



IN THE INCOME TAX APPELLATE TRIBUNAL
"L" BENCH, MUMBAI
BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI N.K PRADHAN, ACCOUNTANT MEMBER

ITA no.1312/Mum/2016
(Assessment Year :2012-13)

TTI Team Telecom International Ltd.
(Now known as Tecco Limited)
C/o Sudit K. Parekh & Co.
Ballard House, Mezzanine Floor
Adi Marzban Path, Ballard Pier
Fort, Mumbai 400 001
PAN – AACCT5300M

..... Appellant

v/s

Dy. Commissioner of Income Tax
I.T – 4(1)(2), Mumbai

..... Respondent

Assessee by : Shri Vijay Mehta
Revenue by : Shri Samuel Darse

Date of Hearing – 11.06.2018

Date of Order – 27.06.2018

ORDER

PER SAKTIJIT DEY, J.M.

Aforesaid appeal by the assessee is directed against assessment order dated 28th January 2016, passed under section 144C(13) r/w section 143(3) of the Income Tax Act, 1961 (for short "the Act") for the assessment year 2012-13, in pursuance to the directions of the Dispute Resolution Panel (DRP)-II, Mumbai, under section 144C(5) of the Act.

2. In ground no.1 with its sub-grounds, the assessee has challenged the taxability of the amount of ₹ 1,70,25,149, received for supply of software as royalty.

3. Brief facts are, the assessee a tax resident of Israel is engaged in supply of software. For the assessment year under dispute, the assessee filed its return of income on 30th November 2012, declaring nil income. In the previous year relevant to assessment year 2003-04, the assessee has entered into an agreement for supply of software with Reliance Infocom Ltd. which subsequently merged with Reliance Communication Ltd. Further, during the previous year relevant to the assessment year 2008-09, more precisely on 17th September 2007, the assessee had entered into a supplementary agreement with Reliance Communication Ltd., wherein, scope of the earlier contract was extended for supply of additional software. Out of the total project value under the contract, the assessee during the previous year relevant to the assessment year under dispute, received an amount of U.S. \$ 3,50,767 equivalent to ₹ 1,70,25,149. Though, the assessee claimed the aforesaid amount to be not taxable in India, as it is not in the nature of royalty, however, the Assessing Officer following the view taken by him in assessment years 2008-09 and 2009-10, held that the amount received from Reliance Communication Ltd. for supply of

software is in the nature of royalty and since the assessee has a Permanent Establishment (PE) in India, the amount is taxable in India in terms of section 9(1)(vi) of the Act. Similarly, the Assessing Officer also held that the amount received from Indus Towers Ltd. towards of supply of software and hardware amounting to ₹ 1,96,29,950, being in the nature of royalty is also taxable in India. Referring to Article-12 of the India-Israel Double Taxation Avoidance Agreement (DTAA), the Assessing Officer brought the aforesaid amount of tax @ 10%. The assessee challenged the aforesaid additions made by the Assessing Officer by raising objections before the DRP.

4. The DRP after considering the submissions of the assessee, however, did not find merit in them and held that the amount received by the assessee are in the nature of royalty. While doing so, the DRP observed that certain decisions of the Tribunal relied upon by the assessee are not applicable.

5. The learned Authorised Representative submitted, identical issue has been decided in favour of the assessee by the Tribunal while deciding assessee's appeal for assessment year 2008-09, 2009-10 and 2010-11. In this context, he specifically drew our attention to the findings of the Tribunal in Para-4.19 of ITA no.2763/Mum./2012 and Ors. dated 30th November 2016.

6. The learned Departmental Representative agreed with the aforesaid submissions of the learned Authorised Representative.

7. We have considered rival submissions and perused materials on record. As could be seen from material on record, similar nature of payment for supply of software was made by the assessee to Reliance Communication Ltd. in assessment years 2008-09 and 2009-10 and 2010-11 and to Indus Towers Ltd. in assessment years 2009-10 and 2010-11. While completing the assessments for these assessment years the assessing officer treated such payments as royalty and brought them to tax. Learned DRP also confirmed the view of the assessing officer. However, the Tribunal while deciding the issue in the appeals filed by the assessee, took note of the orders passed by it in assessee's own case for earlier assessment years and held as under:-

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

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

"License Grant.

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

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

(b) The aforementioned licenses set forth above are hereinafter be referred to as the "Software Licenses". Such software Licenses shall not be sold transferred, assigned, sublicensed by or used by outsourcees of Reliance without TTIs prior written consent except with respect to (i) the sale of the wireless Reliance network (or any relevant component thereof) (ii) the financing of the wireless

Reliance Network (or any component thereof) or (iii) The outsourcing by Reliance of any operating or maintenance functions related to the wireless Reliance Network, under the terms and conditions of the limited license as specified herein; or (iv) the transfer or assignment by Reliance of the Software Licenses to a Reliance Affiliate (or vice versa) in conjunction with a transfer of a portion of the wireless Reliance network to be operated in the territory of India only, provided that in each such case specified in (i)-(iv) above, such transferee, assignee, or outsourcee agrees in writing to abide by all the terms and conditions set forth in the software Licenses and the TTI is informed of the same in writing by Reliance and provided further that the rights transferred, assigned or granted to outsources, as the case may be shall be those reasonably necessary, to fulfill the commercial purposes of such transaction.

(c) Notwithstanding any statement in this Agreement to the contrary, Reliance may permit use under the limited license of the Software (or any part thereof) under the terms of any agreement between reliance and any third party (Contractor Agreement) including without limitation, consultant programmers, system integrators, system maintainers, outsourcing or disaster recovery or other service suppliers (Authorized Subcontractors) (Reliance shall be entitled to grant such Authorized subcontractors a limited sub license to use the software solely to provide services to Reliance under such contractor agreement in respect of the software (the limited License). The limited License expressly excludes any right for the Authorized Sub-contractors. Such limited License shall terminate on termination of the contractor Agreement (or if later, on termination of any obligation to provide services consequent upon termination of such contractor agreement provided that (i) such authorized Subcontractor executes a non disclosure agreement in between itself Reliance and TTI; and (iii) Reliance agrees to be responsible for any breach of the non disclosure agreement by such Authorized Subcontractor.”

4.14. Perusal of the aforesaid clauses clearly reveals that the assessee would continue to remain owner of the intellectual property rights embedded in the software and Reliance would be able to use software only in machine readable form. Reliance was not permitted to reverse engineer, alter, software programme or tinker with proprietary legends of the said software. The software was permitted to be located and used only at the sites designated in the purchase order issued by Reliance. Further, such software was not permitted to be freely sold by Reliance except for strict usages for Wireless Reliance Network only, as permitted in the agreement. The AO noted that in the said agreement, there were

certain clauses with regard to transfer of source code by the assessee to Reliance. It is noted by us that section 11 of the said agreement deals with escrow of source code which is reproduced hereunder for ready reference and further discussion:

"Section 11: Escrow of Source Code

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

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

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

4.15. It was contended by the Ld. Counsel that the lower authorities misled themselves by making incomplete reading of the said clause with regard to source code. It was contended by Ld. Counsel that there was no absolute transfer of source code of the assessee to Reliance. In fact, source code was meant to be provided for the limited purpose of enabling Reliance for maintenance support of the software in accordance with its

rights granted under the said agreement. Thus, source code was not intended to be transferred so as to transfer full-fledged right embedded in the software by the assessee to Reliance. It has been further brought to our notice that in any case, no Escrow Agreement has been entered into between the assessee and Reliance and therefore there was no question of providing the source code by the assessee to Reliance. It was further submitted that in any case, aforesaid agreement has been discussed and analysed in detail by the Tribunal in the order passed for A.Y. 2003-04 and 2006-07 and thereafter only decision has been taken which should be followed by us. We agree with the argument of Ld. Counsel that as far as this agreement is concerned, we are bound to respectfully follow the order of the Tribunal on this issue.

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

4.17. Thus, this supplementary agreement has been entered into in continuation with the earlier agreement dated 27th September 2002 for purchase of additional software by Reliance from the assessee to be used in technologically updated Wireless Reliance Network (i.e. CDMA or GSM etc.).

Thus, vide this supplementary agreement, though scope of usages of the software for relatively wider range of products has been increased, but all other terms and conditions remained same. We do not find any change much less any material change in the terms and conditions of the original agreement which may have any bearing on the decision which has been taken by the Tribunal in earlier years. One of the main objections which had been prominently discussed by the lower authorities is with respect to transfer of source code by the assessee to Reliance. It is noted by us that firstly, as discussed above, the source code was intended to be provided by the assessee to Reliance only for the limited purpose of enabling it maintenance and support of software in accordance with its rights under the said agreement. Secondly, in any case, it has been informed that the aforesaid Escrow

Agreement was never entered into and therefore, there was no question of providing any source code by the assessee to Reliance in this regard. The assessee had submitted on record a copy of declaration which reads as under:

"Declaration

To whomsoever it may concern

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

2. The original SSLA dated 27th September, 2002 between TTI and RCL contained a clause for the transfer of source code to RCL in an escrow account. However, TTI and RCL did not enter any Escrow Agreement and the source code of TTI's software was never deposited at RCL or with an escrow for the benefit of RCL. For TTI Team Telecom International Limited Eitan Naor CEO"

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

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

14. It is an admitted position that the assessee did not have any PE in India in terms of the provisions of art. 5 of the tax treaty, and, accordingly, the assessee cannot be held liable to be taxed in respect of business profits, under article 7, on supply of software

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

"Royalties

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

2. However, such royalties may also be taxed in the Contracting State in which they arise, and according to the laws of that State, but if the recipient is the beneficial owner of the royalties, the tax so charged shall not exceed 10 per cent of the gross amount of the royalties.

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

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

5. Royalties shall be deemed to arise in a Contracting State when the payer is that State itself, a political subdivision, a local authority or a resident of that State. Where, however, the person paying the royalties, whether he is a resident of a Contracting State or not, has in a Contracting State a PE or a fixed base in connection with which the liability to pay the royalties was incurred, and such royalties are borne by such PE or fixed base, then such royalties shall be deemed to arise in the State in which the PE or fixed base is situated.

6. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the royalties, having regard to the use, right or information for which they are paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this article shall apply only to the last mentioned amount. In such case, the excess part of the payments shall

remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Convention. "

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

16. As regards the question whether the payment for software could be treated as payment for "use of, or the right to use, any copyright of literary, artistic or scientific work", we find that this issue directly came up for consideration of a Special Bench of this Tribunal in the case of Motorola Inc. (supra). That was a case in which the Special Bench had an occasion to decide whether payment for software amounts to 'royalty', for the purposes of India Sweden tax treaty [(1998) 229 ITR (St) 11] which incidentally is the same as in Indo-Israel tax treaty and which also defines royalty as "payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, any patent, trademark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience". The Special Bench, after a very erudite discussion on various facets of the issue before them, concluded that "we hold that the software supplied was a copyrighted article and not a copyright right, and the payment received by the assessee in respect of the software cannot, therefore, be considered as royalty either under the IT Act or the DTAA". Right now we are only concerned with the provisions of the tax treaty, and we have noticed that the provisions of tax treaty as before the Special Bench are exactly the same as before us in this case. The issue, therefore, as to whether payment for supply of software can be viewed as a payment for copyright or not is no longer res integra. The Special Bench has decided this issue in favour of the assessee, and the views so expressed by the Special

Bench, being from a higher forum than this Division Bench, are binding on us. In any case, as the provisions of art. 12(3) specifically provide, what is liable to be treated as royalty is payment for "use of, or the right to use, any copyright of literary, artistic or scientific work", and the connotations of "use of copyright" of a work are distinct from the use of a copyrighted article. The meaning of "use of copyright of a work" cannot be treated as extending to "use of a copyrighted work" as well, as it would amount to doing clear violence to the words employed by the treaty. Copyright is one thing, and copyrighted article is quite another thing. To give a simple example, when a person is using a music compact disc, that person is using the copyrighted article, i.e. the product itself, and not the copyright in that product. As held by the Special Bench in Motorola's case (supra), the four rights which, if acquired by the transferee, constitute him the owner of a copyright right, and these rights are :

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

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

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

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

17. It is not even Revenue's case that any of these rights have been transferred by the assessee, on the facts of this case, and, for this reason, the payment for software cannot be treated as payment for use of copyright in the software. As we hold so, we may mention that in the case of Gracemac (supra), a contrary view has been taken but that conclusion is arrived at in the light of the provisions of cl. (v) in Expln. 2 to s. 9(1)(vi) which also covers consideration for "transfer of all or any rights (including the granting of a licence) in respect of any copyright, literary, artistic or scientific work" a provision which is clearly larger in scope than the provision of art. 12(3) of the Indo-Israel tax treaty. The word "of" between 'copyright' and 'literary, artistic or scientific work' is also missing in the statutory provision. The treaty provision that we are dealing with are thus certainly not in pari materia with this statutory provision, and, by the virtue of s. 90(2) of the Act, the provisions of India Israel tax treaty clearly override this statutory provision. In Gracemac decision (supra), the Co-ordinate Bench was of the view that the provisions of the applicable tax treaty and the IT Act are "identical"—a position

which does not prevail in the situation before us. We, therefore, see no reasons to be guided by Gracemac decision (*supra*). The next issue that we need to consider is whether a payment for software can be said to be a payment for "process" as a computer program is nothing but a set of instruction lying in the passive state and this execution of instructions is 'a process' or 'a series of processes'. No doubt, in terms of the provisions of s. 2(ffc) of the Indian Copyright Act, 1957, a computer program, i.e. software, has been defined as "a set of instructions expressed in words, codes, schemes or in any other form, including a machine readable medium, capable of causing a computer to perform a particular task or achieve a particular result", but the moot question is as to what is that a customer pays for when he buys, or to put it in technical terms 'obtains licence to use' the software—for the process of executing the instructions in the software, or for the results achieved on account of use of the software. To draw an analogy, it is akin to a situation in which a person hires a vehicle, and the question could be as to what does he pay for—for the use of the technical know-how on the basis of which vehicle operates, or for the use of a product which carries passengers or goods from one place to another. The answer is obvious. When you pay for use of vehicle, you actually pay for a product which carries the passengers or goods from one place to another and not the technical know-how on the basis of which such a product operates. Same is the case with the software, when someone pays for the software, he actually pays for a product which gives certain results, and not the process of execution of instructions embedded therein. As a matter of fact, under standard terms and conditions for sale of software, the buyer of software is not even allowed to tinker with the process on the basis of which such software runs or to even work around the technical limitations of the software. In *Asia Satellite Telecommunications Co. Ltd. vs. Dy. CIT* (2003) 78 TTJ (Del) 489, a Co-ordinate Bench of this Tribunal did take the view that when an assessee pays for transponder hire, he actually pays for the process inasmuch as transponder amplifies and shifts the frequency of each signal, and, therefore, payment for use of transponder is in fact a payment for process liable to be treated as 'royalty' within meaning of that expression under Expln. 2 to s. 9(1)(vi) of the IT Act. However, when this decision came up for scrutiny of Hon'ble Delhi High Court, in the case reported as *Asia Satellite Telecommunications Co. Ltd. vs. Director of IT* (2011) 238 CTR (Del) 233 : (2011) 51 DTR (Del) 1 : (2011) 332 ITR 340 (Del), their Lordships, after a very erudite and detailed discussion, concluded that "we are unable to subscribe to the view taken by the Tribunal in the impugned judgment on the interpretation of s. 9(1)(vi) of the Act". It cannot, therefore, be open to us to approve the stand of the Revenue to the effect that the payment

for software is de facto a payment for process. That is a hyper-technical approach totally divorced from the ground business realities. It is also important to bear in mind the fact that the expression 'process' appears immediately after, and in the company of, expressions "any patent, trademark, design or model, plan, secret formula or process". We find that these expressions are used together in the treaty and as it is well-settled, as noted by Maxwell in *Interpretation of Statutes* and while elaborating on the principle of *noscitur a sociis*, that when two or more words which are susceptible to analogous meaning are used together they are deemed to be used in their cognate sense. They take, as it were, their colours from each other, the meaning of more general being restricted to a sense analogous to that of less general. This principle of interpretation of statutes, in our considered view, holds equally good for interpretation of a treaty provision. Explaining this principle in more general terms, a very distinguished former colleague of ours Hon'ble Shri M.K. Chaturvedi, had, in an article 'Interpretation of Taxing Statutes' (AIFTP Journal: Vol. 4 No. 7, July, 2002, at p. 7), put it in his inimitable words as follows :

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

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

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

19. On this aspect of the matter also, Gracemac decision (supra) has come to a different conclusion by opining that payment for software is in fact a payment for a process, but the view so expressed, being contrary to earlier decisions of the other Co-ordinate Benches and in accordance with the law laid down by Hon'ble Andhra Pradesh High Court in the case of CIT vs. B.R. Constructions (1993) 113 CTR (AP) 1 : (1993) 202 ITR 2(22)(e) (AP) does not constitute a binding judicial precedent. In our considered view, even a Co-ordinate Bench decision, which is admittedly contrary to earlier precedents on that issue from other Co-ordinate Benches, does not bind the subsequent Co-ordinate Benches. We have all the respect and admiration for the Co-ordinate Bench decision, but, in our considered view, this decision does not constitute a binding judicial precedent, and we leave it at that. The other aspect of the matter is that the issue of taxability of software, as a copyrighted article, is directly covered by a Special Bench of this Tribunal and the said decision, coming from a Bench of larger strength, prevails over the Division Bench decision. As laid down by the apex Court in the case of Ambika Prasad Mishra vs. State of UP AIR 1980 SC 1762 (p. 1764 of AIR 1980 SC) "every new discovery nor argumentative novelty cannot undo or compel reconsideration of a binding precedent. A decision does not lose its authority merely because it was badly argued, inadequately considered or fallaciously reasoned....". Therefore, whatever be the points, right or wrong, which can be put against the Special Bench decisions, the Special Bench decision continues to have a binding force on this Division Bench. In our humble understanding, the Special Bench decision in Motorola's case (supra) binds us and we have to respectfully follow the same. Respectfully following this Special Bench decision, as also a series of other Division Bench decisions on the same lines, we must approve the conclusions arrived at by the CIT(A).

20. In view of the above discussions, respectfully following Special Bench decision in Motorola's case (supra) as also a large number of Division Bench decisions on the issue, including in assessee's own case for one of the preceding assessment years, we approve the conclusions arrived at by the CIT(A) and decline to interfere in the matter.

21. In the result, the appeal is dismissed."

4.19. Thus, in view of the judgment of Hon'ble Supreme Court in the case of Radhasoami Satsang (supra), we respectfully follow

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

X X X X X X

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

8. There being no difference in facts brought to our notice by learned Departmental Representative, respectfully following the aforesaid decision of the Tribunal in assessee's own case as referred to above, we hold that the amount received by the assessee not being in the nature of royalty as per Article-12 of the India-Israel DTAA is not taxable as such in India, but, has to be treated as business profit of the assessee.

9. Ground no.2, raised by the assessee is on the issue of holding TTI India as a dependent agent PE of the assessee. The Assessing Officer while framing the draft assessment order held that TTI India is

the dependent agent PE of the assessee, hence, the business profits of the assessee are taxable in India.

10. The DRP, though, took note of assessee's submissions that TTI India has not undertaken any operations during the relevant previous year and there were no employees, however, it upheld the decision of the Assessing Officer that TTI India is a dependent agent PE of the assessee.

11. The learned Authorised Representative submitted, this issue also stands decided in favour of the assessee by the decision of the Tribunal in assessee's own case for assessment years 2008-09, 2009-10 and 2010-11.

12. The learned Departmental Representative agreed with the aforesaid submissions of the assessee.

13. We have considered rival submissions and perused materials on record. As could be seen from the facts on record, in the preceding assessment years also the Assessing Officer has treated TTI India as a dependent agent PE of the assessee. However, while deciding the issue in dispute, the Tribunal in the order referred to above, have held in the following manner:-

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

14. Consistent with the aforesaid view of the Co-ordinate Bench in assessee's own case, we hold that TTI India cannot be treated as assessee's dependent agent PE in India, hence, the amount of ₹ 2,26,51,706 is not taxable at the hands of the assessee. The grounds are allowed.

15. In course of hearing both the learned counsels have submitted that if the payments made for purchase of software are held as not to be in the nature of royalty, ground no. 3 will become redundant. While deciding ground no.1, since, we have held that the amount received by the assessee from supply of software to Reliance Communication Ltd. and Indus Towers Ltd. are not in the nature of royalty, this ground becomes redundant. Thus, there is no need to adjudicate this ground.

16. As regards ground no.5, it is seen from record that the DRP has directed the Assessing Officer to verify and allow credit to the assessee.

17. In terms with the above, we direct the Assessing Officer to implement the direction of the DRP on this issue.

18. In the result, assessee's appeal is partly allowed.

Order pronounced in the open Court on 28.06.2018

Sd/-
N.K. PRADHAN
ACCOUNTANT MEMBER

Sd/-
SAKTIJIT DEY
JUDICIAL MEMBER

MUMBAI, DATED: 28.06.2018

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The CIT(A);
- (4) The CIT, Mumbai City concerned;
- (5) The DR, ITAT, Mumbai;
- (6) Guard file.

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

(Sr. Private Secretary)
ITAT, Mumbai