature of royalty.

Reference in this respect may be drawn form Apex Court decision in the case of ***Tata Consultancy Services vs. State of Andhra Pradesh (2004) 271 ITR 401*** *wherein it has been held that transfer of software license tantamount to sale of 'copyrighted article' which would be subject to Sales Tax. In this landmark judgement, the Court has observed that non-exclusive and non-transferable license enabling the use of a copyrighted product cannot be construed as an authority to enjoy any or all of the enumerated rights ingrained in a copyright. Hence passing on a right to use and facilitating the use of a product for which the assessee has a copyright is not the same thing as transferring or assigning rights in relation to the copyright.*

Your kind attention is also invited to the decision of Authority for Advance Ruling in the case of ***Dassault Systems KK vs. DIT 322 ITR 125*** *wherein it has been emphasized that the right to download and store a computer programme for internal business purpose is use of the copyrighted product and payments made in this regard cannot be considered as 'royalties' taxable under the provisions of the Act or under the tax treaty.*
Similar views have been expressed time and again by various Courts. An illustrative lit of such cases is given below:

- ***Motorola Inc. v. DCIT (2005) 95 ITD 269 (SB)***
- ***DDIT v. Alcatel USA International Marketing Inc. (2009-ITOL-733-ITAT-MUM)***
- ***Infrasoft Limited v. ADIT (2009) 28 SOT 179 (Del)***
- ***Lucent Technologies Hindustan Ltd. v. ITO (2009) 28 SOT 98 (Del)***
- ***Rational Software Corpn. (India) Ltd. v. ITO ITA Nos. 608 to 610/Bang/2008***
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- ***Wipro Ltd. v. DCIT (2006) 5 SOT 508 (Bang)***
- ***FactSet Research Systems Inc. (2009) 317 ITR 169 (AAR)"***

" Since the assessee merely authorizes or enables a customer to have the benefit of the software without any further right to deal with it independently, sale of the same cannot amount to transfer of rights in

relation to copyright or conferment of the right of using the copyright. Accordingly, receipts from sale of software cannot be construed as income in nature of royalty.

In view of the above, the receipts from sale of software shall constitute business profits and can be brought to tax in India only in cases where the assessee has a PE in the country.

In this regard, it is submitted that the assessee does not have any business presence in India and all services in relation to supply and/or maintenance of pre-packaged software are rendered outside India. Accordingly, the assessee cannot be said to be having a PE in India and receipts from sale of software are not taxable as per the provisions of the Act as well as the DTAA."

"In the facts of the instant case, the assessee provides maintenance services in relation to the pre-packaged software supplied by it. Provision of these services primarily involves utilization of technical know-how/ skill, etc. during the process of rendering of services and no knowledge or skill for further use of the customer is provided. Therefore it cannot be said that any technical knowhow or skill has been made available to the customer.

In view of the above factual and legal position, it can be said that receipts in relation to provision of maintenance and other services in relation to software supplied shall not be in nature FIS in terms of the DTAA. These shall be in nature of business profits, which can be brought to tax in India only in cases where the assessee has a PE in India. As submitted before, the assessee does not have any PE in India and accordingly, the receipts from provision of ancillary services in relation to supply of software are not taxable in India"

2.6 It was further submitted that the title remains with the assessee all the time and it has only to be used for internal purpose. Relying upon Motorala's case reported in 95 ITD 269 (SB) and Erricson's case as reported in 343 ITR 470 (Delhi) and relevant provisions of Software Maintenance Agreement, further, reliance was placed on the case of Infrasoft Ltd. Vs ADIT as reported in 125 TTJ 53 (Delhi), objections filed before DRP, it was pleaded that the receipts from provisions of ancillary in relation of supply of software are not taxable in India. Therefore, order of the AO needs to be reversed by allowing the appeal. It was, thus, pleaded for accepting the plea of the assessee to delete the addition made.

2.7 Ld. DR while supporting the order of AO has strongly pleaded that there was a transfer of right to use when ownership of the copyright has not been transferred and simply use has been allowed and for that ld. DR referred to clause 6.1 of agreement and further submitted that period of license was for one year as per clause 6.3 and clause 7 and 7.1 deals with termination and since software was not sold but license was to be used and use of copyright is embedded therein. So, software has been given for use. Its license only cannot said to be a transfer. Men have come to India, it was composite contract, and software component was not separable. Nokia's case of Delhi High Court is not applicable. Karnataka High Court in the case of CIT vs. Sun Computer is directly applicable to the facts of the case and reference was also made in the case of Citric Systems Asia Pacific Pvt. Ltd. reported in 2012-TII-04-ARA-INTL AAR No. 822 dated 06.02.2012. So it was pleaded for confirmation of the impugned order.

2.7.1 Reliance placed on various decisions by the Ld. A.R. for the assessee has been distinguished by Ld. D.R. as under:

> *(i) DIT vs. Ericsson AB, (Delhi):- It has been argued by the AR that the tax payer's case is covered by the aforesaid decision of the Hon'ble Delhi High Court. As submitted at the time of hearing before the Hon'ble Bench the Ericsson's case is distinguishable on facts. At the time of hearing reference was made to paragraphs 54 to 61 (page 15 to 17) of the decision wherefrom it can be seen that the major thrust of the decision was on the fact that the software that was loaded on the hardware did not have any independent existence and no separate payment was agreed for it: On these facts it was held by the High Court that the payment for software was not royalty.*

In the present case the software is not embedded in any hardware. The assessee has supplied the software on standalone basis. Also, as submitted in detail at the time of hearing, there is no sale of software and only license was given to use it. The software had to be returned to the taxpayer after the expiry of the license which was normally for one year. Thus, .there was -no sale of any copyrighted article.

(ii) Nokia Networks: In the aforesaid case the Delhi High Court has given the decision vide order dated-·07-09-2012. The issue regarding taxability of payment for software has been discussed in para 23 to 30 (page 26-4;0 36) of the decision. As-the facts of the aforesaid case were exactly similar to that of Ericsson's case the High Court-has followed the Ericsson's decision.

(iii) Infrasoft ltd. vs. ADIT, ITAT, Delhi: The aforesaid decision is primarily based on the special bench decision of the ITAT in the case of Motorola and ITAT, Bangalore's decision in the case of Samsung Electronics (para 43 to 46, page 16 & 17). Since subsequently High Courts' decisions have come both in the case of Motorola (viz. Ericsson and Nokia) and Samsung Electronics (Karnataka High Court) the issue is to be decided in the light of the aforesaid High Courts decisions. While the Delhi High Court has approved Motorola's decision in the case of Ericsson and Nokia the Karnataka High Court has reversed the ITAT's decision in the case of Samsung and has decided the issue in the favour of the Revenue:

(iv) -AD IT vs. TII Team Telecom: In this decision also the ITAT has followed

Special Bench decision in the case of Motorola and has not followed ITAT, Delhi decision in the case of Gracemac Corporation.

2.7.2 Decisions relied upon by the Revenue:-

(j) Samsung Electronics ltd. { Karnataka High CourtU2011- TII-43-HC-KAR-INTLl:... The High Court in para 15 (page 39) has referred to Supreme Court's decision the case of Sun Engineering Works to reiterate the settled position of law that a decision is in authority for what it decides. In para 19 (page 43) the High Court has held that a literary work is entitled to copyright and computer software has been recognised as a copyright work in India. In para 20 (page 44) after referring to the terms of-the software licence agreement the High Court has held that what is transferred is only a licence to use the

copyright belonging to the supplier and the supplier continues to be the owner of the copyright and all other IPRs. The High Court did not accept ,the contention of the tax payer that there is no transfer of copyright or any part thereof.

In para 21 and 22 the High Court has considered the issue as to whether the software is to be treated as goods and whether there is sale of the software. The Supreme Court's decision in the case of TCS has also been-discussed. The High Court has held that the aforesaid decision of the Supreme Court is not applicable as the question whether the payment made for supply of software was royalty or not was not at all the issue in TCS case. The Court held that the aforesaid decision would not preclude it from holding that the payment received by the supplier would amount to royalty unless it is proved that the payment is for the sale of software.

In para 23 (page 45) the High Court had referred to the definition of copyright under the Copyright Act, 1957 wherein it is clearly stated that 'literary work' includes computer programmes etc. In para 24 (page 47)the High Court after referring to section 51 and 52 of the Copyright Act has held that licence is granted for taking copy of software and to store it in the hard disk and to take a backup copy and right to make and-copy itself is a part of the copyright. The High Court further held that when licence to make use of the software by making copy of the same and to store it to the hard disk is given then what is transferred is right to use the software, an exclusive right, which the owner of copyright owns and what is transferred is only right to use copy of the software. The High Court thus did not accept the taxpayer's contention that there was no transfer of any part of copyright or copyright under the agreements or licences. The High Court held that right to make a copy of the software and use it for internal business itself amounts to copyright work u/s. 14(1) of the copyright act. According to the High Court what s granted under the licence is only right to copy of the software and there is no sale involved in the transactions. The1iigh Court held-that amount paid to the supplier for the supply of shrink wrapped software was not the price of the CD alone or software alone nor the price of licence granted. This is combination of all: In the aforesaid para the High Court has also highlighted the difference between the computer software and copyright in respect of books etc.

In para 25 (page 48) the High Court has concluded that payment for supply of software would constitute royalty within the meaning of the

D~ and under the I.T. Act as the right that is transferred in such a case is transfer of copyright. The High Court has also held that the payment would constitute royalty for imparting of -any information ·concerning technical; industrial,' commercial or scientific knowledge, experience or skill.

Before the High Court the taxpayer. had referred to the DECO commentary, observation of, Klaus Vogel , the decision of AAR in the case of Dassault Systems and Geoquest System, sale of copyrighted article (para 6 to 9).

(ii) Sunray Computers Ltd: & Lucent Technology (ITA Nos. 756/2006 { Karnataka High Court dated 21st Oct., 2011: In this case the taxpayer had imported computer software ih India. T-he ~assessee had also imported hardware separately. It integrated the software and hardware and supplied the same to telecommunication department (para 5,Page 9). The ITAT held that the payment for software was not royalty as the assessee had not acquired rights in the copyright programme and hence the same could not be exploited commercially (para 7,Page 10). The High Court held that since supply of software was an independent transaction the payment for it amounted to royalty (para 10-11, page 12).

(iii) Citrix Systems Asia (2012-TII-04-ARA-INTL.: This decision of the AAR also pertains to the payment for supply of shrink wrapped software. In para 1 & 6

(page 8 & 9) the terms of agreement are mentioned. In paragraph 10 to 12 (Page 10) the submissions of the tax payers, reference to DECO commentary, distinction between copyright and copyrighted article, etc. are mentioned. In para 15 to 17 (page 11 & 12) the AAR has discussed the various provisions of the Copyright Act. In para. 18 page 12 the AAR has stated that use of a copyright either by a owner or a licensee would not be an infringement of a copyright. The transfer of ownership can be by an assignment of the copyright either wholly or partially. A licence can be granted by the owner of copyright of any .interest in the right. The AAR has held that when a licensee acquires a computer programme he also gets the right to use that programme to a limited extent. He also gets the right, absolute or limited to use the copyright.

In para 19 .(page 13) the AAR has held that when a software is created by a person who acquires a copyright for it, he becomes the owner of that copyright and he can transfer or licence that right.

While selling or licensing the software the owner is also selling or licensing the right to use the copy right embedded therein. It was further held that software is a literary work and copyright of the creator over the software is an important and commercially valuable right and therefore whenever a software is assigned or licensed for use, there is an assignment of the right to use the embedded copyright in the software or a license to use the embedded copyright. The AAR thus held that it is not possible to divorce the software from the IPR of the creator of the software embedded therein.

In Para 21 (page 13) the AAR has held that sale or licensing of a software for use passes to the grantee a copyright as defined in section 14 of the Copyright Act. In para 22 (page 13) after holding that license is not confined to an exclusive license, the AAR has held that where a software is acquired the licensee or purchaser gets the right to use it without being held guilty of infringement of the copyright The AAR has held that sale or licensing of the software involves the grant of a right to use the copyright embedded in the software. The Authority thus did not accept the taxpayer's argument that licensing of the software is the mere sale of a copyrighted article and does not involve the grant of a right to use the copyright in the software.

In para 23 to 27 (page 14 & 15) and para 43 (page 17) the AAR referred to the decisions in the case Factset System, M/s. Dassault, Geoquest and TCS and has disagreed/distinguished the decisions. The Authority has held that whenever a software is transferred or license for used, it takes within it the copyright embedded in the software and the one cannot be divorced from the other.

In paragraph 32 (page 16) the AR has held that the distinction between copyright and copyrighted article is illusory as when a copyrighted article is permitted or licensed the permission involves not only the physical or electronic manifestation of a programme, but also the use of or the right to use the copyright embedded therein. In para 39 (page 17) the AAR has reiterated that the sale or license for use of a copyright software amounts to or amounts also to the grant of a right to use of a copyright.

In para 42 & 43 (page 17) the AAR has held that payment for supply of software would be royalty both under the I.T.Act and under the DTAA."

2.8 In order to counter the submission of ld. DR, ld. Counsel for the assessee submitted that this is not sale of software by any company and there is termination clause and TCS needs to be applied and it is a case where copyrighted article is transferred and not copyright as admitted by the DR. No person visited India and reference was made to Paper book Page 156, 157, 181 and 182. It was submitted that only plan was transferred but nobody visited India and assessee has entered into separate agreement. Under the treaty, assessee is liable to be taxed.

2.9 This case was earlier heard and draft order was prepared and discussed by both the members but fresh development after latest decision on the subject has come to the notice of the members of the Bench. So, the case was refixed for clarification and the same was heard again. Ld. Counsel for the assessee submitted that the issue raised in this appeal is now squarely covered by the latest decision of Hon'ble Delhi High Court in the case of DIT Vs Infrasoft Ltd. dated Nov. 22, 2013 and reported in 2013-TII-15-HC –DEL-INTL, is in favour of the assessee, a copy of which oder has been filed and it was pleaded that such issue is no longer res-integra as the same is covered by Jurisdictional High Court decision, therefore, it should be decided in favour of the assessee by accepting its appeal.

3. Ld. D.R. while submitting that similar issue was dealt by ITAT Mumbai Bench 'L', Mumbai in group of cases DDIT (IT)-2(1) Vs Reliance Infocom Ltd and others dated 06th Sep., 2013 but since the issue is squarely covered in favour of the assessee by Jurisdictional High Court Decision so, such precedent of a Tribunal losses its importance and the precedent of

Jurisdictional High Court will prevail, therefore the matter can be decided accordingly.

4. We have heard both the sides, considered the material on record as well as the precedent already relied upon at the time of original hearing and Mumbai Bench Decision in group of cases DDIT(IT)-2(1) vs Reliance Infocom Ltd. and others (supra) and Jurisdictional High Court decision in the case of DIT Vs Infrasoft Ltd. (supra) cited by the Department and Ld. counsel for the assessee respectively at the time of fresh hearing, we find that since the issue is covered in favour of the assessee as contended by the Ld. A.R. and the same was not disputed by the Ld. D.R., therefore, following the Jurisdictional High Court's decision, we decide the issue in favour of the assessee and allow the appeal of the assessee on this issue and direct to delete the impugned addition made for sale of software and provisions of maintenance / other support services to the customers in India being not taxable.

4.1 As regards charging of interest u/s 234B of the Act is concerned, the same is consequential but since the addition as made by the A.O. has already been deleted by us, therefore, question of charging of interest does not arise which is directed to be deleted.

5. As a result the appeal of the assessee gets accepted.

6. Order pronounced in the open court on 14th Feb., 2014.

Sd./-	Sd./-
(J.S. REDDY)	(U.B.S. BEDI)
ACCOUANTANT MEMBER	JUDICIAL MEMBER

Dt. 14 .02.2014
NS/*A K Keot/Sp.*

Copy forwarded to:-

1. The appellant
2. The respondent
3. The DRP-I
4. The DRP-I, New Delhi.
5. The DR, ITAT, Loknayak Bhawan, Khan Market, New Delhi.

True copy.

Assistant Registrar
(ITAT, New Delhi)