IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'E' NEW DELHI
BEFORE SH. N.K.SAINI, ACCOUNTANT MEMBER
AND
SH.K.N.CHARRY, JUDICIAL MEMBER
ITA Nos. 3313 to 3315/Del/2012
(ASSESSMENT YEARs: 2006-07 to 2007-08, 2009-10)

Nortal Networks India International Inc., C/o-M/s SRBC & Associates, Golf View Corporate Tower-B, Sector-42, Sector Road, Gurgaon-122002. PAN-AACCN2995E	**vs**	ADIT, Circle-2(1), International Taxation, New Delhi.
(Appellant)		**(Respondent)**

ITA No. 1087/Del/2014
(ASSESSMENT YEAR: 2010-11)

Nortal Networks India International Inc., C/o-M/s SRBC & Associates, Golf View Corporate Tower-B, Sector-42, Sector Road, Gurgaon-122002. PAN-AACCN2995E	**vs**	DDIT, Circle-2(1), New Delhi.
(Appellant)		**(Respondent)**

C.O.Nos.21 to 23/Del/2017
(In ITA Nos. 3313 to 3315/Del/2012)
(ASSESSMENT YEARs: 2006-07 to 2007-08, 2009-10)

ADIT, Circle-2(1), International Taxation, New Delhi.	**vs**	Nortal Networks India International Inc., C/o-M/s SRBC & Associates, Golf View Corporate Tower-B, Sector-42, Sector Road, Gurgaon-122002. PAN-AACCN2995E
(Appellant)		**(Respondent)**

C.O.No.-24/Del/2017
(In ITA No. 1087/Del/2014)
(ASSESSMENT YEAR: 2010-11)

DDIT, Circle-2(1), New Delhi.	**vs**	Nortal Networks India International Inc., C/o-M/s SRBC & Associates, Golf View Corporate Tower-B, Sector-42, Sector Road, Gurgaon-122002. PAN-AACCN2995E
(Appellant)		**(Respondent)**

Appellant by	Sh. Deepak Chopra, Adv. & Ms. Manasvini Bajpai, Adv.
Respondent by	Sh. T.M.Shiv Kumar, CIT DR
Date of Hearing	07.09.2017
Date of Pronouncement	26.09.2017

ORDER

PER BENCH

Assessee filed ITA Nos.3313 to 3315/Del/2012 & 1087/Del/2014 whereas the revenue filed C.Os Nos.-21 to 24/Del/2017 challenging the orders of the Ld.CIT(A) confirming the orders of the Ld.AO in respect of AYs 2006-07 to 2010-11, the respectively. This batch of matters involve common facts and raise common questions of fact and law, and hence for the sake of convenience the same are being addressed together and disposed of by way of this common order.

2. Briefly stated facts relevant for the disposal of this matter are that the assessee is a company incorporated on 07.06.2002 under the name and style of Nortel Networks India International Inc. (NNIII) under the laws applicable in the State of Delware, USA and is a tax resident of USA. Assessee is engaged in the business of supplying advanced networking/telecom equipment to customers in Asia Pacific region. The assessee is a step-down subsidiary of Nortel Networks Ltd. Canada, and is wholly held by Nortel Network Inc. which in turn also has an indirect subsidiary in India, namely,

Nortel Networks India Pvt. Ltd. (Nortel India). Nortel LO is the Liaison Office of Nortel Canada in India. In the relevant year under consideration, Reliance required an Indian company to bid for contract for supply of optical hardware and provision of related installation and commissioning services, and Nortel India had entered into such a contract with Reliance. While retaining the Optical services contract remained with them, Nortel India subsequently assigned all its rights, entitlements, covenants and obligations under the Optical hardware supply contract to NNIII under the Assignment and assumption contract, for the performance of which, Nortel Canada provided guarantee. Equipment supplied to Reliance was sourced from Nortel Canada and Nortel Ireland i.e, manufactured by Nortel Canada and Nortel Ireland, and under the Agreement, Reliance placed orders directly on the assessee, and also made all the payments for equipment supplied directly to the assessee.

3. Original assessment in respect of the AY 2006-07 and 2007-08 was complete, however, placing reliance upon the earlier years proceedings the matters were reopened the assessments in respect of those years and assessment u/s 143(3) was done in respect of other two years. For all these Assessment years under consideration and held that the assessee company is having

business connection in India in the form of Nortel Network India Private Limited (Nortel India) and the L.O. of M/s Nortel Network Ltd. AO observed that the contract in this regard is a turnkey contract, indivisible contract for supply, installation, testing, commissioning etc. Yet the contract for installation and commissioning were assigned to Nortel India. The entire responsibility of the execution of turn key contract remained with the Guarantor. AO observed that this arrangement shows that assessee is getting its work executed through Nortel India. The responsibilities of the assessee have been assigned to the Indian company without any consideration. That Nortel India has undertaken the responsibility for negotiating and securing the contracts. Nortel India was working so intimately with the assessee, that the contract awarded to Nortel India was assigned to the assessee and the contract awarded to the assessee was assigned to Nortel India. That this shows that both of them are working in unison and are acting as one entity for all practical purposes. Thus, AO held that Nortel India is a fixed place of business and depended agent permanent establishment of the assessee as well as it is business connection of the assessee in India. AO further observed that the assessee is merely a shadow company of Nortel Group and for all practical purposes, all the

facilities and services available to the Nortel Group of Companies are equally available to the assessee. The hardware supplied through it is installed by Nortel India. The contracts were pre negotiated by Nortel India. The L.O. of Nortel Canada is rendering all kinds of services to all the group companies including the assessee. In view of these facts, AO observed that Assessee Company and Nortel Canada cannot be held as two separate entities. The Assessing Officer also did not accept the assessee's contention that sales were concluded overseas and installation was done under a separate contract. AO observed that assessee through Nortel and LO approached the customer, negotiated the contract, bagged the contract, supplied equipment, installed the same, undertook acceptance test after which the system was accepted. The transfer of title overseas or in mid sea does not alter the facts that the equipment is accepted only after acceptance test is done. This test is done by the Nortel India on behalf of the assessee. The equipment remain in the virtual possession of Nortel Group till such time the equipment is set up and acceptance test is done.

4. In the appeal preferred by the assessee, Ld. CIT(A) agreed with the AO that for the purpose of supply agreement under consideration, the assessee and Nortel Network Canada should be

treated as one and same entity. While rejecting the contention of the assessee that it did not have a PE in India, Ld. CIT(A) held that the activities of the assessee in India constituted PE of the assessee under Article 5(1) fixed place PE, 5(2)(a) a place of management, 5(2)(i) as a sale outlet, 5(2)(k) installation PE, 5(2)(1) in respect of services for related enterprise, and 5(4) dependant agent PE under the Indo US DTAA, and that the activities being carried out by the PE are the core activities of the assessee resulting in generation of income to the assessee, and thus they cannot be considered to be a preparatory and auxiliary. On this premise he confirmed the Assessment orders in appeals. Hence the assessee is in these appeals before us.

5. In respect of all the years, assessee raised almost common grounds questioning the findings of the authorities below in respect of the existence of PE and the consequent taxability of the income of assessee and in respect of the AY 2006-07, the assessee also raised the issue relating to the AO bringing the receipts on account of sale of embedded software as royalty.

6. The common ground raised by the Revenue in Cross objections is as follows:

> *"Whether the assessee is entitled to the benefits of India-USA Double Taxation Avoidance Convention (DTAC) in view of the provisions of Article 24 of the DTAC which restricts the benefits of the treaty to companies in which more than 50% of beneficial interest / shares is / are owned, directly*

or indirectly, by one or more individual residents of one of the Contracting States, considering the fact that the assessee is a 100% subsidiary of M/s Nortel Networks Inc. which in turn is a 100% subsidiary owned by Nortel Networks Ltd., Canada, and hence effectively more than 50% of beneficial interest/shares in the assessee is /are indirectly owned by M/s Nortel Networks, Canada, a company incorporated in Canada and not a resident of USA."

7. In respect of delay in filing the cross objections, Ld. Counsel of the assessee strongly opposed the condonation of delay in preferring the cross objections on the ground that the AO has not made out a case regarding the eligibility of the assessee to the benefits of the Indo US DTAC inasmuch as the Revenue has been pleading that the assessee constitutes Permanent Establishment (PE) in India in term of the DTAC. Ld. AR further contended that the revenue has raised cross objections in each of the years with a delay of 1731 days as is evident from the defect notice issued by the Registry of the Income Tax Tribunal on 06.02.2017, and through the cross objections, the revenue is seeking to raise a legal ground in terms of the limitation of benefits clause under Article 24 of the DTAA to allege that given the restriction under Article 24 of the DTAA, the Assessee was not eligible to the benefits of the India – US DTAA. According to him, the revenue has also filed an Application dated 06.02.2017 seeking condonation of the delay in the filing of the cross objections. However, no supporting affidavit has been filed to support the contents of the condonation Application. Reliance is placed on a decision of the Delhi Tribunal

in the case of DCIT v. YKK India P. Ltd. [(2016) 160 ITD 162 (Delhi)] wherein the department filed cross appeal after a delay of 7 years, it was held as under :

> *"There is at best an indication that the appeal is filed now because of the possibility of damage to the revenue's cause in the other assessment years, but then such a factor, in our considered view, cannot be reason enough to condone the delay. The condonation of delay can only be granted when there is a sufficient cause for delay in filing of appeal, but then in the present case, there is nothing to demonstrate the cause of delay; if at all, the facts set out in the petition show anything, these facts show the cause of filing the appeal now, rather than the cause of delay in filing of the appeal. There is a difference in cause of delay and inferences about cause of delay. Unless the cause of delay is known, which is quite different from inference about the cause of delay, it is not even possible to come to the conclusion whether such a cause is a reasonable cause or not. In the present case, therefore, there is no occasion to even examine reasonableness of the cause of delay, and as such it is not possible to condone the delay. In our considered view, the apprehensions, howsoever justified, about the impact of non filing of appeals for one year, on the fate of similar appeals in the subsequent years, cannot be reason enough to condone the delay in filing of appeal after almost eight years. That cannot, by any stretch of logic, be the cause of delay; that can at best be the impact and consequences of delay, but then, at the cost of repetition, consequences of delay, howsoever material, cannot be reason enough to condone the delay itself. In view of these discussions, in our considered view, the condonation petition does not deserve to be accepted. We reject the same. The appeal is dismissed as time barred."*

Per contra, Ld. Departmental Representative pleaded that this is a pure legal issue and the Revenue may be allowed to raise this ground as no new facts are to be brought on record.

8. In this matter Revenue pleads that in view of the decision of the Hon'ble High Court on 04.05.2016, the need to seek the adjudication of the additional issue had arise, and as a matter of fact substantially the same ground was raised as additional ground in a batch of appeals in I.T. Appeal Nos. 1119 to 1121 & 1153 to

1155/DEL/2010 for ASSESSMENT YEARS 2003-04 to 2005-06. By way of order dated 13.06.2014, vide Paragraph No 19, a coordinate Bench of this Tribunal held as follows:

> ***"19.*** *We have carefully considered the submissions and perused the records. We find that the ground raised by the Revenue goes to the root of the issue involved. Further it has all along been assessee's claim that it is covered under the Indo-US DTAC. Hence, in the interest of substantial justice this additional ground deserves to be admitted."*

9. We have carefully considered the submissions and perused the records. We find that the ground raised by the Revenue goes to the root of the issue involved and it has been the claim of the assessee before the authorities below that it is covered under the Indo-US DTAC. In these circumstances, we are inclined to condone the delay to permit the Revenue to file the cross objections.

10. Now coming the contentions of the parties on either side, though the assessee has raised many grounds, Ld. AR submitted that the incidental issue has been whether the Assessee had a Permanent Establishment in India under the provisions of the India – USA Double Taxation Avoidance Agreement, but after the decision of the Hon'ble jurisdictional High Court in assessee's own case in Nortel Networks India International Inc. Vs. DIT (2016) 386 ITR 353, the issue singularly revolves around the controversy whether any portion of the offshore supplies made by the Assessee were liable to be taxed in India. However, for Assessment Year

2006-07 an additional issue which arises is in respect of the taxation of income from supply of software to Reliance, and in all these appeals, the Assessee has also agitated the issue of levy of interest u/s 234B of the Act. It is contended on behalf of the Revenue that the decision of the Hon'ble Jurisdictional High Court in Nortel Networks India International Inc. Vs. DIT (2016) 386 ITR 353 is challenged by the department before the Hon'ble Supreme Court and since the matter is pending before the Hon'ble Apex Court the issue cannot be said to have been decided finally. On this premise, he urged to uphold the decisions of the authorities below.

11. At the outset, a perusal of the judgement of the Hon'ble Jurisdictional High Court in assessee's own case in Nortel Networks India International Inc. Vs. DCIT (2016) 386 ITR 353 reveals that inasmuch as the present batch of Appeals relate to Assessment Years 2006-07, 2007-08, 2009-10 & 2010-11, similar issues had arisen in the Assessee's own case for Assessment Years 2003-04, 2004-05, 2005-06 & 2008-09; when the matter had travelled upto the jurisdictional High Court, all the issues involved in this matter including the question relating to whether there existed a permanent establishment of the Assessee in India, were considered by the jurisdictional High Court for the above

mentioned Assessment Years, and having considered the facts and circumstances of the case and the legal position, the jurisdictional High Court held that there did not exist any permanent establishment of the Assessee in India and consequently no portion of the income arising from offshore supplies was liable to be taxed in India u/s 9(1) read with Explanation-I of the Income Tax Act.

12. The Hon'ble High Court vide paragraphs 36 of the judgement observed that the controversy whether the Assessee has a PE in India is interlinked to the finding that Nortel India had discharged some of the obligations of the Assessee under the Equipment Contract, and having considered the dispute whether the Assessee has a PE in India and the issue of attribution of income to the Assessee's alleged PE in India, vide paragraph No 39 of the Judgement found that the contention advanced on behalf of the Assessee that Nortel India had acted for itself and not on behalf of any other group entity cannot be accepted and the findings of the Income Tax Authorities that Nortel India had negotiated the contract on behalf of the Nortel group as a whole cannot be faulted.

13. Having found so, after taking into consideration all these averments and allegations of the lower authorities as is also the case of the AO in the Assessment years under consideration now, the High Court thought it fit to assume that the Equipment

Contract was performed by Nortel Canada and after following the decision of Bombay High Court in the case of Sir Dinshaw Maneckjee Petiti AIR 1927, Bombay, 371 lifted the corporate veil to examine the issue and held that the only issue to be examines is whether any income from supply of equipment could be taxed under the Act.

14. The Hon'ble High Court then examined the taxability of the transaction under the Act, in the light of the provisions of section 9(1) of the Act and the phrase "business connection" as has been discussed by the Hon'ble Supreme Court in the case of CIT v. R.D. Aggarwal &Co. (1965) 56 ITR 20 (SC), inasmuch as the provisions of section 9(1) of the Act clearly provide that all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situate in India. Relevant observations of the Hon'ble High Court, vide para 43-44 are that, -

> "***43.*** *It is apparent from the plain reading of Section 9(1) of the Act that all income which accrues or arises through or from any business connection in India would be deemed to accrue or arise in India. In CIT v. R.D. Aggarwal & Co. [1965] 56 ITR 20 (SC), the Supreme Court observed that business connection would mean "a relation between a business carried on by a non-resident and some activity in the taxable territories which are attributable directly or indirectly to the earnings, profits or gains of such business". However, by virtue of Explanation 1 to Section 9(1) of the Act,*

only such part of the income which is reasonably attributable to operations carried out in India would be taxable. Thus, if it is accepted that the Assessee has received only the consideration for the equipment manufactured and delivered overseas, it would be difficult to uphold the view that any part of Assessee's income is chargeable to tax under the Act as no portion of the said income could be attributed to operations in India.

44. *There is little material on record to hold that Nortel India habitually exercises any authority on behalf of the Assessee or Nortel Canada to conclude contracts on their behalf. There is also no material on record which would indicate that Nortel India maintained any stocks of goods or merchandise in India from which goods were regularly delivered on behalf of the Assessee or Nortel Canada. Thus, by virtue of Explanation 2 read with Explanation 3 to Section 9(1)(i) of the Act, no part of Assessee's income could be brought to tax under the Act. It is only when a non-resident Assessee's income is taxable under the Act that the question whether any benefit under the Double Taxation Avoidance Treaty is required to be examined."*

15. The Hon'ble High Court, thus, made it simply clear that mere existence of a business connection is not enough to trigger taxability in India, and in the absence of any evidence brought on record to show that some portion of activities relating to off shore supplies were carried out in India, no profit arising from off shore supplies could be brought to tax in India. Since, to apply the principle of apportionment as envisaged in Explanation 1 and 3 to section 9(1) of the Act, there must be some activity carried out in India relating to the off shore supplies, vide Paragraphs 45 to 50, having considered the Services Contract in the light of the decision of the Hon'ble Supreme Court in the case of Ishikawajma-Harima Heavy Industries Ltd. v. DIT [2007] 288 ITR 408/158 Taxman 259, in assessee's case, the Hon'ble High Court found that the task of installation, commissioning and testing was contracted to Nortel

India and thus, the operations pertaining to installation and commissioning were not performed by Nortel India on behalf of the Assessee or Nortel Canada but on its own behalf, as such, neither the Assessee nor Nortel Canada can be stated to have performed any installation or commissioning activity in India. Observations of the Hon'ble High Court on this aspect are as follows:

> "***45.*** *In Ishikawajma-Harima Heavy Industries Ltd. v. DIT [2007] 288 ITR 408/158 Taxman 259, the Supreme Court considered a case where Petronet LNG Limited and five members of a consortium had entered into an agreement for setting up a Liquefied Natural Gas (LNG) receiving, storage and de-gasification facility at Dahej in the State of Gujarat. The contract was a turnkey project and the role of each member/consortium of contractors was separately specified. The contract involved offshore supply, offshore services, onshore supply, onshore services and construction and erection of the facility. The contract price included consideration for offshore supplies and offshore services which was specified separately. The disputes arose as to liability to pay tax relating to consideration for offshore supplies and offshore services. Whereas the appellant (a member of the consortium of contractors) contended that the contract was a divisible one and it did not have any liability to pay tax in respect of consideration for offshore services and offshore supplies, the Revenue contended to the contrary. According to the Revenue, the contract in question was a composite one and could not be split up for the purposes of considering whether the income arising therefrom was taxable under the Act. The relevant extracts from the said judgment are reproduced below:—*
>
> > *"30. The contract is a complex arrangement. Petronet and the Appellant are not the only parties thereto, there are other members of the consortium who are required to carry out different parts of the contract. The consortium included an Indian company. The fact that it has been fashioned as a turnkey contract by itself may not be of much significance. The project is a turnkey project. The contract may also be a turnkey contract, but the same by itself would not mean that even for the purpose of taxability the entire contract must be considered to be an integrated one so as to make the appellant to pay tax in India. The taxable events in execution of a contract may arise at several stages in several years. The liability of the parties may also arise at several stages. Obligations under the contract are distinct ones. Supply obligation is distinct and separate from service obligation. Price for each of the component of the contract is separate. Similarly, offshore supply and offshore*

services have separately been dealt with. Prices in each of the segment are also different.
31. The very fact that in the contract, the supply segment and service segment have been specified in different parts of the contract is a pointer to show that the liability of the appellant thereunder would also be different.
32. The contract indisputably was executed in India. By entering into a contract in India, although parts thereof will have to be carried out outside India would not make the entire income derived by the contractor to be taxable in India. We would, however, deal with this aspect of the matter a little later.
39. The territorial nexus doctrine, thus, plays an important part in assessment of tax. Tax is levied on one transaction where the operations which may give rise to income may take place partly in one territory and partly in another. The question which would fall for our consideration is as to whether the income that arises out of the said transaction would be required to be proportioned to each of the territories or not.
40. Income arising out of operations in more than one jurisdiction would have territorial nexus with each of the jurisdictions on actual basis. If that be so, it may not be correct to contend that the entire income "accrues or arises" in each of the jurisdiction. ……
76. In construing a contract, the terms and conditions thereof are to be read as a whole. A contract must be construed keeping in view the intention of the parties. No doubt, the applicability of the tax laws would depend upon the nature of the contract, but the same should not be construed keeping in view the taxing provisions.
98. We, therefore, hold as under:

(A) Re: Offshore supply

(1) *That only such part of the income, as is attributable to the operations carried out in India can be taxed in India.*

(2) *Since all parts of the transaction in question i.e. the transfer of property in goods as well as the payment, were carried on outside the Indian soil, the transaction could not have been taxed in India.*

(3) *The principle of apportionment, wherein the territorial jurisdiction of a particular State determines its capacity to tax an event, has to be followed.*

(4) *The fact that the contract was signed in India is of no material consequence, since all activities in connection with the offshore supply were outside India, and therefore cannot be deemed to accrue or arise in the country.*

(5) *There exists a distinction between a business connection and a permanent establishment. As the permanent establishment cannot be said to be involved in the transaction, the aforementioned provision will*

have no application. The permanent establishment cannot be equated to a business connection, since the former is for the purpose of assessment of income of a non-resident under a Double Taxation Avoidance Agreement, and the latter is for the application of Section 9 of the Income Tax Act.

(6) Clause (a) of Explanation 1 to Section 9(1)(i) states that only such part of the income as is attributable to the operations carried out in India, are taxable in India.

(7) The existence of a permanent establishment would not constitute sufficient "business connection", and the permanent establishment would be the taxable entity. The fiscal jurisdiction of a country would not extend to the taxing of entire income attributable to the permanent establishment.

(8) There exists a difference between the existence of a business connection and the income accruing or arising out of such business connection.

(9) Para 6 of the Protocol to the DTAA is not applicable, because, for the profits to be 'attributable directly or indirectly', the permanent establishment must be involved in the activity giving rise to the profits.

(B) Re: Offshore services:

(1) Sufficient territorial nexus between the rendition of services and territorial limits of India is necessary to make the income taxable.

(2) The entire contract would not be attributable to the operations in India viz. the place of execution of the contract, assuming the offshore elements form an integral part of the contract.

(3) Section 9(1)(vii) of the Act read with Memo cannot be given a wide meaning so as to hold that the amendment was only to include the income of non-resident taxpayers received by them outside India from Indian concerns for services rendered outside India.

(4) The test of residence, as applied in international law also, is that of the taxpayer and not that of the recipient of such services.

(5) For Section 9(1)(vii) to be applicable, it is necessary that the services not only be utilized within India, but also be rendered in India or have such a "live link" with India that the entire income from fees as envisaged in Article 12 of DTAA becomes taxable in India.

(6) The terms 'effectively connected' and 'attributable to' are to be construed differently even if the offshore services and the

permanent establishment were connected.

(7) Section 9(1)(vii)(c) of the Act in this case would have no application as there is nothing to show that the income derived by a non-resident company irrespective of where rendered, was utilized in India.

(8) Article 7 of DTAA is applicable in this case, and it limits the tax on business profits to that arising from the operations of the permanent establishment. In this case, the entire services have been rendered outside India, and have nothing to do with the permanent establishment, and can thus not be attributable to the permanent establishment and therefore not taxable in India.

(9) Applying the principle of apportionment to composite transactions which have some operations in one territory and some in others, is essential to determine the taxability of various operations.

(10) The location of the source of income within India would not render sufficient nexus to tax the income from that source.

(11) If the test applied by the Authority for Advanced Rulings is to be adopted here too, then it would eliminate the difference between the connection between Indian and foreign operations, and the apportionment of income accordingly.

(12) The services are inextricably linked to the supply of goods, and it must be considered in the same manner."

46. *It is clear from the above that even in cases of a turnkey contract, it is not necessary that for the purposes of taxability, the entire contract be considered as an integrated one. And, it does not follow that the amount payable for supply of goods overseas would be chargeable to tax under the Act.*

47. *As noticed earlier, there seems to be no dispute that the title to the equipment passed in favour of Reliance overseas. However, the AO, CIT(A) and ITAT did not consider the same to be relevant as according to them, the equipment continued to be in the possession of the "Nortel Group" till its final acceptance by Reliance. In our view, even if it is accepted that the equipment supplied overseas continued to be in possession of Nortel India till the final acceptance by Reliance, the same would not imply that the Assessee's income from supply of equipment could be taxed under the Act. Clause (a) of Explanation 1 to Section 9(1)(i) of the Act postulates the principle of apportionment and only such income that can be reasonably attributed to operations in India would be chargeable to tax under the Act. The position in Ishikawajma-Harima Heavy Industries Ltd.(supra) was also similar. There too, the equipments were supplied overseas and the contractor continued to retain control of equipment and material till the provisional acceptance of the work or the termination of the contract. The relevant clause which was considered by the Supreme Court in that case is as under:—*

"22.1 Title to equipment and materials and contractor's equipment:

Contractor agrees that title to all equipment and materials shall pass to the supplier or subcontractor pursuant to section E of exhibit H (General Project Requirements and Procedures). Contractor shall, however, retain case, custody, and control of such equipment and materials and exercise due care thereof until (a) provisional acceptance of the work, or (b) termination of this contract, whichever shall first occur. Such transfer of title shall in no way affect the owner's rights under any other provision of this contract."

48. *In the present case, the CIT(A) had concluded that Assessee's obligations were not limited to supply of the equipment overseas but also included other obligations that were to be performed in India. He further held that the amounts received by the Assessee also included consideration for performance of certain activities in India. This is stoutly disputed by the Assessee. This dispute is pivotal for determining whether any part of the Assessee's income is chargeable to tax in India.*

49. *Section 3 of the Services Contract which provide for the scope of work and services to be performed under the Service Contract and the relevant extracts from the said section are reproduced below:—*

"3.1.1 The Vendor has to provide to Reliance the Services set forth in the relevant Purchase Order pursuant to and in accordance with this Optical Services Contract. All Services shall comply with the Specifications and the Standards. The Vendor shall coordinate its efforts hereunder with all Subcontractors, Third Party providers and the Other Contractors, to ensure compliance with any and all supply and transportation requirements and all Governmental Entities. All Services, requiring certification shall be certified by independent and appropriate professionals licensed or properly qualified to perform such certification in an appropriate jurisdictions, reasonably acceptable and at no cost to Reliance, if such certification is required by Applicable Law or the Specifications. Vendor shall provide to Reliance, necessary installation Certificates, as per EPCG regulations for which the Parties will mutually agree on a format and procedure and for which Reliance shall reimburse Vendor for reasonable actual fees paid to any chartered engineers providing such certification.

** ** **

3.2.1 Vendor shall provide all Services purchased under a Purchase Order and in accordance with the relevant Specifications on an end-to-end basis to ensure successful completion of the Work (provided, however, that installation and commissioning Services shall be limited to the Services requested ordered in the applicable Purchase Order), which Services include but are not limited to:

(a) Product installation and commissioning (including

commissioning testing) Services including, but not limited to, ready for installation inspection and validation and as-built documentation (redline versions); and

** ** **

3.2.2 At Reliance's request Vendor shall mobilize and commit sufficient resources necessary to successfully implement the Initial Optical Reliance Network which will include up to two hundred (200) expatriates, with the approval of Reliance, as required, including subject matter experts (Subject to the experience requirements set forth in Section 3.10 below)."

50. *A bare perusal of the Services Contract clearly indicates that the task of installation, commissioning and testing was contracted to Nortel India and thus, the operations pertaining to installation and commissioning were not performed by Nortel India on behalf of the Assessee or Nortel Canada but on its own behalf. Thus, neither the Assessee nor Nortel Canada can be stated to have performed any installation or commissioning activity in India."*

16. On the aspect of taxability of the income from installation, commissioning and testing activities as well as any function performed by expatriate employees of the group companies seconded to Nortel India, Hon'ble High Court held that the same cannot be considered as income of the Assessee, but would be subject to tax in the hands of Nortel India, as under:

*"**63.** Undisputedly, even if it is accepted that some portion of the obligations undertaken by the Assessee were performed in India, the Assessee's income arising from the performance of the Equipment Contract could be brought to tax only to the extent as permissible under the relevant DTAA - DTAA between India and USA or DTAA between India and Canada.*

.....

*"**69.** The AO, CIT(A) and ITAT have held that the office of Nortel India and Nortel LO constituted a fixed place of business of the Assessee. As pointed out earlier, we find no material on record that would even remotely suggest that Nortel LO had acted on behalf of the Assessee or Nortel Canada in negotiating and concluding agreements on their behalf. Thus, it is not possible to accept that the offices of Nortel LO could be considered as a fixed place of*

business of the Assessee. Insofar as Nortel India is concerned, there is also no evidence that the offices of Nortel India were at the disposal of the Assessee or Nortel Canada. Even if it is accepted that Nortel India had acted on behalf of the Assessee or Nortel Canada, it does not necessarily follow that the offices of Nortel India constituted a fixed place business PE of the Assessee or Nortel Canada. Nortel India is an independent company and a separate taxable entity under the Act. There is no material on record which would indicate that its office was used as an office by the Assessee or Nortel Canada. Even if it is accepted that certain activities were carried on by Nortel India on behalf of the Assessee or Nortel Canada, unless the conditions of paragraph 5 of Article 7 of the Indo-US DTAA is satisfied, it cannot be held that Nortel India constituted a fixed place of business of the Assessee or Nortel Canada.

70. *The AO has further alleged that the offices of Nortel LO and Nortel India were used as a sales outlet. In our view, this finding is also unmerited as there is no material which would support this view. The facts on record only indicate that Nortel India negotiated contracts with Reliance. Even assuming that the contracts form a part of the single turnkey contract, which include supply of equipment - as held by the authorities below - the same cannot lead to the conclusion that Nortel India was acting as a sales outlet.*

71. *The AO's conclusion that there is an installation PE in India, is also without any merit. A bare perusal of the Services Contract clearly indicates that the tasks of installation, commissioning and testing was contracted to Nortel India and Nortel India performed such tasks on its own behalf and not on behalf of the Assessee or Nortel Canada. Undisputedly, Nortel India was also received the agreed consideration for performance of the Services Contract directly by Reliance.*

72. *The finding that Nortel India is a services PE of the Assessee is also erroneous. There is no material to hold that Nortel India performed services on behalf of the Assessee.*

73. *The AO has also held that Nortel India constituted Dependent Agent PE of the Assessee in India. The aforesaid conclusion was premised on the finding that Nortel India habitually concludes contracts on behalf of the Assessee and other Nortel Group Companies. In the present case, there is no material on record which would indicate that Nortel India habitually exercises authority to conclude contracts for the Assessee or Nortel Canada. In order to conclude that Nortel India constitutes a Dependent Agent PE, it would be necessary for the AO to notice at least a few instances where contracts had been concluded by Nortel India in India on behalf of other group entities. In absence of any such evidence, this view could not be sustained.*

> ***74.*** *The CIT(A) as well as the ITAT has proceeded on the basis that the Assessee had employed the services of Nortel India for fulfilling its obligations of installation, commissioning, after sales service and warranty services. The ITAT also concurred with the view that since employees of group companies had visited India in connection with the project, the business of the Assessee was carried out by those employees from the business premises of Nortel India and Nortel LO. In this regard, it is relevant to observe that a subsidiary company is an independent tax entity and its income is chargeable to tax in the state where it is resident. In the present case, the tax payable on activities carried out by Nortel India would have to be captured in the hands of Nortel India. Chapter X of the Act provides an exhaustive mechanism for determining the Arm's Length Price in case of related party transactions for ensuring that real income of an Indian Assessee is charged to tax under the Act. Thus, the income from installation, commissioning and testing activities as well as any function performed by expatriate employees of the group companies seconded to Nortel India would be subject to tax in the hands of Nortel India and the same cannot be considered as income of the Assessee."*

17. The Hon'ble High Court, therefore, categorically found that

i. that the Assessee does not have a PE in India,

ii. the task of installation, commissioning and testing was contracted to Nortel India and thus, the operations pertaining to installation and commissioning were not performed by Nortel India on behalf of the Assessee or Nortel Canada but on its own behalf, as such, neither the Assessee nor Nortel Canada can be stated to have performed any installation or commissioning activity in India,

iii. even if it is accepted that the equipment supplied overseas continued to be in possession of Nortel India till the final acceptance by Reliance, the same would not imply that the Assessee s income from supply of equipment could be taxed under the Act, and

iv. the income from installation, commissioning and testing activities as well as any function performed by expatriate employees of the group companies seconded to Nortel India would be subject to tax in the hands of Nortel India and the same cannot be considered as income of the Assessee.

18. Facts and circumstances for all these years are the same. Assessing Officer placed reliance on the findings of the earlier Assessment Years in the assessment orders for the assessment years under consideration in these appeals. The issue is no longer Res Integra, and stands squarely covered in favour of the Assessee, and since the High Court had held that no taxability arose under the provisions of Section 9 itself, the issue of existence of permanent establishment becomes academic. We, therefore, while respectfully following the decision of the Hon'ble Jurisdictional High Court in assessee's own case reported in (2016) 386 ITR 353, answer the grounds in the appeals preferred by the assessee accordingly in favour of the assessee.

19. Now coming to the issue relating to taxation of Software is concerned, for Assessment Year 2006-07, the Assessing Officer had separately brought the receipts on account of sale of embedded software as royalty. Ld. AR contended that this issue also stands squarely covered in favour of the Assessee once it was held that the Assessee was not taxable under the provisions of Section 9 itself. Even otherwise, according to him, the issue of embedded software in hardware whether could be taxed separately as royalty already stands decided by the jurisdictional High Court in the case of CIT

Vs. ZTE Corporation (2017) 392 ITR page 80 (Del.). Ld. DR vehemently relied on the orders of the authorities below.

20. In CIT Vs. ZTE Corporation (2017) 392 ITR page 80 (Del.) it is held as follows:

> ***"21.*** *The reference to clauses (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".*
>
> ***22.*** *In the present case, the facts are closely similar to Ericson. 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."*

21. Having considered the submissions of the Ld. AR in the light of the orders of the authorities below and the above decision, we find ourselves in agreement with the submission made on behalf of the assessee that the embedded software is not royalty and the receipts on account of sale of embedded software cannot be separately brought to tax.

22. The next issue relates to the levy of interest under section 234B of the Act. Ld. AR submitted that this issue also stands covered in favour of the Assessee by decisions of the Hon'ble Delhi High Court in the case of DIT Vs. ZTE Corporation (392 ITR 80) and DIT Vs. GE Packaged Power Inc. (373 ITR 65) (Del.). Be that as it may, in view of the finding of the Hon'ble High Court in assessee's own case reported in (2016) 386 ITR 353 that no portion of the profits from off shore supplies was taxable in India, levy of interest becomes academic given the absence of any taxable income in India.

23. As regards the cross objections raised by the revenue, it is contended by the Ld. AR that firstly, the cross objections were barred by limitation, secondly given the finding of the High Court of non-taxability under the provisions of Domestic Law itself, the same were rendered academic, thirdly there was no question of any benefit having taken by the Assessee under the provisions of the

India – USA DTAA since the treaty had been resorted to by the Assessing Officer for the creation of a permanent establishment of the Assessee in India and that was not a benefit provided by the treaty.

24. Having regard to the facts and circumstances of the case in the light of the fact that for the earlier assessment years a specific finding was given by the High Court as to the non-taxability of the Assessee under the provisions of the Income Tax Act and the revenue had filed a Special Leave Petition before the Hon'ble Supreme Court which stood admitted involving similar questions, the questions relating to the limiting of benefits is only academic and does not required to be adjudicated specifically. We, therefore, find that the cross objections preferred by the Revenue are liable to be dismissed.

25. In the result, ITA Nos.3313 to 3315/Del/2012 & 1087/Del/2014 of the assessee are allowed and C.Os Nos.-21 to 24/Del/2017 of the Revenue are dismissed.

The order is pronounced in the open court on 26th September, 2017.

Sd/-	**Sd/-**
(N.K.SAINI)	**(K.N.CHARRY)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Amit Kumar
Date:- 26.09.2017

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI