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

BEFORE SRI MAHAVIR SINGH, JM AND SRI G. MANJUNATHA, AM

ITA No. 2204/Mum/2014

(A.Y. 2009-10)

ITA No. 1203/Mum/2015

(A.Y. 2010-11)

M/s Shell Information Technology Internatinal BV, C/o BSR & Co. LLP, 1st Floor, Lodha Excelus, Apollo Mills Compound, N.M. Joshi Marg, Mahalaxmi Mumbai-400 011	Vs.	Deputy Director of Income Tax (International Taxation)-2(1) Room No. 120, Scindia House, Ballard Estate, N.M. Road, Mumbai-400 038
Appellant	..	**Respondent**
PAN No. AAICS9091A		

Assessee by : Niraj Sheth, AR

Revenue by : Samuel Darse, DR

Date of hearing: 16 -11-2017 **Date of pronouncement :** 16-11-2017

O R D E R

PER MAHAVIR SINGH, JM:

These two appeals by the Assessee are arising out of the orders of Dispute Resolution Panel-II, Mumbai, [in short 'DRP'] in Objection No. 163 & 97 dated 27-12-2013 & 30-10-2014 respectively. The Assessments were framed by the Deputy Director of Income Tax (IT)-2(1)& Deputy Commissioner of Income Tax (IT)-4(1)(2), Mumbai (in short 'DDIT' & 'DCIT') for the assessment years 2009-10, 2010-11 vide order dated 30-

01-2014 & 29-12-2014 under section 143(3) of the Income Tax Act, 1961(hereinafter 'the Act').

2. The first issue in ITA No. 2204/Mum/2014 for AY 2009-10 is as regards to the order of DRP construing the payments received from key of application services ('KPS') providers, International Business Machines ('IBM'), WIPRO and Logica for providing network access to use copyright software in the nature of royalty even though the same is governed by Double Taxation Avoidance Agreement ('DTAA') of India-Netherlands. For this assessee has raised following grounds: -

> *"Payments received from key application services ('KAS') for network access etc held to be royalty.*
>
> *2. erred in construing the payments received from KAS providers i.e. IBM, WIPRO and Logica for providing network access to use copyrighted software to be in nature of royalty, on the alleged ground that payment received by the appellant is consideration for grant right to use various softwares to KAS.*
>
> *3. Failed to appreciate that the payment received by the appellant company for software access fee is payment for use of copyrighted software and not for any copyright over such software and hence does not constitute royalty under the India – Netherlands Double Taxation*

> *Avoidance Agreement ('DTAAA') and the Act."*

3. At the outset the learned Counsel for the assessee stated that this issue is squarely covered by Tribunals decision in assessee's own case for AY 2006-07 in ITA No. 5051/Mum/2009, wherein, the Tribunal has considered the exactly identical issue. The learned Counsel argued the facts are that the assessee company had entered into "Master Service Agreement" (MSA) with certain IT service providers' viz., WIPRO & IBM. Pursuant to such agreement, these IT service providers could enter into separate agreement to provide IT services to Shell Group entities including its entities in India. In order to provide such IT services by WIPRO & IBM, they were required to have access to network and software of the assessee company. Before the AO, the assessee vide letter dated 04.12.2008 have made elaborate submission on services rendered by the assessee and why the payments received by the assessee for such provision of services is not taxable as 'royalty' in India. In view of the above the learned Counsel for the assessee stated that the exactly identical issue has been considered by the Tribunal for AY 2006-07 in ITA No. 5051/Mum/2009 as under:-

> *"8. We have heard the rival submissions made by the parties before us and also perused the relevant finding given in the impugned orders as well as the material referred before us at the time of hearing. As stated earlier, the assessee had entered into service agreement (MSA) with WIPRO/IBM to provide IT services to various Shell Entities. Under this agreement, the assessee provides restricted software / network access and related IT support services to WIPRO/IBM. Before us, the*

learned counsel submitted that the relevant articles and clauses given in the Master service agreements are very relevant to understand the nature and concept of software services provided as well as to examine, whether there is any payment received, which can be reckoned as 'royalty' within the terms of Article 12(4) of India Netherland DTAA, because the assessee has sought benefit under the treaty in terms of section 90 of the IT Act. The relevant terms of service agreement, copy of which are appearing in pages 35 to 40 of the paper-book are reproduced here under:

Preamble "WHEREAS

A. SITI and IT Service Provider have entered into a MSA ('as defined' below) under which IT Service Provider, either directly or as a subcontractor of an affiliate of IT Service Provider, may be providing certain MSA Services (as defined below) to Shell Companies (as defined below);

B. In order to be able to provide MSA Services, IT Service Provider has requested and SITI has agreed to provide certain Services (as defined below).

Article 1. Definitions:

"GI Services "shall mean the services as specified in Exhibit A. section I "Intellectual Property Rights" of a Party means patents, copyrights, designs, trade or service marks

(whether or not registered), rights in inventions and confidential information, semiconductor topography rights, database rights or other similar rights in any country and any applications for registration of any of the foregoing, to the extent the Party in question is entitled to grant licenses there under.

…

"MSA "shall mean the Master Service Arrangement (as may be amended from to time) for the provision of offshore IT services as entered into between srn and IBM Netherland B. V., with contract number LDMO4/00005.

…

"MSA Services" shall mean the IT services provided under MSA by the IT Service Provider either directly or as a sub-contractor of affiliate of IT Service Provider, as further described in a Statement of Work entered into by the IT Service Provider (or an IT Service Provider Affiliate,) and a Shell Company.

"MSA Service Area" shall mean the physical separated and secured area as described in the MSA where (unless otherwise agreed in a particular Statement of Work for the MSA Services to be provided under that particular

Statement of Work only) the MSA Services shall be provided by the IT Service Provider

…

"Services" shall mean the combined Sub-services provided by SITI to the IT Services Provider under this Agreement, which Sub-services include the GI Services, the STO Services and the provision by S117 to the IT Service Provider and Service Personnel of access to and/or use 401 software and/or Optional Software, all as further specified in Exhibit A.

"GI software" shall mean the mandatory GI client software that shall be provided by SITI to the IT Service Provider as part of the GI Services. The exact mandatory 01 client software that will be provided to the IT Service Provider will depend on the equipment used by the IT Service Provider in order to provide the MSA Services. It is not practical to Include a list to this Agreement of all the mandatory GI client software that may be provided by SITI as part of the GI Services, because the list of mandatory GI client software is subject to regular change, however the mandatory GI client software provided to the IT Service Provider shall be the same as the mandatory GI client software provided by SITI to other Shell Companies that use the same equipment as used by the

IT Service Provider in order to provide the MSA Services.

"STO Services" shall mean the services as specified in Exhibit A, section II

ARTICLE 3. PROVISION OF SERVICES.

SITI shall provide the IT Service Provider with the Services. SITI shall at its sole discretion be entitled to subcontract any part of the Services to a Third Party orThird Parties, but S117 shall remain solely responsible for the provision the Services. The IT Service Provider shall not subcontract nor delegate any of its rights and/or responsibilities under this Agreement to a Third Party without SITPs prior written consent. In the event of delegation or sub-contracting by the IT Service Provider the IT Service Provider shall remain solely responsible for its fulfillment of its obligations under this Agreement.

ARTICLE 4. ACCESS TO AND USE OF THE GI SOFTWARE AND OPTIONAL SOFTWARE.

Access to and use the GI software and the Optional Software is subject to the terms and conditions set out in this Agreement, including the specific. terms and conditions of access and/or use as may be set out in Exhibit A, section III (as may be amended from time to time), if any.

Optional Software. In addition to access to and/or use of the GI software, the IT Service Provider may, in order to provide the MS'A Services agreed in certain Statements of Work, need to access and/or use certain Optional Software. In such case the IT Service Provider 01 Focal Point shall request SI11 the right to access and/or use the Optional Software in question in accordance with the Optional Software Ordering Procedures. SITI in its sole discretion may (but is under no circumstances obligated to) grant the IT Service Provider the right to access and/or use the Optional Software in question.

The IT Service Provider GI Focal Point shall only request SITI for access to and/or use of Optional Software, if the IT Service Provider requires such access and/or use in order to provide the MSA Services agreed in certain Statements of Work. The IT Service Provider shall ensure that the IT Service Provider GI Focal Point shall be duly authorized to financially commit the IT Service Provider for the order placed by the IT Service Provider GI Focal Point. The IT Service Provider shall furthermore ensure that the IT Service Provider GI Focal Point shall follow all instructions as may be given from time to time by SITI.

Access/Use restrictions.

The IT Service Provider shall ensure that:

I) only Service Personnel with a strict need to use and/or access the GI software and/or Optional Software in order to provide MSA Services shall use and/or access the GI software and/or the Optional Software; and

2) such Service Personnel shall only access and/or use the GI software and Optional Software in a normal operational manner and only in so far as strictly necessary to provide USA Services; and

3) unless otherwise agreed with SITI, the GI software and Optional Software shall only he accessed from and used In the MSA Service Area.

SITI reserves the right to unilaterally add or remove certain software from the GI software and to stop the IT Service Provider from accessing and/or using certain Optional Software or request the Service Provider to stop accessing and/or using certain Optional Software. SI71 also reserves the right to unilaterally amend the specific terms and conditions for access and/or use of the GI software and/or Optional Software, as may be set out in Exhibit A, section III.

In the event that SUL at its sole discretion, stops the IT Service Provider from accessing and/or using certain Optional Software, or requests the IT Service Provider to slop

accessing and/or using certain Optional Software, and the IT Service Provider does require such Optional Software in order to be able to provide MSA Services, SITI shall use reasonable endeavours to provide the IT Service Provider with sufficient prior notice in order to enable IT Service Provider to acquire a license or any other permission from the applicable Third Party licensor to access and use such Optional Software or a substantial equivalent, so that the IT Service Provider shall continue to be able to provide MSA Services.

In the event that SITI requests the Service Provider to slop accessing and/or using certain Optional Software (unless Optional Software has already been remotely removed from the IT Service Provider equipment by SITI), the IT Service Provider shall ensure that all Service Personnel immediately stop accessing and using such Optional Software and upon request of SITI, the IT Service Provider shall as soon as reasonably possible return to SITI such Optional Software together with any associated documentation, including (but not limited to) manuals relating to the Optional Software in question as well as license certificates etcetera which may be in the IT Service Provider's' and/or Service Personnel's possession.

Upon request by SITI, the IT Service Provider shall inform SITI of the numbers and identities of the Service Personnel accessing and/or using the GI software and/or Optional Software. Subject to applicable Law, SITI shall have the right to log into and monitor the IT Service Provider's and Service Personnel's access to and use of any of the GI software and Optional Software at any time without notice. The IT Service Provider shall permit SITI or its authorized representative's at all reasonable times, to audit the IT Service Provider's and Service Personnel's access to and use of the GI software and Optional Software. The IT Service Provider shall co-operate with S111 in carrying out such audit.

ARTICLE 5. INDEMNITY.

5.2.1. By SITI.

SITI will defend, indemnify and hold harmless the IT Service Provider against any losses, damages, claims, suits, liabilities, judgments and expenses (including but not limited to attorneys 'fees and other costs of litigation) brought by a Third Party that the access and/or use of the GI software or Optional Software by IT Service Provider and/or the Service Personnel in accordance with this Agreement Infringes such Third Party's Intellectual Property Rights.

As a condition of this indemnity, IT Service Provider shall (i) notify SITI promptly in

writing of any allegation of infringement (ii) make no admission relating to the infringement; and (iii) allow SITIto conduct all negotiations and proceedings and give SITI all reasonable assistance. The foregoing indemnity shall not apply to the extent that the infringement or alleged infringement is caused by

(a) the IT Service Provider's and/or the Service Personnel's misuse or modification of the GI software or Optional Software;

(b) the IT Service Provider's and/or the Service Personnel's .failure to use corrections or enhancements made available directly or indirectly by SITI; or

(c) the IT Service Provider's and/or the Service Personnel's use of the GI software or Optional Software otherwise than in accordance with this Agreement.

Provided the exceptions of the foregoing paragraph do not apply, if the IT Service Provider's and/or the Service Personnel's access or use of the GI software or Optional Software in SITI's reasonable opinion are likely to be held to be infringing, SITI shall at its option and expense take one or more of the following actions in order to procure the right for the IT Service Provider and the Service Personnel to continue to use and/or access the GI software or Optional Software in question;

I. replace the GI software or Optional Software in question with a no infringing equivalent. i.e. having substantially equivalent functionalities and features, provided however that such non-infringing equivalent will continue to enable the IT Service Provider to provide MSA Services; or

4. modify the GI software or Optional Software ui question to make it no infringing; or

5. in the case that the IT Service Provider's and/or the Service Personnel's access to or use of a GI software and/or Optional Software is likely to be held to be Infringing, remove the GI software and/or Optional Software from the list included in Exhibit in which case the IT Service Provider shall ensure that all Service Personnel immediately stop using and/or accessing such GI software and/or Optional Software and upon request of SITI the IT Service Provider shall, unless the GI software or Optional Software in question has already been remotely removed by SITI, as soon as reasonably possible return to SITI such GI software together with any associated documentation, including (but not limited to) manuals relating to the GI software, license certificates etcetera which are in the IT Service Provider's and/or Service Personnel's possession. The foregoing slates SITI's entire liability to the IT Service Provider in respect

of the infringement of the Intellectual Property Rights of any Third Party.

ARTICLE 6. OWNERSHIP OF INTELLECTUAL PROPERTY RIGHTS.

The Intellectual Property Rights in the GI software and Optional Software are owned by SITI and/or SITI's Third Party licensors and remain vested in SITI or its Third Party licensors (as applicable). SITI is not expected to make, create or generate any Work Products in the performance at the Services under this Agreement, however in the event that SITI does make, create or generate any Work Products in the performance of the Services, the Intellectual Property Rights in such Work Products shall vest exclusively in SITI and/or SITI's Third Party licensors as applicable. For the avoidance of any doubt, the ownership of/he Intellectual Property rights of any work product made. created or generated by the 11 Service Provider (or the IT Service Provider's affiliates as the case may be in the performance of MSA Services, shall he solely determined in accordance with the Statement of Work under which such MSA Services were provided.

ARTICLE 8. TERMINATION OF THE AGREEMENT AND EFFECT OF TERMINATION.

8.2. Effect of Termination.

Upon termination of this Agreement, for whatever reason, the IT Service Provider shall ensure that all Service Personnel immediately slop using and/or accessing all GI software and Optional Software and the IT Service Provider shall return to SITI as soon as reasonably possible all the GI software and all Optional Software together with the associated documentation, including ('but not limited to) manuals relating to the GI software and Optional Software, license certificates etcetera, which are in the IT Service Provider's possession.

8.3. Termination, of Provision of a Sub Service. In the event that the IT Service Provide,' no longer requires a certain Subservice provided under this Agreement in order to provide MSA Services, the IT Service Provider shall inform SITI there and the provision of such Sub-service will be terminated and the IT Service Provider shall n longer be charged to Fees applicable to the Sub-service iii quest/u/i. If provision by SIT! to the IT Service Provider of access to and/or use a/UI software and Optional software is terminated, the IT Service Provider shall, unless the UI software and all Optional Software has already been remotely removed by SITI, return to SITI as soon as reasonably possible all the GI software and all Optional Software together with the associated documentation, including (but not limited to)

manuals relating to the GI software, or Optional Software, license certificates etcetera, which may, he in the IT Service Provider's possession.

ARTICLE 9. EQUIPMENT NO LONGER USED TO PROVIDE MSA SERVICES.

In the event that the IT Service Provider, in order to provide MSA Services, has installed the GI software and/or Optional software on certain equipment (such as, but not limited to PC's), and such equipment is no longer used by the IT Service Provider in order to provide MSA Services, the IT Service Provider shall, unless expressly otherwise agreed in writing by SITI, ensure that all the GI software and/or Optional Software on such equipment is removed as soon as such equipment is no longer used for provision of the MSA Services.

ARTICLE 17. NETWORK ACCESS

In order for SITI to provide the Services and for the IT Service Provider and Service Personnel 10 make use of the Services, the Service Personnel shall be allowed to access certain parts of the IT network of Shell Companies. IT Service Personnel shall ensure that the Service Personnel only access and use the IT network of Shell Companies in so, far as required in order to provide the MSA Services and shall comply with all further instructions as may be

provided from time to time by SITI with respect to the IT Service Providers access and use of the IT network of Shell Companies.

Exhibit A: Services

Section I

GI Services

The, following services are components of the GI Services and shall be provided by SITI under the Agreement to the IT Service Provider:

I. Office Computing Services.

2. Messaging and Time Management services.

3. Information Access and Sharing services.

4. Remote Access Services.

The above-mentioned services shall be provided by 5177 in the same manner as they are provided to other Shell Companies and in accordance with the relevant sections of the GI service level agreement as agreed between SITI and other Shell Companies.

In the event of a conflict between the relevant sections of the GI service level agreement as agreed between SIT1 and other Shell Companies and the terms and conditions and Exhibits of this Agreement the terms and

conditions and Exhibits of this Agreement shall prevail. The provision of the Services shall be governed by the terms and conditions in this Agreement; the IT Service Provider acknowledges that the "SITI delivery terms." shall not apply to provision of the Services by SITI to the IT Service Provider.

In the event that Service Personnel encounter problems while using the Services the Service Personnel shall follow the problem management procedures/instructions as provided by SITI.

Section II

STO Services

STO services are the end-to-end connectivity services provided by SITI, by means of which the IT Service Provider shall be provided with a connection to (certain parts of) the IT network of Shell Companies.

Section III

In addition to the terms and conditions stated in this Agreement the following specific terms and conditions of access and/or use apply:

Al the date of signature of this Agreement, other than the provisions already set out in this Agreement, no specific terms and conditions of access and/or use the GI software and Optional Software provided by SITI there under apply.

9. From the aforesaid articles of the Master Service Agreement, learned counsel submitted that from the reading of Article 3 it can be noted that right granted to WIPRO/IBM shall not be passed on/transferred to any other person and only WIPRO/IBM are legally permissible to exercise those rights. Article 4 merely grants right to access/use the GI/operational software. This right is subject to the terms and conditions set out in that article and provides following restrictions on to the rights so granted:

1) Only service personnel with a strict need to use and/or access the GI software in order to provide MS services shall use and/or access the GI software and/or Optional software; and

2) Such Service personnel shall only access and/or use the GI software and optional software in a normal operational manner and only in so far as strictly necessary to provide MSA Services; and

3) Unless otherwise agreed with SITI, the GI Software and operational software shall only be accessed from and used in the MSA Service Area.

He pointed out Article 17 stipulates that in order to provide services to Shell Entities, WIPRO/IBM shall be allowed to access certain parts of the IT network of the Shell Companies. Such right is not unfettered but again is limited to use for the own business purpose and not otherwise. Similarly, Article 6 outlines the ownership of the IPRs and clearly states that GI/operational software shall at all times remain vested with the assessee. Similarly, termination agreement under Article 8.2 provides the immediate

stop of access of using GI/operation software and the party shall return the software along with many other things.

10. The learned counsel further submitted that all these terms and conditions as enshrined in MSA will only go to show that the assessee does not in any manner give any right to use any copyright embedded in the software or to make copies or sell the software and only leant right to access/use the software for its own business purpose. WIPRO/IBM does not get any right per se in the software and, hence, such a payment cannot be treated as royalty. He contended that 'royalty' as per DTAA is different from the term 'royalty' as defined under the Indian IT Act, which has a much wider scope. Further, access to the software/network access is not a "process" as referred by the learned AO, because the assessee has not allowed WIPRO/IBM to use the "process" by using the software as they do not have any access to the source code. What is allowable for their use is their software product as such and not a "process" embedded in it. In any case, he submitted that by making use of or having access to the computer programs embedded in the software, it cannot be said that WIPRO/IBM are using the process the process that has gone into the software or that they have acquired any rights in relation to the process as such. Lastly, he contended that access to software/network is not the use of copyright but the use of copyrighted article and, further referring to the relevant definition in section 13 & 14 of the Copyright Act, he submitted that there is no use or

right to use of any copy right and does not fall within the ambit of royalty as covered under DTAA. In support he relied upon the following decisions before us:-

- *DIT v. Infrasoft Ltd [2013] 39 taxmann.com 88 (Del- HC)*
- *ADIT v Baan Global B V [2016] (ITA 7048/Mum/2010*
- *CIT v. Halliburnton Export Inc. [2016] ITA 363/2016 (Del-HC)*
- *DIT v. Nokia Network OY [2012] 25 taxmann.com225 (Del-HC)*
- *DIT v. Ericsson A.B. [2012]246 CTR 422 (Del –HC)*
- *DDIT v. Solid Works Corpn [2012] 18 taxmann.com 189 (Mum – Tri)*
- *Galatea Ltd. v. DCIT [2016]67 taxmann.com 190 (Mum- Tri)*
- *Capgemini Business Services (India) Ltd. vs. ACIT [2016] 68 taxmann.com 36 (Mum-Tri)*
- *DDIT v. Reliance Industries Limited [2016] 69 taxmann.com 311 (Mum- Tri)*
- *Aspect Software Inc. v. ADIT [2015] 61 taxmann.com 36 (Del-Tri)*
- *Allianz SE v. ADIT [2012] 21 taxmann.com 62 (Pune-Tri)*

- *Tata Consultancy Services v. State of AP[2004] 141 Taxman 132 (SC).*

11. On the other hand, the learned CIT-DR after referring to various observations of the AO, submitted that the amendment brought in the section 9(1)(vi) by insertion of Explanation 4 to Finance Act 2012 with retrospective effect, covers such kind of payments for use or right to use of a computer software under the ambit of royalty. Such an amendment has to be read into the Treaty, because the scope of definition and meaning of 'royalty' under the Act and DTAA are by and large same. In support, he strongly relied upon the decision of CIT vs. Siemens Aktiongesellschaft, 310 ITR 320; and Vaicom 18 Media Private Ltd. vs. ADIT (2014) 162 TTJ 336. He gave a small writeup on this aspect, which for the sake of ready reference is reproduced below:

> *1. On the issue whether the Amendments/Explanations inserted in the IncomeTax 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 (Bom HC)rendered in the facts peculiar factscase has notbeen appreciatedin 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 cannot 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 assessee 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 cannot be read into DTAA.

ii) The nature of services rendered in the said case was 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 assessee were preferred over the provisions of the 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 cannot 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 his commentary has also advocated ambulatory approach.

12. After considering the aforesaid submissions and the relevant terms of 'Master Service Agreement' (as reproduced above) between the assessee and the IT Services providers, i.e., WIPRO/IBM, it is quite ostensible that:-

Firstly, any kind of right granted to WIPRO/IBM cannot be passed on or transferred to any other person and only WIPRO/IBM is legally permissible to exercise this right.

Secondly, the right to access/use of software is again subject to various terms and conditions, which has been highlighted under Article 4

The right which has been given to WIPRO/IBM is not unfettered but has a very limited use for the own business purpose and not otherwise.

Thus, only limited right to access/use the software has been provided to the UT service provider for its own business purpose and they do not get any right in the said software. The access to software is not for use of any copyright albeit for a copyrighted articles during the course of providing service.

The agreement clearly envisages that WIPRO/IBM shall use the software only for providing services to Shell entities and cannot alter or modify the software. Since the assessee is a resident of Netherland therefore, such a payment has to be seen in terms of Article 12(4) of DTAA, which reads as under:-

> *"The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience.*

From the plain reading of the article it can be inferred that, it refers to payments of any kind received as a consideration for the use of, or the right to use any 'copyright' of literary, artistic or scientific work including cinematograph films, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience. Thus, in order to tax the payment in question as "royalty", it is sine qua non that the said payment must fall within the ambit and scope of Para4 of Article 12. The main emphasis on the payment constituting 'royalty' in Para4 is for a consideration for the 'use of' or the 'right to use' any copyright..... The key phrases are "for the use" or "the right to use any copyright of"; "any patent....., "or process", "or for

information.....,"; "or scientific experience", etc., are important parameter for treating a transaction in the nature of "royalty". If the payment doesn't fit within these parameters then it doesn't fall within terms of "royalty" under Article 12(4).The computer software does not fall under most of the term used in the Article barring "use of process" or "use of or right to use of copyrights" Here first of all, the limited use of software cannot be held to be covered under the word "use of process", because the assessee has not allowed the end user to use the process by using the software, as the customer does not have any access to the source code. What is available for their use is software product as such and not the process embedded in it. Several processes may be involved in making computer software but what the customer uses is the software product as such and not the process, which are involved into it. What is required to be examined in the impugned case as to whether there is any use or right to use of copyright? The definition of copyright, though has not been explained or defined in the treaty, however, the various Courts have consistently opined that the definition of "copyright "as given in the 'Copyright Act, 1957' has to be taken into account for understanding the concept. Section 14of the said Act defines the 'copyrights' to mean as under:

> *"14. Meaning of copyright – For the purposes of this Act, "copyright" means the exclusive right subject to the provisions of this Act, to do or authorise the doing of any of the*

following acts in respect of a work or any substantial part thereof, namely:

(a) in the case of a literary, dramatic or musical work, not being a computer programme,

(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);

(b) in the case of a computer programme,-

(i) to do any of the acts specified in clause (a);

(ii) to sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer programme: Provided that, such commercial rental does not apply

in respect of computer programmes where the programme itself is not the essential object of the rental."

(c) in the case of an artistic work,-

(i) to reproduce the work in any material form including depiction in three dimensions of a two dimensional work or in two dimensions of a three dimensional work;

(ii) to communicate the work to the public;

(iii) to issue copies of the work to the public not being copies already in circulation;

(iv) to include the work in any cinematograph film;

(v) to make any adaptation of the work;

(vi) to do in relation to an adaptation of the work any of the acts specified in relation to the work in sub-clauses (i) to (iv)

(d) In the case of cinematograph film, -

(i) to make a copy of the film, including a photograph of any image forming part thereof;

(ii) to sell or give on hire, or offer for sale or hire, any copy of the film, regardless of whether such copy has been sold or given on hire on earlier occasions;

(iii) to communicate the film to the public;

(e) In the case of sound recording, -

(i) to make any other sound recording embodying it;

(ii) to sell or give on hire, or offer for sale or hire, any copy of the sound recording regardless of whether such copy has been sold or given on hire on earlier occasions;

(iii) to communicate the sound recording to the public. Explanation: For the purposes of this section, a copy which has been sold once shall be deemed to be a copy already in circulation

13. Thus, the definition of 'copyright 'in section 14 is an exhaustive definition and it refers to bundle of rights. In respect of computer programming, which is relevant for the issue under consideration before us, the copyright mainly consists of rights as given in clause (b), that is, to do any of the act specified in clause (a) from (i) to (vii) as reproduced above. Thus, to fall within the realm and ambit of right to use copyright in the computer software programme, the aforesaid rights must be given and if the said rights are not given then, there is no copyright in the computer programme or software. Here in this case, none of the conditions mentioned in section 14 of the 'Copyright Act' is applicable as held by the learned CIT(A); and is also is evident from the terms of MSA, because no such rights has been given by the assessee to the IT Service providers.

14. Further by making use or having access to the computer programs embedded in the software, it cannot be held that either WIPRO/IBM are using the process that has gone into the software or that they have acquired any rights in relation to the process as such.

The software continues to be owned by the assessee and what WIPRO/IBM is getting mere access to the software. The source code embedded in the software has not been imparted to them. Hence, there is no use or right to use of any process as held by the learned AO. Hence, the finding of the learned CIT(A) that the payment in question cannot be reckoned as "royalty" is factually and legally correct and the same is upheld.

15. Apart from that now there are various decisions of Hon'ble High Court including that of Hon'ble Delhi High Court in case of DIT vs. Infrasoft Ltd., reported in [2013] 39 Taxmann.com 88, wherein host of other decisions have been referred and relied upon. In the A.Y. 2008-09, the learned CIT (A) has relied upon the decision of Hon'ble Karnataka High Court in the case CIT vs. Samsung Electronics Co. Ltd. [2013]345 ITR 494 and some other decisions of the Tribunal. We find that the Hon'ble Delhi High Court has taken note of this fact and also analysed the payment of software within the ambit of royalty as defined under Article 12 of the India US Treaty. The relevant observation and finding of the Hon'ble High Court is as under:

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

88. The license granted by the Assessee is limited to those necessary to enable the licensee to operate the program. The rights transferred are specific to the nature of computer programs. Copying the program onto the computer's hard drive or random access memory or making an archival copy is

an essential step in utilizing the program. Therefore, rights in relation to these acts of copying, where they do no more than enable the effective operation of the program by the user, should be disregarded in analyzing the character of the transaction for tax purposes. Payments in these types of transactions would be dealt with as business income in accordance with Article 7.

89. There is a clear distinction between royalty paid on transfer of copyright rights and consideration for transfer of copyrighted articles. Right to use a copyrighted article or product with the owner retaining his copyright is not the same thing as transferring or assigning rights in relation to the copyright. The enjoyment of some or all the rights which the copyright owner has is necessary to invoke the royalty definition. Viewed from this angle, a nonexclusive and non-transferable licence enabling the use of a copyrighted product cannot be construed as an authority to enjoy any or all of the enumerated rights ingrained in Article 12 of DTAA. Where the purpose of the licence or the transaction is only to restrict use of the copyrighted product for internal business purpose, it would not be legally correct to state that the copyright itself or right to use copyright has been transferred to any extent. The parting of intellectual property rights inherent in and attached to the software product in favour of the

licensee/customer is what is contemplated by the Treaty. Merely authorizing or enabling a customer to have the benefit of data or instructions contained therein without any further right to deal with them independently does not, amount to transfer of rights in relation to copyright or conferment of the right of using the copyright. The transfer of rights in or over copyright or the conferment of the right of use of copyright implies that the transferee/licensee should acquire rights either in entirety or partially co-extensive with the owner/ transferor who divests himself of the rights he possesses pro-tanto.

90. The license granted to the licensee permitting him to download the computer programme and storing it in the computer for his own use is only incidental to the facility extended to the licensee to make use of the copyrighted product for his internal business purpose. The said process is necessary to make the programme functional and to have access to it and is qualitatively different from the right contemplated by the said paragraph because it is only integral to the use of copyrighted product. Apart from such incidental facility, the licensee has no right to deal with the product just as the owner would be in a position to do.

91. There is no transfer of any right in respect of copyright by the Assessee and it is a case of mere transfer of a copyrighted article. The

payment is for a copyrighted article and represents the purchase price of an article and cannot be considered as royalty either under the Income Tax Act or under the DTAA.

92. The licensees are not allowed to exploit the computer software commercially, they have acquired under licence agreement, only the copy righted software which by itself is an article and they have not acquired any copyright in the software. In the case of the Assessee company, the licensee to whom the Assessee company has sold/licensed the software were allowed to make only one copy of the software and associated support information for backup purposes with a condition that such copyright shall include Infrasoft copyright and all copies of the software shall be exclusive properties of Infrasoft. Licensee was allowed to use the software only for its own business as specifically identified and was not permitted to loan/rent/sale/sub-licence or transfer the copy of software to any third party without the consent of Infrasoft.

93. The licensee has been prohibited from copying, decompiling, deassembling, or reverse engineering the software without the written consent of Infrasoft. The licence agreement between the Assessee Company and its customers stipulates that all copyrights and intellectual property rights in

the software and copies made by the licensee were owned by Infrasoft and only Infrasoft has the power to grant licence rights for use of the software. The licence agreement stipulates that upon termination of the agreement for any reason, the licensee shall return the software including supporting information and licence authorization device to Infrasoft. Xxx xxxx xxxxx xxxxx xxxxxx xxxxx xxx xxxxxx

94. The incorporeal right to the software i.e. copyright remains with the owner and the same was not transferred by the Assessee. The right to use a copyright in a programme is totally different from the right to use a programme embedded in a cassette or a CD which may be a software and the payment made for the same cannot be said to be received as consideration for the use of or right to use of any copyright to bring it within the definition of royalty as given in the DTAA. What the licensee has acquired is only a copy of the copyright article whereas the copyright remains with the owner and the Licensees have acquired a computer programme for being used in their business and no right is granted to them to utilize the copyright of a computer programme and thus the payment for the same is not in the nature of royalty.

95. We have not examined the effect of the subsequent amendment to section 9 (1)(vi) of

the Act and also whether the amount received for use of software would be royalty in terms thereof for the reason that the Assessee is covered by the DTAA, the provisions of which are more beneficial.

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

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

98. We are not in agreement with the decision of the Andhra Pradesh High Court in the case of SAMSUNG ELECTRONICS CO. LTD (SUPRA) that right to make a copy of the software and storing the same in the hard disk of the designated computer and taking backup copy would amount to copyright work under section 14(1) of the Copyright Act and the payment made for the grant of the licence for the said purpose would constitute royalty. The license granted to the licensee permitting

him to download the computer programme and storing it in the computer for his own use was only incidental to the facility extended to the licensee to make use of the copyrighted product for his internal business purpose. The said process was necessary to make the programme functional and to have access to it and is qualitatively different from the right contemplated by the said provision because it is only integral to the use of copyrighted product. The right to make a backup copy purely as a temporary protection against loss, destruction or damage has been held by the Delhi High Court in DIT v. M/s Nokia Networks OY (Supra) as not amounting to acquiring a copyright in the software".

The ratio of the above decision clearly clinches the issue which is applicable in the case of the assessee also. This ratio and principle has been followed and reiterated again in the case of Principal CIT vs M.Tech India Pvt Ltd (supra) and again in the decisions of Alacatel Lucent, Canada, reported [2015] 372 ITR 476 , wherein Hon'ble Delhi High Court relying upon its earlier two decisions in the case of DIT vs Ericson , [2012] 343 ITR 470 and DIT vs M/s Nokia Networks, reported in 358 ITR 259 (Del) concluded that, when assessee supplies the software which is incorporated on CD, it has applied only a tangible property and payment made for acquiring such a

property cannot be regarded as payment by way of royalty. The relevant observation of the High Court in Alcatel Lucent (supra) in this regard reads as under:

> *" We have noticed, at the outset, that the ITAT had relied upon the ruling of this Court in Director of Income Tax V. Ericsson A.B. (2012) 343 ITR 470 wherein identical argument with respect to whether consideration paid towards supply of software along with hardware – rather software embedded in the hardware amounted to royalty. After noticing several contentions of the revenue, this Court held in Ericsson A.B. (supra) as follows: "*
>
> *54. It is difficult to accept the aforesaid submissions in the facts of the present case We have already held above that the assessee did not have any business connection in India. We have also held that the supply of equipment in question was in the nature of supply of goods. Therefore, this issue is to be examined keeping in view these findings. Moreover, another finding of fact is recorded by the Tribunal that the Cellular Operator did not acquire any of the copyrights referred to in Section 14 (b) of the Copyright Act, 1957.*

55. Once we proceed on the basis of aforesaid factual findings, it is difficult to hold that payment made to the assessee was in the nature of royalty either under the Income -Tax Act or under the DTAA. We have to keep in mind what was sold by the assessee to the Indian customers was a GSM which consisted both of the hardware as well as the software, therefore, the Tribunal is right in holding that it was not permissible for the Revenue to assess the same under two different articles. The software that was loaded on the hardware did not have any independent existence. The software supply is an integral part of the GSM mobile telephone system and is used by the cellular operator for providing the cellular services to its customers. There could not be any independent use of such software. The software is embodied in the system and the revenue accepts that it could not be used independently. This software merely facilitates the functioning of the equipment and is an integral part thereof. On these facts, it would be useful to refer to the judgment of the Supreme Court in TATA Consultancy Services Vs. State of Andhra Pradesh (2004) 271 ITR 401 (SC), wherein the Apex Court held that software which is

incorporated on a media would be goods and, therefore, liable to sales tax. Following discussion in this behalf is required to be noted: - "In our view, the term "goods" as used in Article 366(12) of the Constitution of India and as defined under the said Act are very wide and include all types of movable properties, whether those properties be tangible or intangible. We are in complete agreement with the observations made by this Court in Associated Cement Companies Ltd. (supra). A software programme may consist of various commands which enable the computer to perform a designated task. The copyright in that programme may remain with the originator of the programme. But the moment copies are made and marketed, it becomes goods, which are susceptible to sales tax. Even intellectual property, once it is put on to a media, whether it be in the form of books or canvas (In case of painting) or computer discs or cassettes, and marketed would become "goods". We see no difference between a sale of a software programme on a CD/floppy disc from a sale of music on a cassette/CD or a sale of a film on a video cassette/CD. In all such cases, the intellectual property has been

> *incorporated on a media for purposes of transfer. TAXPUNDIT.ORG Sale is not just of the media which by itself has very little value. The software and the media and case laws in favour of the assessee including that of the Delhi High Court on several occasions, we are inclined to follow the decision and proposition laid down by the Hon'ble Delhi High Court. Thus, in view of the finding given above, we uphold the order of the CIT(A) that the payment received by the assessee for sums amounting to Rs. 3,75,25,291/- does not amount to "royalty" within the meaning of Article 12(4) of Indo-Netherland DTAA and accordingly, the same is not taxable in India. Since, admittedly, the assessee has no PE in India; therefore, same cannot be taxed as business income under Article 7. Accordingly, ground raised by the revenue stands dismissed."*

The aforesaid decision clearly clinches the issues in favour of the assessee.

16. So far as the reading of amended definition of 'royalty' as given in section 9(1)(vi) into treaty as contended and argued by ld. CIT DR, we find that, Hon'ble Delhi High Court in its latest judgment in the case of DIT vs. New Skies Satellite, reported in [2016] 95 CCH 0032,wherein their Lordships shave

discussed the issue threadbare and came to the conclusion in the following manner:-

> *"60. Consequently, since we have held that the Finance Act, 2012 will not affect Article 12 of the DTAAs, it would follow that the first determinative interpretation given to the word "royalty" in Asia Satellite, supra note 1, when the definitions were in fact pari material (in the absence of any contouring explanations), will continue to hold the filed for the purpose of assessment years preceding the Finance Act, 2012 and in all cases which involve a Double Tax Avoidance Agreement, unless the said DTAAs are amended jointly by both partners to incorporate income from data transmission services as partaking of the nature of royalty, or amend the definition in a manner so that such income automatically becomes royalty. It is reiterated that the Court has not returned a finding on whether the amendment is in fact retrospective and applicable to cases preceding the Finance Act of 2012 where there exists no Double Tax Avoidance Agreement.*

The aforesaid decision also takes care of all the arguments relied upon by the ld. CIT DR including that of the Verizon Communications Singapore Pte. Ltd. The Hon'ble High Court has specifically clarified as to why the said judgment of Madras High Court cannot be applied in such cases after observing as under:-

> *"31. In a judgment by the Madras High Court in Verizon Communications Singapore Pte Ltd. V. The Income Tax Officer, International Taxation I, [2014] 361 ITR 575 (Mad), the Court held the Explanations to be applicable to not only the domestic definition but also carried them to influence the meaning of royalty under Article 12. Notably, in both cases, the clarificatory nature of the amendment was not questioned, but was instead applied squarely to assessment years predating the amendment. The crucial difference between the judgments however lies in the application of the amendments to the DTAA. While TV Today, supra note 22 recognizes that the question will have to be decided and the submission argued, Verizon, supra note 23 cites no reason for the extension of the amendments to the DTAA.*

As regards the decision of Hon'ble Bombay High Court in the case of CIT vs. Siemens Aktiongesellschaft (supra), referred to by d. CIT DR, the Hon'ble Delhi High Court has also dealt with this point and made distinction that the issue and situation before the Hon'ble Bombay High Court was materially different and also the term 'royalty' was not defined in the German DTAA.

17. Thus, we hold that for all the years the payments received by the assessee from WIPRO/IBM in pursuance to the MSA cannot be treated as "royalty" under Article 12(4) of the India-Netherland DTAA.

Thus, the matter is decided in favour of the assessee and against the revenue."

4. The learned Counsel then took us through the findings of the DRP, who is relied on the CIT(A)'s decision for AY 2008-09 and DRP has also gone through the decision of CIT(A) in AYs 2006-07, 2007-08 and 2008-09 and noted as under: -

"4.2.6 We have also gone through the decisions of the CIT(A) in the case of assessee for the AY 2006-07 and 2007-08. We find that the at that time the decisions of Karnataka High court and ruling of AAR as mentioned above were not available for consideration. The decision of jurisdictional ITAT in the case of DDIT (IT) v. Reliance Infocom Ltd. and Others [TS-433-ITAT-2013 (Mum)] was also not available for consideration. The retrospective amendment was also made after the decisions in the case of assessee by the Ld. CIT(A). For this very reason the Ld. CIT(A) while deciding the case of the assessee for AY2008-09 vide order dated 30-11-2011 has held that the income on this account is taxable as royalty. The Relevant para of the order of the CIT(A) is reproduced hereunder:

"..The present case is also a case of grant of license to use

various software's held by the appellant. Such right to use was granted by the appellant to the IT services providers M/s. IBM & M/s. Wipro to exploit the software commercially and provide IT services to the group companies of the appellant. Therefore, considering the judgments of Hon'ble Karnataka High court in the case of Samsung Electronics C. Ltd., Lucent Technologies Hindustan Ltd. & Wipro Ltd., It is held that payment received by the appellant is consideration for grant of right to use various software's to IBM Wipro under licence and therefore, it is taxable as "royalty". Hence, the first ground of appeal is dismissed".

In conclusion, considering the above factual and legal matrix, we are of the opinion that the action of the AO in treating the above receipt as royalty does not require any interference.

5. In view of the above, the learned Counsel for the assessee stated that the Tribunal in assessee's own case has taken the view that the payments received by the assessee from WIPRO, IBM and Logica in

pursuance to the MSA cannot be treated as royalty under Article 12(4) of the Indian-Netherlands DTAA.

6. Exactly on identical facts, this was confronted to the learned CIT DR, he fairly agreed that the issue is covered by the Tribunal's decision. After hearing both the sides and gone through the facts of the case, we find that exactly on identical facts the issue is covered by Tribunal's decision for AY 2006-07 and 2007-08 in ITA No. 551/Mum/2009 and 3818/Mum/2011 respectively, vide order dated 15-03-2017. Respectfully following the same, we allow this issue of the assessee's appeal.

7. The next issue common issue in both the appeals of assessee is as regards to taxability of payment received by assessee from IT support services which constitutes Fees for Technical Services ('FTS') and royalty under the India-Netherlands Treaty DTAA. For this Assessee has raised following ground:-

> *"Payments towards IT Suport fees held to be Fees for Technical Services ('FTS') and royalty.*
>
> *4. Erred in holding that payments received by the Appellant for IT support services constitutes FTs and royalty under the India-Netherlands DTAA.*
>
> *5. Failed to appreciate that IT support services do not 'make available any technical knowledge, skill, experience etc.to the services recipient under Article 12 of the India-Netherlands DTAA and hence not subject to tax in India.*

6. Erred in alternatively holding that the receipt from IT support services qualify as 'Royalty' under the India-Netherlands DTAA."

8. The facts and circumstances are exactly identical in both the AYrs i.e. 2009-10 and 2010-11 and also the grounds raised are identically worded hence, we will take the facts from 2009-10.

9. The learned Counsel for the assessee, first of all, took us through the findings of the DRP on the issue which is recorded in Para 5.3 as under: -

"5.3 Discussions and directions of DRP

5.3.1 We have considered the draft assessment order, submissions of assessee and material. We hae seen that under the Master Services Agreement, the assessee SITI BV has furnished technical and advisory services to various clients based in India. The delineated services are significantly technical in nature and the resultant fees are liable to be treated as Fees for Technical Services. We are also in agreement with the AO that the Ruling of Hon'ble Authority for Advance Rulings in he case of AREVA T&D India Limited (ATDIL) is applicable in the case of assessee. In this case, the Aar held as below:

"We have noted that under the IT Agreement, the French company is to provide support services through a central team in the area of Information Technology to the Applicant and to its other subsidiaries in the world. The provision of support services by the French company would itself make available, the technical knowledge/ experience to the Applicant.

In Perfetti Van Melle Holdings B.V1 this Authority held the view that "the expression 'make available' only means that the recipient of the service should be in a position to derive an enduring benefit and be in a position to utilize the knowledge or knowhow in future on his own". Here, information technology relating to design, engineering, manufacturing and supply of electric equipment that help in transmission and distribution of power, commissioning and servicing of transmission and distribution system is provided to the Indian entity whichis applied in running the business of the Applicant and the employees of the Applicant would get equipped to carry on these systems on their own without reference to the French Company, when the IT Agreement comes to an end. It is not as if for making

> *available, the recipient must also be conveyed specifically the right to continue the practice put into effect and adopted under the agreement on its expiry. We are of the view that the services provided under the IT agreement are in the nature of Fees for Technical Services and taxable under the DTAA as well as under the Act.*
>
> *Though the ruling is technically not binding in the present case, the ratio and logic followed by the Hon'ble Authority have very high degree of persuasive value. In any case, this technical know-how is of an enduring nature and has a direct nexus with the assessee's business.*
>
> *5.3.2 considering the above factual and legal matrix, we are of the opinion that the action of the AO in treating the above receipt as fee for technical services does not require any interference. The alternate arguments on taxability of the receipt as royalty do not require any direction from the penal as we have already upheld the taxability of the services as "fees for included service.""*

10. The learned Counsel for the assessee explained the facts that the SITI BV is a company registered in the Netherlands. SITI BV is in the business of providing information technology ('IT') support services. During the financial year ended 31.03.2006 SITI BV provided IT (mobile

office) support services, IT helpdesk and network infrastructure related services to Indian customers. SITI BV is a tax resident of The Netherlands and is eligible to claim benefits under the Double Taxation Avoidance Agreement entered into between India and The Netherlands. He explained that SITI BV is in the business of providing information technology support services. SITI BV, typically, provides helpdesk services and network infrastructure services to Shell group companies comprising. Information Technology ('IT') support for solving any IT related problems faced by users i.e. any problem faced by users for accessing any application software. e-mails, Computer repairs and maintenance etc., desktop, laptop and workstation support; Services related to Wide area network ('WAN') and Local area network ('LAN') for connection to the global servers', and Facilitating teleconferencing and video conferencing services. Further, in the event Shell requires IT services from external service providers like WIPRO and IBM, SITI BV is engaged in providing the necessary network access and related services as well. For this purpose, reference can be made to the scope of services to be rendered by SITI BV to WIPRO under the Services Agreement (copy of which is enclosed in the paper book of the assessee) and from the same Article 3 is reproduced below:

> *Article 3 - Provision of Services*
>
> *SITI BV shall provide the IT Service Provider with the service."*
>
> *Further, 'Service' has been defined in Article 1 - Definitions as 'the combined Sub-services provided by SITI BV to she IT Services Provider wider this Agreement, which Sub-services include the (if Services, the STO Services and she provision by SITI BV to the IT Service*

> *Provider and Service Personnel of access to and/or use of GI software and/or Optional Software ……*

11. Further, SITI BV is company incorporated in The Netherlands. SITI BV is a tax resident of The Netherlands eligible to claim the benefits conferred by the Double Taxation Avoidance Agreement entered into between India and The Netherlands (Treaty'). Section 90 of the Act read with the Circulars and several judicial precedents issued thereunder provide that a non-resident taxpayer is eligible to be assessed as per the provisions of the Act or as per the provisions of the relevant double taxation avoidance agreement, whichever is more beneficial. SITI BV is a non-resident for Indian tax purposes. Accordingly, SITI BV could be assessed as per the provisions of the Actor as per the Treaty, whichever is more beneficial to SITI BV. IN view of the same, the non-taxability of the services rendered by SITI BV has been examined under the provisions of the Treaty. Article 12(4) of the Treaty defines the term 'royally' as follows:

> *“Payments of any kind received as a consideration for the use, or the right to use, any copyright of literacy, artistic or scientific work including cinematograph films, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience.”*

12. From the above, it is clear that SITI BV is engaged in providing IT services to Indian entities but does not provide any right to use any copyright of literary, artistic or scientific work including cinematograph films, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific

experience. Even under the agreements entered into with WIPRO and IBM, SITI BV only provides them access to the software i.e. computer Programme. SITI BV does not provide them the right to use the copyright embedded in the software. In other words, WIPRO, IBM are not permitted to make copies and sell the software. Under the Services Agreements, WIPRO and IBM have been granted the mere under the right in the copyrighted software and not the right of, use of copyright'. Whereas 'use of copyright' encompasses exploitation of the rights embedded in a copyright but a mere user right is a limited right and consideration paid for such user right cannot be regarded as consideration for use of or right to use a copyright. In view of the above, the learned Counsel for the assessee stated that the issue is fully covered by the decision of Hon'ble Delhi High Court in the case of DIT Vs. Guy Carpenter & Co. Ltd, (2012) 20 taxmann.com 807 (Del-HC), wherein India-UK DTAA was under consideration of Hon'ble Delhi High Court and Hon'ble High Court after considering the Article 13 of the DTAA of India-UK and also the facts of the assessee finally held the concept of 'make available' of technical services that such receipts would not amount to fee for technical services so as to the "concept of make available clause' contained in Article 13(4)(c) of the treaty has not been satisfied. In the given facts and circumstances of the case, Hon'ble Delhi High Court vide Para 8 to 13 held as under: -

> *"**8.** Before we go on to examine the findings of the Tribunal it would be pertinent to refer to article 13 of the DTAA to the extent it is relevant :-*
>
> *"ARTICLE 13- Royalties and fees for technical services-*
>
> *1. Royalties and fees for technical services arising in a Contracting State and paid to a resident of the*

other Contracting State may be taxed in that other State.

2. However, such royalties and fees for technical services may also be taxed in the Contracting State in which they arise and according to the law of that State; but if the beneficial owner of the royalties or fees for technical services is a resident of the other Contracting State, the tax so charged shall not exceed:

(a) In the case of royalties within paragraph 3 (a) of this Articles, and fees for technical services within paragraphs 4 (a) and (c) of this Article,-

(i) during the first five years for which this Convention has effect;

(aa) 15% of the gross amount of such royalties or fees for technical services when the payer of the royalties or fees for technical services is the Government of the first mentioned Contracting State or a political sub-division of that State, and

(bb) 20% of the gross amount of such royalties or fees for technical services in all other cases; and

(ii) during subsequent years, 15% of the gross amount of such royalties or fees for technical services; and

(b) in the case of royalties within paragraph 3(b) of this Article and fees for technical services defined in paragraph 4(b) of this Article, 10% of the gross amount of such royalties and fees for technical services.

	(3)**	**	**

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

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

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

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

5. The definition of fees for technical services in paragraph 4 of this Article shall not include amounts paid:

(a) for services that are ancillary and subsidiary, as well as inextricable and essentially linked, to the sale of property, other than property described in paragraph 3 (a) of this Article;

(b) For services that are ancillary and subsidiary to the rental of ships, aircraft, containers or other

equipment used in connection with the operation of ships, or aircraft in international traffic;

(c) For teaching in or by educational institutions;

(d) For services for the private use of the individual or individuals making the payment; or

(e) To an employee of the person making the payments or to any individual or partnership for professional services as defined in Article 15 (Independent personal services) of this Convention.

	(6), (7), (8) and (9)**	**	**"

9. *A plain reading of Article 13(4)(c) of the DTAA indicates that 'fees for technical services' would mean payments of any kind to any person in consideration for the rendering of any technical or consultancy services which, inter alia, "makes available" technical knowledge, experience, skill, know-how or processes, or consist of the development and transfer of a technical plan or technical design. According to the Tribunal this "make available" condition has not been satisfied inasmuch as no technical knowledge, experience, skill, know-how, processes, have been made available by the assessee to the insurance companies operating in India. It also does not consist of the development and transfer of any technical plan or technical design.*

10. *The Tribunal examined the evidence available on record in order to return a finding on the issue as to whether the payments received by the assessee*

from the insurance companies operating in India would fall within the expression 'fees for technical services' as appearing in article 13(4)(c) of the DTAA read with section 9(1)(vii) of the said Act. While doing so the Tribunal, inter alia, found that the assessee company was an international reinsurance intermediary (broker) and was a tax resident of United Kingdom. Further, that it was a recognized broker by the financial services authority of United Kingdom. It was also an admitted position that the assessee did not maintain any office in India and that it had a referral relationship with J.B. Boda reinsurance (Broker) Pvt. Ltd of Mumbai and that J.B. Boda was duly licenced by the Insurance Regulatory & Development Authority to transact reinsurance business in India.

11. *The Tribunal also observed as under: -*

"27. In the illustrative transaction, New India Insurance Co. Ltd. in India has entered into an agreement to reinsure on an Excess Loss basis the catastrophe risk arising from its primary insurance cover in conjunction with J.B. Boda and Alsford Page and gems Ltd. (the reinsurance brokers). The terms of the agreement specifies that the assessee in conjunction with J.B. Boda are recognized as intermediary, through whom all communications relating to this agreement shall pass. The terms of the agreement further provides that the assessee will provide all the details of agreed endorsements to the reinsurers by e-mail or facsimile and shall submit the slip policy to XIS (Lloyd's processing market) for signing. The assessee will act as a claim

administrator and will submit claims advices to relevant market systems. For the services rendered, the assessee along with the other reinsurance brokers acting as an intermediary in the reinsurance process for New India Assurance Co. will be entitled to 10% brokerage. From the role played by the assessee in the reinsurance process as discussed above, it is evident to us that the assessee was rendering only intermediary services while acting as an intermediary/facilitator in getting the reinsurance cover for New India Insurance Co. There exists no material or basis on the basis of which, it would be said that the assessee was rendering any kind of technical/consultancy service within the meaning of Article 13 of Indo-UK treaty. The consideration received by the assessee acting as an intermediary in the reinsurance process cannot, by any stretch of imagination, be qualified as a consideration received for rendering any financial analysis related consultancy services, rating agency advisory services, risk based capital analysis etc. as alleged by the A.O."

The Tribunal also noted the process by which the transaction takes place. It has been pointed out that the originating insurer in India would contact J.B. Boda/ M.B. Boda for placing identified risks/ class of risks with international reinsurers. J.B. Boda, in turn, would contact one or more international firm(s) of reinsurance broker(s) like the assessee for competitive proposals from the international reinsurer. Then, the international reinsurance brokers like the assessee would contact other

primary brokers and various syndicates in the Lloyds market for competitive proposals. Based on the various offers or proposals given by the international reinsurance brokers, like the assessee, to J.B. Boda, the latter would present various options to the originating insurer in India, which would take a final decision in the matter. Based on the decision of the originating insurer in India, the policy terms would then be agreed upon and the risk would be placed with the international reinsurer. It was also pointed out that as per the normal industry practice, the reinsurance premium net of brokerage of 10% as per the policy contract is remitted to the assessee, i.e., reinsurance brokers, for onward transmission to international reinsurers. The intermediation fee which is another word for brokerage is paid separately by the originating insurance in India to J.B. Boda, the international reinsurance brokers like the assessee and other intermediaries, based on a mutually agreed ratio which accounts for their relative contribution in the reinsurance process.

12. *Based on this manner of transacting, the Tribunal came to a conclusion that the payment received by the assessee could not be regarded as 'fees for technical services'. Further, more, the Tribunal also held that such receipts would not amount to fees for technical services as the "make available" clause contained in article 13(4)(c) had not been satisfied in the facts and circumstances of the present case.*

> ***13****. In our view, the Tribunal has arrived at these conclusions purely on assessing the factual matrix of the case at hand. The findings are in the nature of factual findings and, therefore, according to us, no substantial question of law arises for our consideration, particularly, because the learned counsel for the Revenue was unable to point out any perversity in the recording of such findings. As such no substantial question of law arises for our consideration. The appeal is dismissed. There shall be no order as to costs."*

13. Further, the learned Counsel for the assessee stated that the reliance placed by DRP in Arevay T and D India Limited of Perfeti Van Melle Holdings B.V. In re [2011] 16 taxmann.com 207 (AAR – New Delhi) was reversed by Hon'ble Delhi High Court and reported in 2014 52 taxmann.com 161 (Delhi), wherein Hon'ble Delhi High Court has considered as under: -

> *"1. This writ petition is directed against the ruling dated 09.12.2011 in AAR No.869/2010 given by the Authority for Advance Rulings. One of the pleas raised by the petitioner was that the said authority had not considered the Double Taxation Avoidance Agreement between India and Portugal which is an OECD country. The learned counsel for the petitioner submitted that any agreement between India and an OECD country could be looked into while construing the Indo-Netherlands Double Taxation Avoidance Convention. The*

learned counsel for the petitioner had also raised the plea that the memorandum of understanding concerning fees for included services referred in Article 12(4) of the Indo-USA DTAA concerning the expression? make available? was also not considered by the Authority for Advance Rulings. It was submitted that the said Authority refused to look into the Indo-Portugese DTAA or the Indo-USA DTAA and memorandum of understanding between India and USA on the ground that only the Indo-Netherlands DTAC needed to be looked into.

2. The learned counsel for the respondent states that the Authority for Advance Rulings was correct in not looking into the Indo-Portugese DTAA, but insofar as the Indo-USA DTAA is concerned, a provision similar to that DTAA has been incorporated in the Indo-Netherlands DTAC by virtue of paragraph 5 of Article 12 of the same, whereby the very same make available clause, which is to be found in the DTAA between India and USA read with the memorandum of understanding connected therewith, has been incorporated into Indo-Netherlands convention by way of amendment on

30.08.1999, by notification No. S.O. 693 (E) [reported in (1999) 239 ITR (Stat) 56]. It is evident that the Authority for Advance Rulings had not considered the said amendment."

14. In view of the above, we are of the view that the concept of 'make available' of technical services that such receipts would not amount to fee for technical services so as to the "concept of make available clause' contained in Article 13(4)(c) of the treaty has not been satisfied. Accordingly, we delete the addition and allow this issue of assessee's appeal.

15. **In the result, both the appeals of assessee are allowed.**

Order pronounced in the open court on 16-11-2017.

Sd/-	Sd/-
(G. MANJUNATHA)	(MAHAVIR SINGH)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Mumbai, Dated: 16-11-2017
Sudip Sarkar /Sr.PS

Copy of the Order forwarded to:

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

//True Copy//

BY ORDER,

Assistant Registrar
ITAT, MUMBAI