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IN THE INCOME TAX APPELLATE TRIBUNAL
"L" Bench, Mumbai

Before Shri Mahavir Singh, Judicial Member
and Shri G. Manjunatha, Accountant Member

ITA No. 1393/Mum/2016
(Assessment Year: 2012-13)

DCIT (IT) - 4(1)(1) Room No. 120, Scindia House Ballard Pier, N.M. Road Mumbai 400038	Vs.	M/s. Reuters Transaction Services Ltd. C/o. BMR & Associates BMR House, 36-B Dr. R.K. Shirodkar Marg Parel, Mumbai 400012

PAN – AACCR0226Q

Appellant	**Respondent**

ITA No. 2219/Mum/2016
(Assessment Year: 2012-13)

M/s. Reuters Transaction Services Ltd. C/o. BMR & Associates BMR House, 36-B Dr. R.K. Shirodkar Marg Parel, Mumbai 400012	Vs.	DCIT (IT) - 4(1)(1) Room No. 120, Scindia House Ballard Pier, N.M. Road Mumbai 400038

PAN – AACCR0226Q

Appellant	**Respondent**

Revenue by:	Shri Samual Darse
Assessee by:	Shri P.J. Pardiwala & Shri Nishant Thakkar

Date of Hearing:	23.07.2018
Date of Pronouncement:	03.08.2018

O R D E R

Per G. Manjunatha, AM

These cross appeals filed by Revenue as well as the assessee are directed against the order of the Dispute Resolution Panel-2, Mumbai dated 14.12.2015 under Section 144C(1) of the Income Tax Act, 1961 (hereinafter "the Act") for A.Y. 2012-13. Since the facts are common in both the appeals, these appeals were heard together and are disposed off by this common order for the sake of convenience.

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2. Revenue has raised the following grounds: -

"1. Whether on the facts and in the circumstances of the case and in law, the DRP has erred in giving direction that interest u/s. 234B is not chargeable in view of decision of Director of Income-tax (International Taxation) Vs. NGC Network Asia LLC (2009) 222 CTR 0086 : (2009) 313 ITR 0187 though proviso to section 209(1)(d) is introduced in the Act w.e.f. 01.04.2012.

2. Whether on the facts and in the circumstances of the case and in law, after introduction of proviso to section 209(1)(d) interest u/s. 234B is chargeable even in the cases where tax is not deducted by the person responsible for deducting tax while making payment.

3. The Appellant prays that the order of the DRP be set aside on the above grounds and the draft order of the Assessing Officer be restored."

The following grounds were raised by the assessee in its appeal:

"1. On facts and circumstances of the case and in law, the Hon'ble DRP erred confirming the action of the learned AO in characterising subscription revenue received by the Appellant, in the nature of 'Royalty' or 'Fees for technical services' under the Income-tax Act, 1961 ('the Act') and under the India-United Kingdom tax treaty ('the treaty');

2. Without prejudice to the above, based on the facts and circumstances of the case and in law, the Hon'ble DRP has erred in fact and in law in not applying the provisions of Article 13(6) of the treaty, despite the fact that the learned AO has himself adjudicated that the Appellant has a Permanent Establishment in India.

3. On facts and circumstances of the case and in law, the learned AO has erred in levying surcharge and education cess on the sum of the tax liability, calculated pursuant to the final assessment order issued under section 143(3) read with section 144C(3) of the Act."

3. Through these grounds of appeal, the Revenue has challenged the order of the DRP deleting interest charged by the AO under Section 234B of the Act, on tax computed under Section 115A of the Act. The assessee, through these grounds, challenged the directions of the DRP confirming the action of the AO in charging subscription revenue received by the assessee in the nature of royalty or fees for technical services under the Income Tax Act and under the India-UK Tax Treaty. The assessee also

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challenged the action of the AO in not applying the provisions of Article 13(6) of the India-UK Treaty.

4. The brief facts of the case are that the assessee, Reuters Transaction Services Ltd., is a company incorporated under the laws of England and is a tax resident of United Kingdom. The assessee is in the business of providing Reuters Dealing 3000, which is an electronic deal matching system enabling authorised dealers in foreign exchange such as banks and other financial institutions, etc. to effect deals in spot foreign exchange with other foreign exchange dealers. The main server of the assessee is located in Geneva and the assessee has executed a Dealing Services Marketing Agreement with Reuters India Pvt. Ltd. whereby the Reuters India Pvt. Ltd. has undertaken marketing services of the assessee to subscribers in India. During the financial year relevant to A.Y. 2012-13 the assessee has earned revenue of ₹14,18,44,012/- from customers in India. The assessee has filed its return of income declaring Nil income. It has been claimed by the assessee that as per the provisions of Section 90(2) of the Act, it has the option to be taxed as per the provisions of Income tax or the relevant tax treaty executed by India, whichever is more beneficial to the assessee. Since it is a tax resident of UK, the assessee has opted to be taxed as per the provisions of DTAA between India and UK. The assessee further claimed that the revenue earned by the assessee from its subscribers in India are in the nature of business profit and as per Article 7 of the India-UK tax treaty business profits of a tax resident of UK are taxable in India, only if it has a Permanent Establishment (PE) in India and in such case only to the extent of profits that are attributable to the PE in India. The assessee further claimed that for the year ended 31.03.2012 it has no PE in India as contemplated under Article 5 of the DTAA and accordingly its revenue is not liable to be taxed in India in terms of the provisions of the DTAA.

5. During the course of assessment proceedings the AO, after considering the submissions of the assessee and also considering the India-UK Tax Treaty, observed that the assessee is having a PE in India

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and the activities being carried on by the assessee in India is not squarely covered under Article 13 of the treaty between India and UK. Therefore the revenue earned by the assessee is liable for taxation as royalty. The AO further observed that though it has been held that assessee is having a PE in India, but the income is not computed as provided under Article 13(6) of the India-UK treaty as the assessee has disputed the existence of PE itself. Accordingly, the draft order has been passed under Section 143(3) r.w.s. 144C(1) of the Act dated 27.03.2015 levying tax @20% along with surcharge and education cess on total revenue earned by the assessee.

6. Aggrieved by the draft assessment order, the assessee company has filed objections before the DRP-2, Mumbai and challenged the findings of the AO in respect of PE and also levy of tax at 20% on gross revenue earned by the assessee. The assessee also challenged the findings of the AO in so far as the issue of subscription revenue earned by the assessee from its subscribers in India are towards the use of equipments and process and hence in the nature of royalty income chargeable to tax in India under the Income Tax Act and the tax treaty between India and UK. The assessee has filed detailed submissions before the DRP and contended that the AO was erred in treating the subscription charges received from customers in India are in the nature of royalty or fees for technical services which is taxable under the Income Tax Act and India-UK tax treaty.

7. The DRP, vide its order dated 14.12.2015 issued directions under Section 144C(5) of the Act. The DRP, by following the decision of ITAT Mumbai "L" Bench in assessee's own case for assessment years 2008-09 and 2009-10 vide order dated 18.07.2014, upheld the action of the AO in treating the revenue received by the assessee from its customers in India is towards use of equipments and process, which is in the nature of royalty both under the Income Tax Act and the Tax Treaty between India and UK. The DRP, further held that in so far as the issue of PE in the light of the discussions of the AO that the server of the assessee located in Geneva extends to the equipment provided by Reuters India Pvt. Ltd. to the subscribers of the assessee in India and hence the server located in

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Geneva constitutes an equipment PE of the assessee in India under Article 5(1) of the Treaty has not been adjudicated as the assessee has not pressed the ground taken challenging the existence of PE in India. On applicability of Article 13(6) of the tax treaty between India and UK, the DRP held that though in the alternate view of the AO the assessee has a PE in India, in view of the findings of the ITAT Mumbai "L" Bench in assessee's own case for earlier years wherein it was held that part 6 of Article 13 can be pressed into service only in the case where the existence of PE of non-resident is not in dispute. In this case the assessee company has contended that it has no PE in India, therefore following the order of the ITAT no directions are being issued to the AO on this ground of objection. Similarly, in so far as computing the income chargeable in India in the hands of the assessee, the AO has charged 20% tax in the draft assessment order instead of 10% as prescribed under Section 115A of the Act. Therefore directed the AO to verify the claim of the assessee in the light of the agreements submitted by the assessee and accordingly apply 10% tax. In so far as levy of interest under Section 234B of the Act the DRP, by following the decision of the Hon'ble Bombay High Court in the case of DIT vs. NGC Network Asia LLC (2009) 222 CTR 86, held that duty is cast on the payer to deduct tax at source, on failure of the payer to do so, no interest can be imposed on the payee assessee under Section 234B of the Act. Accordingly, directed the AO to modify the draft assessment order excluding interest levied under Section 234B of the Act. Aggrieved by the order of the DRP, the assessee as well as Revenue are in appeal before us.

8. The learned A.R. of the assessee referred to the decision of the ITAT Mumbai in assessee's on case for assessment years 2008-09 and 2009-10 to submit that although the issue has been decided against the assessee in so far as the issue of PE and nature of income in the light of the services rendered by the assessee in India, yet the findings of the ITAT in so far as applicability of Article 13(6) of DTAA between India and UK is contrary to its own finding that the assessee is having PE in India. Therefore the decision requires reconsideration and accordingly, vehemently argued on

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the issue of taxability income. The learned A.R. further submitted that once the AO held that there is a PE in India, then the income of the assessee from revenue generated in India should be taxed under Article 13(6) of the India-UK tax treaty, but the AO has taxed the income under the provisions of Section 115A of the Act. Therefore it was submitted that once there is no dispute about the existence of PE and also the fact that the assessee has not taken any ground challenging the findings of the AO on existence of PE, then the AO ought to have computed the income under Article 13(6), but the AO has determined the income in accordance with the provisions of Section 115A of the Act which is incorrect. The learned A.R., in response to a query from the Bench that is there any change in the facts during the current year when compared to the facts already considered by the Tribunal in the earlier years, fairly accepted that there is no change in the facts, but still reiterated his argument that once the assessee has not challenged existence of PE income shall be computed in accordance with the provisions of Article 13(6) of India-UK treaty and not under the provisions of the Income Tax Act.

9. The learned D.R. for the Revenue, on the other hand, submitted that the issue has been decided by the ITAT in earlier years and held that the revenue earned by the assessee in India from its subscribers is in the nature of royalty and therefore the other issue of fees for technical services becomes academic. The learned D.R. further submitted that the ITAT further held that once the receipt in question has been decided as royalty in nature then there is no need to go into the question whether the assessee is having PE in India and also when the assessee has not come up with the claim that the services rendered to the Indian banks are through its PE, para 6 of Article 13 cannot be applied. Since, there is no change in the facts during the year under consideration from that of already considered by the ITAT for earlier years, there is no reason to deviate from the view taken by the Tribunal. In so far as the issue of chargeability of interest under Section 2w34B of the Act, the learned D.R. submitted that after introduction of proviso to Section 209(1)(d), interest

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under Section 234B is chargeable even if tax is not deducted by the person responsible for deducting tax while making payment. The DRP, without considering the proviso to section 209(1)(d) directed the AO to delete interest levied under Section 234B of the Act, which is incorrect.

10. We have heard both the parties and perused the material on record. The issue of characterising subscription revenue of the assessee whether it is in the nature of royalty or fees for technical services under the Income Tax Act or under the India-UK tax treaty and applicability of provisions of Article 13(6) of the tax treaty between India and UK has been already considered by the ITAT. The Coordinate Bench of ITAT, in assessee's own case for assessment years 2008-09 and 2009-10 in ITA No. 6947/Mum/ 2012 and ITA No. 7211/ Mum/2012 vide its order dated 18.07.2014 had dealt with the issue at length after considering the relevant provisions of India-UK Tax Treaty and nature of services rendered by the assessee in India through its server located at Geneva and held that subscription charges received by the assessee from its customers in India is in the nature of royalty. The ITAT, further held that once the receipt in question has been decided as royalty in nature then there is no need to go into the question of assessee having PE in India and applying Article 13(6) of the India-UK Tax Treaty to determine the income attributable in India. The relevant portion of the order is extracted below: -

> *"11. We have considered the rival submissions as well as relevant material on record. The assessee has entered into a contract with Indian clients for providing its foreign exchange deal matching system services namely dealing 2000-02. The clients of the assessee are mainly Indian Banks. The services are provided against the monthly charges as per the agreement. In order to provide the service and access to the foreign exchange deal matching system, the assessee has also entered into agreements with its Indian Subsidiary namely Reuters India Pvt. Ltd in short (RIPL). The said agreements are called as promotion service agreement as well as advertising and marketing service agreement both dated 20.11.2006. The terms and conditions of the services provided to the Indian subscribers are stipulated in the Reuters Trading Service agreement (in short RTS agreement). The agreements are executed in accordance with the Reuters Business Principles reduced in writing being part and parcel of the RTS agreement. The RIPL in turn also entered into Reuters Service*

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Contract with the Indian clients for providing the necessary equipments, connection facility, installation and support service in order to avail the foreign exchange deal matching system provided by the assessee. Thus the Indian clients could avail the services of the assessee only through the equipments and connectivity provided by the assessee itself through its Indian subsidiary namely RIPL. The fee for providing the services is charged by the assessee from the Indian subscribers and actual uses of telecommunication are paid to the RIPL. The assessee is remunerating the RIPL for the services of marketing and installation of the equipment on behalf of the assessee to its clients. Thus though the equipments and other installation and connectivity are installed and provided through RIPL but the charges for the entire services and facility are paid by the clients to the assessee and not to the RIPL. The Ld. Counsel has also submitted that it is an integrated service rendered to the clients from its server situated in Geneva, therefore, there is no control or possession of the Indian clients to use or right to use the server of the assessee situated outside India. It is also contended that the assessee is rendering the services to the Indian clients by using its own server situated in Geneva and, therefore, in view of the decision of Hon'ble High Court of Delhi in the case of Asia Satellite Telecommunications Co. Ltd (supra), the charge/fee received by the assessee in rendering the services is not royalty. He has also strongly relied upon the decision of Hon'bld Andhra Pradesh High Court in the case of Sanofi Pasteur Holding SA (354 ITR 316)(supra).

11.1 It is pertinent to note that in the case of Asia Satellite Telecommunications Co. Ltd (supra), the issue fell for consideration of the Hon'ble Delhi High Court was whether rental charges for lease of transponder capacity to TV channels carrying out operations in India is the income deemed to accrue or arise in India and whether such income is royalty. The income to the non resident was for leasing out the transponder capacity to the non resident TV channels who are providing their channel services in India. The Hon'ble High Court in the case of Asia Satellite Telecommunications Co. Ltd (supra), after considering the fact that the appellant is a foreign company incorporated in Hongkong and carried on business of providing private satellite communications and broadcasting facilities to the clients with whom the appellant had entered into agreement are not resident of India. The appellant had merely given access to a broadband available with the transponder which could be utilized for the purpose of transmission of signals to the customers. Thus it was found by the Hon'ble High Court that the data sent by the telecast operator does not undergo any change for improvement through the media of transponder. Since the transponder was in control and used by the appellant/transponder owner and it does not vest with the telecast operator/TV channels, therefore, the Hon'ble High Court has held that the process carried on in the transponder in receiving signals and retransmitting the same, is an inseparable part of the process of the satellite and that process is utilized only by the owner

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of the transponder who is in control thereof and, therefore, there was no use of process by the T.V. channels. Moreover, no such purported use has taken place in India as both the assessee and the broadcaster/T.V. channels are situated outside India. In the said case the payment by the broadcaster/T.V. Channels were paid for using the transponder capacity of satellite and not for using any information or data to be provided to Indian customers. In the case in hand the assessee is rendering the services of providing foreign exchange deal matching system. This system facilitates the Indian subscribers i.e. Banks to deal in the foreign exchange with the other counterparts who are ready for the transaction of purchase and sale of foreign currency. Thus the role of the deal matching system is to provide a platform where both purchaser and seller find the respective match for the intended transaction of purchase and sale. Therefore, the decision of Hon'ble Delhi High Court in the case of Asia Satellite Telecommunications Co. Ltd (supra), is not applicable in the facts of the case and particularly when the said decision is based on the finding that the transponder capacity has only a media for uplinking and downlinking of signals of the broadcaster and TV operators to be transmitted to their customers without any manipulation for improvement, whereas in the case in hand, the assessee is providing not only media but also the necessary information and data which process the order of the clients and find the corresponding match to meet the order.

12. One more aspect which was involved and relevant for deciding the issue in the case of Asia Satellite Telecommunications Co. Ltd (supra) was the income deemed to accrue or arise in India on account of lease of transponder capacity to TV channels which is not in dispute in the case before us as the income in question has been received by the assessee from the Indian clients. The limited issue before us is the nature of income whether it is business income or royalty or fee for technical services. The Ld. Counsel has forcefully contended that a unilateral amendment in the Act without a corresponding change in DTAA cannot take away the benefit available in the treaty. There is no dispute that if a particular income is not taxable as per the provisions of DTAA then a unilateral amendment in the statute of the contracting state alone would not bring the said income to tax because as per the provisions of section 90 of the Income Tax Act, the beneficial provisions of DTAA will have the overriding effect to the provisions of Act. Thus the question arises whether the amount received by the assessee is Royalty or FTS income under the provisions of DTAA. The definition of royalty and fee for technical services has been provided under Article -13(3) and (4) as under:-

3 "For the purpose of this Article, the term "royalties" means:

(a) payments of any kind received as a consideration for the use of, or the right to use, any copyright of a literary, artistic or scientific work, including cinematography films or work on films, tape pr other means

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of reproduction for use in connection with radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience; and

(b) payments of any kind received as consideration for the use of, or the right to use, any industrial commercial or scientific equipment work, other than income derived by an enterprise of a Contracting State from the operation of ships or aircraft in international traffic.

4. For the purpose of paragraph 2 of this Article, and subject to paragraph 5, of this Article, the term "fees for technical services" means payment of any kind of any person in consideration for the rendering of any technical or consultancy services (including the provision of services of a technical or other personnel) which:

(a) are ancilliary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3(a) of this article is received; or

(b) are ancially and subsidiary to the application or enjoyment of the property for which a payment described in paragraph 3(b) of this Article is received; or

(c) make available technical knowledge, experience, skill know-how or processes, or consist of the development and transfer of a technical plan or technical design."

13. The payment received by the assessee against the services rendered to the Indian Banks whether falls under the term royalty or fee for technical services has to be decided by considering the definition as provided under the treaty and the real nature of the service provided in terms of the various contracts entered into between the parties. The various terms of agreement are defined under clause 1 of the RTS agreement and some of the relevant terms are defined as under:-

"Application Programming Interface(API) means a subscriber interface for use with the related service;

Autoquote Subscriber Interface means a subscriber interface for use with the Autoquote service"

Services

Means the product, materials or services provided by Reuters to Subscriber from time to time purusant to the Agreement

Site

Means my location of subscriber to which Reuters supplies access to the services directly;

Software

Means software, including APIs and related documentation provided by Reuters;"

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System

Means the Reuters Equipment and networks used for the provision for the Services:

14. The assessee is facilitating its clients to use its system and application programming interface which is subscriber interface for use with the related services includding Autoquote service. The assessee is also providing the equipments with pre-loaded software to its subscribers and network used for provision of the services. The assessee grants subscriber limited license of software to install and use at the site as per clause 8.1 of the agreement as under:-

"8.1 Reuters grants Subscriber a non-exclusive, non-transferable, terminable license for so long as Subscriber receives the service to which the software relates, to install and use the software at the site solely in the ordinary course of its own business unless otherwise set forth in this Agreement."

15. Even the said license can be sub-licensed by the subscriber with the prior consent of the assessee as per clause 9.5 as under:-

"9.5 Upon Reuters' prior written consent, subscriber may sublicense its license to use Development Tools to a Developer for the sole purpose of carrying out the development work described in clause 9.2 for the subscriber and only if subscriber ensures that the developer

(a) Is made aware of any complies with the provisions of the agreement.

(b) Does not re-use in any way the development work carried out for subscriber;

(c) becomes a mamber of Reuters Developer Partner Program (or any successor program) and signs the Retuers Trading Application Partner Agreement (or any successor agreement)."

16. As per the Reuters license principles interactive features of the system includes messaging, chatroom, bulletin board or those that allow interactivity between the users. Hardware/software and related documentation supplied by the assessee's group concern also includes the assessee's Application Programming Interface (API). All the services are rendered by the assessee on the site /office of the subscriber as per the clause 2.1 and 2.1.1 of the business principles as under:

2.1 Usage rights for information

We classify services containing information into families sharing common business terms, as follows

2.1.1 Individual Services (listed here)

Individual services are user-based Services priced, postitioned and packaged for users. For as long as they take the relevant service, users can:

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a) View, manipulate and create Derived Data fron information for their individual use:

b) Store information, Manipulated Information and/or Derived Data for their individual use;

c) Distribute and Redistribute limited extracts of information, Manipulated information and/or Derived Data to anyone, provided this is doen in a non systematic manner and (except for derived data) is attributed to Reuters:

d) Systematically Distribute Information and Manipulated Information if you comply with paragraph 2.4; and

e) Systematically Distribute and Redistribute certain derived Data if you either

(i) Pay the relevant Derived Date Redistribute Service fees; or

(ii) Sent the relevant Derived Data to us as Contributed Data.

Provided that, in each case, you pay any related charges specified in the Contract and such Redistribution does not form part of a saleable product. The rights in the paragraph 2.1.1(e) are granted only in respect of specified sources of information and are subject t further conditions imposed by Third Party Providers.

17. Therefore, the subscriber/user can view, manipulate and create the derived data from information for their individual use. Further the subscriber can Store information, Manipulate information for its use and also to Distribute or Redistribute information and Drive Data to anyone to a limited extent so far as it is not done in a systematic manner. The subscribers are allowed to use the information and even to manipulate and Drive the Data to anyone for their individual use. Thus it is clear from the terms and conditions of the contract between the parties that it is subscriber who is using the information and system of the assessee for their commercial/business purposes. The information is made available by the assessee through its system and other equipments installed at the site of the subscriber to facilitae the connectivity with the assessee's system/reuter located in Geneva. The portal design having the system of matching the request of the clients of the Assessee is hoisted on its server. The system which is a complex, commercial device /apparatus provides a gateway for processing request of the clients and makes available the matching counter request and thereby ensures the transactions of purchase and sale of foreign exchange between the two counter parts of the clients. Therefore, the portal having system of matching the request along with the computer and internal access to the clients constitute integrated commercial equipment which performs complex functions of processing the request, providing information and facilitates the transaction of purchase and sale of foreign exchange by matching the demand and supply. The platform of transacting the purchase and sale is commercial equipment allowed to be used by clients/ subscribers for commercial purposes. The payments made by Indian

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clients/subscribers to the Assessee for use and right to use of such equipment and information for processing their request of purchase and sale of foreign exchange constitute royalty.

17.1 The nature of service rendered by the assessee includes the information concerning commercial use by the subscriber. Further the entire system of the assessee including the equipments and connectivity facility is provided at the site of the subscriber. Therefore, the assessee is providing the service in the form of information and solution to the need of the subscribers by providing the matching party. The entire system along with the matching system and connectivity involves processing of subscriber's business queries and orders and finding out the matching reply in the shape of counterpart demand or supply for execution of the transaction of purchase and sale of foreign exchange. This sytem of the assessee is available only to the subscribers who have been given the access to the information concerning commercial as well as processing the orders placed by the subscribers. It is the term of the contract/agreement that the subscriber is given the license to use the software running the system.

17.2 As per the terms and conditions stipulated in the agreement the Indian clients/subscribers accept the individual non-transferable and non exclusive license to use the licensed software programme for the purpose of carrying out the purchase and sale of foreign exchange. Thus, what is granted under the agreement is license to use the software for internal business of Indian clients. Further, the Assessee also permitted the Indian clients to sub-license the software with prior permission of assessee. It is pertinent to note that its not the license to use the software alone but the Assessee has made available the computer system along with the software. The Indian clients are paying for use and right to use of equipment (scientific, commercial) along with software for which license was granted by assessee. It is clear from the terms and conditions of the agreement and arrangement between parties that the Indian clients are not permitted to access the portal of the Assessee from any other computer system other than the computer provided by the Assessee and by use of software provided in the said computer system. Therefore, it is not a case of simplicitor payment for access to the portal by use of normal computer and internal facility but the access is given only by use of computer system and software system provided by the Assessee under license. Indian clients make use of the copyright software along with computer system to have access to the requisite information and data on this portal hoisting on the server of the Assessee. Accordingly, by allowing the use of software and computer system to have access to the portal of the Assessee for finding relevant information and matching their request for purchase and sale of foreign exchange amount to imparting of information concerning technical, industrial, commercial or scientific equipment work and payment made in this respect would constitute royalty.

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18. As we have given the finding that the income received by the assessee from the Indian Banks is in the nature of royalty, therefore, the other issues of fee for technical services becomes academic and we do not propose to decide the same. Further, though the assessee has not raised any specific ground on the issue of PE, however, the Ld. Counsel for the assessee has submitted that even if the Indian subsidiary of the assessee constitute PE or otherwise the assessee has PE in India in that case para 6 of Article 13 of DTAA will apply and the royalty or fee for technical services is assessed to tax in terms of provisions of Article -7 or Article -15 of DTAA. We do not agree with the contention of the ld. Counsel for the Assessee because once the receipt in question has been decided as royalty in nature then there is no need to go into the question of assessee having PE in India. Para 6 of Article-13 can be pressed into service only in the case when the existence of PE of a non resident is not in dispute. In the case in hand the assessee has not come up with the claim that the services rendered to the Indian Banks are through its PE. Rather the assessee has vehemently contended that it has no PE in India. In these facts and circumstances, the provision of para 6 of Article -13 canot be invoked in case when the receipt is found as royalty in terms of Article – 13(3) of the DTAA and assessee has not admitted any PE in India."

11. The facts remained unchanged. The assessee failed to bring on record any evidence to prove that the finding of facts recorded by the ITAT for earlier year is incorrect. Therefore considering the facts and circumstances and also respectfully following the decision of the ITAT in assessee's own case for earlier years, we are of the considered view that subscription charges received by the assessee from the customers in India is in the nature of royalty. We further are of the opinion that once the receipt in question has been decided as royalty in nature, then there is no need to go in to the question of assessee having PE in India. Article 13(6) can be pressed into service only in the case when the existence of PE of non-resident is not in dispute. In this case the assessee has contended before the lower authorities that it does not have any PE in India and under these facts and circumstances the provisions of Article 13(6) cannot be invoked in the case when the receipt is found as royalty.

12. In so far as chargeability of interest under Section 234B of the Act, we find that the DRP has given a direction to the AO to not levy interest under Section 234B of the Act, by following the decision of the Hon'ble

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High Court in the case of NGC Network Asia LLC (supra) wherein it was held that when a duty is cast on the payer to deduct tax at source, on failure of the payer to do so, no interest can be imposed on the payee under Section 234B of the Act. The Revenue has failed to bring on record any contrary decision against the directions of the DRP in the light of the decision of the Hon'ble High Court. Therefore, we are of the considered view that there is no error in the directions given by the DRP to the AO not to charge interest under Section 234B of the Act and hence, we are inclined to uphold the findings of the DRP and the ground taken by the Revenue is dismissed.

13. In the result, the appeals filed by Revenue as well as the assessee are dismissed.

Order pronounced in the open court on 3rd August, 2018.

Sd/-	Sd/-
(Mahavir Singh)	**(G. Manjunatha)**
Judicial Member	**Accountant Member**

Mumbai, Dated: August, 2018

<u>*Copy to:*</u>

1. *The Appellant*
2. *The Respondent*
3. *The DRP-2, Mumbai*
4. *The CIT - concerned, Mumbai*
5. *The DR, "L" Bench, ITAT, Mumbai*

By Order

//True Copy//

Assistant Registrar
ITAT, Mumbai Benches, Mumbai

n.p.