आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'एल', मुंबई ।
IN THE INCOME TAX APPELLATE TRIBUNAL "L", BENCH, MUMBAI
सर्वश्री राजेन्द्र, लेखा सदस्य, **एवं** , राम लाल नेगी न्यायिक सदस्य के समक्ष
BEFORE SHRI RAJENDRA, AM AND SHRI RAM LAL NEGI, JM
आयकर अपील सं./**ITA No. 2058/Mum/2016**
(**निर्धारण वर्ष /** Assessment Year: 2011-12)

M/s Shell Information Technology International BV, C/o B S R & Co. LLP, 1st Floor, Lodha Excelus, Apollo Mills Compound, N.M. Joshi Marg, Mahalaxmi, Mumbai - 400011	Vs.	The Assistant Commissioner of Income Tax (International Taxation)-4(2)(1), Scindia House, Ballard Estate, N.M. Road, Mumbai - 400038
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : **AAICS9091A**		
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

राजस्व **की ओर से** / Assessee by : Shri MadhurAgrawal (AR)
निर्धारिती **की ओर से** /Revenue by : Shri Samuel Darse (CIT DR)

सुनवाई की तारीख **/ Date of Hearing : 27/02/2018**
घोषणा की तारीख/**Date of Pronouncement: 28/05/2018**

आदेश / O R D E R

PER RAM LAL NEGI, JM

This appeal has been filed by the assessee against the assessment order passed by the Assessing Officer (AO) on the basis of the direction dated 29.12.2015 passed by the Ld. Dispute Resolution Panel-2 (DRP), Mumbai, pertaining to the Assessment Year 2011-12, whereby the AO has passed the assessment order u/s 143(3) read with section 144C(13) of the Income Tax Act. (For short 'the Act') determining the total income of the assessee at Rs. 5,86,94,274/- as against the returned income of Rs. 66,870/- after making addition of Rs. 25,21,84,024/- on account of income from software services taxable as royalty @ 10% as per article 12A of DTAA and an addition of Rs. 33,46,91,849/- as income from IT support services – fees for technical services/royalty taxable @ 10% as per article 12 of DTAA.

2. The assessee has raised the following effective grounds of appeal against the impugned order passed by the Assessing Officer:-

> *"On the facts and circumstances of the case and in law, the learned AO based on the directions of the Hon'ble DRP:*
> *General*
>
> 1. *Erred in assessing the total income at Rs. 58,69,42,743 as against returned income of Rs. 66,870 offered by the Appellant.*
>
> *Receipts being reimbursements does not constitute ' income'*
>
> 2. *Erred holding that the payments received by the Appellant during the year, constitutes 'income' without appreciating that the receipts were reimbursements being in the nature of cost allocation without markup and hence does not constitute 'income' under section 2(24) of the Act.*
>
> *Payments received for providing access to use copyrighted software held to be royalty*
>
> 3. *Erred in construing the payments of Rs. 25,21,84,024 received by the Appellant for providing network access to use copyrighted software as royalty taxable under section 9(1)(vi) of the Act as well as under Article 12 of India-Netherlands Double Taxation Avoidance Agreement (India Netherlands DTAA).*
>
> 4. *Failed to appreciate that the payments received were only for the ' use of copyrighted article' as compared to use 'copyright' or use of process' which does not constitute 'royalty' under the India-Netherlands DTAA.*
>
> *Payments towards IT Support services held to be Fees for Technical Services ('FTS') and Royalty*

5. *Erred in holding that payments of Rs. 33,46,91,849/- received by the Appellant for IT Support Services constitutes FTS under the provisions of the Act and under Article 12 of the India-Netherlands DTAA.*

6. *Failed to appreciate that IT support services do not make available any technical knowledge, experience, skill, know-how or processes etc. to the service recipient under Article 12 of the India-Netherlands DTAA and hence not subject to tax in India.*

7. *Without prejudice to the above, the learned AO erred in alternatively holding that the receipts qualify as 'equipment royalty' under the Act as well as under the India-Netherlands DTAA.*

Interest under section 234A

8. *Erred in incorrectly computing the interest of Rs. 62,06,880 leviable under section 234A of the Act.*

Interest under section 234B

9. *Erred in levying interest of Rs. 2,24,99,940 under section 234B of the Act without appreciating the facts and circumstances of the case.*

Initiation of Penalty Proceedings

10. *Erred in initiating penalty proceedings under section 271(1)(c) of the Act on the ground that the Appellant had filed inaccurate particulars and thereby concealed income without appreciating the facts and circumstances of the case."*

3. Brief facts of the case are that the assessee company, registered in Netherlands is engaged in the business of providing Information Technology Support Services, Information Technology Helpdesk and Network Infrastructure service to Shell Group Companies comprising of Information Technology support for solving any IT related problems faced by users for

accessing any application software, e-mails, computer repairs and maintenance, Desktop, Laptop and work station support, service related to wide area network and local area network for connection to the global services and facilitating teleconferencing and Video conferencing services. The assessee entered into an agreement with certain IT service provider's viz. WIPRO and IBM as per the said agreement, these IT service providers could enter into separate agreement to provide IT services to Shell Group entities including its entity in India. In order to provide such IT services by WIPRO and IBM, they were required to have access to network and software of the assessee company. During the financial year relevant to the assessment year under consideration, the assessee company received the following payments from the 'Key Application Service' providers i.e., IBM, WIPRO, Logica as well as Shell group entities for providing access to software:

S. No.	*Name of Entity*	*Total Invoice Amount (INR)*
1.	*Accenture Services*	*64,513*
2.	*IBM India Pvt. Ltd.*	*1,71,22,435*
3.	*Logica CMG Pvt. Ltd.*	*6,39,949*
4.	*Shell India Markets Private Limited*	*22,61,39,537*
5.	*Shell Gas LPG*	*261*
6.	*Shell MRPL Aviation Fuels &*	*1,29,601*
7.	*WIPRO Technologies*	*80,87,728*
	Grant Total	*25,21,84,024*

4. The AO held that the payment received by the assessee for network access and related services for the right of access and use of software which would qualify as royalty under clause 4 of Article 12 of the DTAA between India and the Netherlands, therefore, the said amount would be taxed @ 10% as per

Article 12 (2) of the DTAA with the Netherlands. The Ld. DRP vide its order dated 29.12.2015 affirmed the findings of the AO.

5. Ground No. 1 and 2 of the appeal are of general in nature, hence we do not consider it necessary to adjudicate the said grounds separately.

6. Vide ground Nos. 3 and 4 the assessee has challenged the action of the AO in holding that the aforesaid amount of Rs. 25,21,84,024/- as royalty and taxable @ 10% as per the DTAA with the Netherlands.

7. Before us, the Ld. counsel for the assessee submitted that this ground of appeal is covered in favour of the assessee by the order of the Mumbai Bench of ITAT rendered in the appeals filed by the department in assessee's case, ITA No. 5051/Mum/2009 for the A.Y. 2006-07 and ITA No. 3818/Mum/2011 for the A.Y. 2007-08 and the appeal filed by the assessee in its own case ITA No. 729/Mum/2012 for the A.Y. 2008-09. Since, the ITAT has decided the identical issue in favour of the assessee, the impugned findings of the AO as per the direction of the Ld. DRP is liable to be set aside.

8. On the other hand, the Ld. Departmental Representative (DR) relying on the order passed by the AO u/s 143 (3) read with section 144C (13) of the Act submitted that since the principle of *res judicata* does not apply to the proceedings under the Income Tax Act. Since, the AO has decided the issue on merits, there is no infirmity in the impugned order to interfere with the same.

9. We have heard the rival submissions and also perused the material on record. The coordinate Bench of the Tribunal has decided the identical issue in favour of the assessee in the assessee's own case for the A.Y. 2006-07, 2007-08 and 2008-09. The coordinate Bench of the Tribunal has decided this issue in favour of the assessee holding as under:-

> *"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 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 of the conditions mentioned in section 14 of the Copyright Act is ápp1icable 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 WJPRO/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 [20131 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 csal4ish 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 payments 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 piôd.t 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, decompiling, de-assembling, 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 license authorization device to Infrasoft.
Xx xxxx xxxxx xxw xxxxxx xxm w xxx.

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 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 us M. Tech India Put 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 us 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 1,4eiftSsessee did not have any business connection. in India. have also held that the supply of equipment in question was in the nature of supply of goods. Therefore, this issue is to t 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 (In case of painting) or computer discs or cassettes, marketed would become "goods". We see no difference 4dveen 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. 3,75,25,2911- 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 Id. 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 id. 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 1, /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 regard the decision of Hon'ble Bombay High Court in the case of CIT vs Siemens Aktiongesellschaft (supra), referred to by d CIT DR, the kmb1e 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."

10. Since, the coordinate Bench of the Tribunal has decided the identical issue in favour of the assessee in assessee's own case for the A.Ys. 2006-07, 2007-08 and 2008-09 discussed above, we respectfully following the decision of the co-ordinate Bench decide this issue in favour of the assessee. Accordingly, Ground No. 3 and 4 of the assessee's appeal is allowed.

11. The assessee during the financial year relevant to the assessment year under consideration received fees for provision of Information Technology support services for the several customers based in India. The details of payment received by the assessee are as under:-

S. No.	*Name of Entity*	*Total Invoice amount (INR)*
1.	*Accenture Service*	*35,28,131*
2.	*Hazira LNG Private Limited*	*5,30,186*
3.	*IBM India Pvt. Ltd.*	*3,56,55,244*
4.	*Logica CMG Pvt. Ltd.*	*26,68,790*
5.	*Shell India Markets Private Limited*	*19,45,00,903*
6.	*Shell MRPL Aviation Fuels &*	*32,88,714*
7.	*WIPRO Technologies*	*9,45,19,881*
	Grand Total	*33,46,91,849*

12. The AO held that the use of technological knowhow and software are covered under the provisions of section 9(1)(vi) of the Income Tax Act and also under article 12(4) of the Act India-Netherlands DTAA. The AO further held that the payments have been received for providing specialized technical inputs and services rendered by the assessee will be covered under the definition of fees for technical services and accordingly added the said amount to the income of the assessee.

13. The assessee challenged the action of the AO by raising Ground Nos. 5, 6 and 7.

14. Before us, the Ld. counsel for the assessee submitted that Mumbai Bench of the ITAT has decided the issues raised vide ground No. 5, 6 and 7 of the appeal in favour of the assessee in assessee's own case for the A.Y. 2009-10 and 2011-12. Since, the identical issue has been decided by the Tribunal in favour of the assessee, the impugned findings of the AO is liable to be set aside.

15. On the other hand, the Ld. DR relied on the order passed by the AO.

16. We have heard the rival submissions and also perused the material on record. The co-ordinate Bench has decided the identical issue in favour of the assessee in the assessee's own case ITA No. 2204/Mum/2014 for the A.Y. 2009-10 and ITA No. 1203/Mum/2015 for the A.Y. 2010-11 holding as under:-

> *"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 Support fees held in be Fees for Technical Services 'FTS') and royalty.*
> > *4. Erred in holding that payments received by the Appellant for IT support*
> > *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 53 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 have 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 the case of ARE VA T&D India Limited (A TD/L) 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 worId. The provision of support services by the French company would 'itself make available, the technical knowledge/ experience to the Applicant.

In Porfetti Van Melle Holdings B.V1 this Authority held the view that the expression 'in 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 tr'1nernv ion and distribution system is provided to the Indian entity Which is applied in running the business of the Applicant and the employees of the Applicant would got equipped to carry on the 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 7 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 assessees business.
5.3.2 considering the above factual and leg& matrix we are of the opinion that the action of the AO in treating the above receipt is 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. SIT! BV is in the business of providing information technology (IT') support services. During the financial year ended 31.03.2006 SIT! 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 NetherIand 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 (II) support for solving any IT related problems faced by users i e any problem

faced by users for accessing any application software c-mails, Computer repairs and maintenance etc. desktop laptop and workstation support, Services related to Wide area network ('WAN') arid 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 I - Definitions as 'the combined Sub-services provided by S/TI BV to she IT Services Provider wider this Agreement, which Sub-services include the (if Services, the STO Services and she provision by S/TI BV to the IT Service Provider and Service Personnel of access to and/or use -of GI software and/or Optional Software.…*

11. Further, SIT! 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. SIT! 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 SIT! By. 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.

"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 l3(4)() 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 Stale; 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 Govern rent of the first mentioned Contracting State or a political sub-division of that State and

(bb) 2Q% of the gross amount of such royalties or fees for technial 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 purpose 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
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, k7jcv-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 dye/lab/c 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 mat 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. Bode 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 transactions 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, tea reinsurance premium net of

brokerage al 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. Bodo, 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 asséssee 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.86912010 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? 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 lndo 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 lndo - 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, 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 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."

17. Since, the co-ordinate Bench has decided the identical issue in favour of the assessee in assessee's own appeals for the A.Y. 2009-10 and 2010-11

referred above, we respectfully following the order of the co-ordinate Bench allow Ground No. 5, 6 and 7 of this appeal.

18. The Ld. counsel for the assessee submitted that the assessee does not want to press Ground No. 8 and 9 of the appeal. Hence, Ground No. 8 and 9 of the appeal are dismissed as not pressed.

In the result, appeal filed by the assessee for assessment year 2011-12 is partly allowed.

Order pronounced in the open court on 28th May, 2018.

Sd/-	*Sd/-*
(RAJENDRA)	(RAM LAL NEGI)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated: 28/05/2018

Alindra, PS

आदेश प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**