

**BEFORE THE AUTHORITY FOR ADVANCE RULINGS (INCOME TAX)
NEW DELHI**

27th Day of February, 2012

A.A.R. No.989 of 2010

PRESENT

Justice Mr. P.K.Balasubramanyan (Chairman)
Mr. V.K. Shridhar (Member)

Name & address of the applicant	Acclerys K K, Nishi Shin Pashi, T.S. Building, 11F, 3-3-1 Nishi Shin Pashi, Minato – Ku, Tokyo – 105-003, Japan
Present for the applicant	Mr. Manoj Arora, Advocate Mr. Siddharth Shankar, Advocate
Present for the Department	Mr. Somanath S Ukkali, DDIT C 1(1), Bangalore

RULING

The applicant is a company incorporated in Japan. It is part of Acclerys Group of companies. It is a subsidiary of Acclerys incorporated in USA. It has a liaison office in India. Liaison office acts as a coordinator. No sales are carried out through the liaison office. The applicant is a scientific informatics software and services company for life sciences, chemical and material research & development. The applicant enables the customers to accelerate their research process to enable them to rapidly discover new therapeutics materials and compounds and to introduce new efficiencies into the process that drive lower cost. The applicant has vast portfolio of copyrighted computer aided design modeling and stimulation offerings which assist customers in conducting scientific experiments in order to reduce the duration and cost of discovering and developing new drugs and materials. The company's platform can be used by customers to mine aggregate, analyze and report scientific data from disparate

sources thereby better utilizing scientific data within their organization. The applicant is a subsidiary for dealing with products of the Acclerys group in Asia.

2. The product of the applicant are in a software form and the right to use the application is given to customers by way of vendor licence key and through an independent reseller in India for which the customers make a one time payment. They also further pay update and / maintenance charges. To enable the sale of its products in India, the applicant had entered into an arrangement in India, with Apsara Innovations Pvt. Ltd. Apsara Innovations acts as a reseller of products. The reseller quotes it's own prices of products to the end users. After getting acceptance of the terms and prices by the customers, reseller places purchase orders on the applicant. Thereafter the license key is generated and delivered to the customer in India from overseas. The applications developed by the applicants are copyrighted material. The applicant authorizes the end users / customers to have benefit of the data, modules and applications contained in copyrighted products without any further right to deal with them independently. The license given to the customers is copyrighted material by the applicant and is provided to the customers on a non-exclusive and non-transferable basis. The independent resellers while remitting the consideration are deducting tax from all payments made under section 195(1) of the Income-tax Act, 1961 (Act) at 20% of the consideration.

3. The applicant contends that the company is authorizing an end user to have benefit of data or modules of the copyrighted software on a non-exclusive and non-transferable basis by granting license and since any transfer of rights on a copyrighted software would be business income and not royalty received from the independent reseller or customers under Article 12 of the Double Taxation Avoidance Agreement between India and Japan. The income being business income, Article 7 of the Convention would be attracted and since the applicant does not have a Permanent Establishment (PE) in India, the amount realized is not taxable in India. It is in this context that the applicant approached this Authority for an advance ruling. By order dated 25.8.2011 this Authority allowed

the application under section 245R(2) of the Act to give a ruling on the following questions:-

1. *Whether on the facts and circumstances of the case and in law, the payments received by Acclerys KK from sale of software products to end users / customers through an independent reseller in India will be taxable as business profits under Article 7 of the India-Japan Double Taxation Avoidance Agreement ('India-Japan DTAA' or 'Treaty')?*
 2. *Whether on the facts and circumstances of the case and in law, the payments received by Acclerys KK from sale of software products to end users / customers through its independent reseller in India will not constitute 'royalties and fee for technical services' as defined in Article 12 of India-Japan DTAA?*
 3. *Whether any tax needs to be deducted by the customers while making the remittances to the applicant as consideration for the copyrighted software supplied to them on a non-exclusive, non-transferable basis?*
4. The Revenue in its submission has taken the stand that the both the sellers and the end-users have rights subject to the terms of their respective agreement with the applicant. Resellers have been given the right to make an offer for sale and the payments the resellers make for it is in the nature of royalty under the definition of royalty in the Act and in the Tax Convention. The right given to the end-user involves a right to use a copyright and hence the payment received can only be royalty. In essence the contention is that what is paid by the reseller to the applicant and by the end-user customer to the applicant is royalty as defined in the act and as defined in the DTAC between India and Japan. It does not appear to be necessary to further detail the submission made by the revenue since we find that the questions posed for our ruling have already been answered in three other rulings of this Authority.
5. Learned counsel for the applicant relied on the ruling of this Authority in Dassault Systems KK in re. (AAR/821 of 2009) to contend in that ruling also what was involved was a resale of copyrighted articles and this Authority had ruled that the payment was not royalty and that the payment cannot be taxed as business profits in India in the absence of a PE as envisaged by Article 7 of the India-Japan Treaty. He submitted that the facts of the present case are similar.

He fairly brought to our notice the ruling this Authority had rendered in Millenium IT Software Ltd., In re.(AAR/835 of 2009) to point out that a different approach had been made in that ruling. But, in view of the factual situation here available he would urge that the reasoning and conclusion in the Dassault ruling may be accepted. He also emphasized that in Millennium Ruling Dassault has only been distinguished.

6. We had occasion to consider the ruling in Dassault, the ruling in P.No.30 of 1999 in re.(AAR/821/2009) of this Authority, the other relevant rulings and the ruling in Millenium, in our recent ruling in Citrix Systems Asia Pacific Pty. Ltd. (AAR/822 of 2009). Therein we have held that there cannot be a user of software over which exists a copyright without a use of the copyright therein. The payment for such use can only be royalty. We have also held that what is paid by a seller on behalf of the customer and what is paid by the customer direct, both partake the character of royalty. In the light of that Ruling, it does not appear to be necessary to further reason out the issue. We adopt the reasons given by us in the Citrix Ruling to find that what is paid by the reseller to the applicant and what is paid for updates and maintenance are royalty and not business income.

7. In the light of this conclusion, we rule on question No.1 that the amount received by the applicant through an independent reseller in India will not be business income covered by Article 7 of the India-Japan DTAC. On Question No.2 we rule that the payments received by the applicant from the sale of software products to the end users / customers through its independent reseller in India will be royalty as defined in Article 12 of the India-Japan DTAC. On Question No. 3 we rule that the tax needs to be deducted by the customers while making the remittances to the applicant as consideration for the software supplied to them.

Accordingly this ruling is pronounced on this day of 27th February, 2012

(V.K.Shridhar)
Member

(P.K.Balasubramanyan)
Chairman