IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH, 'C' PUNE

BEFORE SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER
AND SHRI S.S. VISWANETHRA RAVI, JUDICIAL MEMBER

Sl. No.	ITA No.	Name of Appellant	Name of Respondent	Asst. Year
1	1554/PUN/2018	TIBCO Software B.V., C/o. TIBCO Software India Pvt. Ltd., 3rd Floor, Binarius, Deepak Complex, National Games Road, Shastri Nagar, Yerwada, Pune- 411 006 PAN : AAECT3252G	ACIT (IT), Circle-2, Pune	2015-16
2	1348/PUN/2019	TIBCO Software B.V., C/o. TIBCO Software India Pvt. Ltd., 3rd Floor, Binarius, Deepak Complex, National Games Road, Shastri Nagar, Yerwada, Pune- 411 006 PAN : AAECT3252G	ACIT (IT), Circle-2, Pune	2011-12

Assessee by : Shri Somil Agarwal
Revenue by : Shri Deepak Garg

Date of hearing : 12-05-2022
Date of pronouncement : 17-05-2022

आदेश / ORDER

PER INTURI RAMA RAO, AM :

These are appeals filed by the assessee directed against the separate final assessment orders dated 04.07.2019 for A.Y. 2011-12 and dated 18.07.2018 for A.Y. 2015-16 passed u/s.144C(13) r.w.s. 143(3) of the Income Tax Act, 1961 ('the Act') respectively.

2. Since the identical facts and issues are involved in both the appeals, except the addition of amounts, we proceed to dispose of the same by this common order.

3. For the sake of convenience and clarity, the facts relevant to the appeal in ITA No.1348/PUN/2019 for the assessment year 2011-12 are stated herein.

<u>ITA No.1348/PUN/2019, A.Y. 2011-12 :</u>

4. The appellant raised the following grounds of appeal :-

> *"Ground No.1:*
>
> *On the facts and circumstances of the case, and in law, the Hon'ble DRP erred in directing the Ld. AO to tax receipt of INR 26,02,184 towards software license fees as 'Royalty' as per the provisions of the Income Tax Act, 1961 read with the provisions of the India-Netherlands Double Taxation Avoidance Agreement.*
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> *It is thus prayed that the addition proposed by the Ld. AO and confirmed by the Hon'ble DRP be deleted.*
>
> *Ground No.2:*
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> *On the facts and circumstances of the case, and in law, the Hon'ble DRP erred in directing the Ld. AO to tax the receipt of INR 29,05,513 towards software maintenance fees as Fees for Technical Services within the meaning of Article 12(5)(a) of the India-Netherlands Double Taxation Avoidance Agreement.*
>
> *It is thus prayed that the addition proposed by the Ld. AO and confirmed by the Hon'ble DRP be deleted.*
>
> *Ground No.3:*

On the facts and circumstances of the case, and in law, the Hon'ble DRP erred in directing the Ld. AO to tax the receipt of INR 3,78,346 towards consulting service fees as Fees for Technical Services within the meaning of Article 12(5)(a) of the India-Netherlands Double Taxation Avoidance Agreement.

It is thus prayed that the addition proposed by the Ld. AO and confirmed by the Hon'ble DRP be deleted.

Ground No.4:

On the facts and circumstances of the case, and in law, the Hon'ble DRP erred in directing the Ld. AO to tax the receipt of INR 34,23,769 towards training fees as Fees for Technical Services within the meaning of Article 12(5)(a) of the India-Netherlands Double Taxation Avoidance Agreement.

It is thus prayed that the addition proposed by the Ld. AO and confirmed by the Hon'ble DRP be deleted.

Ground No.5:

On the facts and circumstances of the case, and in law, the Hon'ble DRP erred in directing the Ld. AO to tax the receipt of INR 2,65,424 towards other services fees as Fees for Technical Services within the meaning of Article 12(5)(a) of the India-Netherlands Double Taxation Avoidance Agreement.

It is thus prayed that the addition proposed by the Ld. AO and confirmed by the Hon'ble DRP be deleted.

Ground No.6:

On the facts and circumstances of the case and in law, the Ld. AO erred in granting short credit for Tax Deducted at Source ('TDS') to the extent of INR 9,59,092.

It is thus prayed that the Company be granted with appropriate credit for TDS.

Ground No.7:

On the facts and circumstances of the case and in law, the Ld. AO erred in levying interest under section 234B of the Income-tax Act, 1961.

The levy of interest is consequential to the short grant of TDS credit. It is prayed that the Company be granted with appropriate credit for TDS post which the interest levy shall become inapplicable.

Ground No.8:

On the facts and circumstances of the case and in law, the Ld. AO erred in initiating penalty proceedings against the Company under section 274 r.w.s. 271F of the Income-tax Act, 1961.

It is prayed that the revenue earned in India from the aforementioned income is not liable to tax in India during the year and therefore the Company was not under an obligation to file a return of income in this regard. Hence, the subject penalty proceedings be overturned.

Ground No.9:

On the facts and circumstances of the case and in law, the Ld. AO erred in initiating penalty proceedings against the Appellant under section 274 r.w.s. 271(1)(c) of the Income-tax Act, 1961.

It is prayed that the additions made by the Ld. AO merely represent a difference in opinion and the Company has not furnished any inaccurate particulars of income and thus, the subject penalty proceedings be overturned.

The above grounds are without prejudice to each other."

5. Briefly, the facts of the case are as under :

The appellant TIBCO Software B.V. is a non-resident company incorporated in Netherlands. The company is engaged in sale of Software licences and provision of Software maintenance, Consulting and Training services in India. The return of income for the assessment year 2011-12 was not filed by assessee-company. Thereafter, on receipt of information that the appellant had received income of Rs.33,96,623/- on which TDS had been deducted, the Assessing Officer formed an opinion that income had escaped assessment to tax, then issued notice u/s 148 on 29.03.2018 after recording reasons u/s 147. In response to notice u/s 148, the appellant had filed return of income on 26.04.2018. Against the said return of income, the assessment was completed by the Assistant Commissioner of Income Tax (International Taxation), Circle-2, Pune ('the Assessing Officer'). During the previous year relevant to the assessment year under consideration, it is stated that the appellant company had received a sum of Rs.98,72,321/- towards Software licenses, Software maintenance and Customer support, Consultancy services and Training services in India. The break-up of the above is as under :

NATURE OF RECEIPTS	*AMOUNT (RS.)*
Software License Fees	*26,02,184*
Software Maintenance Fees	*29,05,513*
Consulting Service Fees	*3,78,346*
Training Fees (USD)	*29,51,080*
Training Fees (Euro)	*4,72,689*
Reimbursement of expenses	*2,97,085*
Other Services	*2,65,424*
TOTAL	*98,72,321*

6. During the year relevant to the assessment year under consideration, above sum of Rs.98,72,321/- received by the appellant company was brought to tax by AO. The nature of the receipt is as under :

A. Software Licence :

- TIBCO BV enters into non-exclusive, non-transferable, non-sub licensable agreement with the customer to use the software during the licence term (typically annual). The software in consideration is a standard software and not a customized software. It is upgraded on an annual/periodic basis/.

- The software is imported via the electronic medium or physical medium.

- The title to, ownership and all rights in patents, copyrights, trade secrets and other Intellectual rights in the software do not transfer to the customer and continue to vest with the TIBCO Group ('TIBCO').

- The customer cannot make any modifications or enhancements to the software, create any derivative works of software or merge or separate any component. All rights with respect to this remain with TIBCO B.V.

- The customer cannot reverse compile, dissemble or otherwise reverse engineer the software. If the customer requires modification to the software to make it further useful to him, the same would have to be made by TIBCO B.V.

7. The AO was of the opinion that the consideration received towards use of the software is taxable as Royalty u/s.9(1)(vi) of the Act as well as under Article 12 of the Double Taxation Avoidance Agreement (DTAA) between India and Netherland placing reliance on the following decisions :

a) *CIT Vs. Samsung Electronics Co. Ltd. (ITA No.2808 of 2005) dt. 15-10-2011.*
b) *CIT Vs. Synopsis International Old Ltd. (ITA No.11 to 15/2008 & 17/2008) dated 03-08-2010.*
c) *Millennium IT Software Ltd. (AAR No.835 of 2009) dt. 28-09-2011.*
d) *Citrix Systems Asia Pacific Pty Ltd. (AAR No.822 of 2009) dt.06-02-2012.*
e) *Acclerys K.L. Japan (AAR No.989 of 2010) dt. 27-02-2012*

f) ING Vysya Bank Ltd. (ITA No.160/2010, dt. 05-08-2011 (A.Y.2008-09)- Bangalore-Tribunal
g) Mac Corporation (ITA No.1331 to 1336/2008) (A.Y. 1999-2000 to 2004-05)-Delhi Tribunal.

Rejecting the contentions of the appellant that such payment cannot be characterized as Royalty as the payment is made for purchase of standard software, not for use of 'copyright itself'. The appellant placed reliance on the OECD commentary as well as the decisions of Hon'ble Delhi High Court in the case of *DIT Vs. Infrasoft Ltd. (2013) 39 taxmann.com 88 (Del)*, the decision of Pune Tribunal in the case of *Allianz SE Vs. ADIT (TS-204-ITAT-2012 (Pun)* and the decision of Mumbai Tribunal in the case of *DDIT Vs. Solid Works Corporation (ITA No.3219/Mum/2010.*

8. On receipt of above draft assessment order, the appellant filed objections before the DRP. The DRP considering the decisions relied upon by the appellant held that the consideration received towards software license fee is taxable as Royalty in India placing reliance on the judgment of Hon'ble Karnataka High Court in the case of *Samsung Electronics Co. Ltd.16 taxmann.com 141 (Kar.)* Further, DRP also treated the software maintenance fees, consulting service fee and training fees as ancillary and subsidiary to the enjoyment of right

in the software, i.e., in respect of software licences and held chargeable to tax as "Fees for Technical services" as per clause (5)(a) of Article 12 of the India and Netherland treaty.

On receipt of the DRP directions, the AO has passed the final assessment order vide order dated 04.07.2019 by bringing it to tax the above items in conformity with the directions of the DRP as Royalty income at Rs.26,02,184/- and the Software Maintenance services, Consultancy services and Training services as chargeable to tax in India as "Fees for Technical services" @ 10% in terms of the DTAA between India and Netherland.

9. Being aggrieved, the appellant is in appeal before us in the present appeal.

10. It is submitted before us that the ground of appeal No.1 challenges the action of the lower authorities in bringing to tax the software license fees at Rs.26,02,184/- as Royalty within the meaning of Article 12 of the India and Netherland DTAA. It is submitted before us that in the succeeding assessment year 2013-14 the Co-ordinate Bench of this Tribunal had decided this issue in favour of the appellant and finally submitted that the reasoning of the lower authorities in treating the software license fee as Royalty was not

approved by the Hon'ble Supreme Court in the case of Engineering Analysis *Engineering Analysis Centre of Excellence Pvt. Ltd. Vs. CIT (2021) 432 ITR 472 (SC).*

11. The ld. CIT-DR placing reliance on the orders of the lower authorities justified the action of bringing to tax the software license fee of Rs.26,02,184/- as Royalty.

12. We heard the rival submissions and perused the material on record. The appellant company granted the software license fee on non-exclusive non-transferable basis during the license term. The subject software is standard software not customised software. The title, the ownership and all rights in patents, copyrights and trade secrets and other software contained does not get transferred to the customer. The Courts as well as OECD commentary on Article 12 of the DTAA recognized the distinction between "copyrighted article" and "copyright right" in the programme and software which incorporates a copy of the copyrighted programme. Any payment made for acquisition of copy of the software is held not to be Royalty. Even the Hon'ble Delhi High Court in the case of *DIT Vs. Infrasoft Ltd. 39 taxmann.com 88* held to the same effect. Whereas the Hon'ble Karnataka High Court in the case of *Samsung Electronics Co.*

Ltd.345 ITR 494 and CIT Vs. Synopsis International Old Ltd. 212 taxmann 454 held to the contrary. The reasoning given by the Hon'ble Karnataka High Court has been disapproved by the Hon'ble Supreme Court in the case of Engineering Analysis *Engineering Analysis Centre of Excellence Pvt. Ltd. Vs. CIT (2021) 432 ITR 472 (SC)*. The operative paras of the judgment are reproduced below :

> "**105**. The reasoning of the High Court of Karnataka in *Synopsis International Old Ltd.* (*supra*) does not commend itself to us. First and foremost, as held in *Swastik Tobacco Factory* (*supra*), the expression "in respect of", when used in a taxation statute, is only synonymous with the words "on" or "attributable to". Such meaning accords with the meaning to be given to the expression "in respect of" contained in Explanation 2(*v*) to section 9(1)(*vi*) of the Income-tax Act, and would not in any manner make the expression otiose, as has wrongly been held by the High Court of Karnataka.
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> **106**. Secondly, section 16 of the Copyright Act, which states that "no person shall be entitled to copyright…otherwise than under and in accordance with the provisions of this Act or of any other law for the time being in force" has been completely missed, thus making it clear that the expression "copyright" has to be understood only as is stated in section 14 of the Copyright Act and not otherwise.
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> **107**. Thirdly, when it comes to computer programmes, the High Court in *Synopsis International Old Ltd.* (*supra*) was wholly incorrect in stating that the storage of a computer programme per se would constitute infringement of copyright. This, again, would directly be contrary to the terms of section 52(1)(*aa*) of the Copyright Act.
>
> **108**. Fourthly, the High Court is not correct in referring to section 9(1)(*vi*) of the Income-tax Act after considering it in the manner that it has and then applying it to interpret the provisions under the Convention between the Government of the Republic of India and the Government of Ireland for the Avoidance of Double Taxation and for the Prevention of Fiscal Evasion with respect to Taxes on Income And Capital Gains,[40] ["India-Ireland DTAA"]. Article 12 of the aforesaid treaty defining "royalties" would alone be relevant to determine taxability under the DTAA, as it is

more beneficial to the assessee as compared to section 9(1)(*vi*) of the Income-tax Act, as construed by the High Court. Here again, section 90(2) of the Income-tax Act, read with explanation 4 thereof, has not been properly appreciated.

109. Fifthly, the finding that when a copyrighted article is sold, the end-user gets the right to use the intellectual property rights embodied in the copyright which would therefore amount to transfer of an exclusive right of the copyright owner in the work, is also wholly incorrect.

For all these reasons, therefore, the judgment of the High Court of Karnataka in *Synopsis International Old. Ltd.* (*supra*) also does not state the law correctly.

110. A series of judgments by the High Court of Delhi have dealt with the same question that now lies before us. In *DIT* v. *Ericsson A.B.* [2011] 16 taxmann.com 371/[2012] 204 Taxman 192/343 ITR 470 (Delhi) ["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 may be 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 *DIT* v. *Nokia Networks OY* [2012] 25 taxmann.com 225/[2013] 212 Taxman 68/358 ITR 259 (Delhi) ["Nokia Networks OY"],[41] 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,[42] ["India-Finland DTAA"]. After setting out the rationale for the clarificatory amendment made *vide* the Finance Act 2012, the High Court held :

"He, thus submitted that the question of "copyrighted article" or actual copyright does not arise in the context of software both in the 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."(page 281)

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

112. In *DIT* v. *Infrasoft Ltd.* [2013] 39 taxmann.com 88/[2014] 220 Taxman 273 (Delhi) ["Infrasoft"],[43] a Division Bench of the High Court of Delhi, by an exhaustive analysis of the provisions contained the India-USA DTAA, the Income-tax Act and the Copyright Act, dealt with a situation in which the assessee who was primarily into the business of developing and manufacturing civil engineering software, licensed the said software to persons engaged in civil engineering work in India. The High Court referred to a decision of the Special Bench of the ITAT (New Delhi) in *Motorola Inc.* v. *Dy. CIT* [2005] 147 Taxman 39 (Mag.)/95 ITD 269 ["Motorola (ITAT)"] as follows:

"65. The issue whether consideration for software was royalty came up for consideration before the Special Bench of the Tribunal in Delhi in the case of Motorola Inc v. Deputy Cit And Deputy Cit V. Nokia (2005) 147 TAXMAN 39 (DELHI). The Tribunal has held as under:

155. It appears to us from a close examination of the manner in which the case has proceeded before the Income-tax authorities and the arguments addressed before us that the crux of the issue is whether the payment is for a copyright or for a copyrighted article. If it is for copyright, it should be classified as royalty both under the Income-tax Act and under the DTAA and it would be taxable in the hands of the Assessee on that basis. If the payment is really for a copyrighted article, then it only represents the purchase price of the article and, therefore, cannot be considered as royalty either under the Act or under the DTAA. This issue really is the key to the entire controversy and we may now proceed to address this issue.

156. We must look into the meaning of the word "copyright" as given in the Copyright Act, 1957. Section 14 of this Act defines "Copyright" as "the exclusive right subject to the provisions of this Act, to do or authorize the doing of any of the following acts in respect of a work or any substantial part thereof […]

It is clear from the above definition that a computer programme mentioned in clause (*b*) of the section has all the rights mentioned in clause (*a*) and in addition also the right to sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer programme. This additional right was substituted w.e.f. 15-1-2000. The difference between the earlier provision and the present one is not of any relevance. What is to be noted is that the right mentioned in Sub-clause (*ii*) of clause (*b*) of Section 14 is available only to the owner of the computer programme. It follows that if any of the cellular operators does not have any of the rights mentioned in Clauses (*a*) and (*b*) of Section 14, it would mean that it does not have any right in a copyright. In that case, the payment made by the cellular operator cannot be characterized as royalty either under the Income-tax Act or under the DTAA. The question, therefore, to be answered is whether any of the operators can exercise any of the rights mentioned in the above provisions with reference to the software supplied by the Assessee.

157. We may first look at the supply contract itself to find out what JTM, one of the cellular operators, can rightfully do with reference to the software. We may remind ourselves that JTM is taken as a representative of all the cellular operators and that it was common ground before us that all the contracts with the cellular operators are substantially the same. Clause 20.1 of the Agreement, under the title "License", says that JTM is granted a non-exclusive restricted license to use the software and documentation but only for its own operation and maintenance of the system and not otherwise. This clause appears to militate against the position, if it were a copyright, that the holder of the copyright can do anything with respect to the same in the public domain. What JTM is permitted to do is only to use the software for the purpose of its own operation and maintenance of the system. There is a clear bar on the software being used by JTM in the public domain or for the purpose of commercial exploitation.

158. Secondly, under the definition of "copyright" in Section 14 of the Copyright Act, the emphasis is that it is an exclusive right granted to the holder thereof. This condition is not satisfied in the case of JTM because the license granted to it by the Assessee is expressly stated in clause 20.1 as a "non exclusive restricted license". This means that the supplier of the software, namely, the Assessee, can supply similar software to any number of cellular operators to which JTM can have no objection and further all the cellular operators can use the software only for the purpose of their own operation and maintenance of the system and not for any other purpose. The user of the software by the cellular operators in the public domain is totally prohibited, which is evident from the use of the words in Article 20.1 of the agreement, "restricted" and "not otherwise". Thus JTM has a very limited right so far as the use of software is concerned. It needs no repetition to clarify that JTM has not been given any of the seven rights mentioned in clause (*a*) of Section 14 or the additional right mentioned in Sub-clause (*ii*) of clause (*b*) of the section which relates to a computer programme and, therefore, what JTM or any other cellular operator has acquired under the agreement is not a copyright but is only a copyrighted article.""
(pages 362-364)

113. Further, the Court noted that the same argument that found favour with the AAR in *Citrix Systems Asia Pacifice Pty. Ltd.* (*supra*) was pressed into service by the learned senior counsel who appeared for the Revenue in the case of *Motorola Inc.* (*supra*), and this was correctly turned down as follows:

"163. We may now briefly deal with the objections of Mr. G.C. Sharma, the learned senior counsel for the Department. He contended that if a person owns a copyrighted article then he automatically has a right over the copyright also. With respect, this objection does not appear to us to be correct. Mr. Dastur filed an extract from Iyengar's Copyright Act (3rd Edition) edited by R.G. Chaturvedi. The following observations of the author are on the point:

"(*h*) Copyright is distinct from the material object, copyrighted:

It is an intangible incorporeal right in the nature of a privilege, quite independent of any material substance, such as a manuscript. The copyright owner may dispose of it on such terms as he may see fit. He has an individual right of exclusive enjoyment. The transfer of the manuscript does not, of itself, serve to transfer the copyright therein. The transfer of the ownership of a physical thing in which copyright exists gives to the purchaser the right to do with it (the physical thing) whatever he pleases, except the right to make copies and issue them to the public" (underline is ours)."
The above observations of the author show that one cannot have the copyright right without the copyrighted article but at the same time just because one has the copyrighted article, it does not follow that one has also the copyright in it. Mr. Sharma's objection cannot be accepted."
(pages 365-366)

114. Referring to the High Court's earlier judgments in *Ericsson A.B.* (*supra*) and *Nokia Networks OY* (*supra*) and the determinations of the AAR in *Dassault Systems K.K.* (*supra*) and *Geoquest Systems B.V.* (*supra*), the High Court concluded:

"87. In order to qualify as royalty payment, it is necessary to establish that there is transfer of all or any rights (including the granting of any licence) in respect of copyright of a literary, artistic or scientific work. In order to treat the consideration paid by the Licensee as royalty, it is to be established that the licensee, by making such payment, obtains all or any of the copyright rights of such literary work. Distinction has to be made between the acquisition of a "copyright right" and a "copyrighted article". Copyright is distinct from the material object, copyrighted. Copyright is an intangible incorporeal right in the nature of a privilege, quite independent of any material substance, such as a manuscript. Just because one has the copyrighted article, it does not follow that one has also the copyright in it. It does not amount to transfer of all or any right including licence in respect of copyright. Copyright or even right to use copyright is distinguishable from sale consideration paid for "copyrighted" article. This sale consideration is for purchase of goods and is not royalty.

88. The license granted by the Assessee is limited to those necessary to enable the licensee to operate the program. The rights transferred are specific to the nature of computer programs. Copying the program onto the computer's hard drive or random access memory or making an archival copy is an essential step in utilizing the program. Therefore, rights in relation to these acts of copying, where they do no more than enable the effective operation of the program by the user, should be disregarded in analyzing the character of the transaction for tax purposes. Payments in these types of transactions would be dealt with as business income in accordance with Article 7.

89. There is a clear distinction between royalty paid on transfer of copyright rights and consideration for transfer of copyrighted articles. Right to use a copyrighted article or product with the owner retaining his copyright, is not the same thing as transferring or assigning rights in relation to the copyright. The enjoyment of some or all the rights which the copyright owner has, is necessary to invoke the royalty definition. Viewed from this angle, a non-exclusive and non-transferable licence enabling the use of a copyrighted product cannot be construed as an authority to enjoy any or all of the enumerated rights ingrained in Article 12 of DTAA. Where the purpose of the licence or the transaction is only to restrict use of the copyrighted product for internal business purpose, it would not be legally correct to state that the copyright itself or right to use copyright has been transferred to any extent. The parting of intellectual property rights inherent in and attached to the software product in favour of the licensee/customer is what is contemplated by the Treaty. Merely authorizing or enabling a customer to have the benefit of data or instructions contained therein without any further right to deal with them independently does not, amount to transfer of rights in relation to copyright or conferment of the right of using the copyright. The transfer of rights in or over copyright or the conferment of the right of use of copyright implies that the transferee/licensee should acquire rights either in entirety or partially co-extensive with the owner/transferor who divests himself of the rights he possesses pro tanto."
(pages 385-386)

115. The High Court of Delhi also expressed its disagreement with the impugned judgment of the High Court of Karnataka dated 15-10-2011, in *Samsung Electronics Co. Ltd.* (*supra*) as follows:

"96. The amount received by the Assessee under the licence agreement for allowing the use of the software is not royalty under the DTAA.

97. What is transferred is neither the copyright in the software nor the use of the copyright in the software, but what is transferred is the right to use the copyrighted material or article which is clearly distinct from the rights in a copyright. The right that is transferred is not a right to use the copyright but is only limited to the right to use the copyrighted material and the same does not give rise to any royalty income and would be business income.

98. We are not in agreement with the decision of the [Karnataka] High Court in the case of *SAMSUNG ELECTRONICS CO. LTD* (*SUPRA*) that right to make a copy of the software and storing the same in the hard disk of the designated computer and taking backup copy would amount to copyright work under section 14(1) of the Copyright Act and the payment made for the grant of the licence for the said purpose would constitute royalty. The license granted to the licensee permitting him to download the computer programme and storing it in the computer for his own use was only incidental to the facility extended to the licensee to make use of the copyrighted product for his internal business purpose. The said process was necessary to make the programme functional and to have access to it and is qualitatively different from the right contemplated by the said provision because it is only integral to the use of copyrighted product. The right to make a backup copy purely as a temporary protection against loss, destruction or damage has been held by the Delhi High Court in *DIT* v. *Nokia Networks OY* (*supra*) as not amounting to acquiring a copyright in the software."
(page 388)

116. Likewise, in *CIT* v. *ZTE Corporation* [2017] 77 taxmann.com 304/245 Taxman 252/392 ITR 80 (Delhi) ["ZTE"], a Division Bench of the High Court of Delhi dealt with the India-China DTAA and after referring to its earlier judgments, held as follows:

"The misconception that the revenue harbors stems from its flawed appreciation of a copyright license. True, "copyright" is not defined; yet what works are capable of copyright protection is spelt out in the Copyright Act. Sections 13 and 14 of the Copyright Act flesh out the essential ingredients that make copyright a property right."
(page 93)

"Thus, Section 14 categorically provides that copyright "means the exclusive right to do or authorizing the doing of any of the acts mentioned in section 14 (*a*) to (*e*) or any "substantial part thereof". The content of copyright in respect of computer programmes is spelt out in section 14 (*b*). A joint reading of the controlling provisions of the earlier part of section 14 with clause (*b*) implies that in the case of computer programs, copyright would mean the doing or authorizing the doing-in respect of work (*i.e.* the programme) or any substantial part thereof —

(*b*) In the case of a computer programme,-

(i) to do any of the acts specified in clause (*a*)
(ii) to sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer programme

Provided that such commercial rental does not apply in respect of computer programmes where the programme itself is not the essential object of the rental.

The reference to clause (*a*) and (*b*) means that all the rights which are in literary works *i.e.*"(*i*) to reproduce the work in any material form including the storing of it in any medium by electronic means; (*ii*) to issue copies of the work to the public not being copies already in circulation; (*iii*) to perform the work in public, or communicate it to the public; (*iv*) to make any cinematograph film or sound recording in respect of the work; (*v*) to make any translation of the work; (*vi*) to make any adaptation of the work; (*vii*) 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 (*i*) to (*vi*)" inhere in the owner of copyright of a computer programme. Therefore, the copyright owner's rights are spelt out comprehensively by this provision. In the context of the facts of this case, the assessee is the copyright proprietor; it made available, through one time license fee, the software to its customers; this software without the hardware which was sold, is useless. Conversely the hardware sold by the assessee to its customers is also valueless and cannot be used without such software. This analysis is to show that what was conveyed to its customers by the assessee bears a close resemblance to goods-significantly enough, Section 14(1) talks of sale or rental of a "copy". The question of conveying or parting with copyright in the software itself would mean that the copyright proprietor has to assign it, divesting itself of the title implying that it has divested itself of all the rights under Section 14. This would mean an outright sale of the copyright or assignment, under section 18 of the Act. Section 16 of the Copyright Act enacts that there cannot be any other kind of right termed as "copyright".

In the present case, the facts are closely similar to Ericsson. The supplies made (of the software) enabled the use of the hardware sold. It was not disputed that without the software, hardware use was not possible. The mere fact that separate invoicing was done for purchase and other transactions did not imply that it was royalty payment. In such cases, the nomenclature (of license or some other fee) is indeterminate of the true

nature. Nor is the circumstance that updates of the software are routinely given to the assessee's customers. These facts do not detract from the nature of the transaction, which was supply of software, in the nature of articles or goods. This court is also not persuaded with the submission that the payments, if not royalty, amounted to payments for the use of machinery or equipment. Such a submission was never advanced before any of the lower tax authorities; moreover, even in Ericsson (*supra*), a similar provision existed in the DTAA between India and Sweden."
(pages 95-96)

117. The conclusions that can be derived on a reading of the aforesaid judgments are as follows:

(i) Copyright is an exclusive right, which is negative in nature, being a right to restrict others from doing certain acts.

(ii) Copyright is an intangible, incorporeal right, in the nature of a privilege, which is quite independent of any material substance. Ownership of copyright in a work is different from the ownership of the physical material in which the copyrighted work may happen to be embodied. An obvious example is the purchaser of a book or a CD/DVD, who becomes the owner of the physical article, but does not become the owner of the copyright inherent in the work, such copyright remaining exclusively with the owner.

(iii) Parting with copyright entails parting with the right to do any of the acts mentioned in section 14 of the Copyright Act. The transfer of the material substance does not, of itself, serve to transfer the copyright therein. The transfer of the ownership of the physical substance, in which copyright subsists, gives the purchaser the right to do with it whatever he pleases, except the right to reproduce the same and issue it to the public, unless such copies are already in circulation, and the other acts mentioned in section 14 of the Copyright Act.

(iv) A licence from a copyright owner, conferring no proprietary interest on the licensee, does not entail parting with any copyright, and is different from a licence issued under section 30 of the Copyright Act, which is a licence which grants the licensee an interest in the rights mentioned in section 14(*a*) and 14(*b*) of the Copyright Act. Where the core of a transaction is to authorize the end-user to have access to and make use of the "licensed" computer software product over which the licensee has no exclusive rights, no copyright is parted with and consequently, no infringement takes place, as is recognized by section 52(1)(*aa*) of the Copyright Act. It makes no difference whether the end-user is enabled to use computer software that is customised to its specifications or otherwise.

> (v) A non-exclusive, non-transferable licence, merely enabling the use of a copyrighted product, is in the nature of restrictive conditions which are ancillary to such use, and cannot be construed as a licence to enjoy all or any of the enumerated rights mentioned in section 14 of the Copyright Act, or create any interest in any such rights so as to attract section 30 of the Copyright Act.
>
> (vi) The right to reproduce and the right to use computer software are distinct and separate rights, as has been recognized in *State Bank of India* (*supra*) (see paragraph 21), the former amounting to parting with copyright and the latter, in the context of non-exclusive EULAs, not being so.
>
> **118.** Consequently, the view contained in the determinations of the AAR in *Dassault Systems K.K.* (*supra*) and *Geoquest Systems B.V.* (*supra*) and the judgments of the High Court of Delhi in *Ericsson A.B.* (*supra*), *Nokia Networks OY* (*supra*), *Infrasoft Ltd.* (*supra*), *ZTE Corporation* (*supra*), state the law correctly and have our express approval. We may add that the view expressed in the aforesaid judgments and determinations also accords with the OECD Commentary on which most of India's DTAAs are based."

13. In the light of the judgment of Hon'ble Supreme Court, we hold that fee for grant of software license cannot be taxed in India. Since we have held that the subject transaction of receipt of consideration for grant of software license is held not to be Royalty under the provisions of Income Tax Act, 1961, the question of consideration of the issue under the provisions as per DTAA between India and Netherland does not arise. Thus, ground of appeal No.1 filed by the assessee stands allowed.

14. Grounds of appeal No.2, 3, 4 and 5 challenges the direction of the DRP directing the AO to bring to tax software maintenance fee of

Rs.29,05,513/- and consulting service fee of Rs.3,78,346/- and training fees of Rs.34,23,769/- and other services fee of Rs.2,65,424/- as Fees for Technical services within the meaning of Article 12(5)(a) of the India and Netherland treaty. The DRP held that the receipts of assessee from the software maintenance, consulting services and training fees are chargeable to tax as Fees for Technical services as per Article 12 (5)(a) of India and Netherland treaty.

15. On the other hand the ld. AR submits that the consideration received towards software maintenance, consulting services and training services cannot be considered as "Fees for Technical services" under Article 12(5)(a)of the treaty. He also submitted that the question of treating the above consideration as Fees for Technical service does not arise as the consideration received towards software license fees cannot be considered as "Royalty" as per para 4 of Article 12 of the DTAA, placing reliance on the following decisions :

Datamine International Ltd. Vs. ADIT (2016) 68 taxmann.com 97
Technip Singapore Pte Ltd. V. ADIT 385 ITR 408 (Delhi)
Aspect Software Inc. Vs. ADIT (2015) 61 taxmann.com 36 (Delhi)
DDIT Vs. Scientific Atlanta Inv. (2009) 33 SOT 220 (Mumbai)
Renaissance Services BV Vs. DDIT 94 taxmann.com 465 (Mumbai)

16. In order to decide the issue on hand, it is appropriate to extract Article 12 of the India and Netherland treaty which reads as under :

> "ARTICLE 12 - Royalties and Fees for Technical Services –
>
> 1. Royalties and fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.]
>
> 2 [2. However, such royalties and fees for technical services may also be taxed in the Contracting State in which they arise and according to the laws of that State, but if the recipient is the beneficial owner of the royalties, or fees for technical services, the tax so charged shall not exceed 10 per cent of the gross amount of the royalties or the fees for technical services.]
>
> 3. The competent authorities of the States shall by mutual agreement settle the mode of application of paragraph 2. 1
>
> 4. The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience.]
>
> 5. For purposes of this Article, "fees for technical services" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services :
>
> (a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 4 of this Article is received; or
>
> (b) make available technical knowledge, experience, skill, know-how or processes, or consist of the development and transfer of a technical plan or technical design.
>
> 6. Notwithstanding paragraph 5, "fees for technical services" does not include amounts paid :
>
> (a) for services that are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of property;

(b) for services that are ancillary and subsidiary to the rental of ships, aircraft, containers or other equipment used in connection with the operation of ships or aircraft in international traffic;

(c) for teaching in or by educational institutions;

(d) for services for the personal use of the individual or individuals, making the payment; or

(e) to an employee of the person making the payments or to any individual or partnership for professional services as defined in Article 14 (Independent Personal Services) of this Convention.]

7. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the royalties or fees for technical services, being a resident of one of the States, carries on business in the other State, in which the royalties or fees for technical services arise, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the royalties or fees for technical services are effectively connected with such permanent establishment or fixed base. In such case, the provisions of article 7 or article 14, as the case may be, shall apply.

8. Royalties or fees for technical services shall be deemed to arise in one of the States when the payer is that State itself, a political sub-division, a local authority or a resident of that State. Where, however, the person paying the royalties or fees for technical services, whether he is a resident of one of the States or not, has in one of the States a permanent establishment or a fixed base in connection with which the contract under which the royalties or fees for technical services are paid was concluded, and such royalties or fees for technical services are borne by such permanent establishment or fixed base, then such royalties or fees for technical services shall be deemed to arise in the State in which the permanent establishment or fixed base is situated.

9. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of royalties or fees for technical services, having regard to the royalties fees for technical services for which they are paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payment shall remain taxable, according to the laws of each State, due regard being had to the other provisions of this Convention.]”

17. Clause 5 of Article 12 defines "fees for technical services" to mean the payment of any kind to any person in consideration of rendering any technical or consultancy services that are ancillary and subsidiary to application of enjoyment of the right, any copyright information described in clause 4 which deals with the payment made towards Royalties. The DRP gave a finding that the software maintenance, consultation charges and training fees are in connection with the receipt of consultation towards software license fee. This finding of the DRP is not under challenge before us. Therefore, the software maintenance fees, consulting charges and training fees which are incidental to software license fee, assumes same character as that of software license fee. In relation to ground of appeal No.1 in the preceding paragraphs, we have held that the consideration received towards software license fee cannot be termed as "Royalty". Hence, what follows from this, is that even the software maintenance, consulting charges and training fees which are incidental to software maintenance fee cannot come within the purview of FTS within clause 5 of Article 12 of the treaty. Our view is fortified by the judgment of Hon'ble Delhi High Court in the case of *Datamine International Ltd.*

Vs. ADIT (2016) 68 taxmann.com 97, Bharati Axa General Insurance Co. Ltd. 326 ITR 477 (AAR) and Citrix Systems Asia Pacific Pty Ltd., In Re: (2012) 343 ITR 1 (AAR). We, therefore, hold that software maintenance fees, consultancy services fees and training services fees cannot be held to be "Fees for Technical services". Thus, grounds of appeal no. 2 to 5 stands allowed.

18. Ground of appeal No.6 challenges short credit of deduction of tax at source by Rs.9,59,092/-. This ground of appeal no.6 is restored to the file of AO with a direction to allow tax as per the information contained in Form No.26AS and in accordance with provisions of section 199 of the Income Tax Act, 1961. Thus, ground of appeal no.6 is allowed for statistical purposes.

19. Ground of appeal No.7, 8 and 9 relates to initiation of penalty proceedings under the Income Tax Act, 1961 are consequential in nature and the same are dismissed.

20. In the result, the appeal filed by the assessee in ITA No.1348/PUN/2019 for A.Y. 2011-12 stands partly allowed for statistical purposes.

ITA No.1554/PUN/2018, A.Y. 2015-16 :

21. Since the facts and issues involved in both the above captioned appeals are identical, therefore, our decision in ITA No.1348/PUN/2019 for A.Y. 2011-12 shall apply *mutatis mutandis* to the ground of appeal no.1 to 5 and 7 & 8 filed by assessee in ITA No.1554/PUN/2018 for A.Y. 2015-16. Accordingly, the ground of appeal no.1 to 5 are allowed and the ground of appeal no.7 & 8 are partly allowed for statistical purposes.

22. By the ground of appeal no.6, the appellant company challenges the action of the lower authorities in bringing to tax the difference between the receipts as per Form No.26AS and receipts credited to Profit & Loss Account of Rs.54,91,255/- rejecting the explanation of the appellant that the difference had arisen due to difference in rate applied for conversion. However, we find from reading of the orders of the lower authorities that the explanation rendered by the appellant is not supported by any material on record. In order to meet the ends of justice, we remand the matter to the file of the Assessing Officer with direction to produce the necessary evidence in support of the explanation offered by the appellant company reconciling the difference between the amount shown in Form No.26AS and the

amount shown in the Profit & Loss Account. Thus, the ground of appeal no.6 stands partly allowed.

23. In the result, the appeal filed by the assessee in ITA No.1554/PUN/2018 for A.Y. 2015-16 stands partly allowed for statistical purposes.

24. Resultantly, both the appeals of the assessee stands partly allowed for statistical purposes.

Order pronounced in the Open Court on 17th May, 2022.

Sd/-	Sd/-
(S.S. VISWANETHRA RAVI)	**(INTURI RAMA RAO)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

पुणे Pune; दिनांक Dated : 17th May, 2022
Sujeet
आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to:

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. The CIT (DRP-3), Mumbai-1, CIT (DRP-3), Mumbai-2, CIT (DRP-3), Mumbai-3,
4. DR, ITAT, 'C' Bench, Pune
5. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune