आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ,L,मुंबई ।

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "L", MUMBAI

श्री अमित शुक्ला, न्यायिक सदस्य **एवं**

श्री अश्वनी तनेजा, लेखा सदस्य**,** के समक्ष

Before Shri Amit Shukla, Judicial Member, and
Shri Ashwani Taneja, Accountant Member

ITA No.2763/Mum/2012
Assessment Year: 2008-09
&
ITA No.5766/Mum/2012
Assessment Year: 2009-10
&
ITA No.2099/Mum/2014
Assessment Year: 2010-11

M/s. TTI Team Telecom International Ltd. C/o. Sudit K.Parekh & Co. Ballard House, 2nd Floor, Adi Marzban Path, Ballard Pier, Fort, Mumbai-400001	**बनाम**/ Vs.	ADIT (IT)-2(2) R.No.116, 1st Fl. Scindia House, Ballard Pier, Mumbai-38
(Appellant)		(Respondent)
P.A. No.AACCT5300M		

Appellant by	Shri Vijay Mehta & Anuj Kisnadwala (AR)
Revenue by	Shri Jasbir S. Chauhan (CIT-DR)
सुनवाई की तारीख**/Date of Hearing:**	**01/11/2016**
आदेश की तारीख /**Date of Order:**	**30/11/2016**

आदेश / O R D E R

Per Ashwani Taneja (Accountant Member):

These appeals pertain to same assessee involving identical issue filed against separate orders passed by the Commissioner of Income Tax (Appeals) for different years. Therefore, these were heard together and being disposed by this common order.

2. During the course of hearing, arguments were made by Shri Vijay Mehta & Anuj Kisnadwala, Authorised Representatives (AR) on behalf of the Assessee and by Shri Jasbir S. Chauhan, Departmental Representative (CIT-DR) on behalf of the Revenue.

First we shall take assessee's appeal in ITA No.2763/Mum/2012 for A.Y. 2008-09 filed on the following grounds:

> ***"I . Ground No. I - Taxability of Software Supply as Royalty instead of Business Income.***
>
> *1.1 On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in confirming the action of the learned Assessing Officer of disregarding the appellants submission and in holding that the consideration for the supply of software be taxed @ 10% by treating it as royalty payment, within the meaning of section 9(1)(vi) of Income Tax Act 1961 and Article 12 of Double Taxation Avoidance Agreement (DTAA) between India & Israel.*
>
> *1.2. Without prejudice to the above, the appellant contends that even if the consideration received for the supply of software are treated as Royalty under the Act, the same cannot be treated as Royalty within the meaning of Article 12 of DTAA between India & Israel.*
>
> *1.3. The appellant contends that the income from software supply is in the nature of Business Income and in the absence of the appellant constituting Permanent*

Establishment (PE) in India in respect of such income; it is not taxable in India.

1.4. Without Prejudice to the above, the appellant contends that even if such income is to be regarded as taxable in India the same would be taxable only in the year of receipt as per Article 12(2) read with Article 12(1) and 12(3) of the DTAA.

1.5. On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in not following the favorable decisions of the Honorable Tribunal in the appellant's own case for A.Y. 2003-04 and A.Y. 2006-07 by holding that new facts have come to light during the year under consideration. In doing so, the learned CIT(A) has failed to appreciate that the facts before the learned CIT(A) are same as the facts before the Honorable Tribunal in the earlier years.

1.6. On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in holding that the appellant has not supplied the software to known client in overseas market disregarding the submission made by the appellant in this regard.

1.7. In view of the above, the Appellant respectfully prays that the consideration received by the Appellant from supply of software be treated as Business income and held to be not taxable in India in absence of the Appellant's PE in India.

II. Ground No.** II - **Indian subsidiary Considered as PE of the Appellant

2.1. On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in confirming the action of the learned Assessing Officer of holding TTI Team Telecom Software Pvt. Ltd. ('TTI India') to be a dependent agent PE of the appellant company in India without appreciating the fact that the provisions of the DTAA are not fulfilled.

2.2. On the facts and in the circumstances of the case, the learned CIT(A) has erred confirming the action of the learned Assessing Officer of holding the agreements between the appellant and Reliance Communication Limited (RCL); agreement between RCL and TTI India and agreement between TTI India and the appellant to be

interconnected without appreciating the fact that the same are independent in nature and are entered into at different dates and on principal to principal basis.

2.3. The appellant contends that on facts the learned CIT(A) has erred in wrongly interpreting the facts and agreements and drawn erroneous conclusion.

2.4. Without prejudice to the above, the appellant further contends that learned CIT(A) has erred in applying the ruling of the Delhi High Court in case of Rolls Royce PLC to the appellants case and holding that TTI India constitutes a dependent agent PE of the appellant. The appellant contends that the facts of the Appellant's case are not identical to Rolls Royce PLC and hence TTI India does not constitute dependent agent PE of the appellant company.

2.5. In view of the above, the Appellant respectfully prays that TTI India be held to not constitute the Appellants PE in India.

III. Ground No.** III - **Reimbursement of Expenses considered as Fees for Technical Services (FTS) taxable as Business Income consequent to holding that Indian Subsidiary is a PE of the Appellant.

3.1. On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in confirming the action of the learned Assessing Officer of holding the reimbursement of expenses as FTS under Article 13 of India - Israel DTAA.

3.2. Without prejudice to the above, the appellant contends that even if the reimbursements are treated as FTS under the Act, the same cannot be treated as FTS within the meaning of Article 13 of the India - Israel DTAA read with Protocol to the India-Israel DTAA and Article 12 of India-Canada DTAA, since such reimbursements neither make available technical knowledge, experience, skill, etc nor consist of the development and transfer of a technical plan or a technical design.

3.3. Without prejudice to the above, the learned CIT(A) has further erred in confirming the action of the learned Assessing Officer of holding that these payments would be considered as FTS under Article 13 of India - Israel DTAA

and consequently, TTI India being PE of the appellant in India, payment would be considered as Business income under Article 7 read with Article 13(4) of India - Israel DTAA and taxed @ 42.23%.

3.4. Without prejudice to the above, the appellant contends that even if the said amount is taxable in India as Business Profit then the executive and general administrative expenses incurred for earning this income is to be allowed as a deduction in arriving at the taxable income.

3.5. The appellant contends that learned CIT(A) has allowed deduction of traveling expenses of INR 73,35,088 and not salary expenses of INR 81,19,009 and once the salary expenses of INR 81,19,009 are allowed as deduction the income will be NIL and hence no tax liability.

3.6. In view of the above, the Appellant respectfully prays that the consideration received from TTI India by the Appellant be treated as reimbursement of expenses and not FTS.

IV. Ground No. IV - Incorrect addition of income of earlier years

4.1. On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in directing the learned Assessing Officer to verify the taxability of the reimbursement of expenses, pertaining to F.Y. 2003-04 & 2005-06 received in the year under consideration, as taxable in India as FTS on cash basis, disregarding the submission made to the CIT(A) in this regard.

4.2. The learned CIT(A) has disregarded the fact that these amounts have already been held as taxable on accrual basis in the course of the assessment proceedings in the respective years and subsequently deleted in the appeal.

4.3. In view of the above, the Appellant respectfully prays that the double taxation of the reimbursement of expenses, pertaining to F.Y. 2003-04 & 2005-06, in the year under consideration be deleted.

V. Ground No. V - No credit of tax deducted at source

5.1. On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in directing the learned Assessing Officer to verify the credit for the taxes deducted on the amounts received towards supply

of software & reimbursement of expenses while computing the tax liability, disregarding the submission made to the CIT(A) in this regard.

5.2. It is submitted by the appellant that while computing the total liability of the assessment year in which the income is sought to be taxed u/s 199, credit for the taxes deducted have to be given.

5.3.In view of the above, the Appellant respectfully prays that the credit for the taxes deducted on the amounts received towards supply of software & reimbursement of expenses be granted in the year under consideration.

VI. Ground No. VI - Levy of interest under Section 234B

6.1. On the facts and circumstances of the case, the learned CIT(A) has erred in law and in fact, in holding that levy of interest under section 234B of the Act is consequential to the grant of tax credit, disregarding the fact that the Appellant is a non-resident Appellant and its entire revenues/ receipts are subject to tax withholding in India under section 195 of the Act and the Appellant is not liable to pay advance tax in respect of such revenues.

6.2. The Appellant respectfully submits that, as per the provisions of the Act, the interest under section 234B of the Act is not leviable and the learned CIT(A) be directed to delete the interest levied under section 234B."

3. During the course of hearing, Ld. Counsel of the assessee did not press Ground No.4 & 5 and therefore these are dismissed as not pressed.

4. Ground No.1: It was stated by the Ld. Counsel during course of hearing that only Ground No.1.1 is the effective ground and others sub grounds are supporting arguments only. In these grounds the assessee has challenged the action of Ld. CIT(A) in confirming the action of AO in holding that the consideration for supply of software should be taxed @ 10% by treating it as payment of 'royalty' within the meaning of section

9(1)(vi) of the Act, as well as Article 12 of Double Taxation Avoidance Agreement between India & Israel.

4.1. During the course of hearing, it was argued by the Ld. Counsel at the outset that the issue involved in this case is percolating down from the assessment year 2003-04 onwards, and this issue has already been decided in favour of the assessee by the Tribunal in assessee's own case in A.Ys. 2003-04, 2005-06, 2006-07 & 2007-08 and he placed before us detailed orders passed by the Tribunal in A.Yrs. 2003-04 & 2006-07 and submitted that the issue stands covered and Ld. CIT(A) has grossly erred in refusing to follow the judgment of the Tribunal in assessee's own case for the earlier years despite the fact that there was no change in material facts, and he requested the bench to follow the orders of the earlier years.

4.2. Per contra, Ld. DR submitted that the amended agreement was passed during the year under consideration bringing an amendment to the base agreement which was passed in the period relevant to A.Y. 2003-04 and further there has been judgments from Hon'ble Karnataka High Court in the case of CIT v. Samsung Electronics Co. Ltd. 345 ITR 494 and in the case of CIT v. Synopsis International Old Ltd. 212 taxman 454 which are against the assessee on this issue, therefore, Ld. CIT(A) has rightly refused to follow the earlier decisions of the Tribunal.

4.3. In rejoinder, the Ld. Counsel submitted that the base agreement remained the same, and the amendment agreement was only to accommodate up-gradation in mobile technology,

but other material terms and conditions remained the same. Further, there has been positive legal development in favour of the assessee on this issue from various other High Courts. In his support, he relied upon the judgment of Hon'ble Delhi High Court in the case of DIT v. New Skies Satellite BV 383 ITR 114 (Del). It was requested that under these circumstances, the Hon'ble Bench should follow the decision of the Tribunal rendered in assessee's own case in all the earlier years.

4.4. Under these circumstances, before deciding this issue independently on merits, we shall examine the primary aspect that whether judgments delivered by the Tribunal in assessee's own case in earlier years were passed in identical facts and legal position as compared to the year before us. If the answer to this question is yes, then, we shall like to respectfully follow the decision of the Tribunal rendered in earlier years in assessee's own case. If the answer to that question would be no, only then an effort could be made to decide the issue raised before us independently on its merits. We had also expressed our view in the open court during the course of hearing. Thus, with this understanding, we proceed to analyse the facts as have been brought out by both the parties before us.

4.5. The facts as culled out form the assessment order reveals that the assessee company i.e. TTI Team Telecom International Ltd. is a company incorporated in Israel and engaged in the business of supply of software. Further facts noted by AO in the assessment order are as under:

> *"During the previous year relevant to the Assessment Year 2003-04, the assessee company had entered into*

an agreement for supply of software with Reliance Infocomm Ltd. (RIL), now merged with Reliance Communications Ltd (Reliance). During the previous year relevant to AY 2008-09, the assessee company had entered into another agreement on 17th Sep. 2007 wherein the scope was extended for supply of additional software. The consideration for this was USD 1,810,433. Out of the said amount invoices to the extent of USI) 1,084839 was raised by the assessee company.

During the previous year relevant to the assessment year under consideration the assessee company was also engaged in rendering technical/consultancy services through its employee outside India to TTI Team Telecom Software Private Ltd., it's wholly Owned Subsidiary. The assessee contends that it had incurred a sum of Rs.81 lacs towards cost of its' employees and Rs: 73 lacs towards travelling expenses which has been claimed back as reimbursement. The assessee has not offered to tax the said amount. Also it maintains that refund of the tax deducted (Rs.15.73 lacs) will be claimed in the year of receipt.

On similar stand taken in past years the assessee has claimed refund of TDS on the alleged reimbursement of Rs 1.72 crores pertaining to FY 2003-04, 2004-05 and 2005-06.

6. In the earlier years the receipts of the assessee on account of supply of software was treated as Royalty income by the Assessing Officer in AY 2003-04 and AY 2006-07. The assessee maintains that the supply of software is like supply of other product and not assessable to tax in India. This view of the assessee was accepted by the Hon'ble ITAT in AY 2003-04 and CIT(A) in AY 2006-07."

4.6. Having noted this background, it was observed by the AO that there were some new facts in the year before us. The analysis made by the AO of the alleged new facts and implication of the same for deciding these issues as noted by AO in the assessment order are reproduced as under:

"7. Certain new facts have come to light during the course of assessment proceedings for the current year

i.e. Al 2008-09 which were not presented before the assessing officer in the past years. Based on these facts the understanding of the case needs revision and the findings of the Hon'ble ITAT and Ld. CIT(A) for the earlier years will not apply.

a. *The assessee company entered into a Software Supply & License Agreement (SSLA) with Reliance Infocom Ltd. (Reliance/RJL) on 27.09.2002 for supply of software, acceptance testing, installation and arrangements for annual maintenance (Annexure A)*
b. *In the year under consideration an amendment to the Software Supply & License Agreement (SSLA) was made on 17.09.2007.*
c. *The agreement also envisaged transfer of Source Code of the software to be transferred to Reliance through an escrow.*
d. *The assessee after entering into the said agreement with RIL set up an Indian subsidiary (rri India) on 20.02.2003 and entered into a service agreement with the same on 23.02.2003. (Annexure B)*
e. *Subsequently TTI India entered into an agreement with RIL on 28.05.2003 for providing services such as installation, acceptance testing (UAT), commissioning and annual maintenance, which otherwise, was an obligation of the assessee. (Annexure C)*
f. *The assessee was also a guarantor in the service contract between ITI India and RIL (Clause 18 and Annexure F of agreement dated 28.05.2003 - Annexure B)*
g. *TTI India is the only company in the country to with which the assessee has entered into a service contract and which is capable of providing services with respect to telecom software purchased by RIL.*
h. *The only source of revenue for 'ITI India is the service contract with RIL which has been guaranteed by the assessee.*

REVENUE'S STAND

8. Based on the new facts found during the course of assessment proceedings, most of which were not brought to the knowledge of the Assessing Officer in the earlier

years, it is the case of Revenue that the Indian subsidiary is a dependent agent of the assessee company. The Indian subsidiary of the assessee has undertaken the obligations which were, otherwise, a contractual responsibility of the assessee. The contract between ITI India and RIL was not done on a principal to principal basis. TI'I India, in concluding the contract with R1L, acted as an agent and representative of the assessee company. Therefore TTI India is but a PE of the assessee.

9. It is also contested by the Revenue that since source code of the software was transferred to the buyer, as a necessary condition for the said supply of software, there is a definite transfer of proprietary material from the assessee to the client. The specialized product was developed in tandem with the requirements and feedback of the client (Reliance) as is also illustrated by the UAT process. The software supplied by the assessee was not a 'canned software' (not specifically created for a particular consumer). It does not have a market, except a select few CDMA telecom service provider all over the world. There are no known clients of the same software, either in India or outside. All the above facts on to strengthen Revenue's claim that the receipt for supply of software through the SSLA and its subsequent amendment in the previous year corresponding to the assessment year under consideration in a receipts in the nature of royalty."

4.7. Thereafter, Ld. AO made analysis of various clauses of the agreement and took note of a clause with regard to transfer of Source Code of the software by the assessee to M/s. Reliance Communication Ltd. (i.e. the buyer) and held that the amount received by the assessee from Reliance amounted to payment for 'royalty' under the provisions of Act as well as Article 12 of the Indo Israel DTAA, by observing, *inter alia,* as under:

"38. The Income Tax act, 1961 recognizes royalty in Explanation 2 to section 9(1)(vi) as transfer of all or any rights (including the granting of a license). The fact that license of computer programs supplied along with computer under specified schemes of Government of India

are excluded from the definition of Royalty further establishes that other software licenses are included in royalty for the purposes of section 9.

39. Reliance did not only have rights over the machine code i.e. the binary format, but also the source code developed by the assessee. The contention of the assessee that it has purchased an off-the-shelf product is conclusively proved to be false. Source code is the intellectual property generated by the assessee. It is a matter of public knowledge that only machine code (or executable copy) is transferred/sold for use of software. Such copy can never be read, modified or understood in any manner by the end user. Executable copies of computer application are like monolithic black boxes which can be put to use but cannot be understood or modified upon in any way. The fact that assessee not only partakes with an executable copy but also partakes away with the source code (which is the very creation of programmers & developers) clearly establishes that the intellectual property of the software so developed had also been explicitly transferred to Reliance through the agreement.

40. Interestingly it may be noted that unlike clause 2.1 of the SSLA, which speaks of the transfer of software being 'royalty-free' the transfer of source code is not stated to be royalty free. This alone established that the transfer of source code cannot be said to be a 'royalty-free' affair.

41. Transfer of source code would automatically imply transfer of executable program. The converse is however not true. Given the source code the assessee is merely required to compile the same into executable programs with publically available specialized computer programs known as 'compilers'. Hence source code is intrinsically much more valuable than the binary executable generated from the same.

42. The sale consideration, as recorded in the SSLA, consists of consideration for transfer of intellectual property, copy righted material, conduction of UAT, successful installation and assurance of annual maintenance. The consideration cannot be divided into two parts - one part given for the source code and the other for

the executable. The one who has the source code can always generate the executable machine code at will. Not much value is added by transfer of binary executable once the source code has already been transferred. The assessee has misled the department by claiming the same to be sale consideration in lieu of transfer of goods. With the source code and machine code in hand the assessee is required to install the same and run the User Acceptance Tests before it can be put to commercial use.

43. In view of the above facts it is held that where the assessee has developed and supplied software, along with the source code, to the client the consideration received is in the nature of royalty and not for sale of goods. This is especially true where the software has no available market or another known client in the country or elsewhere.

44. The income from the purported sale of good has been treated by the Assessing Officer in the past as royalty income in AY 2003-04 onwards. There have been new findings-namely the terms & conditions of the SSLA, the Escrow agreement for transfer of Source Code, and the agreement between Reliance & Indian subsidiary TTI India on the guarantee of the assessee. These new findings clearly explicate the nature of payment received by the assessee. It is a mischief of highest degree on the part of the assessee to color the payments received for supply of software and its proprietary Source Code as 'sale of goods'.

45. It is conclusive that what has been portrayed as an innocuous sale of goods is in fact a transfer of intellectual property and squarely covered as royalty. The same is taxable under Article 12 of the DTAA at the prescribed rate of 10%. Penalty proceedings under section 271(1)(c) of the Income Tax Act, 1961 are initiated separately for furnishing inaccurate particulars of income."

4.8. Being aggrieved, the assessee filed an appeal before the Ld. CIT(A) and submitted in detail that there was no material change in fact or legal position. It was also argued that Ld. CIT(A) was bound by the decision of the Tribunal in assessee's own case of earlier years. But, Ld. CIT(A) endorsed the

observations of the AO relying upon the judgment of Hon'ble Karnataka High Court in the case of Samsung Electronics Co. Ltd. (supra). After analyzing various clauses of the agreements and various judgments available before him at the time of passing of the order, he independently analysed the issue and chose not to follow the order of the Tribunal in assessee's own case in earlier years and decided this issue raised by the assessee independently on facts. The crux of the reasoning given by the Ld. CIT(A) was that the terms of the agreement entered into by the assessee with Reliance indicated that right in copyright of the software was transferred by the assessee to Reliance and therefore, payment for the same fell into the definition of 'royalty' as envisaged under the Act as well as Treaty.

4.9. Still being aggrieved, the assessee filed before the Tribunal. During the course of hearing before us, Ld. Counsel of the assessee submitted that there was no change in facts. In support of his arguments, he drew our attention on the amended agreement dated 17th September, 2007 and compared it with original agreement dated 27th September, 2002 to demonstrate that there was no material change in the terms and conditions and in substance, the agreement remains the same., It was further submitted that the lower authorities were influenced mainly by the clause related to transfer of Source Code. He submitted that the said clause suggested for entering into another Escrow Agreement for transfer of source code by the assessee to Reliance in certain given circumstances. It was also submitted that Source Code

was never given to escrow agent. Our attention was drawn on page no.156 which is a copy of the declaration submitted by the assessee wherein it has been affirmed that the assessee never entered into any escrow agreement and thus, the Source Code of the software under question was never deposited with the agent for the benefit of reliance. Our attention was drawn on copies of the judgments of the Tribunal passed in assessee's own case for A.Y. 2003-04 and 2006-07 wherein same agreement has been considered in detail by the Tribunal before issuing decision in favour of the assessee. He also relied upon the decision of Mumbai Bench of the Tribunal in the case of DDIT v. Reliance Industries Ltd. (order dated 18.05.2016 in ITA No.1980/Mum/2008) wherein similar issue has been decided in favour of the assessee.

4.10. Per contra, Ld. CIT-DR submitted in detail that lower authorities have not followed the decisions of earlier year for the reasons mentioned in detail in their orders by the AO as well as Ld. CIT(A). He submitted that in this case material change in fact was that the new agreement contained clause with regard to transfer of source code. It was submitted that since source code was agreed to be transferred, therefore it is clear case of transfer of copyright. He submitted at the conclusion of the hearing a brief note summarising his submissions as under:

> *"1. On the issue whether the Amendments/Explanations inserted in the Income Tax Act can be read into the DTAA or not, in my most respectful submissions, the Bombay high court decision in the case of CIT v. Siemens Aktiongesellschaft, 310 ITR 320) (Born HC) rendered*

in the facts peculiar to that case has not been appreciated in the proper perspective in various decisions of the Delhi high Court and Mumbai Tribunal relied upon by the assessee. While appreciating the Siemens AG, supra, the following facts may kindly be kept in mind:

i. The exact question of law before the Hon'ble High court was NOT that whether Amendments in the I.T. Act can be read into the DTAA or not and therefore, the Hon'ble High Court can not be said to have answered it as claimed.

ii. In the said case, old DTAA (1960) between India and Germany was under consideration in which "Royalty" had not been defined.(Para 15).

iii. "Royalty" under the I.T. Act has been defined in Explanation 2 to S.9(1)(vi), inserted by the Finance Act 1976 w.e.f 01-06-1976.

iv. The agreements under consideration in the case of Siemens AG, supra which gave rise to the impugned income were entered into before 01-06-1976 when there was no definition of "Royalty" both under the I.T. Act and under the DTAA. The A.Y. under consideration in Siemens AG, supra was A.Y.1979-80.

v. Section 9(1) (vi) upto and including Explanation 2 are substantive provisions as inserted by Finance Act 1976 and thereafter, Explanation 3 to 6 and explanation below S.9(2) are only clarificatory provisions inserted subsequently.

Vi. For the purpose of the present appeal, the definition of "royalty" as applicable has been defined both under the DTAA as well as I.T. Act and the issue is regarding the application of Explanations (clarificatory provisions) inserted in the Act into the DTAA by virtue of article 3(2) of the DTAA.

vii. The said decision in the case of Siemens AG, supra was rendered in 2008 when the only clarificatory provision by way of Explanation in section 9 was the Explanation below S.9(2) inserted by the Finance Act 2007 doing away with the requirement of PE for Royalty etc.

viii. In the case of Siemens AG, supra, the basic question before the Hon'ble HC was whether the

definition of "Royalty" as per Explanation 2 to S.9 inserted by the Finance Act 1976 w.e.f. 01-06-1976 could be imported into the old DTAA (1960) when at the relevant point of time of application of treaty, " Royalty" was not defined both under the then DTAA and the I.T. Act and what was the character of payment under the DTAA.

ix. It is not disputed by the Revenue that the provisions of DTAA, if beneficial to the assesse shall prevail over the provisions of the I.T. Act.

2.In my respectful submissions, a perusal of Bombay HC decision in the case of Siemens AG, supra would reveal that:

i. In the operational part (paras 27 to 31) of the judgment in the case of Siemens AG, supra, nowhere it is mentioned that amendments in the I.T. Act can not be read into DTAA.

ii. The nature of services rendered in the said case were found to be not Royalty under the DTAA though found to be Royalty under the Act (post 01-06-1976). Those services were found to fall under the expression "commercial or industrial profits" as per the then DTAA (Old) and therefore could not be taxed in India in absence of PE. Thus, the provisions of DTAA being more beneficial to the assesse were preferred over the provisions of I.T. Act.

iii. In paras 13,22 and 28 of its order, the Hon'ble HC has approved the insertion of Explanation below S.9(2) inserted by the Finance Act 2007, thereby implying that the Clarificatory Explanations could be read into modern DTAAs.

iv. Mumbai Tribunal In the case of Viacom 18 Media (P.) Ltd.(2014) 162 TTJ 336 (Mum) has explained the import of Bombay HC decision in right perspective in paras 16 and 17 of its order while rejecting the assessee's argument that the HC has held that amendments in the Act can not be read into DTAAs.

v. The Bombay HC has approved ambulatory approach (para 22) to interpretation of treaties against Static approach adopted by the Delhi HC. Klaus Vogel in commentary has also advocated ambulatory approach."

4.11. Finally, Ld. CIT-DR prayed that in view of the above submissions orders passed by the Tribunal in earlier years should not be followed.

4.12. In rejoinder, Ld. Counsel of the assessee submitted that Revenue has not properly appreciated the crucial facts here. He took us through the supplementary agreement which was entered during the relevant period to show that intention of providing the source code by the assessee to Reliance was **not** to transfer the full rights in the software. But, it was meant only to protect the buyer in case of any disaster management so as to enable it to do requisite repairs. It was further submitted that in any case, 'object code' was not transferred to Reliance. Thus, even if some modification was considered necessary by Reliance in the source code under any given circumstances, the Reliance was bound to approach the assessee for the purpose of making requisite amendments in the 'object code'. He also placed before us copy of Indo Malaysia Treaty to show that Article 12 of the Treaty clearly make mention of the words "computer software programme" which were specifically excluded subsequently by notification dated 29.01.2013. He thus, submitted that since the Indo-Malaysia treaty does not make a mention of any such words, it clearly shows the intention of both the parties that when the treaty was drafted 'computer software programme' was not intended to be included. He again drew our attention to the declaration showing that source code was actually never provided by the assessee to Reliance and submitted that this vital fact has not been contradicted by any authority so far or

even by Ld. CIT-DR during the course of hearing before the Tribunal. He prayed reliance on the following judgments:

i. DIT v. Infrasoft Ltd. 264 CTR 329(Del)

ii. DIT v. New skies Satellite 382 ITR 114 (Del)

iii. ADIT v. Baan Global BV (ITA No. 7048/Mum/2010 dated 13.06.2016.

He requested for following the order of the Tribunal passed in the earlier years in view of facts of this case and in view of the judgment of Hon'ble Supreme Court in the case of Radhasoami Satsang v. Commissioner of Income-tax 193 ITR 321(SC).

4.13. We have gone through the orders passed by the lower authorities as well as submissions made before us by both the sides and also judgment of the Tribunal passed in assessee's own case in the earlier years. The Only issue to be decided by us is whether amount received by the assessee on account of supply of software to M/s. Reliance Infocom Ltd.(subsequently name changed to Reliance Communication Ltd.) constituted payment of 'royalty' within the meaning of section 9(1)(vi) of the Act and Article 12 of DTAA between India and Israel. It is noted by us that as discussed in detail above, the impugned amounts have been received in pursuance to an agreement between the assessee and Reliance dated 27th September, 2002 (entered into the period relevant to A.Y. 2003-04). The AO has contended in the order that an amendment has been made in the said agreement vide supplementary agreement dated 17th September 2007, which has brought out a material change and that is why decision given by the Tribunal in earlier orders needs to be deviated. We have analysed this

contention very carefully. It is noted by us that agreement dated 27th September 2002 has been analysed by the Tribunal twice in two separate orders i.e. for A.Y. 2003-04 and A.Y. 2006-07 and detailed orders were passed wherein it was observed, after analyzing various clauses of the agreement and position of law, that the impugned amount did not constitute 'royalty' in the hands of the assessee. Under these circumstances, we shall not repeat the exercise done by the coordinate bench in assessee's own case, nor shall we like to modify the conclusion drawn by the coordinate bench as far as analysis of the original agreement is concerned. We shall therefore analyse the nature and scope of amendment agreement dated 17th September 2007 in the light of some of the relevant clauses of the original agreement dated 27th September 2002, which are reproduced hereunder:

> *"License Grant.*
>
> *a) TTI hereby grants to Reliance and its affiliates (and to any third party to whom Reliance or its Affiliates have contracted to operate the Wireless Reliance Network on their behalf within the territory of India and only for that purpose (and to the extent of the same under a limited Lincense as defined herein) a perpetual irrevocable, non-exclusive, royalty free, worldwide license to install, use and operate and copy the software and the documentation licensed under any approved Purchase order in accordance with the terms and conditions contained in Wireless Reliance network within India. Agreement solely for the implementation operation, management and maintenance of the license does not give Reliance title to the software, or to any trademark or copyright in them (TTI will be the owner or the license of the intellectual property Rights in the Software). Reliance may only use the software in machine readable form.*

Reliance shall not (i) reverse engineer, decompile or disassemble any part of the Software without the express prior written consent of TTI; (ii) Reliance shall not remover, obscure or deface any proprietary legend relating to the software without TTIs prior written consent, and further, shall not delete any and all such proprietary legends for such copies as are made. The software is to be locate and used at the designated site/s specified in the purchase order only.

(b) The aforementioned licenses set forth above are hereinafter be referred to as the "Software Licenses". Such software Licenses shall not be sold transferred, assigned, sublicensed by or used by outsourcees of Reliance without TTIs prior written consent except with respect to (i) the sale of the wireless Reliance network (or any relevant component thereof) (ii) the financing of the wireless Reliance Network (or any component thereof) or (iii) The outsourcing by Reliance of any operating or maintenance functions related to the wireless Reliance Network, under the terms and conditions of the limited license as specified herein; or (iv) the transfer or assignment by Reliance of the Software Licenses to a Reliance Affiliate (or vice versa) in conjunction with a transfer of a portion of the wireless Reliance network to be operated in the territory of India only, provided that in each such case specified in (i)-(iv) above, such transferee, assignee, or outsourcee agrees in writing to abide by all the terms and conditions set forth in the software Licenses and the TTI is informed of the same in writing by Reliance and provided further that the rights transferred, assigned or granted to outsources, as the case may be shall be those reasonably necessary, to fulfill the commercial purposes of such transaction.

(c) Notwithstanding any statement in this Agreement to the contrary, Reliance may permit use under the limited license of the Software (or any part thereof) under the terms of any agreement between reliance and any third party (Contractor Agreement) including without limitation, consultant programmers, system integrators, system maintainers, outsourcing or disaster recovery or other service suppliers (Authorized Subcontractors) (Reliance shall be entitled to grant such Authorized subcontractors a limited sub license to use the software solely to provide

services to Reliance under such contractor agreement in respect of the software (the limited License). The limited License expressly excludes any right for the Authorized Sub-contractors. Such limited License shall terminate on termination of the contractor Agreement (or if later, on termination of any obligation to provide services consequent upon termination of such contractor agreement provided that (i) such authorized Subcontractor executes a non disclosure agreement in between itself Reliance and TTI; and (iii) Reliance agrees to be responsible for any breach of the non disclosure agreement by such Authorized Subcontractor."

4.14. Perusal of the aforesaid clauses clearly reveals that the assessee would continue to remain owner of the intellectual property rights embedded in the software and Reliance would be able to use software only in machine readable form. Reliance was not permitted to reverse engineer, alter, software programme or tinker with proprietary legends of the said software. The software was permitted to be located and used only at the sites designated in the purchase order issued by Reliance. Further, such software was not permitted to be freely sold by Reliance except for strict usages for Wireless Reliance Network only, as permitted in the agreement. The AO noted that in the said agreement, there were certain clauses with regard to transfer of source code by the assessee to Reliance. It is noted by us that section 11 of the said agreement deals with escrow of source code which is reproduced hereunder for ready reference and further discussion:

"Section 11: Escrow of Source Code
11.1. Escrow, concurrent with the execution or this Agreement, the parties will duly execute and deliver the Escrow Agreement, and TTI, upon Acceptance of the software, will deliver to the Escrow Agent a complete master, reproducible copy of all source code relating to the

software. TTI promptly will update the source code in escrow to reflect all revisions, modifications and enhancements to the software that are provided to Reliance hereunder. In the event that the Escrow Agreement has not been executed and the source code delivered to Escrow Agent within thirty (30) days after acceptance of the Software, then until such events have occurred Reliance shall be entitle to terminative this agreement by written notice provided that Reliance has given written notice and details of such breach to TTI and has advised TTI of its intention to terminate and TTI has failed to deliver the Source Code to the Escrow Agent within thirty (30) days from Reliance's notice thereof no payment obligation with respect to such software or nay support services (and if Reliance has previously paid any sums in respect thereof, TTI will promptly refund all such sums to Reliance).

11.2. Release of Source Code. Upon occurrence of the conditions described in the Escrow Agreement (each, a "Release condition") the Source Code placed in escrow will be delivered to Reliance for us, copying in connection with Reliance's use, maintenance and support of the software in accordance with its rights under this Agreement.

11.3 License; Ownership. TTI hereby grants and agrees to grant to Reliance a perpetual, non-exclusive, worldwide license to use, copy, and create derivative works the purposes specified in Section 11.2 (the Derivative Works"). Reliance will be the exclusive owner of any modifications to or Derivative Works of the Source Code created by or for Reliance under this terms and circumstances Section 11."

4.15. It was contended by the Ld. Counsel that the lower authorities mislead themselves by making incomplete reading of the said clause with regard to source code. It was contended by Ld. Counsel that there was no absolute transfer of source code of the assessee to Reliance. In fact, source code was meant to be provided for the limited purpose of enabling Reliance for maintenance support of the software in accordance with its rights granted under the said agreement. Thus, source code was not intended to be transferred so as to

transfer full-fledged right embedded in the software by the assessee to Reliance. It has been further brought to our notice that in any case, no Escrow Agreement has been entered into between the assessee and Reliance and therefore there was no question of providing the source code by the assessee to Reliance. It was further submitted that in any case, aforesaid agreement has been discussed and analysed in detail by the Tribunal in the order passed for A.Y. 2003-04 and 2006-07 and thereafter only decision has been taken which should be followed by us. We agree with the argument of Ld. Counsel that as far as this agreement is concerned, we are bound to respectfully follow the order of the Tribunal on this issue.

4.16. With regard to supplementary amendment agreement dated 17th September 2007, it is noted by us with the assistance of the parties that this agreement was entered into by the parties mainly for the purpose of widening the scope of Wireless Reliance Network for which software was provided by the assessee to Reliance. The original agreement permitted usages of software for the Wireless Reliance network for the mobiles phones using CDMA technology. But, subsequently mobile phones based on GSM technology were also included under the aforesaid amendment agreement. Thus, in brief, main objective of the aforesaid amendment agreement was to include mobile phones using new technology.

4.17. Thus, this supplementary agreement has been entered into in continuation with the earlier agreement dated 27th September 2002 for purchase of additional software by Reliance from the assessee to be used in technologically

updated Wireless Reliance Network (i.e. CDMA or GSM etc.). Thus, vide this supplementary agreement, though scope of usages of the software for relatively wider range of products has been increased, but all other terms and conditions remained same. We do not find any change much less any material change in the terms and conditions of the original agreement which may have any bearing on the decision which has been taken by the Tribunal in earlier years. One of the main objections which had been prominently discussed by the lower authorities is with respect to transfer of source code by the assessee to Reliance. It is noted by us that firstly, as discussed above, the source code was intended to be provided by the assessee to Reliance only for the limited purpose of enabling it maintenance and support of software in accordance with its rights under the said agreement. Secondly, in any case, it has been informed that the aforesaid Escrow Agreement was never entered into and therefore, there was no question of providing any source code by the assessee to Reliance in this regard. The assessee had submitted on record a copy of declaration which reads as under:

"*Declaration*

To whomsoever it may concern

1. Exhibit C of the Original Software Supply and License Agreement (SSLA) dated 27th September 2002 executed between TTI Team Telecom International Ltd. (TTI) and Reliance Infocomm Ltd. (now known as Reliance Communications Ltd. (RCL) has never been executed.

2. The original SSLA dated 27th September, 2002 between TTI and RCL contained a clause for the transfer of source code to RCL in an escrow account. However, TTI and RCL did not enter any Escrow Agreement and the source code

of TTI's software was never deposited at RCL or with an escrow for the benefit of RCL.

For TTI Team Telecom International Limited

Eitan Naor

CEO"

4.18. These facts have not been disputed before us. Under these circumstances, the issue of source code becomes academic. Under these circumstances, we find that there is no change in facts which could have permitted or compelled us to deviate from decision of the Tribunal rendered in earlier years. Thus, under these circumstances, we are bound to respectfully follow orders of the Tribunal passed in earlier years. It is noted by us that the Tribunal has in its order for A.Y. 2006-07 in assessee's own case vide order dated 26.08.2011 in ITA No.3939/Mum/2010 analysed all the facts in detail and decided this issue in favour of the assessee, after analyzing provisions of the Act as well as provisions of Treaty at great length. Relevant part of the order is reproduced hereunder:

"13. *In view of the above discussions, as long as the assessee cannot be subjected to tax on the impugned receipts in terms of the provisions of Indo-Israel tax treaty, the assessee will not have tax liability in India. The provisions of the IT Act, 1961, cannot be put into service in such a situation, because, as we have noticed earlier, these provisions can apply only when they are more beneficial to the assessee vis-a-vis the provisions of the applicable tax treaty.*

14. *It is an admitted position that the assessee did not have any PE in India in terms of the provisions of art. 5 of the tax treaty, and, accordingly, the assessee cannot be held liable to be taxed in respect of business profits, under*

article 7, on supply of software in question. The case of the Revenue really rests on taxability under art. 12 which provides as follows:

"Royalties

1. Royalties arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, such royalties 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, the tax so charged shall not exceed 10 per cent of the gross amount of the royalties.

3. 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, trademark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience.

4. The provisions of paras 1 and 2 shall not apply if the beneficial owner of the royalties, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties arise, through a PE situated therein, or perform in that other State independent personal services from a fixed base situated therein, and the right or property in respect of which the royalties are paid is effectively connected with such PE or fixed base. In such case, the provisions of art. 7 or art. 15, as the case may be, shall apply.

5. Royalties shall be deemed to arise in a Contracting State 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, whether he is a resident of a Contracting State or not, has in a Contracting State a PE or a fixed base in connection with which the liability to pay the royalties was incurred, and such royalties are borne by such PE or fixed base, then such royalties shall be deemed to arise in the State in which the PE or fixed base is situated.

6. 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 the royalties, having

regard to the use, right or information 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 payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Convention."

15. *In terms of the provisions of art. 12(3) of the Indo-Israel tax treaty, royalty is defined, for the purposes of this tax treaty, as "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, trademark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience". The question then arises whether a payment for computer software cannot be a payment for use of or right to use of 'a copyright of literary, artistic or scientific work, including cinema photographic film', and, while examining this question, it is important to bear in mind the fact that there is a specific mention about the use "of" copyright. The only other clause in which payment for software could possibly fall is "consideration for use of, or right to use of, a "process". Let us examine these two aspects of the definition of 'royalty' under the India-Israel tax treaty.*

16. As regards the question whether the payment for software could be treated as payment for "use of, or the right to use, any copyright of literary, artistic or scientific work", we find that this issue directly came up for consideration of a Special Bench of this Tribunal in the case of Motorola Inc. (supra). That was a case in which the Special Bench had an occasion to decide whether payment for software amounts to 'royalty', for the purposes of India Sweden tax treaty [(1998) 229 ITR (St) 11] which incidentally is the same as in Indo-Israel tax treaty and which also defines royalty as "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, trademark, design or model, plan, secret formula or process, or for

information concerning industrial, commercial or scientific experience". The Special Bench, after a very erudite discussion on various facets of the issue before them, concluded that "we hold that the software supplied was a copyrighted article and not a copyright right, and the payment received by the assessee in respect of the software cannot, therefore, be considered as royalty either under the IT Act or the DTAA". Right now we are only concerned with the provisions of the tax treaty, and we have noticed that the provisions of tax treaty as before the Special Bench are exactly the same as before us in this case. The issue, therefore, as to whether payment for supply of software can be viewed as a payment for copyright or not is no longer res integra. The Special Bench has decided this issue in favour of the assessee, and the views so expressed by the Special Bench, being from a higher forum than this Division Bench, are binding on us. In any case, as the provisions of art. 12(3) specifically provide, what is liable to be treated as royalty is payment for "use of, or the right to use, any copyright of literary, artistic or scientific work", and the connotations of "use of copyright" of a work are distinct from the use of a copyrighted article. The meaning of "use of copyright of a work" cannot be treated as extending to "use of a copyrighted work" as well, as it would amount to doing clear violence to the words employed by the treaty. Copyright is one thing, and copyrighted article is quite another thing. To give a simple example, when a person is using a music compact disc, that person is using the copyrighted article, i.e. the product itself, and not the copyright in that product. As held by the Special Bench in Motorola's case (supra), the four rights which, if acquired by the transferee, constitute him the owner of a copyright right, and these rights are :

(i) The right to make copies of the computer programme for purposes of distribution to the public by sale or other transfer of ownership, or by rental, lease, or lending.

(ii) The right to prepare derivative computer programmes based upon the copyrighted computer programme.

(iii) The right to make a public performance of the computer programme.

(iv) The right to publicly display the computer programme.

17. *It is not even Revenue's case that any of these rights have been transferred by the assessee, on the facts of this case, and, for this reason, the payment for software cannot be treated as payment for use of copyright in the software. As we hold so, we may mention that in the case of Gracemac (supra), a contrary view has been taken but that conclusion is arrived at in the light of the provisions of cl. (v) in Expln. 2 to s. 9(1)(vi) which also covers consideration for "transfer of all or any rights (including the granting of a licence) in respect of any copyright, literary, artistic or scientific work" a provision which is clearly larger in scope than the provision of art. 12(3) of the Indo-Israel tax treaty. The word "of" between 'copyright' and 'literary, artistic or scientific work" is also missing in the statutory provision. The treaty provision that we are dealing with are thus certainly not in pari materia with this statutory provision, and, by the virtue of s. 90(2) of the Act, the provisions of India Israel tax treaty clearly override this statutory provision. In Gracemac decision (supra), the Co-ordinate Bench was of the view that the provisions of the applicable tax treaty and the IT Act are "identical"—a position which does not prevail in the situation before us. We, therefore, see no reasons to be guided by Gracemac decision (supra). The next issue that we need to consider is whether a payment for software can be said to be a payment for "process" as a computer program is nothing but a set of instruction lying in the passive state and this execution of instructions is 'a process' or 'a series of processes'. No doubt, in terms of the provisions of s. 2(ffc) of the Indian Copyright Act, 1957, a computer program, i.e. software, has been defined as "a set of instructions expressed in words, codes, schemes or in any other form, including a machine readable medium, capable of causing a computer to perform a particular task or achieve a particular result", but the moot question is as to what is that a customer pays for when he buys, or to put it in technical terms 'obtains licence to use' the software—for the process of executing the instructions in the software, or for the results achieved on account of use of the software. To draw an analogy, it is akin to a situation in which a person hires a vehicle, and the question could be as to what does he pay for—for the use*

of the technical know-how on the basis of which vehicle operates, or for the use of a product which carries passengers or goods from one place to another. The answer is obvious. When you pay for use of vehicle, you actually pay for a product which carries the passengers or goods from one place to another and not the technical know-how on the basis of which such a product operates. Same is the case with the software, when someone pays for the software, he actually pays for a product which gives certain results, and not the process of execution of instructions embedded therein. As a matter of fact, under standard terms and conditions for sale of software, the buyer of software is not even allowed to tinker with the process on the basis of which such software runs or to even work around the technical limitations of the software. In Asia Satellite Telecommunications Co. Ltd. vs. Dy. CIT (2003) 78 TTJ (Del) 489, a Co-ordinate Bench of this Tribunal did take the view that when an assessee pays for transponder hire, he actually pays for the process inasmuch as transponder amplifies and shifts the frequency of each signal, and, therefore, payment for use of transponder is in fact a payment for process liable to be treated as 'royalty' within meaning of that expression under Expln. 2 to s. 9(1)(vi) of the IT Act. However, when this decision came up for scrutiny of Hon'ble Delhi High Court, in the case reported as Asia Satellite Telecommunications Co. Ltd. vs. Director of IT (2011) 238 CTR (Del) 233 : (2011) 51 DTR (Del) 1 : (2011) 332 ITR 340 (Del), their Lordships, after a very erudite and detailed discussion, concluded that "we are unable to subscribe to the view taken by the Tribunal in the impugned judgment on the interpretation of s. 9(1)(vi) of the Act". It cannot, therefore, be open to us to approve the stand of the Revenue to the effect that the payment for software is de facto a payment for process. That is a hyper-technical approach totally divorced from the ground business realities. It is also important to bear in mind the fact that the expression 'process' appears immediately after, and in the company of, expressions "any patent, trademark, design or model, plan, secret formula or process". We find that these expressions are used together in the treaty and as it is well-settled, as noted by Maxwell in Interpretation

of Statutes and while elaborating on the principle of noscitur a sociis, that when two or more words which are susceptible to analogous meaning are used together they are deemed to be used in their cognate sense. They take, as it were, their colours from each other, the meaning of more general being restricted to a sense analogous to that of less general. This principle of interpretation of statutes, in our considered view, holds equally good for interpretation of a treaty provision. Explaining this principle in more general terms, a very distinguished former colleague of ours Hon'ble Shri M.K. Chaturvedi, had, in an article 'Interpretation of Taxing Statutes' (AIFTP Journal: Vol. 4 No. 7, July, 2002, at p. 7), put it in his inimitable words as follows :

"Law is not a brooding omnipotence in the sky. It is a pragmatic tool of the social order. The tenets of law being enacted on the basis of pragmatism. Similarly, the rules relating to interpretation are also based on commonsense approach. Suppose a man tells his wife to go out and buy bread, milk or anything else she needs, he will not normally be understood to include in the terms 'anything else she needs' a new car or an item of jewellery. The dictum of ejusdem generis refers to similar situation. It means of the same kind, class or nature. The rule is that when general words follow particular and specific words of the same nature, the general words must be confined to the things of same kind as specified. Noscitur a sociis is a broader version of the maxim ejusdem generis. A man may be known by the company he keeps and a word may be interpreted with reference to the accompanying words. Words derive colour from the surrounding words."

18. Viewed in this perspective, and taking note of lowest common factors in all the items covered by definition of the expression 'royalty' in art. 12(3), the 'process' has to be in the nature of know-how and not a product. In this view of the matter, and in view of Hon'ble Delhi High Court's declining to uphold the Co-ordinate Bench's decision in the case of Asia Satellite Telecommunication Co Ltd. (supra), we are of the considered view that the payment for software, by no stretch of logic, can be treated as a payment for "a process" liable to be taxed as royalty. This is precisely what was held by a Co-ordinate Bench of this

Tribunal in the case of Sonata Information Technology (supra), though for different reasons.

19. *On this aspect of the matter also, Gracemac decision (supra) has come to a different conclusion by opining that payment for software is in fact a payment for a process, but the view so expressed, being contrary to earlier decisions of the other Co-ordinate Benches and in accordance with the law laid down by Hon'ble Andhra Pradesh High Court in the case of CIT vs. B.R. Constructions (1993) 113 CTR (AP) 1 : (1993) 202 ITR 222 (AP) does not constitute a binding judicial precedent. In our considered view, even a Co-ordinate Bench decision, which is admittedly contrary to earlier precedents on that issue from other Co-ordinate Benches, does not bind the subsequent Co-ordinate Benches. We have all the respect and admiration for the Co-ordinate Bench decision, but, in our considered view, this decision does not constitute a binding judicial precedent, and we leave it at that. The other aspect of the matter is that the issue of taxability of software, as a copyrighted article, is directly covered by a Special Bench of this Tribunal and the said decision, coming from a Bench of larger strength, prevails over the Division Bench decision. As laid down by the apex Court in the case of Ambika Prasad Mishra vs. State of UP AIR 1980 SC 1762 (p. 1764 of AIR 1980 SC) "every new discovery nor argumentative novelty cannot undo or compel reconsideration of a binding precedent. A decision does not lose its authority merely because it was badly argued, inadequately considered or fallaciously reasoned....". Therefore, whatever be the points, right or wrong, which can be put against the Special Bench decisions, the Special Bench decision continues to have a binding force on this Division Bench. In our humble understanding, the Special Bench decision in Motorola's case (supra) binds us and we have to respectfully follow the same. Respectfully following this Special Bench decision, as also a series of other Division Bench decisions on the same lines, we must approve the conclusions arrived at by the CIT(A).*

20. In view of the above discussions, respectfully following Special Bench decision in Motorola's case (supra) as also a large number of Division Bench decisions on the issue,

including in assessee's own case for one of the preceding assessment years, we approve the conclusions arrived at by the CIT(A) and decline to interfere in the matter.
21. In the result, the appeal is dismissed

4.19. Thus, in view of the judgment of Hon'ble Supreme Court in the case of Radhasoami Satsang (supra), we respectfully follow the order of the Tribunal for A.Ys. 2003-04 & 2006-07 and hold that the payment received by the assessee on account of supply of software by the assessee to Reliance in pursuance to agreements made between both the parties dated 27th September, 2002 read with supplementary agreement 17th September, 2007 is not in the nature of 'Royalty' within the meaning of Article 12 of DTAA between India and Israel and therefore not liable to tax as such, but assessable as business income of the assessee subject to other provisions of the Act and DTAA. Thus, Ground No. 1.1 is decided in favour of the assessee.

5. Ground No.2: This ground deals with the action of the Ld. CIT(A) in upholding the action of the AO in holding that M/s. TTI Team Telecom Software Pvt. Ltd. (TTI India) was Dependent Agent Permanent Establishment (DAPE) of the assessee company in India. In this ground AO alleged that the aforesaid company (in short referred to as TTI India) was a Permanent Establishment of the assessee company in India. The AO has noted that TTI India undertook to deliver all technical and commercial documentation, maintenance and operational process, reports, drawing for execution of services mentioned in the statement of work to the customer Reliance for and on behalf of the assessee. TTI India has also conducted user acceptance test for

the software installation, commissioning and maintenance services on behalf of the assessee. Reliance is the only client in India to whom the software has been supplied. The assessee has guaranteed all the services provided by TTI India to Reliance under agreement with assessee. TTI India has no support agreement with the Reliance and also TTI India has not provided any service to any other customer except Reliance. Therefore, TTI India is wholly dependent on assessee and the assessee also is wholly dependent on TTI India for providing its services to Reliance. TTI India has no other independent business. On these facts, the AO has also referred to user acceptance test clauses and parent guarantee clause of the agreement and has also held that TTI India and the assessee has close and invisible nexus for providing the services. Reliance has also been placed upon the fact that expenses to the tune of Rs. 154 lakhs have been reimbursed to the parent company at cost, implying thereby that the employees of the assessee have been traveling to India to render the services and that TTI India is not capable for rendering necessary services independently.

5.1. Being aggrieved, the assessee contested this issue before Ld. CIT(A) and submitted in detail that TTI India should not have been held as DAPE of the assessee because it was neither an agent of the assessee nor it was dependent upon the assessee and nor it had authority to conclude contracts on behalf of the assessee. But, Ld. CIT(A) did not agree with the submission of the assessee; he relied upon the judgment of

Hon'ble Delhi High Court in the case of Rolls Royce PLC dated 30.08.2011 and held that the aforesaid Indian subsidiary was DAPE of the assessee. Ld. CIT(A) simply reproduced the aforesaid judgment and concluded that the aforesaid company being Indian subsidiary of the assessee constituted its PE in India.

5.2. Still being aggrieved, the assessee contested this issue before the Tribunal. During the course of hearing, it was submitted by the Ld. Counsel that lower authorities have neither understood nor discussed the facts properly while upholding TTI India as DAPE of the assessee. It was submitted by the Ld. Counsel that as per Section 12 of agreement dated 27th September 2002, between the assessee and Reliance, it was agreed that a separate agreement would be entered into for providing annual maintenance services by the assessee to Reliance but this agreement was never entered into. Subsequently, assessee's subsidiary i.e. TTI India entered into a separate agreement with Reliance for verification of AMC dated 28th May 2003. It was submitted that the said agreement was executed independently by TTI India as independent terms and conditions and on 'Principal to Principal' basis, and assessee was not part to the said agreement. It was further submitted that Articles of Indo Israel DTAA have not been referred to at all while deciding this issue against the assessee. It was also submitted that dependent agency principles were not applicable in this case. It was also submitted that in A.Y. 2006-07, the Tribunal has already examined all the facts and held that assessee did not have any

PE in India, and thus he requested for following order of the Tribunal. It was also submitted that Ld. CIT(A) has relied upon the case of Rolls Royce PLC without comparing facts at all. Per contra, Ld. CIT-DR relied upon the orders of the lower authorities.

5.3. We have gone through the orders passed by the lower authorities. It is noted by us that it is sixth year of the transactions; which have always been accepted by the Revenue in all the earlier years. It is further noted that the Tribunal in assessee's own case in A.Y. 2006-07 clearly held that assessee had no permanent establishment in India. It is further noted that TTI India has entered into the agreement on independent basis. No facts have been discussed by the Ld. CIT(A) to show that how the judgment of Rolls Royce PLC was applicable in the preference of the decisions of the Tribunal rendered in assessee's own case. Under these circumstances, we do not find any reason to deviate from the order of the Tribunal of the earlier years. Thus, respectfully following the order of the Tribunal for A.Y. 2006-07, we decide this issue in favour of the assessee. Thus, ground no.2 is allowed.

6. Ground No.3: In this ground, the assessee has challenged the action of Ld. CIT(A) in confirming the action of AO in holding reimbursement of expenses as fees for Technical Services (FTS) as per Article 13 of Indo-Israel DTAA. It is noted that Ld. CIT(A) has decided this ground as consequential to Ground no.2 and held that since assessee has a Permanent Establishment in India, therefore reimbursement expenses was nothing but business income of the assessee in India.

During the course of hearing before us, it was stated by the Ld. Counsel that in A.Y. 2005-06, Ld. CIT(A) decided this issue in favour of the assessee wherein it was held that amount of reimbursement of expenses (which were similar to expenses reimbursed in the impugned year) could not be taxed as FTS in the hands of assessee and this issue was not contested by the Revenue and thus attained finality. But, in A.Y. 2006-07 and 2007-08, this issue had reached before the Tribunal wherein, taking support from the order of the Ld. CIT(A) of A.Y. 2005-06, the Tribunal vide its order dated 11.09.2015 for AY 2006-07 held as under:

> *"8. We have heard both the parties and perused the orders of the Revenue Authorities as well as the cited precedents and the decisions of the Tribunal and also the relevant material placed before us. On perusal of the order of the CIT (A) for AY 2005-06 in general and paras 3.6 to 3.8 in particular, we find the same are relevant in this regard, and therefore, the said paras are extracted as follows:*
>
> > *"3.6. The payments received by the appellant are not in respect of services that make available any technical knowledge, experience, skill, know-how or process. As per the MOU of India-US Treaty, generally technology will be considered "make available" when the person acquiring the service is enabled to apply the technology. In the present case, the appellant has provided services to Reliance Infocam Ltd (RIL) under an agreement with TTI-India in connection with engineering, installation, commissioning and acceptance of network services, guidance and consultancy, it does not make available technical services, which will enable TTI-India to apply the same in future on its own independently. Hence, it does not satisfy the "make available" criteria. The assessee-company has cited Example 7 of the MOU between India-US DTAA which also supports its view. The Ld AR has also placed reliance on Boston*

Consulting Group P Ltd (94 TD 31) (Mum) and other judicial citations referred to above which says that "the period of MOU clearly revealed that for a fees to be called as fees for technical services rendered, it is essential that technical knowledge, skill, knowhow should be made available to the assessee should be at liberty to use them in his own right. The services referred to in the instant case did not result in making available any knowledge, experience, skill, know-how or process to the assessee. That was essential before it could be said that the payment made to the assessee were fees for technical services rendered."

3.7 Thus, the services rendered by the assessee-company does not fall within the ambit of fees for technical services as defined in Article 13(3) of the Indo-Israel Treaty read with clause 4 of Article 12 of India-Canada Tax Treaty. Therefore, I am of the considered opinion, that the appellant merely rendered services without imparting any knowledge, skills, etc to TTI-India. Consequently, the services are not in the nature of fees for technical services within the meaning of Article 13(3) of the Indo-Israel Treaty read with clause 2 of the protocol dated29.01.1996.

3.8 I have also considered the cases relied by the AO in his order dated 19.12.2008 and mentioned above. I have perused the same it is noticed that these decisions relied upon by the Assessing Officer are in the context of taxability of reimbursement of expenses under the context of Income Tax Act ie the domestic law and there is no reference to the tax treaties therefore, these are not applicable to the present case under consideration. In view of these facts, the Ground no.2 is allowed in favour of the assessee."

9. Further, we have also gone through the judgment of the Hon'ble Bombay High Court in the case of Seimens Aktiongesellschaft (supra) and find para 33 of the said judgment is relevant in this regard and the relevant portion of the said para is extracted as follows:

"33. ……the last contention whether the amounts by way of reimbursements are liable to tax. To answer that issue, we may gainfully refer to the judgment of a Division Bench of the Delhi High Court in

Industrial Engineering Projects (P) Ltd's case (supra). The Ld Division Bench of the Delhi High Court was pleased to hold that reimbursement of expenses can, under no circumstances, be regarded as a revenue receipt and in the present case the Tribunal has found that the assessee received no sums in excess of expenses incurred……."

10. We have also perused the order of the CIT (A) for the AY 2005-06, and find paras 1.5.1 to 1.5.3 of the said FAA order are relevant in this regard. In the said FAA order for the AY 2005-06, dated30.1.2008, the CIT (A) held that since the assessee merely rendered services without imparting any knowledge, skills etc to TTI-India, therefore, the said services are not in the nature of fees for technical services within the meaning of Article 13(3) of India-Israel Tax Treat read with clause 2 of the protocol dated 29.01.1996. We also find that on identical facts, the CIT (A)'s decision for the AY 2005-06 was accepted by the Revenue and no appeal is filed against the said order of the CIT (A). When the facts are identical, and the difference is only in figures, deviating from the decision of the earlier AY's order of the CIT (A) in the absence of any valid reason is not sustainable in law and the same against the principles of consistency."

6.1. Similar decision as taken by the Tribunal in A.Y. 2007-08 in ITA No.9008/Mum/2010. During the course of hearing, Ld. CIT-DR fairly agreed that nature of expenses incurred in this year is similar, and facts & circumstances of the case and legal position also remains the same. Under these circumstances, respectfully following the order of the Tribunal, we decide this issue in favour of the assessee and hold that the impugned expenses could not be taxed as Fees for Technical Services in the hands of assessee.

7. Ground No.6: This ground is with regard to levy of interest u/s 234B. It was fairly stated by the Ld. CIT-DR that interest under section 234B was not leviable upon the assessee being

non-resident, in view of the judgment of Hon'ble Bombay High Court in the case of DIT v. NGC Network Asia LLC 313 ITR 187 (BOM). Thus, in view of judgment of Hon'ble Bombay High Court, this ground is also deiced in favour of assessee and it is held that interest u/s 234B was not leviable in the hands of assessee.

8. With respect to appeal for A.Yrs. 2009-10 and A.Y. 2010-11, it was jointly stated by both the parties that grounds raised therein are identical and facts and circumstances of the case as well as legal position remains the same. Under these circumstances, the AO is directed to follow our order with respect to each ground in accordance with our directions given in our order for A.Y. 2008-09, which shall be applicable *mutatis mutandis*.

9. In the result, the appeals of the assessee are partly allowed in terms of our directions as indicated above.

Order pronounced in the open court on 30th November, 2016.

Sd/-	Sd/-
(Amit Shukla)	(Ashwani Taneja)
न्यायिक सदस्य / JUDICIAL MEMBER	**लेखा सदस्य** / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 30/11/2016

*Patel, P.S.*नि.स.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai

6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**