IN THE INCOME TAX APPELLATE TRIBUNAL
'B' BENCH : BANGALORE

BEFORE SHRI. B.R. BASKARAN, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER

IT(IT)A No. 364/Bang/2017
Assessment Year : 2007-08

M/s. Synamedia Ltd. [formerly known as 'NDS Limited'], C/o. M/s. Synamedia India Pvt. Ltd., Block 9A & 9B, Pritech Park, Survey No. 51-64/4, Sarjapur Outer Ring Road, Bellandur Village, Bangalore – 560 103. PAN: AABCN2524L	**Vs.**	The Assistant Commissioner of Income Tax, International Taxation, Circle – 1(2), Bangalore.
APPELLANT		**RESPONDENT**

Assessee by	:	Shri Sharath Rao, Advocate
Revenue by	:	Shri Dilip, Standing Counsel for Dept.

Date of Hearing	:	16-12-2021
Date of Pronouncement	:	28-12-2021

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present appeal has been filed by assessee against final assessment order dated 16.12.2016 passed by Ld.ACIT, Circle-1(2), International Taxation u/s. 143(3) r.w.s. 147 and 144C of the Act for Assessment Year 2007-08 on following revised grounds of appeal.

"Based on the facts and circumstances of the case and in law, Synamedia Limited [formerly known as `NDS Limited] (hereinafter referred to as the 'Appellant') respectfully craves leave to prefer an appeal against the order passed by the Assistant Commissioner of Income-tax, International Taxation, Bengaluru (hereinafter referred to as the 'learned AO'), dated December 16, 2016 under Section 143(3) read with section 147 and 144C of the Act (The Impugned order') inter-alia on the following grounds:

That on the facts and circumstances of the case and in law:

A. Grounds of appeal relating to corporate tax matters

1. The learned AO has erred in law and in fact, in treating the receipts pertaining to licensing of software by the Appellant to be in the nature of 'royalty' as defined under the provisions of the Act read with the Double Taxation Avoidance Agreement entered into between India and United Kingdom (`DTAA').

2. The learned AO has erred in fact, in treating the receipts pertaining to sale of hardware in the nature of Set Top Box, Viewing cards, CAM hardware etc. by the Appellant to be in the nature of a licensing arrangement and treating the same as 'royalty' as defined under the provisions of the Act and DTAA.

3. The learned AO has erred in law and in fact, in treating the receipts on account of rendering of support services to be in the nature of 'Fees for Technical Services' (`FTS') as defined under the provisions of the Act read with the DTAA.

4. The learned AO has erred in law and in fact by treating the amounts as recovered by the Appellant from Cisco Video Technologies India Private Limited (`CVTIPL') to be in the nature of consideration received for provision of 'Business support services' chargeable to tax as FTS as defined under the provisions of the Act and the DTAA.

B. Grounds of appeal relating to other matters

5. The learned AO has erred in law and facts by levying interest of INR 10,95,44,982 under section 234B of the Act, on account of the adjustments proposed to the returned

> *income, by not appreciating the fact that even in a scenario wherein the impugned receipts were to be considered as Royalty/FTS taxable in India, the entire such receipts of the appellant were liable to be subjected to withholding tax provisions of the Act and accordingly, there was no requirement for the Appellant to pay advance tax in respect of such receipts.*
>
> *The Appellant submits that each of the above grounds is independent and without prejudice to one another.*
>
> *The Appellant craves leave to add, alter, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of the appeal, so as to enable the Hon'ble Tribunal to decide on the appeal in accordance with the law."*

The Ld.AR at the outset submitted that the issue raised in Grounds 1-4 relates to the question where receipts on sale of hardware with embedded software therein could be taxed as royalty.

He submitted that identical issue on similar facts have been considered by coordinate bench of this *Tribunal* in assessee's own case for assessment years 2006-07, 2012-13, 2013-14, 2010-11 in ITA Nos. 363, 504, 505/Bang/2017 and 255/Bang/2014.

2. Brief facts of the case are as under:

The facts and circumstances that give rise to the aforesaid grounds of appeal are that the assessee is a non-resident foreign company incorporated in United Kingdom. It is in the business of supply of open digital technology and services to digital pay television (pay-TV) platform operators and content providers. The assessee entered into agreement with its customers for supply of integrated hardware systems along with embedded software. The hardware is primarily in the form of viewing cards, Set-top-Box

(STB) and other connected components, usually used in viewing television through satellite. The embedded software is required to run the hardware components. The assessee received the following sums in respect of supply of integrated hardware systems along with embedded software.

2.1 During the AY 2007-08, Assessee filed a NIL return of income. The return of income was processed under section 143(1) of the Income Tax Act, 1961 (`the Act') and the case was not picked for scrutiny under section 143(3) of the Act. Subsequently, the AO re-opened the assessment by issuing a notice under section 148 of the Act citing that certain third party receipts were not offered to tax in the return of income for AY 2007-08. Various Submissions were filed before the Ld.AO in relation to notices issued.

2.2 In the draft assessment order served on the Assessee, the Assessing Officer has proposed to make the following additions:

i) Treatment of receipts on account of supply of software license as royalty amounting to Rs. 48,80,75,507/-

ii) Treatment of receipts on account of sale of hardware in the nature of Set-Top-Box ('STB'), viewing cards, Conditional Access Module hardware ('CAM hardware') etc. as royalty amounting to Rs. 33,83,56,660/-.

iii) Treatment of receipts on account of provision of support services to be in the nature of 'Fees for Technical Services' ('FTS') amounting to Rs. 1,16,08,302/- which were received in respect of rendering of support services in relation to software / hardware supplied to customers.

iv) Treatment of amounts recovered from Cisco Video Technologies India Pvt. Ltd. ('CVTIPL') on account of amount paid to their parties on behalf of CVTIPL amounting to Rs. 5,74,94,598/- as FTS.

3. The Ld.AR submitted that assessee granted exclusive non-transferrable license to customers in India to enable them to use the software for provision of DTH services to Indian subscribers. It is also submitted that the hardware sold is transferred outside in India and it constitutes business income of the foreign company which is not comparable to tax in India unless the PE situated in India to which income is directly attributable. He submitted that the STB viewing cards, CAM hardware etc were sold and not licensed and the title in the ownership of the goods passed to the customer on sale of hardware components along with the risk.

4. The Ld.AR argued that treating the receipts on account of rendering support services to be in the nature of FTS needs to satisfy certain criteria as per India UK DTAA. As there is a make available clause, it is a necessity that the technical knowledge and skill must remain with the person receiving the services even after a particular contract comes to an end. The use of a product which is embedded with technology shall not be considered to be "make available".

5. The Ld.AR submitted that authorities below erroneously treated amount recovered from CISCO to be on account of business support services. He submitted that the assessee has not provided any services to CVTIPL and the amount recovered was on account of payments made to third party vendors on behalf of CISCO for administrative convenience. He placed reliance on the decision of *coordinate bench* of this *Tribunal* in assessee's own case *(supra)* for preceding assessment years and subsequent assessment years on identical issue wherein this *Tribunal* followed the decision of *Hon'ble Supreme Court* in case of *Engineering Analysis Centre of Excellence Pvt. Ltd.* reported in *(2021) 125 taxmann.com 42.*

Ld.AR submitted that for year under consideration, the present assessee has received incomes from following parties.

Nature of receipt	Payer Hathway Cable & Datacom P Ltd	Payer Tata sky Ltd	Total
Supply of software	9159134	478916373	488075507
Supply of hardware	14881760	323474900	338356660
Provision of Services	**741115**	10867187	11608302
Total	**24782009**	**813258460**	**838040469**

6. The Ld.AR submitted that the above receipts were not offered to tax as they cannot be regarded as royalty in the hands of the assessee in the light of the definition of the term, "Royalty" as given under Article 12(3)(a) in DTAA between India and UK. The Ld.AR submitted that in the decision relied by the Ld.AR passed by the *Coordinate Bench (supra),* Tata Sky and Hathway Cable were also one of the parties who were made payment in those Assessment years. He submitted that the terms of these license agreements and their rights to transfer have been discussed in the order passed by this *Tribunal (supra).* He submitted that this

Tribunal after considering the various clauses of the agreement, remanded the issues for consideration by the Ld.AO/TPO in the light of observations made therein and to decide in accordance with law. He thus prayed that the issues may be remanded with similar directions.

7. The Ld.CIT.DR though vehemently opposed the submissions by the Ld.AR could not controvert the fact that the Ld.AO has proceeded on surmises and conjectures and without application of the DTAA to the facts of the present case.

We have perused the submissions advanced by both sides in the light of records placed before us.

8. Admittedly, the facts in the present case are identical with that considered by this *coordinate bench* of this *Tribunal* in assessee's own case *(supra).* The relevant observations on the various issues addressed by the *coordinate bench* of this *Tribunal* which is similar with the issues raised by assessee in the present appeal are as under.

> *"7. The AO, after analyzing the terms of agreement between assessee and some of the parties set out in the chart in paragraph-4 of this order, came to the conclusion that the receipts from the aforesaid parties by the assessee was in the nature of royalty as defined in section 9(1)(vi) explanation 2 to 5 of the Act. The AO on this issue after referring to the several terms of the agreement dated 16.08.2007 between Bharti Telemedia Ltd., and the assessee, has drawn the following conclusions:*
>
> *"3.5 It is therefore evident as per the agreement*

a) Supply of software and hardware should not be treated as sales since it is only licensed to be used by Bharti.
b) Bharti is expressly given the right to distribute the viewing cards which contains NDS proprietary technology, to its subscribers.
c) The viewing cards are used in the Set Top Box ("STB") which is located at the subscribers site.

d) Bharti cannot provide the service to its customers without the Set top Box ("STB") which is a device that executes functions as per the NDS Functional Specification.
e) It is impossible for a subscriber to use the STB and Viewing cards independent of the NDS Software, NDS Hardware and STB.
f) It is clear from the agreement that the NDS Hardware, NDS Software, STBS and Viewing cards are supplied to Bharti under license and therefore the receipts on account of the same is to be treated as Royalty.

8. The AO also came to the conclusion that the receipts were in the nature of royalty or fee for technical services (FTS) as envisaged under the DTAA and the observations of the AO in this regard were as follows:

<u>"Taxation under the DTAA:</u>

6 As stated earlier, the NDS UK is based in United Kingdom ("UK") and the payment is made by Bharti a company based in India. The Double Taxation Avoidance Agreement ("DTAA" / "Treaty") between India and UK is applicable in this case. Article 12 of the Treaty deals with royalties. Sub-clause (a) of Clause 3 of Article 12 of the DTA defines royalties as under:

3. For the purposes 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 or other means 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, other than income derived by an enterprise of a Contracting State from the operation of ships or aircraft in international traffic.

6.1 Though the word "granting of licence" does not figure in the royalty definition of the DTAA, the scope of the definition of royalty is wide enough to include the granting of licence which is nothing but the authorization by the owner i.e. NDS UK. Bharti gets the the right to use the CAS, NDS Hardware, NDS Software and distribute the viewing cards by virtue of the licencse granted by the Agreement. A licensee is the authorized user of and any consideration received by from the authorised user is also to be treated as royalty receipt under the DTAA, as the definition covers consideration received for the use of Intellectual Property, ICS equipment, copyright.

7. Without prejudice to the above view, in the instance of Tata sky and DEN if in case it happens that some of the receipts pertain to implementation services and support services(technical support, AMC, training etc) for hardware then such receipts are also held to be covered by the definition of Fees from Technical services under the Act and the DTAA as discussed in the following paragraphs.

7.1 Under the DTAA, the fees for technical services is defined as under:

12(4). For the purposes of paragraph 2 of this Article, and subject to paragraph 5, of this Article, the term "fees for technical services" means payments 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 ancillary 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 ancillary and subsidiary to the 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.

7.2 Para 3(a) and 3(b) of the Article are reproduced below for reference

3. For the purposes 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 or other means 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, other than income derived by an enterprise of a Contracting State from the operation of ships or aircraft in international traffic

7.3 Article 12(4)(a) and 12(4)(b) are similar to the clause(vi) of Explanation 2 to Section 9(1)(vi) of the Act. As discussed in the earlier paragraphs if the payments for hardware services not offered to tax also include payments for implementation/installation services or for support services then such payments are covered by Article 12(4)(a) and 12(4)(b) and therefore held to be Fees for Technical services under the DTAA."

9. In short, the conclusion of the AO was that the sum received has to be regarded as "Royalty" within the meaning of Article 12(3) of the DTAA because the STB will not function without the viewing card and the software and therefore the entire payment has to be regarded as royalty. Alternatively, if part of the payment is to be considered as payment for hardware services, then the payment to the extent it relates to hardware services has to be regarded as Fees for Technical Services within the meaning of Article 12 (4) of the DTAA.

10. The assessee filed objections before the Dispute Resolution Panel (DRP) confirming the order of the AO. The conclusions of the DRP in this regard were as follows:

"5.9. The arguments of the AO and the objections raised by the assessee have been carefully cons dared. Both sides have relied on a plethora of case laws in support of their respective contentions. However on facts, we have note that the essence of the dispute is with regard to the actual item transferred from the assessee to its customers i e., whether it is the physical item alone in the form of viewing cards. CAS etc. or the Intellectual Property, copyright distribution rights etc. embedded within these items. In other words. whether the item transferred was a mere plastic or fibre card alongwith a physical set top box, or rather a code aril license for distribution of electronic media content which resided within the physical items. ***Though the assessee has strenuously argued that it supplied only purely hardware items, it is clear to us that it is actually not the software which is ancillary to the hardware as claimed by the assessee, but rather that the hardware is nothing but a vehicle to store, carry and facilitate usage of the licensed rights, embedded within the form of a software, which are the actual commodity supplied and charged for in this case.*** *We are in conformity with the AO's analysis of the agreements between the assessee and its customers which clearly reveal that the items being sold were far more than the mere physical hardware.* ***The ownership over the IP and copyrights are found to be never transferred but rather charged for on a continuous usage or compounded basis. It is not case of the assessee that viewing card did not contain any application software, but its defence rather is that the card is the main item sold and the software etc are only attending facilities embedded therein.*** *As already stated above, we are not in agreement with this interpretation. Hence, we are of the view that the AO has correctly categorized the transaction as one of the transfer of license and copyright and the fees charged for the sane are very much in the nature of "royalty" as defined in Sec. 9 of the IT Act. With regard to the other services rendered (implementation, technical, AMC etc) these are essential support services of the supply of the products carrying the IP to the customer and receipts on their account are found to be very much it the nature of "FTS". Hence, we are of the view that the AO has correctly brought these amounts within the ambit of taxation under*

the relevant provisions of the IT Act and the Indo- UK DTAA. We do not in these circumstances find reason to interfere with the proposal of the AO and the objection raised by the assessee is accordingly dismissed."

11. Aggrieved by the aforesaid order of the DRP which was incorporated in the final order of assessment, the assessee has raised ground Nos. 2 and 4 before the Tribunal.

12. As far as the additional ground of appeal is concerned, we have already seen from the chart reproduced in paragraph-4 of this order that the assessee has in the return of income filed offered to tax amounts on which tax has been deducted at source by the person making payment to the assessee. In additional ground which is sought to be raised before us, is that the aforesaid sum which was offered to tax is not taxable in the hands of the assessee in India and hence taxes paid on the sums so offered should be refunded. In the application filed for seeking to raise additional ground, the assessee has submitted that the Assessee received certain sum from Indian residents towards sale of hardware and copyrighted software. Out of the above payments made to the Assessee by the Indian residents, taxes have been deducted by few parties on payment made towards hardware and software receipts based on their understanding during the relevant year under consideration viz. Financial Year ("FY") 2009-10. The Assessee also had offered entire receipts from Bharati Telemedia Limited (pertaining to sale of both hardware and the software component) and receipts from certain parties, Viz Hathway Cable and Datacom Limited, DEN Networks Limited, Tata Sky Limited and Gujarat Telelink Private Limited, pertaining to sale of the software component to tax. It has been further stated that the legal issue with respect to deduction of tax at source was highly litigated during the decade including the relevant year under consideration. It has been stated that the legal issue with respect to taxability of the copyrighted article was recently settled by the Honorable Supreme Court (-SC") on 2 March 2021 in the case of Engineering Analysis Centre of Excellence (P.) Ltd. [2021] 125 taxmann.com 42 (SC). In light of the recent developments in the legal jurisprudence with respect to taxability of the software as 'royalty', the Assessee now seeks to raise a ground that since this claim is a purely legal claim, the Assessee is entitled to make this claim before the Tribunal in its pending appeal, as an additional ground. The Assessee has also placed reliance on the decision of Ahmedabad Income-

tax Appellate Tribunal ("ITAT") in case of ITO vs Smt. Manini Niranjanbhai [1992] 41 ITD 324 (Ahmedabad ITAT) wherein it has been explained that it is a well-established position that the SC does not declare the law with effect from the date of its order and the law declared by the SC has effect not only from the date of the decision but from the inception of the statutory provision. It has also been submitted that under Article 265 of the Constitution of India no tax shall be levied except by authority of law. Hence only legitimate tax can be recovered and even a concession by a tax-payer does not give authority to the tax collector to recover more than what is due from him under the law. In this regard, reliance has also been placed on the CBDT Circular No 14 (XL-35) which has dealt with the aspect of the role of the AO to be adjudicator of the correct tax liability of the assessee. As per this Circular, the AO cannot take advantage of ignorance of the assessee as to his rights.

13. We have considered the prayer for admission of additional ground and are of the view that the additional ground can be adjudicated on facts already available on record and by applying the law declared by the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Pvt. Ltd., (supra). Hence, keeping in view the ratio laid down by the Hon'ble Supreme Court in the case of NTPC Ltd., 229 ITR 383 (SC), we admit the additional grounds for adjudication.

14. As far as ground Nos. 2 and 3 are concerned, the question that has to be decided is as to whether the receipts by the assessee on sale of hardware with software embedded therein can be regarded as royalty chargeable to tax under the Act or under the DTAA. On this issue, we find that the assessee has produced the copies of agreements (i) between the assessee and Bharti Telemedia Limited, (ii) the assessee and Gujarat Tele Link Private Limited, assessee, (iii) Assessee and Hathway Cable and (iv) Assessee and Datacom Limited, (v) the assessee and Tata Sky Limited, (vi) the assessee and DEN Digital Entertainment Networks Private Limited. The terms of these licence agreements and the rights to transfer have been discussed in the order of assessment. The primary contention of the assessee in this appeal is that the Hon'ble Supreme Court in the case of Engineering Analysis (supra) has explained the law with regard to software royalty and in the light of the law as explained by the Hon'ble Supreme Court, the conclusions drawn by the Revenue authority that the receipts by the assessee are in the nature of royalty cannot be sustained. In this regard, learned Counsel has filed a chart before us explaining as to how the *conclusions drawn by the Revenue authorities on various terms of the agreement between the parties are erroneous and contrary to the law laid down by the Hon'ble Supreme Court in the case of Engineering Analysis (supra).*

15.The learned counsel for the Assessee drew our attention to para 4 of the Hon'ble Supreme Court's judgment in the case of Engineering Analysis (supra) wherein Hon'ble Supreme Court specifically dealt with cases wherein computer software is affixed on to hardware as an integrated unit/equipment by foreign non-resident supplier to Indian distributors or end users. This is the fourth category of cases which was dealt with by the Hon'ble Supreme Court in the aforesaid decision. The Hon'ble Supreme Court thereafter dealt with category 4 in paragraphs 44 to 52 and paragraph 118 of its judgment. He pointed out that the Hon'ble Supreme Court in paragraph 118 of its judgment has specifically approved the ruling of the Hon'ble Delhi High Court in the case of Ericsson A.B. (infra) and Nokia Networks (infra). He brought to our notice that the Hon'ble Delhi High Court while dealing with an identical sale of hardware with embedded software has dealt with the same as follows:

"110.A series of judgments by the High Court of Delhi have dealt with the same question that now lies before us. In Director of Income Tax v. Ericsson A.B., (2012) 343 ITR 470 ["Ericsson A.B."], which happens to be impugned in C.A. Nos. 6386-6387/2016 before us, ***the assessee was a company incorporated in Sweden which entered into an agreement with Indian cellular operators, pursuant to which the assessee supplied various equipment (hardware) embedded with software to the said cellular operators.*** *The High Court in this case, found:*

"Once we proceed on the basis of aforesaid factual findings, it is 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 well as the software, therefore, the Tribunal is right in holding that it was not permissible for the Revenue to assess the same under two different articles. The software that was loaded on the hardware did not have any independent existence. The software supply is an integral part of the GSM mobile telephone system and is used by the cellular operator for providing the cellular services to its customers. There could not be any 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 and is an integral part thereof. On these facts, it would be useful to refer to the judgment of the Supreme Court in TATA Consultancy Services v. 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, liable to sales tax. Following discussion in this behalf is required to be noted:-

"In our view, the term "goods" as used in Article 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 term "all materials, articles 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, possessed etc. The software programmes have all these attributes."

In Advent Systems Ltd. v. Unisys Corpn, 925 F. 2d 670 (3rd 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 artistry 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 maybe tailored for specific purposes need not alter their status as "goods" because the Code definition includes "specially manufactured goods."

A fortiorari when the 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 regarded as a payment by way of royalty.

(pages 499-500)

"Be that 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 copyright of a literary, artistic or scientific work. Section 2(o) 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 contemplated 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".

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 assuming the payment made by the cellular operator is regarded as a payment by way of royalty as defined in Explanation 2 below Section 9(1)(vi), nevertheless, it can never be regarded as royalty within the meaning of the said term in article 13, para 3 of the DTAA. This is so because the definition in the DTAA is narrower than the definition in the Act. Article 13(3) brings within the ambit of the definition of royalty 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. 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.

(pages 501-502)

111.This judgment was followed in Director of Income Tax v. Nokia Networks OY, (2013) 358 ITR 259 ["Nokia Networks OY"],42 with the High Court of Delhi, ***adverting, this time, to the further expanded definition of "royalty" that is contained in the retrospective amendment that inserted explanation 4 to section 9(1)(vi) of the Income Tax Act.*** *In this case, the High Court was concerned with the Agreement between the Republic of India and the Republic of Finland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income,43 ["India-Finland DTAA"]. After setting out the rationale for the clarificatory amendment made vide the Finance Act 2012, the High Court held :*

> *"DTAA and in the Income Tax Act since the right to use simpliciter of a software program itself is a part of the copyright in the software irrespective of whether or not a further right to make copies is granted. The decision of the Delhi Bench of the ITAT has dealt with this aspect in its judgment in Gracemac Co. v. ADIT 134 TTJ (Delhi) 257 pointing out that even software bought off the shelf, does not constitute a "copyrighted article" as sought to be made out by the Special Bench*

of the ITAT in the present case. However, the above argument misses the vital point namely the assessee has opted to be governed by the treaty and the language of the said treaty differs from the amended Section 9 of the Act. It is categorically held in CIT v. Siemens Aktiongesellschaft, 310 ITR 320 (Bom) that the amendments cannot be read into the treaty. On the wording of the treaty, we have already held in Ericsson (supra) that a copyrighted article does not fall within the purview of Royalty. Therefore, we decide question of law no. 1 & 2 in favour of the assessee and against the Revenue."

The High Court then followed its own judgment in Ericsson A.B. (supra), deciding the case in favour of the assessee."

16. It was therefore submitted by him that the receipts in question were not in the nature of royalty and therefore could not be charged to tax in India.
17. The next submission of the learned Counsel for the assessee was that in the case of the assessee in the Assesment Year 2016-17, the DRP had the benefit of considering the case of the assessee on identical issue in the light of the decision of the Hon'ble Supreme Court in the case of Engineering Analysis (supra) and has concluded after remand report of the AO that the assessee's case is covered in favour of the assessee by the decision of the Hon'ble Supreme Court.

18. On question whether the receipts can be taxed as FTS in so far as it relates to receipts from Tata Sky and DEN, it was submitted as follows:

a. Mere issue of plastic/fiber cards along with physical set-up box does not constitutes FTS, instead of sale of hardware.
b. Supply of products carrying the IP to the customer does not amounts to "FTS".
c. The AO and the DRP have erred in holding that provisions of DTAA are very similar to provision of the Act without understanding the legal position.
d. The lower authorities have failed to appreciate that the "make available clause" required under the India-UK DTAA are not satisfied in the instant case
*e. The AO and the DRP have erred in not considering the settled position of law on make available clauses including the decision of the Jurisdictional High Court in the case of De Beers India Minerals Private Limited (**Page 1172-1223 of case-law compilation**).*

19.Reference was made to decision of Hon'ble Madras High Court in the case of ***Skycell Communications Ltd [2001] 119 Taxman 496 (Madras)*** *wherein it has been held that Installation and operation of sophisticated equipments with a view to earn income by allowing customers to avail of the benefit of the user of such equipment, does not result in the provision of technical service to the customer for a fee. Reference was also made to the order of the DRP in assessee's own case for AY 2016-17 (page 1725 of case law compilation) wherein the DRP has categorically held that the technical support and rendered by the assessee for ensuring the deployment/maintenance of the hardware and software is a routine after-sales support service and does not make available any technical know-how to the Indian customers. The DRP held that the 'make available' clause as per Article 13 is not being satisfied in the case of the Assessee. It was further submitted that once the principal receipts are not held to be in nature of "royalty", but receipts towards simplicitor sale of goods (copyrighted product), then the receipts from subsequent AMC and other services will also not be covered under clause (vi) to Explanation 2 of section 9(1)(vi). Even under the DTAA, these will not be covered by Article 12(4)(a) or 12(4)(b), since these services fees will be seen as towards services for post-sale of goods and not ancillary to royalty transactions.*

20.Learned DR submitted that neither the AO or the DRP had the benefit of the decision of the Hon'ble Supreme Court in the case of Engineering Analysis (supra) and therefore the issue is to be directed to be examined afresh by the AO in the light of the principles laid down by the Hon'ble Supreme Court.

21.We have given a very careful consideration to the rival submissions. We find that the AO has examined the terms of the agreement between the assessee and its customers. We shall examine some of the Agreements between the Assessee and the customers of STB. In so far as the agreement between the assessee and Bharti Telemedia Limited is concerned, Article 3 of the Licence Agreement provides as follows:
Article 3. Licence

3.01. Licence Grant. In consideration of the payment (and any continuing payments, if any) by Bharti on the licence fees referred to in Annexure A. and subject at all times to the terms and conditions of this Contract, NDS hereby grants to Bharti the non-exclusive, perpetual, nontransferable object code only right and licence in the Country of Designation (which includes the right to grant limited end-user sub-licenses to Subscribers):

(a) to use the NDS Software, Embedded Software and NDS Hardware on the hardware authorized by NDS solely for the purpose of developing and transmitting the Service to Subscribers using Set-top-Boxes and make two back-up copies of the NDS Software Incorporating the Embedded Software on back-up server(s) for the limited purpose of ensuring the provision of uninterrupted service in the event that the primary server(s) fails to function properly;

(b) to permit Subscriber to use the NDS Software as integrated in a Set-top- Box for the purposes of accessing the Service.

(c) to use the NTP's in connection with the operation of the NDS Systems; and

(d) to distribute the Viewing Cards to Subscribers for use in Set-top-boxes in the Country of Destination and also the geographical areas where the satellite beam is present for viewing the Service.

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3.02 License Restrictions. Except for the permitted back-up copies for testing and disaster recovery, Bharti shall make no more copies of the NDS Software, Embedded Software or third party software than for which it has paid the applicable licence fees. Bharti shall not reverse engineer, decompile or otherwise attempt to create the source code from the NDS Software nor shall it modify, translate or create derivative works based on the NDS Software or NTP's except as expressly provided in this Contract. Bharti shall not sub-licence, rent, lease, sell or otherwise transfer or distribute copies of the NDS Software or NTP's (expressly excluding Viewing Cards) to any third *party, whether as a stand-alone or **bundled** product excepting for the purposes of sub-licensing Subscribers for accessing the Service. Bharti shall not exceed the scope of the licenses granted in this clause. Bharti may not remove any copyright notice and any other notices that appear on the NDS Software or Embedded Software or third party software or NTP's or from any copies thereof. Bharti shall supervise and control the use by its employees, agents and subcontractors of the NDS Software, to ensure that it is used in accordance with the terms of this Contract. The use of the Embedded Software in addition to the above terms is subject to the licence terms set out in Annexure F and Bharti agrees to be subject to these terms. Provided nothing contained herein shall be construed as restricting or forbidding Bharti from doing anything that is absolutely essential for providing DTH services to its Subscribers. <u>It is clarified for removal of doubt that there shall no restriction in Bharti to provide necessary Software and Hardware of NDS to Subscribers to access the DTH Services of Bharti.</u>*

3.03 Documentation. <u>Bharti acknowledges that the NTP's falls within the scope of this Contract and that all rights in and to the NTP's whether delivered by NDS to Bharti prior to or subsequent to the execution of this Contract vest in NDS.</u>

*3.04 No License to Accessed Materials. All content accessed **by** use of the NDS Conditional Access System is the properly of the applicable content owner and may be protected by applicable copyright law. This Contract gives Bharti shall be solely responsible to obtain such rights.*
*3.05 Ownership. **<u>The NDS Software, NDS Hardware and NTP's is licensed and not sold to Bharti. NDS and its licensors own and retain all right, title and interest in the NDS Software, NDS Hardware and NTP's any modifications thereto expressly authorized by this Contract, and intellectual Property Rights."</u>***

22. In respect of the agreement between assessee and Tata Sky is concerned, the relevant terms are as follows:

"3 LICENSE

3.1 License Grant.** In consideration of the payment (and any continuing payments) by TATA SKY* *of the license fees referred to in Schedule 1, and subject at all times to the terms and conditions of this Agreement, NDS hereby grants to TATA SKY* ***the non-exclusive, non-transferable object code only right and perpetual license in the Territory:

(a) ***To use the NDS Software and NDS Hardware authorized by NDS solely for the purpose of developing and transmitting the DTH Service to Subscribers using Set-top-Boxes*** *and to use two back-up server(s) for the limited purpose of ensuring the provision of uninterrupted service in the event that the primary server(s) fails to function properly.*

(b) *To use the Components as integrated in a Set-top-Boxes and/or CAM that shall be manufactured by a third party or as manufactured by NDS as the case may be;*

(c) *To use the Documentation in connection with the operation of the NDS Systems which shall include the right to make copies of the Documentation for internal purposes;*

(d) *to use the Test Systems at the agreed locations solely for the purposes of testing, demonstration and back-up, not for providing a DTH Service to Subscribers except where the broadcast system used by TATA SKY is undergoing maintenance and is not being used at that time to provide a DTH Service to Subscribers, or as backup where the main broadcast system has failed;*

(e) ***to grant non-exclusive, non-transferable end user sub-licenses to Subscribers*** *in the Territory for the Term of this Agreement."*

23. In respect of agreement between the assessee and DEN, the relevant terms of the licence is as follows:

7. LICENSE

License Grant. *In consideration of payment by DEN of all license fees due in accordance with Schedule 1, and subject at all times to DEN complying with the terms and conditions of this Agreement, NDS hereby grants to DEN the non-transferable object code only right and license in the Territory.*

(a) To use the NDS Software, NDS Hardware, Third Party Hardware and Third Party Software in accordance with Schedule 2 but only as is strictly required to provide the services to Subscribers using STBs incorporating the Components;

(b) From Acceptance, to make, store and use two back-up copies of the NDS Software and Third Party Software on back-up server(s) but only as required as part of a disaster recovery programme or expressly permitted under applicable law;

(c) From Acceptance, to use the Components as integrated in the STBs but only as is strictly required to provide the services to the Subscribers;

(d) To use the documentation in connection with the operation of the NDS Systems;

(e) From Acceptance, to distribute the Viewing Cards to Subscribers in the Territory so that such Subscribers may, in conjunction with the STBs receive ***the*** *Services in the Territory; and*
From Acceptance, to grant Subscribers a sublicense to use the NDS Software incorporated into the Viewing Cards but only as is strictly required to receive the Services from DEN and on terms consistent with those set out in Clause 7.2 and 7.4 which relate to the NDS Software contained on the Viewing Cards.

24.The terms of the other licence agreement between the various parties have not been set out in the order of assessment though the copies of the same are available in the Paper Book. The terms of the agreement are clearly similar to the terms of the agreement which the Hon'ble Supreme Court analyzed in the case of Engineering Analysis. We shall anlyse the terms of the Agreement between the Assessee and Bharati Telemedia as a sample. Techinical and commercial proposal given by the Assessee alongwith the STB provides technical specifications for the engineering of the relevant systems. That by itself cannot be the basis to conclude that there has been use of any copyright or that technical services have been provided. This is like providing a technical and user manual describing the system and does not imply granting of any copyright rights or transferring technical knowledge. The software is only licensed for use without granting any license over the copyrights [see Article 3 – 3.01 – clause (a) at Page 58]. There are further restrictions on such license like (a) no copies to be made (b) no reverse engineering decompiling or otherwise (c) no sub-license rights (see *clause 3.02 at Page 59). The clauses are typical clauses in a Software End User License Agreement (EULA) as analysed by Honble Supreme Court in the Engineering Analysis case (see paras 45 – 47 of the SC judgment). The Viewing cards, Set Top Boxes and the software to run it are together an integrated system. This is similar to the fourth category examined by the Supreme Court. The Supreme Court approved the judgment of Delhi High Court (para 118) in the cases of Ericsson and Nokia which dealt with the sale of integrated telecom equipment with embedded software (para 110). The AO also acknowledges that STB, Viewing Card and embedded software is an integrated system. There were certain inferences drawn by the AO based on the FAO given along with the STB. Even if software is licensed and not sold, it is akin to sale based on real nature of transaction. Bharti is just a distributor of Assessee's products (ie, integrated system). Distributor is buying products for onward sale – para 45 of SC judgment. Use of hardware and software to run are key characteristics of an integrated system. Even if it is licensed, the real nature is that of a sale as per para 51 of SC judgment (one has to look at the real nature of the transaction upon reading the agreement as a whole as laid down by the Hon'ble Supreme Court and para 52 of SC judgment (licensing is akin to sale – reference to SC judgment in TCS case). With reference to paras 4.1 to 4.8 of FAO, it is clear from para 73 of SC judgment that granting of license has to be granting license over copyright rights as per section 14(b) read with 14(a) of Copyright Act. In para 97 the Hon'ble Supreme Court has observed that under software license agreement, customer is licensed to only use the software as such and not the copyrights in the software, therefore granting of license in such cases does not amount to royalty (Assessee's case is similar – see Article 3.01 and 3.02 of the Agreement). In para 109 of SC judgment, it has been specifically laid down that it is wholly incorrect to say that license in software EULA is license to use copyrights. In para 117 for overall conclusions of SC in the context of distinction between license over copyright and license to use copyrighted product – specifically para 117(v), the Hon'ble Supreme Court has held that even if fee schedule refers to royalty payment, this is consideration for purchase of an integrated system. One has to look at the overall agreement and the real nature* *of the transaction (para 51 of SC judgment). On the AO's reference in para 4.4 of FAO as license being for use of IPR over viewing cards and software is incorrect since as per Article 3.01 and 3.02 (page 58-59 of paper book), license is for simplicitor use of the software, with several restrictions. Also, as per clause 3.04 (No license to accessed materials) and clause 3.05 (Ownership), no license whatsoever is granted over using the IPR in the software. License is to only use software to enable using the accompanying hardware, as part of an integrated system. Aspect of training referred to in para 4.5 of FAO does not advance AO's case since software and hardware are part of an integrated system akin to supply of goods. When training is provided to use it, it is similar to initial training provided by a vendor of any high end electronic or integrated equipment (for example, telecom equipment as examined by Delhi HC in Ericsson case). This doesn't amount to training in furtherance of license of copyright. With reference to para 4.6 on provision of operations and maintenance manual, this is akin to provision of a User Manual which describes the functioning of any equipment. For example, every sale of a TV comes with an operations and user manual. With refence to para 4.7, the providing of AMC services like repair, etc is akin to post-sale standard AMC services provided in the case of any sale of equipment. This AMC service does not in any way make the original transaction a royalty transaction. Since the AY is AY 2010-11 (ie, prior to the Finance Act, 2012 amendment by way of inserting Explanation 4 to Section 9(1)(vi) of the Act, as per the SC in its judgment, the Finance Act, 2012 amendment has to be read as expanding the scope of royalty with prospective effect from the Assessment Year 2013-14 (After FA, 2012 was enacted) and cannot be upheld as clarificatory so as to apply retrospectively for previous assessment years (para 73 - 74, 78 and 79). Therefore, the payments made under the customer contracts are not be treated as "royalty" under section 9(1)(vi) of the Act itself for the subject AY 2010-11, even without reference to the DTAA. Under the DTAA, clearly these are not "royalty" payments under Article 12 of the India – UK DTAA as held by the SC (UK DTAA has also been examined by the SC para 40.*

25. As already observed in the earlier paragraph, the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence (P) Ltd. (2021) 125 Taxmann.com 42 (SC) held that A copyright is an exclusive right that restricts others from doing certain acts. A copyright is an intangible right, in the nature of a privilege, entirely independent of any material substance. Owning copyright in a work is different from owning the physical material in which the copyrighted work may be embodied. Computer programs are categorised as literary work under the Copyright Act. Section 14 of the Copyright Act states that a copyright is an exclusive right to do or authorise the doing of certain acts in respect of a work, including literary work. The Hon'ble Court took the view that a transfer of copyright would occur only when the owner of the copyright parts with the right to do any of the acts mentioned in section 14 of the Copyright Act, 1957(Copyright Act). In the case of a computer program, section 14(b) of the Copyright Act, speaks explicitly of two sets of acts:

1. *The seven acts enumerated in sub-clause (a); and*
2. *The eighth act of selling or giving of commercial rental or offering for sale or commercial rental any copy of the computer program.*

The seven acts as enumerated in section 14(a) of the Copyright Act, in respect of literary works are:

1. *To reproduce the work in any material form, including the storing of it in any medium electronically;*
2. *To issue copies of the work to the public, provided they are not copies already in circulation;*
3. *To perform the work in public, or communicate it to the public;*
4. *To make any cinematographic film or sound recording in respect of the work;*
5. *To make any translation of the work;*
6. *To make any adaptation of the work; and*
7. *To do, in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in sub-clauses (1) to (6).*

The court held that a licence from a copyright owner, conferring no proprietary interest on the licensee, does not involve parting with any copyright. It said this is different from a licence issued under section 30 of the Copyright Act, which grants the licensee an interest in *the rights mentioned in section 14(a) and 14(b) of the Copyright Act. What is 'licensed' by the foreign, non-resident supplier to the distributor and resold to the resident end-user, or directly supplied to the resident end-user, is the sale of a physical object which contains an embedded computer program. Therefore, it was a case of sale of goods. The payments made by end-users and distributors are akin to a payment for the sale of goods and not for a copyright license under the Copyright Act. The decision of the Hon'ble Karnataka High Cour in the case of CIT Vs. Samsung Electronics Co. Ltd. (2011) 16 taxmann.com 141 (Karn.), on which the revenue authorities placed reliance in making the impugned addition stood overruled by the Hon'ble Supreme Court. We have already set out the terms of the Agreement under which software in question was sold by the Assessee to its distributions and the terms of the EULA. The same are identical to the case decided by the Hon'ble Supreme Court and hence the ratio laid down therein would squarely apply to the present case also.*

26.On the question whether the provisions of the Act can override the provisions of the DTAA, the Hon'ble Court held that Explanation 4 was inserted in section 9(1)(vi) of the ITA in 2012 to clarify that the "transfer of all or any rights" in respect of any right, property, or information included and had always included the "transfer of all or any right for use or right to use a computer software". The court ruled that Explanation 4 to section 9(1)(vi) expanded the scope of royalty under Explanation 2 to section 9(1)(vi). Prior to the aforesaid amendment, a payment could only be treated as royalty if it involved a transfer of all or any rights in copyright by way of license or other similar arrangements under the Copyright Act. The court held that once a DTAA applies, the provisions of the Act can only apply to the extent they are more beneficial to the taxpayer and therefore the definition of 'royalties' will have the meaning assigned to it by the DTAA which was more beneficial. It was held that the term 'copyright' has to be understood in the context of the Copyright Act. The court said that by virtue of Article 12(3) of the DTAA, royalties are payments of any kind received as a consideration for "the use of, or the right to use, any copyright "of a literary work includes a computer program or software. It was held that the regarding the expression "use of or the right to use", the position would be the same under explanation 2(v) of section 9(1)(vi) because there must be, under the licence granted or

sales made, a transfer of any rights contained in sections 14(a) or 14(b) of the Copyright Act. Since the end-user only gets the right to use computer software under a non-exclusive licence, ensuring the owner continues to retain ownership under section 14(b) of the Copyright Act read with sub-section 14(a) (i)-(vii), payments for computer software sold/licenced on a CD/other physical media cannot be classed as a royalty.
27.The terms of the licence in the present case does not grant any proprietory interest on the licencee and there is no parting of any copy right in favour of the licencee.It is non-exclusive non-tranferrable licence merely enabling the use of the copy righted product and does not create any interest in copy right and therefore the payment for such licence would not be in the nature of royalty as defined in DTAA. We therefore hold that the sum in question cannot be brought to tax as royalty.

28.On the question whether the sums in question can be taxed as FTS, we agree with the submissions made by the learned counsel for the Assessee set out in paragraph-18 & 19 of this order and hold that the sums in question cannot be brought to tax as FTS.

29.As far as the question whether the sum which was offered to tax by the assessee and which by virtue of our conclusions as aforesaid cannot be regarded as royalty or FTS and hence cannot be taxable, the Revenue should be directed to not to tax the aforesaid sum also. The first aspect that may require consideration is as to whether the assessee can seek to lay a claim that the amount offered tax in the return of income is not taxable. On this issue, the law is well settled and the Hon'ble Delhi High Court in the case of Indglonal Investments and Finance Limited Vs. ITO, Writ Petition (Civil) 15639/2006 and 7127/2008 dated 03.06.2011 after considering the decision rendered in the case of CIT Vs. Shelly Products 261 ITR 361 (SC) came to the conclusion that if by mistake or inadvertently or on account of ignorance included in his return of income in income which is not income within contemplation of law, bring the same to the notice of tax authorities and the tax authorities can grant him relief and repay of tax in excess. The Hon'ble Court referred to article 265 of the Constitution of India which provides that there shall be no tax levied or collected except by authority of law. We therefore are of the view that in the light of the discussion in the earlier part of this order regarding taxability of receipts on sale of set-top-box, the amount offered to tax by the *assessee which is now found to be not taxable cannot be brought to tax. We hold and direct accordingly and allow the ground of appeal.*

30.The next issue that requires consideration is ground No.3 raised by the assessee which reads as follows:

3.Reimbursements from Cisco Video for expenses incurred

30.on behalf of Cisco Video

3.1.The Ld AO and the Honourable DRP have erred in law and on facts in holding that the receipts by the Appellant from Cisco Video Technologies India Private Limited ("Cisco Video") for procurement of fixed assets and other expenses incurred on behalf of Cisco Video to be in the nature of FTS under the provisions of section 9(1)(vi) of the Act (except for reimbursement towards software which has been held to be in the nature of 'royalty') as well as under the provisions of the India — UK DTAA.

3.2.The Ld AO and the Honourable DRP have erred in not appreciating the fact that the reimbursements were purely on cost to cost basis, which was initially incurred by NDS Limited purely for administrative purposes and does not contain any profit element to hold the amount taxable as income / revenue.

3.3.The Ld AO and the Honourable DRP have erred in law and on facts in placing reliance on several decisions and wrongly contending that the facts of the Appellant's case to be similar to the cases on which reliance were placed upon against the Appellant.

3.4.The Ld AO and the Honourable DRP have erred on facts in wrongly terming the receipts by the Appellant from Cisco Video as receipts for rendering of 'business support services'.

3.5.The Ld AO and the Honourable DRP have erred in law and on facts by presuming facts contrary to what was submitted by the Appellant and thereafter making several wrong inferences/ observations based on such incorrect facts assumed by him.

3.6.The Ld AO and the Honourable DRP have erred in law and on facts in not appreciating the contents of the agreement entered into between NDS Limited and Cisco Video for the subsequent AY 2011-12, which clearly mentioned that there was no services rendered by NDS Limited to Cisco Video even after explanations were furnished to him that the facts of the case for the AY 2010-11 were the same as that prevailing for the AY 2011-12.

3.7.The Ld AO and the Honourable DRP have erred in law and facts in concluding that the reimbursements received by NDS Limited were taxable in India merely due to the presence of a confidentiality clause in the cost sharing agreement entered into between NDS Limited and Cisco Video (which was effective April 1, 2011).
3.8.The Ld AO and the Honourable DRP have erred in law and on facts in holding that the receipts by the Appellant from Cisco Video constitutes FTS under the India-UK DTAA, without appreciating the fact that even assuming without admitting that services were rendered, the same did not `make available' technology as contemplated under the India-UK DTAA and consequently not chargeable to tax in India.

31.The facts in relation to ground No.3 raised by the assessee are according to the Assessee, during the FY 2009-10, the Assessee had procured assets and incurred other expenses on behalf of NDS Services Pay-TV Technology Private Limited (also referred to as NDS Pay-TV or "NDS India in the orders of the revenue authorities and submissions of the Assessee. NDS Pay TV reimbursed the Assessee on a cost to cost basis for the same. A total of Rs. 11.54 Crores was reimbursed by NDS India for procurement of its fixed assets and reimbursement of expenses. The AO held that Assessee is into provision of business support services and held that where cost of services is charged and recovered by way of reimbursement, even without any profit element provisions of Tax deduction at source (TDS) is applicable. The AO further held that the services rendered are in the nature of FTS due to existence of and presence of confidential information along with non-disclosure clauses in the agreement. The DRP agreed with the reasoning of the AO and held that the actual functions performed by the assessee includes a gamut of technical inputs and held receipts are in the nature of FTS and the assessee has made available the services to the customers. The DRP further held that the cost sharing agreement is effective only from 1.4.2011 and hence, not applicable to the year under consideration.

32. Before the Tribunal it was submitted that the details of the reimbursement are as follows:

Sl.No.	***Nature of Reimbursement***	***Amount***	***Paper Book Page reference***

I	***Fixed Assets along with invoices***	***5,00,42,174 (sub-total)***	*Page 313 – 382 - Detailed list of assets along with 38 Invoices*
	Plant and Machinery	*1,55,55,218*	
	Capital assets	*2,96,03,311*	*Page 619 – Disclosure in financials of NDS India*
	Fixed assets accruals and miscellaneous	*5,51,807*	
	Software	*12,80,565*	*Page 620 – 705 - Bill of Entry for proof of assets imported*
II	***Other expenses***	***6,53,63,696***	
	along with invoices	***(sub-total)***	*Page 383 – 599 - Detailed list of assets along with 48 invoices raised by third party vendors on Appellant*
	Communication	***3,89,340***	
	Equipment maintenance	***16,70,095***	
	Medical insurance	***3,07,895***	*Page 706 - 732 – Details of miscellaneous expenses and equipment maintenance along with invoice copies*
	Miscellaneous	***1,12,89,209***	
	Travel	***50,11,525***	
	Accommodation Overseas	***3,25,69,355***	
	Travel Advance	***90,274***	*Pages 757-765 – Purpose of overseas travel made by employees of NDS India*
	Software	***1,40,05,934***	
	Exchange realized gain/loss	***30,069***	
	TOTAL	***11,54,05,870***	

*33.With respect to reimbursement of cost of fixed assets, the learned counsel for the Assessee submitted that the detailed listing of the fixed assets along with invoices raised by NDS Pay TV and other documentary evidence have been duly submitted by the Assessee vide submission dated 2nd November 2012 (**Page 310 of the Paper Book**). Further, it was submitted that Assessee has also provided sample copies of the 38 third party invoices raised on the Assessee in respected of the fixed assets (**Page 313-382 of the Paper Book**). It was submitted that from a perusal of the same, it would be apparent that cost relating to fixed assets amounting to Rs. 5,00,42,174/- represent a pure reimbursement of cost actually incurred by the Appellant in relation to the fixed assets that has been transferred by NDS Pay-TV. With respect to assets delivered to NDS Pay-TV, it was* *submitted that the fact is clearly brought out in the audited account of NDS Pay-TV which clearly documents the purchase of fixed assets (**Page 619 of the Paper book**). Also the bill of entry to India is also provided in **Page 620-705 of the Paper book.** Hence, it was submitted that above arrangement does not involve any Business Support Services as assumed by the AO and confirmed by the DRP. The cost reimbursement agreement (**Page 305 of the Paper Book**) support that fact that cost being reimbursed to Assessee not pursuant to any services but for actual expenditure incurred by the Assessee towards fixed assets and other administrative expenses. It was submitted that clause 2 of the Agreement (**Page 306 of the Agreement**) which states as under:*

*"It is expressly understood between the parties that the expenses reimbursed under this agreement would be **<u>at cost with no mark-up or profit element</u>**, since **<u>no service are being provided under the agreement</u>**"*

The learned counsel thus submitted that supply of fixed assets are not part of any service arrangement between the parties and hence, the said amount received by the Assessee does not fall under the category of FTS under the Act as well as the DTAA. Even if the cost reimbursement agreement was not covering the subject AY 2010-11, the agreement should be seen as clarifying the position for AY 2010-11 as well in light of the supporting evidence and back-to-back reimbursement invoices provided by the Appellant.

*34. With respect to reimbursement of expenses, it was submitted that the expenses are cross charged on cost to cost basis. The detailed list of assets along with sample of 48 invoices raised by third party vendors on Assessee were submitted to the AO (**Refer Pages 383 – 599 of the Paper Book**). Further, the details of miscellaneous expenses and equipment maintenance along with invoice copies from vendors were furnished at **Pages 706 – 732 of Paper Book**). Further, it was submitted that the employees of NDS India have travelled to NDS UK for sole purpose of business of NDS India and not for the purpose of rendering any services. The purpose of the travel of the employee are clearly coming out from the communications shared in **pages 757-765 of the Paper Book**. The communication provided at **pages 761-762 of the Paper***

***Book** clearly shows the all the expenses will be borne by NDS India. Further, as per the terms of the agreement, it is apparent that no service is being rendered by NDS UK. Hence, it wwas submitted that the expenses incurred are towards administrative expenses which cannot be considered as FTS under the provisions of the Act.*

*35. Without prejudice to the above factual background, it was submitted that the assessee does not make available any technical knowledge, skill, experience, know-how or processes to NDS India as required under clause 13(4) of the India-UK DTAA. With respect to confidentiality clause referred by the AO, it was submitted that the DRP has held that the agreement is not applicable to the instant AY 2010-11 but have upheld the order of the AO which refers to the clauses of the said agreement thereby blowing hot and cold at the same time. Further, it was submitted that the AO has **wrongly extracted the confidentiality clause** of the agreement at page 52 of the Order. The actual relevant clause 6(iv) of the cost sharing agreement which states as under (**Page 311 of the paper Book**)*

"iv. Confidentiality

*Under this agreement, NDS UK and NDS India, would keep all the information or material which are confidential, secret or proprietary in nature, **concerning the financial or business affairs of NDS UK**"*

It was submitted that a reading of the above clause would show that both parties namely, NDS UK and NDS would keep confidentiality of the proprietary information/material concerning financial and business affairs of NDS UK. Thus, it was submitted that

a. The clause is applicable to both the parties, NDS UK and NDS India

b. The confidentiality clause is relating to finance and business affairs

c. Does not refer to any technical knowledge or know-how shared by NDS UK

*Hence, it was submitted that the case-laws referred by the AO in his order are not relevant to the facts of the instant case. It was submitted that decision of the AAR in the case of **Perfetti Van Melle ltd** (16 Taxmann.com 207) [2012] (AAR) has been reversed by the Honorable Delhi Court vide [2014] 52 taxmann.com 161 (Delhi) (Provided at **page 1820-1821 of case-law compilation 2**). The learned counsel for Assessee also relied on the following judicial* *precedence to submit that the reimbursement of the expense are not taxable:*

a. A.P. Moller Maersk A S [2017] 78 taxmann.com 287 (SC)
b. Expeditors International (India) (P.) Ltd. [2012] 24 taxmann.com 76 (Delhi)
c. Dunlop Rubber Co. Ltd [1982] 10 Taxman 179 (Calcutta)
d. Industrial Engineering Projects (P.) Ltd [1993] 202 ITR 1014 (Delhi)
e. Krupp Udhe GMBH [2013] 40 taxmann.com 38 (Bombay)
f. WNS Global Services (UK) Ltd [2013] 32 taxmann.com 54 (Bombay)

g. CSC Technology Singapore Pte. Ltd. [2012] 19 taxmann.com 123 (Delhi)

h. Global E-Business Operations (P.) Ltd. [2012] 23 taxmann.com 455(Bang.)

i. Bovis Lend Lease (India) (P.) Ltd. [2010] 1 ITR(T) 87 (Bangalore)

36. Without prejudice to the above factual back ground, it was submitted that the assessee does not make available any technical knowledge. Hence, in light of the decision of the jurisdictional High Court in the case of De Beers India Minerals Private Limited (supra), it was submitted that the said reimbursement of expenses does not fall the definition of the FTS as per the India-UK DTAA.

37. The learned DR relied on the orders of the revenue authorities. Without prejudice to the above submission, he submitted that since the details of one-to-one reimbursement have not been given or examined by the Revenue authorities, the issue should be remanded for consideration afresh by the AO.

38.We have given a careful consideration to the rival submissions. It is the case of the Assessee that the receipts in question are pure reimbursement of expenses incurred by the Assessee for and on behalf of NDS Pay TV. It is the case of the revenue that (Para 2.1 of AO's order) that reimbursement of expenses may be made by the service provider at actual or alternatively, the agreement may provide a fixed amount towards reimbursement and that the issue that generally arises in such cases is to see whether such reimbursements of expenses is purely reimbursement or for rendering *services. Therefore according to the revenue the nature of reimbursement of expenses has to be examined and if the receipts for services rendered then whether the charge for the services is equivalent to the cost or not becomes immaterial. Therefore, if the receipts fall within the ambit of Sec.9(1)(v) (vi) or (vii) of the Act, then it would constitute income in the hands of the assessee chargeable to tax. Thereafter the AO has in paragraph 2.5 of his order proceeded to hold that on perusal of same copy of invoices furnished along with the submission dated 2.11.2012 and 13.12.2012, the assessee is providing business support services to NDS Pay Tv, though the invoices show that the same were in relation to purchase of fixed assets and reimbursement of expenses. He thereafter went ahead and held that the assessee is providing procurement services for plant and machinery, capital assets, computers to be used by NDS Pav Tv in its projects and that the procurement services extended from creating, approval, confirmation of purchase order to the receipt of material, invoicing and payment release and also equipment maintenance services. He also held that services of providing information technology will include identifying appropriate software and solutions for NDS Pav TV to successfully utilize cost advantaged locations and resources for application development. In so far as reimbursement of expenses is concerned, the AO has held that the assessee is providing human resources services in terms of managing overseas accommodation of NDS Pav TV employees, insurance benefits, travel plans, immigration services etc. He also held that the assessee is providing Marketing assistance support to NDS Pav TV employees who travel abroad for business purposes and that the services include arrangement of business meetings, marketing capabilities of NDS Pay TV to potential customers etc.,*

39.Having made the above observations (which are in our opinion purely on surmises and without first giving a finding that there is no one to one tally between the actual cost and actual sum reimbursed by NDS Pav TV to the assessee and that there is an element of mark up in such payments) he also observed that there is no written agreement between the parties regarding Cost Contribution Agreement (CCA) in relation to AY 2010-11 but such agreement existed from 1.4.2011 (i.e., from AY 2011-12 onwards). He went on to analyze the terms of the said agreement and found that the preamble to the

Agreement provided that the agreement is being entered into to obtain benefits of corporate purchasing contracts and for administrative simplicity. The AO has thereafter referred to cases where the factual finding (in the case of Van Oord Acz Marine Contractors (52 SOT 423 (Chennai ITAT) was that the assessee could not show that the price reflected in the invoices were comparable to similar services provided by international parties. He also referred to decisions rendered in the context of TDS provisions and cases where there were agreements for secondment of employees and where employees costs were reimbursed. He thereafter proceeded to hold that reimbursements are in the nature of FTS.

40.The DRP made a reference to the preamble to the agreement dated 1.4.2011 and held that the same did not exist for AY 2010-11 and is not relevant. The DRP however concluded that the AO has given valid reasons for treating the receipts by the Assessee as FTS. With regard to the argument that under the DTAA, taxability of FTS is subject to the condition that the FTS should make available technical knowledge to the person to whom services were rendered, the DRP by merely observing that the AAR in the case of Perfetti Vam Melle Ltd., 342 ITR 200 (AAR) and Mersen India Pvt.Ltd. 249 CTR 345(AAR) held that make available also includes providing expert advice and including one time assistance. The DRP thereafter observed that the Assessee also provided maintenance and support services and finally concluded that the except payment for software which was held to be in the nature of royalty, the remaining payment constituted FTS taxable in India under the provisions of the DTAA.

41. We are of the view that in principle we hold that pure reimbursement does not give rise to any income and the decisions cited by the learned AR in this regard lay down the above principle. We find that the revenue authorities have not firstly held that as to whether there was one-to-one tally of sums spent by the Assessee that was reimbursed by NDS Pay Tv. Once this factual finding is rendered then there has been no payment for any services whatsoever. The question is can one infer that the sums reimbursed were for services rendered by Assessee when there is one to one tally. In our view it cannot be said so. As we have already mentioned the AO has proceeded to draw inferences on surmises and conjectures. Firstly there is no evidence to show that services were rendered which can be termed as FTS. Under the DTAA FTS can be taxed only when it makes available technical knowledge to the person making

> *payment. On the application of "make available" clause of the DTAA, there is no finding whatsoever as to what was the technical service made available to NDS Pay TV. We, therefore, deem it fit to set aside this issue and remand the same for consideration by the AO in the light of the observations made above (in particular with regard to actual tally of expenses incurred and reimbursed by NDS Pay Tv to Assessee), in accordance with law, after affording assessee opportunity of being heard."*

9. The facts are identical and the arguments advanced by the Ld.AR as well as the Standing Counsel for revenue are similar with that raised in the preceding assessment years. It is noted that the Ld.AO proceeded on identical basis for the relevant assessment year, we are of the opinion that the entire addition in respect of international transaction needs to be looked into afresh having regards the principles laid down by various decisions cited and referred to by *coordinate bench* of this *Tribunal* hereinabove as well as the articles under the DTAA between India and UK. Needless to say that appropriate opportunity of being heard should be granted to assessee in accordance with law. **Accordingly, these grounds raised by assessee stands allowed for statistical purposes.**

10. Ground no. 5 has been raised by assessee in respect of levy of interest u/s. 234B on the proposed addition under international taxation. This issue also stands covered by *coordinate bench* of this *Tribunal* in assessee's own case *(supra)* as under.

> *"42. Ground No.5 raised by the assessee in its appeal is with regard to non-grant of credit for TDS. In our view, it would be just and appropriate to direct the AO to consider the calim of the assessee and allow credit in accordance with law. The issue raised by the assessee in ground No.6 is with regard to levy of interest under section 234B of the Act. In this regard, we find that the issue with regard to levy of interest under section 234B in the case of a non-resident has been settled by the Hon'ble Supreme Court in*

> *the case of DIT Vs. Mitsubishi Corporation (2021) 130 taxmann.com 276 (SC) and the Hon'ble Supreme Court took when the assessee is a nonresident foreign company incorporated in Japan and when the entire income that arises to them and the payment them is subject to deduction of tax at source there was no question of advance tax payment by assessee, accordingly, no interest under section 234B could be levied upon assessee. Following the said ration, we direct that there shall be no levy of interest u/s.234B of the Act."*

11. Respectfully following the same, we direct that there shall be no levy of interest u/s. 234B of the Act under the present facts of the case. Accordingly, this ground raised by assessee stands allowed.

In the result, the appeal filed by assessee stands allowed.

Order pronounced in open court on 28th December, 2021.

Sd/-	Sd/-
(B.R. BASKARAN)	(BEENA PILLAI)
Accountant Member	Judicial Member

Bangalore,
Dated, the 28th December, 2021.
/MS /

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore
6. Guard file

By order

Assistant Registrar,
ITAT, Bangalore