IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "A", PUNE

BEFORE SHRI I C SUDHIR, JUDICIAL MEMBER
AND SHRI G.S. PANNU, ACCOUNTANT MEMBER

ITA No. 1569/PN/08
(Asstt. Year: 2005-06)

Allianz SE (Formerly known as Allianz AG), .. Appellant
C-401, 4th Floor, Panchshil Tech Park
Yerawada, Pune 411 006
PAN AAAAA2110L

Vs.

Asstt. Director of Income-tax, .. Respondent
(International Taxation) – I,
Pune

Appellant by : S/Shri Rajan Vora & Rajendra Agiwal
Respondent by : Shri Hareshwar Sharma, CIT

Date of hearing : 17.01.2012
Date of pronouncement : 14 .03.2012

ORDER

PER G.S. PANNU, A.M.:

This appeal by the assessee is directed against the order of the Commissioner of Income-tax (Appeals)-I, Pune dated 01.09.2008 which, in turn, has arisen from order passed by the Asstt. Director of Income-tax (International Taxation)-I, Pune under section 143(3) of the Income-tax Act, 1961 (in short "the Act"), pertaining to the assessment year 2005-06.

2. The appellant-assessee M/s Allianz AG is a company incorporated in Germany and is taxed as a non-resident in India. The assessee is primarily engaged in the business of providing insurance and other financial services

worldwide. In India, the assessee owns 26% of the shareholding in two Insurance companies, namely, Bajaj Allianz Life Insurance Co Ltd (in short "BA Life") and Bajaj Alliance General Insurance Co. Ltd. (in short "BA General"). For the assessment year under consideration, assessee filed its return of income declaring a total income of Rs 33,55,248/-. The Assessing Officer noticed that during the previous year relevant to the assessment year under consideration, assessee received payments from BA Life and BA General, on account of three categories of transactions viz., re-insurance transactions, technical awareness workshop; and, transactions under a software license agreement. The subject-matter of dispute before us are the amounts of Rs 39,08,506/- and Rs 1,22,30,020/- received from BA Life and BA General respectively in terms of the third category of transactions, i.e. under a software license agreement. Therefore, hereinafter we are confining ourselves to the facts pertaining to such transactions alone.

3. The assessee entered into separate Opus Software License Agreements (in short "License agreement") with B A Life and B A General whereby the latter companies were granted the right to use the Opus software for their internal business purposes and the amounts received by the assessee as per agreement have been christened as 'license charges' and claimed to be exempt from tax in India. Broadly speaking, taxability of such license charges earned by the assessee is the subject matter of dispute before us, as the same have been held to be taxable in India by the Income-tax authorities. Before appreciating the rival positions on this dispute, it would be appropriate to briefly touch upon the nature of the arrangement contained in the license agreement as also the nature of software in question.

4. As noted earlier, in terms of the license agreement, assessee has granted right to use the Opus software for the business purposes of BA Life and BA General. Opus software is an insurance business software solution,

based on Global Insurance Operating Solution (in short “GIOS software”) which in turn has been developed by CGI Group (Europe) Ltd (in short “CGI”). GIOS is a software which is used by the insurance companies across the world and its copyright is owned by CGI. The AllianzSE Group which constitutes of the assessee also, acquired the user rights of GIOS software from CGI and in pursuance to such user rights, Allianz SE Group extended the functionality of certain modules of GOIS to suit the business requirements of its Group and the same is referred to as “Opus Software”. In other words, it is to be understood that the GOIS Software together with the additional functionalities developed by the Allianz SE is being referred to as ‘Opus Software’. Notably, the ‘Opus Software’ cannot be used independent of the GIOS software platform. In terms of the agreement with CGI, the Allianz SE is to act as a nodal company and be responsible at all times for the compliance of the terms of the agreement. In consequence of such arrangement, the assessee entered into license agreement with its Indian affiliates, namely, BA Life and BA General, whereby the Indian affiliates have been granted simple, non-exclusive and non-transferrable right to use the ‘software opus’ for an unlimited number of personal computers. Further, BA Life and BA General can use ‘Opus Software’ only for processing data for its own business purposes; that BA Life and BA General are authorized to produce back-up copies only for archiving purposes; that modifications for the purposes of customizing Opus Software to meet local requirements, such as language, can only be carried out by BA Life and BA General. Furthermore, in terms of the License agreement, the BA Life and BA General are specifically prohibited from changing, translating or decompiling of software opus; and renting, leasing or selling of the software opus or putting it up for someone’s disposal free of charge. In terms of the termination Clauses, BA Life and BA General are required to return or destroy the original and all copies of the software, manual etc., except archival copy. Further in terms of the confidentiality and protection against unauthorized use clauses, BA Life and BA General have agreed not to share any information/knowledge regarding software opus with third parties.

5. In this background, we may now refer to the stand of the Revenue that the license charges received by the assessee of Rs 1,61,38,526/- constitute 'royalty' within the meaning of section 9(1)(vi) of the Act and is, therefore, subject to taxation in India. Further, as per the Revenue such license charges fall for consideration in Article 12 of the Double Taxation Avoidance Agreement (in short 'DTAA") between India Germany and accordingly the same are liable to be taxed as royalty at the rate of 10%.

6. The primary plea raised by the assessee against the case set up by the Revenue is to the effect that the license charges have been received only for granting the right to use Opus software for the internal business purposes of BA Life and BA General and that it does not entail the grant of any copyright. Before us also, learned Counsel for the assessee sought to point out that use of copyright or the right to use copyright are distinct from an arrangement whereby a mere user right of the product has been granted. The case set up by the assessee is that copyright is to be distinguished from the material object which is the subject matter of the copyright, and thus, it is pointed out that the payments have been made by BA Life and BA General to the appellant for the use of the Opus software, which is a copyrighted article and is not for awarding of any copyright therein. It was therefore vehemently brought out that consideration for use of a copyright article cannot be regarded as a royalty for the purposes of the Act and the aforesaid proposition is sought to be justified on the basis of the following decisions:

(i) Motorola Inc. v. DCIT 95 ITD 269 (Del) (SB)

(ii) Samsung Electronics Co. Ltd. v. ITO 93 TTJ 658 (Bang. Trib);

(iii) DCIT v. Metapath Software International Ltd 9 SOT 305 (Del. Trib)

9. It is further pointed out that the above proposition propounded by the Special Bench of the Tribunal in the case of Motorola Inc. (supra) has since been also approved by the Hon'ble Delhi High Court in ITA No 504/2007, etc. dated 23.12.2011, a copy of which has also been placed on record.

10. Per contra, the Assessing Officer has made out a case that the instant fact-situation is covered by the expression "royalty" as per Clause (v) of Explanation 2 to section 9(1)(vi) of the Act. The Assessing Officer in para 5.4.2 of the assessment order has observed that what is transferred by the license agreement is the user rights of the software Opus. As per the Assessing Officer, in terms of an agreement between Allianz AG and CGI dated 19.1.1999, Allianz AG received the rights to use the software which in turn were transferred by way of the license agreement to the Indian affiliates, BA Life and BA General. In this background, the Assessing Officer inferred that the assessee is liable to be treated as owner of such rights in the copyright of the Opus Software, which were acquired in terms of the agreement dated 19.1.1999 (supra). As per the Assessing Officer, since it is only the right to use the software which has been transferred, the same is liable to be treated as royalty within the meaning of 9(1)(vi) read with Explanation thereof. Before us also the learned Departmental Representative has reiterated the arguments set out by the Assessing Officer. Further, it is submitted by the learned Departmental Representative that BA Life and BA General have utilized the software Opus for the purposes of their respective businesses, which constitutes commercial exploitation of the software and, therefore, consideration paid for the same is to be understood as 'royalty'. It has also been pointed out that in terms of the license agreement, BA Life and

BA General are not prohibited from developing special solutions or to customize the Opus software to meet the local requirements and that the use of such modifications outside the Allianz Group is permitted subject to the consent of both the licensor and licensee. In the course of the hearing, the learned CIT-Departmental Representative has referred to a decision of the Authority for Advance Rulings in the case of IMT Labs (I) P. Ltd. 287 ITR 450 (AAR) wherein license fee paid to a non-resident for use of a software developed by a non-resident has been considered to be royalty within the meaning of section 9(1)(vi) of the Act.

11. We have carefully considered the rival submissions. The pertinent point to be addressed in this appeal relates to the nature of the payments received by the assessee as license charges. As per the assessee, the payments have been received against granting of a user right in the Opus software, which is a copyrighted product and not for the use of copyright itself. Therefore, the case of the assessee is that such license charges are liable to be treated as profits falling in Article 7 of the India-Germany DTAA and as such license charges are not attributable to a Permanent Establishment (PE) in India, same are not taxable in India. In so far as the plea of the assessee that it has granted only user right to BA Life and BA General in terms of the license agreement, the same is not disputed by the Assessing Officer. The following discussion by the Assessing Officer would show that there is no dispute to the assessee's assertion that it is only right to use of a copyrighted article which has been granted and not for the use of a copyright:-

> *"Thus the rights were received by Allianz AG to use the software. These rights were transferred by Allianz to BA Life and BA General to use the software in Indian Territories. Thus, the licensee in first case (between Certis and Allianz) becomes sub-licensor (between Allianz and BA Life/BA general.) As submitted by the assessee the copyright of OPUS vests with the CGI Group. Now CGI Group has assigned the right to use the software to Allianz AG in the Authorized Territories (Basically all world except Canada) for which Allianz AG will pay some amount to CGI Group. Further, Allianz AG assigns the right to use the software to BA Life and BA General being its affiliates in India. As per the copyright Law, whenever the assignee of a copyright becomes entitled to any rights comprised in the copyright, he shall be treated*

> *as the owner of copyright in respect of those rights. The assignor shall also be treated as the owner of copyright in respect of unassigned rights. If we apply this principle we can say that, in respect of the Authorised territory, the right to use the Software OPUS lies only with Allianz despite the fact that the copyright of OPUS lies with CGI Group. In respect of exercising the right to use the software OPUS, Allianz will have no limitation except as those binding on it by the terms of the Agreement. But will definitely enjoy the right to use the software as its owner. There won't be any other rights associated with OPUS at the disposal of Allianz. e.g. it cannot brand this product as its own, it cannot term this produce as its own, it cannot market this produce etc. Similar to the rights of Allianz in the Authorised Territory, the BA Life and BA General will enjoy the rights in India. The rights in this regard only mean the right to use the Software in India.*
> *5.5……………………………………………………….*
>
> *………The thing to be noted here is that the copyright over the software remained with the CGI Group."*

Pertinently, there is no disagreement that the copyright continue to remain with the CGI as observed by the Assessing Officer. The point to be addressed is as to whether the payments in question have been received by the assessee for grant of use of a copyright or for grant of use of a copyrighted article. Ostensibly, the payments have been received by the assessee for grant of use of a copyrighted article and not for use of the copyright itself. Thus, the point to be addressed is whether such payments are in the nature of royalty. Similar situation was considered by the Special Bench of the Tribunal in the case of Motorola Inc. (supra). In that case,, the Revenue had contended that the receipts in respect of license to use software, which was a part of the hardware, could be taxed on the basis that the same constituted 'royalty' within the meaning of section 9(1)(vi) of the Act and the relevant clauses of the Double Taxation Avoidance Agreement (DTAA) with the country of assessee's residence. As per the Special Bench, if the payment was for copyright, the same was liable to be classified as 'royalty' under the Act as well as under the DTAA so as to be taxable in the hands of the assessee. On the contrary, if the payment is found to be for a copyrighted article, then it takes the character of purchase price of the article and would not constitute royalty under the Act or under the relevant clauses of the DTAA. The Special Bench after considering the meaning of the expression 'royalty' under the Act and that of a 'copyright' under the Copyright Act, 1957 held that what was sold by the non-resident was the copyrighted article and the payment was not for a copyright. The aforesaid proposition has since been examined and affirmed by the Hon'ble Delhi High Court in its order dated 23.12.2011 (supra), the relevant portion reads as under:

> *"WHETHER THE INCOME FROM THE SUPPLY CONTRACT CAN BE TREATED AS 'ROYALTY' UNDER SECTION 9(1)(vi) OF THE ACT:*
>
> *50. Section 9(1)(i) of the Act which deals with the taxability of royalty income reads as under:*
> *Section 9 INCOME DEEMED TO ACCRUE OR ARISE IN INDIA.*
>
> *(1) The following incomes shall be deemed to accrue or arise in India :-*
>
> *(i) All income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situate in India"*
>
> *51. The submission of Mr. Prasaran, learned ASG was that Software part of the equipment supply would attract royalty as copy right of the said software programme still vests with the assessee. Therefore, payments made or the licence to use the software programme give rise to royalty for the purposes of both the IT Act as well as DTAA entered into between Sweden and India. Referring to Explanation II (v) to section 1(vi) of the Act as well as Article 13, para 3 of DTAA, it was argued that for the purposes of Income-tax law, is essentially a payment received as consideration for the use or right to use a particular integral property right, whether partially or entirely.*
>
> *52. We find that the Tribunal has held that there was no payment towards any royalty and this conclusion is based on the following reasoning:*
>
> *(i). Payment made by the cellular operator cannot be characterized as royalty either under the Income Tax Act or under the DTAA.*
> *(ii). The operator has not been given any of the seven rights under S.14 (a) (i) to (vii) of the Copyright Act, 1957 and, therefore what is transferred is not a copyright but actually a copyrighted article*
> *(iii). The cellular operator cannot commercially exploit the software and therefore a copyright is not transferred.*
> *(iv). Further, the parties to the agreement have not agreed upon a separate price for the software and therefore it is not open for the income tax authorities to split the same and consider part of the payment for software to be royalty*
> *(v). The bill of entry for importing of goods shows that the price has been separately mentioned for software and that this was only for the purposes of customs. There is no*

evidence to show that the assessee was a party to the fixation of value for the customs duty purposes.

(vi). The software provided under the contract is goods and therefore no royalty can be said to be paid for it.

53. Mr. Prasaran, countered the aforesaid reasoning arguing that Clause 20 of the Supply Contract uses the term 'licence' and the same term is used in the context of software throughout the three Agreements indicating that it is not an outright sale of goods, or a full transfer rights from the assessee to the Indian company. He also submitted that the software is a computer programme, which is treated differently from a book, not only in the Copyright Act, 1957 but also the Income tax Act' itself. His submission was that Section 52(1) (aa) of the Copyright Act only deems that certain acts will not to amount to infringement in the light of various concerns, where otherwise such acts would amount to infringement under Section 51 of the Copyright Act. The provision cannot by itself be used to hold that no right exists in the first place since the scope of the right has to be understood only from the provisions of Section 14 of the Copyright Act, 1957. He also argued that the ITAT has misinterpreted the provisions of the DTAA, specifically Article 13, para 3 of the DTAA (Article 12, para 3 of the Model Convention) which defines royalties to mean "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". The ITAT, submitted, has not appreciated that the royalty is for the use or right to use any copyright. According to him, since title of the software continued to vest with the assessee as provided in clause 20.2 of the Supply Agreement and the assessee was free to grant non-exclusive licenses to other parties, it follow that there was no full time transfer of copyright but I was only a case of right to use the software, and thus payment for use of software is to be treated as royalty. He further argued that reference to OECD Commentary was not apposite as it could not be used to interpret the scope of the relevant provisions of DTAA.

54. It is difficult to accept the aforesaid submissions in the fact~ present casco We have already held above that the assessee did I1(any business connection in India. We have also held that the sur equipment in question was in the nature of supply of goods. The this issue is to be examined keeping in view these findings. MOl another finding of fact is recorded by the Tribunal that the C Operator did not acquire any of the copyrights referred to in Sect] (b) of the Copyright Act,1957.

55. Once we proceed on the basis of aforesaid factual finding~ difficult to hold that payment made to the assessee was in the nature of royalty either under the Income-Tax Act or under the DTAA. We have to keep in mind what was sold by the assessee to the Indian customers was a GSM which consisted both of the hardware as we] software, therefore, the Tribunal is right in holding that it permissible for the Revenue to assess the same under two articles. The software that was loaded on the hardware did not I independent existence. The software supply is an integral pal GSM mobile telephone system and is used by the cellular operator for providing the cellular services to its customers. There could no independent use of such software. The software is embodied in the system and the revenue accepts that it could not be used independently. This software merely facilitates the functioning of the equipment an integral part thereof. On these facts, it would be useful to refer judgment of the Supreme Court in TATA Consultancy Services State of Andhra Pradesh, 271 ITR 401, wherein the Apex Court held that software which is incorporated on a media would be goods and therefore,l liable to sales tax. Following discussion in this behalf is required to be noted:-

` *"In our view, the term "goods" as used in Atiicle 366(12) of the Constitution of India and as defined under the said Act are very wide and include all* *types of movable properties, whether those properties be tangible or intangible. We are in complete agreement with the observations made by this Court in Associated Cement Companies Ltd. (supra). 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 sales 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 "goods". We see no difference 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 sale of computer software is clearly a sale of "goods" within the meaning of the term as defined in the said Act. The telm "all materials, miicles and commodities" includes both tangible and intangible/incorporeal property which is capable of abstraction, consumption and use and which can be transmitted, transferred, delivered, Stored, Posessessed etc. The Software programmes have all these attributes."*

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"In Advent Systems Ltd. v. Unisys Corpn, 925 F. 2d 670 (yct Cir. 1991), relied on by Mr. Sorabjee, the court was concerned with interpretation of uniform civil code which "applied to transactions in goods". The goods therein were defined as "all things (including specially manufactured goods) which are moveable at the time of the identification for sale". It was held:

> *"Computer programs are the product of an intellectual process, but once implanted in a medium are widely distributed to computer owners. An analogy can be drawn to a compact disc recording of an orchestral rendition. The music is produced by the miistry of musicians and in itself is not a "good," but when transferred to a laser-readable disc becomes a readily merchantable commodity. Similarly, when a professor delivers a lecture, it is not a good, but, when transcribed as a book, it becomes a good.*
>
> *That a computer program may be copyrightable as intellectual property does not alter the fact that once in the form of a floppy disc or other medium, the program is tangible, moveable and available in the marketplace. The fact that some programs may be*

tailored for specific purposes need not alter their status as "goods" because the Code definition includes "specially manufactured goods."

56. A fortiorari when assessee supplies the software which is incorporated on a CD, it has supplied tangible property and the payment made by the cellular operator for acquiring such property cannot be regardedas a payment by way of royalty.

57. It is also to be borne in mind that the supply contract cannot be separated into two viz. hardware and software. We would like to refer the judgment of Supreme Court in CIT Vs. Sundwiger EMFG Co., 266 ITR 110 wherein it was held:

"A plain and cumulative reading of the terms and conditions of the contract entered into between the principal to principal i.e., foreign company and Midhani i.e., preamble of the contract, Part-I and II of the contract and also the separate agreement, as referred to above, would clearly show that it was one and the same transaction. One cannot be read in isolation of the other. The services rendered by the experts and the payments made towards the same was part and parcel of the sale consideration and the same cannot be severed and treated as a business income of the non-resident company for the services rendered by them in erection of the machinery in Midhani unit at Hyderabad. Therefore, the contention of the Revenue that as the amounts reimbursed by Midhani under a separate contract for the technical services rendered by a non-resident company, it must be deemed that there was a "business connection", and it attracts the provisions of Section 9(1)(vii) of the Income Tax Act cannot be accepted and the judgments relied upon by the Revenue are the cases where there was a separate agreement for the purpose of technical services to be rendered by a foreign company, which is not connected for the fulfillment of the main contract entered into principal to principal. This is not one such case and thus the contention of the Revenue cannot be accepted in the circumstances and nature of the terms of the contract of this case."

58. No doubt, in an annexure to the supply contract the lump sum price is bifurcated in two componenets, viz., the consideration for the supply of the equipment and for the supply of the software. However, it was argueued by the learned counsel for the assessee tht this separate specification of the hardware/software supply was necessary because of the differential customs duty payable.

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, aliistic or scientific work. Section 2 (0) 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 operator, 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 :ontemplated 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. Mr. Dastur is right in this submission which is based on the commentary on the OECD Model Convention. Such a distinction has been accepted in a recent ruling of the Authority for Advance Ruling(AAR) in Dassault Systems KK 229 CTR 125. We also find force in the submission of Mr Dastur that even assuing the payment mad by the cellular operator is regarded as a payment by way of royalty as definedin Explanation 2 below Secion 9(1) (vi), nevertheless, it can never be rearded as royalty within the meaning of the said term in article 13 para 3 of the DTAA. This is so because he definition in the DTAA is narrower than the efinition in the Act, Article 13(3) BRINGS WITHIN THE AMBIT OF THE DEFINITION OF ROYALY 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 lump sum payment as is the position in the present case.*
>
> *61. we thus hold that payment received by the assessee was towards the title and GSM system of which software was an inseparable parts incapable of independent use and it was a contract for supply of goods. Therefore, no part of the payment therefore can be classified as payment towards royalty."*

In our view, the aforesaid judicial pronouncement clearly supports the proposition advanced by the assessee in the present case. In fact, in so far as the factual aspect is concerned, the Assessing Officer has clearly stated that the copyright of software vests only with the CGI Group and therefore, even from that standpoint, there can be no divergence from the assessee's point that what has been transacted in the license agreement is only the grant of user right in the copyrighted software and not the use of copyright itself. Therefore, having regard to the fact-position and the judgment of the Hon'ble Delhi High Court, wherein the decision of the Special Bench in the case of Motorola Inc. (supra) has since been approved, the view of the assessee has to be upheld.

12. Before parting, we may refer to the decisions relied upon by the learned CIT-Departmental Representative before us, namely, the decision of Authority in the case of IMT Labs (India) P Ltd (supra) and also of the Hon'ble Karnataka High Court in the case of CIT v. Samson Electronics Co. Ltd 320

ITR 209 (Kar). The Hon'ble Karnataka High Court was dealing with a case of requirement to deduct tax at source under section 195(1) on amounts paid to foreign software supplier. As per Hon'ble High Court, consideration received for granting of right to use software under certain circumstances could be regarded as 'royalty'. The two contrary view, namely, that the Hon'ble Delhi High Court on one hand and that of the Hon'ble Karnataka High Court were before the Mumbai Bench of the Tribunal in the case of M/s Solid Works Corporation in ITA No 3219/MUM/2010, order dated 08.01.2012. The Tribunal after making following discussion applied the view expressed by the Hon'ble Delhi High Court in the case of Ericsson A.B., New Delhi (supra), which was favourable to the assessee:-

> *"8. On the argument of the ld DR that where two views are available on an issue one favourable to the assessee should be preferred, should not be applied to non-resident assessees, we are of the view the same caot be accepted in view of Article 24 of the DTAA between India and USA which provides for non-discrimination. Article 24(1) lays down that Nationals of a contracting State shall not be subjected in other contracting State to any taxation or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances, in particular with respect to residence, are or may be subjected. This provision shall, notwithstanding the provisions of article 1, also apply to persons who are not residents of one or both of the Contracting States. Therefore where two views are available on an issue one favourable to the assessee and the one against the assessee, the view which is favourable to the assessee and does not support levy of tax on the assessee should be preferred, should be applied to non-resident assessee in this case."*

Accordingly, the consideration received by the assessee in that case allowing the use of the software was not considered as a royalty and instead, it was held as business receipts in the hands of the assessee. Therefore, in the present case also we find ample force to adopt a similar approach and, therefore, we hold that the assessee is justified in canvassing that the license charges earned by it was not liable to be treated as royalty following the judgement of the Hon'ble Delhi High Court. Accordingly, the appeal of the assessee has to succeed.

13. In the result, the appeal of the assessee is allowed.

Decision pronounced in the open Court on 14 day of March, 2012.

Sd……	**Sd……**
(I C SUDHIR)	**(G.S. PANNU)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Pune, Dated 14th March, 2012

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Copy to:-

1) Allianz SE, Pune,
2) Asstt. Director of IT (International Taxation-I), Pune,
3) The CIT(A)-I, Pune
4) CIT (International Taxation), Pune
5) DR, "A" Bench, I.T.A.T., Pune.
6) Guard File

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By Order

Sr. PS, ITAT Pune