

आयकर अपीलीय अधिकरण पुणे न्यायपीठ "बी" पुणे में  
**IN THE INCOME TAX APPELLATE TRIBUNAL  
PUNE BENCH "B", PUNE**

सुश्री सुषमा चावला, न्यायिक सदस्य एवं श्री अनिल चतुर्वेदी, लेखा सदस्य के समक्ष  
**BEFORE MS. SUSHMA CHOWLA, JM AND SHRI ANIL CHATURVEDI, AM**

**आयकर अपील सं. / ITA Nos.905 & 906/PUN/2015**  
**निर्धारण वर्ष / Assessment Years :2007-08 & 2008-09**

John Deere India Pvt. Ltd.,  
Tower XIV, Cybercity,  
Magarpatta City,  
Hadapsar,  
Pune – 411028  
PAN: AAACJ4233B

.... अपीलार्थी/Appellant

Vs.

The Dy. Director of Income Tax  
(International Taxation)–1, Pune

.... प्रत्यर्थी / Respondent

**आयकर अपील सं. / ITA Nos.907 & 908/PUN/2015**  
**निर्धारण वर्ष / Assessment Years :2007-08 & 2008-09**

John Deere India Pvt. Ltd.,  
(John Deere Equipment merged with  
John Deere India Pvt. Ltd.)  
Tower XIV, Cybercity,  
Magarpatta City,  
Hadapsar,  
Pune – 411028  
PAN: AAACJ4233B

.... अपीलार्थी/Appellant

Vs.

The Dy. Director of Income Tax  
(International Taxation)–1, Pune

.... प्रत्यर्थी / Respondent

Assessee by : Shri Nikhil Pathak

Revenue by : S/Shri Ajay Modi, Pankaj Garg and  
Sudhendu Das

सुनवाई की तारीख / <b>Date of Hearing : 20.11.2018</b>	घोषणा की तारीख / <b>Date of Pronouncement: 23.01.2019</b>
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**आदेश / ORDER****PER SUSHMA CHOWLA, JM:**

This bunch of four appeals filed by the assessee are against two separate orders of CIT(A)-13, Pune, both dated 30.03.2015 relating to assessment years 2007-08 and 2008-09 against respective orders passed under section 201(1) and 201(1A) of the Income-tax Act, 1961 (in short 'the Act').

2. This bunch of appeals relate to two connected assessee against demand raised under section 201(1) of the Act and interest charged under section 201(1A) of the Act relating to assessment years 2007-08 and 2008-09. All the appeals were heard together and are being disposed of by this consolidated order for the sake of convenience. However, in order to adjudicate the issues, reference is being made to the facts in ITA No.905/PUN/2015, relating to assessment year 2007-08.

3. The assessee in ITA No.905/PUN/2015 relating to assessment year 2007-08 has raised the following grounds of appeal:-

- 1] *The learned CIT(A) erred in holding that the assessee company should have deducted TDS on the payments made to Deere & Co. USA of Rs.51,928,969/- on account of software license fees and IT support services on the ground that the same was taxable under the Income Tax Act as well as under the DTAA as Royalty.*
- 2] *The learned CIT(A) erred in not appreciating that the amount of Rs.51,928,969/- was not covered under Royalties and or fees for technical services of the DTAA between India and USA as well as under the Income Tax Act and therefore, the Appellant Company was not required to withhold tax u/s. 195 on above amounts and accordingly, the demands raised of tax and interest u/s 201(1) and 201(1A) may kindly be deleted.*

- 3] *The learned CIT(A) ought to have appreciated that the payments made to Deere & Co. USA was on account of reimbursement of software license fees and IT support services and since there was no income earned by the said entity, no TDS was required to be deducted on such reimbursement of expenditure.*
- 4] *The learned CIT(A) erred holding that payment for lease line charges to Deere & Co. USA is taxable as "Royalty" under the DTAA as well as per Regular provisions of the Income Tax Act, 1961.*
- 5] *The learned CIT(A) erred in not appreciating that –*
- (a) *the payment of lease line charges to Deere & Co. USA was not covered under clause "Royalty and / or Fees for Technical services" of the DTAA between India and USA and hence the Appellant Company was not required to withhold tax u/s. 195 on above amounts;*
- (b) *the payment of lease line charges to Deere & Co. USA were not covered under the definition of 'royalty' in Section 9(1)(vi) of the Act and hence, the assessee company was not required to deduct any TDS on the said payments.*
- (c) *the payment of lease line charges to Deere & Co. USA was in the nature of reimbursement of expenses and no tax was deductible at source.*
- 6] *The learned CIT(A) erred in making an enhancement by holding that the appellant company ought to have deducted TDS on the charges on account of training and reimbursement of salary paid to Deere & Co.USA without appreciating that the appellant company was not required to deduct any TDS on the above referred payments and accordingly, the enhancement made by the learned CIT(A) is not justified at all and the demand raised may kindly be deleted.*
- 7] *The learned CIT(A) erred in holding that the appellant company should have deducted TDS on the training fees paid to Deere & Co. USA of Rs.6,392,707/- on the ground that the same constituted fees for technical services under the Income Tax Act as well as under the DTAA between India and USA.*
- 8] *The learned CIT(A) failed to appreciate that the payments were made to Deere & Co. on account of web based training which did not make available any technical service and hence, the same was not taxable under Article 12 of the DTAA between India and USA and hence, there was no reason for the appellant company to deduct TDS on the said payments.*
- 9] *The learned CIT(A) erred in holding that the assessee was required to deduct TDS on the charges paid to Deere & Co. on account of reimbursement of salary of expat employees of Rs.4,58,66,353/- on the ground that the said payment constituted fees for technical services and hence, the appellant company was required to deduct TDS on the said payments.*
- 10] *The learned CIT(A) erred in holding that Deere & Co. by deputing its employees to the appellant company was providing technical services to the appellant company and accordingly, the TDS was required to be deducted on such payments.*

- 11] *The learned CIT(A) failed to appreciate that as per the secondment agreement between the appellant company and Deere & Co., all the expat employees are on the roll of the appellant company and TDS u/s 192 is deducted in respect of the salary paid to them and hence, there is no question of holding that the services rendered by these employees constituted fees for technical services under the Income Tax Act as well as under the DTAA between India and USA.*
- 12] *The learned CIT(A) erred in not appreciating that Deere & Co. was not providing any fees for technical services to the appellant company by deputing its employees to the appellant company and therefore, there was no question of deducting any TDS on the reimbursement of the salaries of the expat employees.*
- 13] *Without prejudice to the above grounds, the learned CIT(A) erred in not appreciating that the A.O. had grossed up the amounts chargeable to TDS u/s 195A for the purposes of computing tax and interest, without appreciating that the said section was not applicable while determining the tax and interest u/s. 201 and 201(1 A) and hence, the grossing up of the amounts was not justified at all.*

4. The assessee has raised several grounds of appeal. The grounds of appeal No.1 to 3 relate to purchase of software license and IT support services and whether TDS is to be deducted on the same or not. The grounds of appeal No.4 and 5 are against non deduction of TDS on lease line charges. The ground of appeal No.6 raised by assessee is against enhancement by the CIT(A) on payment made for training and reimbursement of salary paid and non deduction of TDS on the same. The grounds of appeal No.7 and 8 are against stand of authorities below that training fees were in the nature of fees for technical services and TDS provisions are applicable. The grounds of appeal No.9 to 12 are against payment for reimbursement of salary, on which TDS had to be deducted @ 30%, the CIT(A) calls it fees for technical services and TDS should have been deducted. The ground of appeal No.13 raised by assessee is without prejudice on the issue of grossing up.

5. The learned Authorized Representative for the assessee pointed out that John Deere India Pvt. Ltd. was engaged in software development services, IT

support services, whereas John Deere Equipment Pvt. Ltd. was engaged in the manufacture of tractors and John Deere Equipment Pvt. Ltd. had merged with John Deere India Pvt. Ltd., so all the appeals were under the same name.

6. Briefly, in the facts of the case, the Assessing Officer received information that during the year under consideration, the assessee had not deducted tax at source while making payment to the foreign company M/s. Deere & Co., USA for SAP License, email facility, disk storage and other system expenses, software charges and system updation charges, etc. The Assessing Officer was of the view that these payments were liable to tax as Royalty / FTS as per section 9(1)(vi) & 9(1)(vii) of the Act as well as Article 12 of the Double Taxation Avoidance Agreement (DTAA) between India and USA. Therefore, the assessee was asked to submit reasons for non deduction of tax at source under section 195 of the Act in the case of such payments debited during the year along with copies of all documentary evidence in support thereof. The main plea of assessee before the Assessing Officer was that the above said payments made to Deere & Co., USA and associated enterprise of assessee, were not taxable in India and the assessee was not liable to deduct tax at source under section 195 of the Act. This plea of assessee was not accepted by the Assessing Officer. The Assessing Officer at page 5 of assessment order has summarized services provided by Deere & Co., USA to the assessee. The Assessing Officer was of the view that the consideration received by Deere & Co. was on account of various IT support services, use or right to use softwares, access to server (scientific equipment) and leased line charges. The Assessing Officer observed that the assessee had not contested the chargeability of above payments under the provisions of the Act. The Assessing Officer thus, held that the assessee agreed that the above payments were taxable as fees for technical services under section 9(1)(vii) of the Act. The main

contention of assessee that payments for above services were mere reimbursement and had no element of income and further that these IT services could not be said to be made available to the assessee, was noted by the Assessing Officer. He further noted that service provider was tax-resident of USA. Article 12 of DTAA between India and USA defined 'Royalties' and Fees for Included Services (FIS). He then went on to hold that FIS means payments of any kind to any person in consideration for the rendering of any technical or consultancy services, which made available technical knowledge, experience, skill know-how or processes, or consist of the development and transfer of technical plans or technical design. The Assessing Officer thus, held that services provided by assessee were made available to the users as per interpretation of the term 'make available' as per MOU to India-USA DTAA for various reasons, which are enumerated at pages 9 to 11 of assessment order. Since in the present case, service provider had provided full range of IT services regarding SAP implementation, maintenance, project development, support, customization of softwares, etc., the Assessing Officer held the same to be technical services, which were used by assessee for its business purposes. He further noted that recipient was enabled to use technology which the provider had provided. He further held that service provider had made available the technology, knowledge, experience, skill to the recipient and the same was used by recipient to carry on its work on its own use and could be used in future, without recourse to the service provider. The Assessing Officer further held that the said knowledge, experience, skill made available was of enduring nature and had direct nexus with the business which the recipient was carrying on. Therefore, provision of above services by Deere & Co. would make available the technical knowledge, experience and skill to the assessee and hence, liable to tax in India. The Assessing Officer made reference to various AAR rulings for the proposition that IT support services made available to

the recipients were taxable in India. The Assessing Officer further held that case laws relied upon by assessee were not applicable as in none of the said cases, the services rendered were IT support services as was the case of assessee. In view thereof, the Assessing Officer held that services provided by Deere & Co., USA were in the nature of fees for technical fees and taxable under Article 12(4)(b) of DTAA as well as under section 9(1)(vii) of the Act.

7. The next aspect taken up by Assessing Officer was the consideration paid for use or right to use software and he was of the view that the same was chargeable as 'Royalty' as per section 9(1)(vi) of the Act and Article 12(3) of DTAA. The Assessing Officer noted the provisions of section 9(1)(vi) of the Act i.e. income by way of royalty and observed that the assessee had not provided end-user license agreements with the software suppliers; hence exact nature of software provided and the terms and conditions were not named. However, he was of the view that in case of payments for license, non-resident receives consideration for transfer of all or any right for use or right to use computer software and owned all right, title and interest in the softwares. Therefore, what the supplier parts with to the end user was only right to use software for its application and one of the rights embedded was the right to copy and use, which was transferred by supplier to the assessee, therefore what was being transferred was right to use software. He referred to the definition of 'royalty' and also definition of 'computer software' as provided in Explanation 3 under section 9(1)(vi) of the Act and was of the view that computer programme means a set of instructions expressed in words, codes, schemes. He then referred to section 2(o) of Copyright Act, 1957, which defined 'literary work' to include computer programmes, tables and compilations including computer (databases). He thus, observed that computer programme was considered as literary work under the Copyright Act. He was further of the view that

computer software or computer programme could also be considered a scientific work because the set of instructions which defined a computer programme enabled the computer to perform particular task or carry out particular functions. The said task was not simple and involved lot of skill, time, labour and considerable experimentation. Therefore, computer software or a computer programme may be included under scientific work. The payment for right to use software was therefore, as per the Assessing Officer, in the nature of royalty and taxable as 'royalty' as per clause (v) of Explanation 2 of section 9(1)(vi) of the Act. He, then referred to amendment made by Finance Act, 2012, which according to him, had clarified that right to use computer software, (including granting of license) was 'royalty'. He referred to Explanation 4 under section 9(1)(vi) of the Act. He also referred to Memorandum to the Finance Bill, 2012 introducing the said amendment and held that in view of said Explanation the payment was in the nature of 'royalty' and taxable as 'royalty' under section 9(1)(vi) of the Act. The next view of the Assessing Officer was that computer programmes were copyrightable subject matter, just like any other literary work. However, copyright protection applied to software, which would protect only the intellectual property embodied in the software as a mode of expression i.e. the source code and object code of computer programme were entitled to copyright protection. He further observed that only in the case of an outright sale of software, the source code could be modified, tampered, changed according to the discretion of the buyer. In the case of license agreement, the licensee was not supposed to make any changes in the source code and source code could be kept confidential, which gives rise to another meaning to a licensed software that is of a secret formula or process. He was of the view that in such scenario, where the source code was to be kept confidential, then software invariably be included under the category of secret formula or process. He further observed that since the source code or the object code of

software had been protected and was not available freely, these software could even qualify as secret formula or process, therefore, payments received were 'royalty' as per clause (i) and (iii) of Explanation 2 of section 9(1)(vi) of the Act i.e. payment received as consideration for the use or right to use secret formula or process. The Assessing Officer also observed that the assessee was getting access to the knowledge database/servers of Deere & Co., which access was maintained by service provider online and such right to access would amount to transfer of copyright to use the copyright held by foreign company and payment received by foreign company on this behalf was license to use the said database and such payment was to be treated as 'royalty'. He placed reliance on the decision of the Hon'ble High Court of Karnataka in the case of CIT Vs. Wipro Ltd. in ITA No.2804/2005, judgment dated 15.10.2011. In view of the said facts and amendment to section 9(1)(vi) of the Act, the Assessing Officer held that payments made by assessee were in the nature of 'royalty' within meaning of section 9(1)(vi) of the Act.

8. The next issue which was taken up by Assessing Officer was taxability of license fees as 'royalty' under DTAA. He referred to the definition of 'royalty' under DTAA and observed that literary or scientific work obviously included software and there was no requirement of transfer of copyright. Considering the payment as 'royalty' under the DTAA, he reiterated that as source code or the object code of software had been protected under the Copyright Act, the software could even qualify as secret formula or secret process and even by this meaning the payment received for granting software license came under the heading of 'royalty'. The Assessing Officer thus, observed that character of above payments received for right to use software and for support services clearly was 'royalty' as defined in Article 12 of the respective DTAA as well as Explanation 2 to section 9(1)(vi) of the

Act. He then referred to various Circulars issued by CBDT regarding views of the Government of India on the issue of software license. He observed that the Legislative intent was to bring software under 'royalty provisions' and then granting conditional exemption wherever necessary. He then observed that receipts on account of right to use software (license fee) and support services were in the nature of 'royalty' under the Act as well as DTAA with respective countries. He referred to various decisions of different Courts for the proposition that payments received for supply of software work were taxable as 'royalty'. The Assessing Officer thus, held that payments received by foreign company for supply of software and support services constitute 'royalty' under DTAA as well as the Act. Reference was made to the decision of the Hon'ble High Court of Karnataka in the case of CIT Vs. Samsung Electronics Co. Ltd. in ITA No.2808 of 2005, judgment dated 15.10.2011 and also to the decision of the Hon'ble High Court of Karnataka in the case of CIT Vs. Synopsis International Old Ltd. in ITA Nos. 11 to 15/2008 & 17/2008, judgment dated 03.08.2010. Then, he made reference to various AAR decisions as noted on page 28 of assessment order.

9. The next issue decided by the Assessing Officer was the taxability of payments for lease line charges and he was of the view that the same was taxable as 'royalty'. He pointed out that for providing these services, the service provider uses complex and highly sophisticated industrial, commercial or scientific equipment and charges for the same; therefore receipts on account of leased line charges could be termed as for the use of various industrial, commercial or scientific equipment used for WAN, data connectivity, internet services. Therefore, as per the Assessing Officer, it was 'royalty' as per Explanation (iva) of section 9(1)(vi) of the Act i.e. payment received as consideration for the use or right to use any industrial, commercial or scientific equipment. It was also 'royalty' under the

Article 12(3)(b) of DTAA as payment received was consideration for the use or right to use industrial, commercial or scientific equipments. The Assessing Officer was of the view that payment was for transmission of data or cable / optic fibre; was payment for process as defined in Explanation 6 to section 9(i)(vii) of the Act, hence it was also 'royalty' as payment was received as consideration for the use or right to use process and rendering of services in connection with such process. He points out that payment made by assessee for leased line charges were also taxable as 'royalty' under the Act as well as DTAA. Further, payment made for use for mainframe / server were taxable as 'royalty' as per Explanation (iva) of section 9(1)(vi) of the Act i.e. payment received as consideration for the use or right to use any industrial, commercial or scientific equipment. It was also 'royalty' under Article 12(3)(b) of DTAA. The next contention of assessee was that expenses charged by Deere & Co. were in the nature of reimbursement and such reimbursement of expenses was not liable to TDS. This contention of assessee was also not accepted by Assessing Officer as once the income was chargeable to tax as 'royalty' or 'FTS' under the DTAA, it was taxable on the gross basis and no deduction for the expenses incurred for the same were to be allowed. Further, the assessee had not submitted documentary evidence to prove that above mentioned payments were reimbursement at cost. Accordingly, assessee's contention in this regard was not accepted and the Assessing Officer held that the payments by assessee were in the nature of 'FTS' / 'royalty' within meaning of section 9(1)(vi) and 9(1)(vii) of the Act and also within meaning of Article 12 of DTAA between India and USA. The Assessing Officer thus, invoked provisions of section 195 of the Act for payment of license fees and held that the assessee was bound to deduct taxes before remitting the money to non-resident and by not deducting or withholding taxes, the assessee was in default in terms of sections 201(1) and 201(1A) of the Act and was thus, treated as assessee in default. The Assessing Officer observed

that tax was to be deducted @ 15% as per DTAA and the assessee was also held liable to pay simple interest under section 201(1A) of the Act. The Assessing Officer has computed the liability on gross up as per section 195A of the Act and has raised total demand of tax at ₹ 91,63,936/- and interest under section 201(1A) of the Act at ₹ 70,99,898/-.

10. The CIT(A) first took up the issue of reimbursement of right to use SAP license. He was of the view that as far as taxability of payments made under the Income Tax Act i.e. payment made for acquiring right to use software was made expressly taxable by the retrospective amendment to the Act on the provision of royalty under section 9 of the Act. Accordingly, he held the payments were taxable under 'royalty' under the Act. As far as its taxability under DTAA was concerned, he referred to the decision of Pune Bench of Tribunal in the case of Cummins Inc for assessment years 2004-05 and 2006-07 in ITA Nos.73 & 74/PN/2011, order dated 08.08.2013, wherein also the right to use software was held to be taxable as 'royalty' under DTAA. Accordingly, he held that payments made to above company were to be taxed as 'royalty'. He further placed reliance on the ratio laid down by Mumbai Bench of Tribunal in the case of DDIT Vs. Reliance Infocom/Luscent Technologies [(TS-433-ITAT-2013(Mum))], in which also the payments made for acquiring right to use software was treated as 'royalty'. The plea of assessee that between conflicting decisions of CIT Vs. Samsung Electronics Co. Ltd. (2009) 185 taxmann.com 313 (Kar) and DIT Vs. Infracsoft Ltd. (2013) 39 taxmann.com 88 (Del), the decision in Infracsoft (supra) being later decision rendered after discussing Samsung (supra), should be followed, was not accepted being decisions of non jurisdictional High Courts when decision of jurisdictional Tribunal was available. The assessee also pointed out that there were conflicting decisions of some Tribunals i.e. in the case of Allianz SE and Cummins Inc. and the decision in Allianz

SE should be applied. However, since the decision in Cummins Inc. was later decision, the same was applied. He then held that payments for acquiring software license was taxable under the Income Tax Act as well as DTAA.

11. The next plea of assessee was that it was reimbursement of expenses and not taxable. The CIT(A) referred to Circular No.715 of CBDT, dated 08.08.1995 and held that the same as not correct. The CIT(A) held that the assessee should have deducted tax at source on the payments made for reimbursement of payments made for acquiring software license. He thus, confirmed the demand and interest raised by the Assessing Officer in respect of said payments.

12. The next issue adjudicated was the payment for leased line charges. In this regard, he referred to the decision of the Hon'ble High Court of Madras in the case of Verizon Communications Singapore Pte Ltd. Vs. DDIT (2013) 263 CTR (Mad) 497, wherein it was held that use of leased line was the use of equipment and hence, payment for use of leased circuit was taxable as 'royalty'. The Hon'ble High Court had further held that even if the payment was not treated as one for the use of equipment, it would be for the use of process provided, whereby through the assured bandwidth, the customer was guaranteed the transmission of data and voice. The provisions of DTAA dealing with royalty taxation were held to be *pari materia* with the Income Tax Act, hence, the payment was taxable both under the Income Tax Act and DTAA. The CIT(A) applying the said decision held that the payment made for the use of leased line charges was taxable and also ought to have deducted the tax at source on the payments made.

13. The next aspect was with regard to enhancement notice issued by CIT(A). The Assessing Officer during remand proceedings had given breakup of payments

which were taxable in the hands of assessee for assessment years 2007-08 and 2008-09. The CIT(A) asked the assessee as to why the said payments should have been held as taxable and the assessee was show caused in this regard. The assessee filed reply, against which the Assessing Officer filed remand report and the issue was decided by CIT(A). The first issue was training of employees, wherein the assessee claimed that it was web based training and there was no scope for asking questions and training module proceeded according to the said pattern, hence web based training programme could not be satisfaction of 'make available' condition which was provided in DTAA. The CIT(A) was of the view that the said payments were taxable as FTS, since the training imparted to employees was technical in nature and the payments made for the same were held to be taxable under section 9(1)(vi) of the Act. The plea of assessee that payments could not be covered as FTS as no technical knowledge was imparted, was not accepted in the absence of necessary details and evidences. He further referred to MOU between India and USA, DTAA, which shows that technical training was considered to be taxable under clause (iv)(b) of DTAA. Further example 6 and 9 given in the MOU, training imparted to staff was considered to satisfy 'make available' condition. Accordingly, he held that payments made towards training programme were liable to be taxed under Income Tax Act and DTAA and he placed reliance on various decisions. In view thereof, he held that payments of ₹ 63,92,707/- made in assessment year 2007-08 and ₹ 94,75,408/- made in assessment year 2008-09 were taxable and the assessee ought to have deducted tax on the same. Accordingly, he directed the Assessing Officer to raise demand towards tax and interest under section 201(1) and 201(1A) of the Act.

14. The next aspect was the reimbursement of salary, wherein the assessee had submitted Deere & Co. had deputed its employees to assessee company on long

term assignment. All the expats were on the pay rolls of assessee, but they continued to get their salary from Deere & Co., which then debited the salary cost of deputed employees to the assessee company. These employees were covered by Secondment Agreement entered into between Deere & Co. and assessee. The CIT(A) relied on the decision of the Hon'ble High Court of Delhi in the case of Centrica India Offshore Pvt. Ltd. Vs. CIT [TS-237-HC-2014(Del)], wherein it was held that Secondment Agreement amounts to rendition of technical services. The Hon'ble High Court had further held that secondees were regular employees of overseas entities and were seconded for a limited period of time to the assessee, but the assessee had a right to terminate the secondment; but it had no right to terminate the original and subsisting employment of the seconded employees. The Hon'ble High Court held that when there was a provision of services, the quantum of payments made would not make any difference to taxability. The CIT(A) held that facts in the assessee's case were similar to the facts before the Hon'ble High Court and where Deere & Co. remains the legal employer of the expatriate employees, then it was case of provision of technical services through employees, which satisfied 'make available' condition, hence the payments made were taxable under Income Tax Act as well as DTAA and the assessee ought to have deducted tax at source. He thus, held these payments of ₹ 4,58,66,353/- made in assessment year 2007-08 and ₹ 6,59,49,529/- made in assessment year 2008-09 were taxable and the assessee ought to have deducted tax at source. Accordingly, he directed the Assessing Officer to raise demand towards tax and interest under section 201(1) and 201(1A) of the Act.

15. The assessee is in appeal against the order of CIT(A).

16. The learned Authorized Representative for the assessee pointed out that the assessee was part of US based Deere & Co. The said company purchases software worldwide which were off shelf software and were acquired by US company and were allocated to worldwide entity software groups. The Assessing Officer was of the view that use of software license is copyright and hence TDS had to be deducted. He further pointed out that the CIT(A) vide para 2.7 at page 10 relied on the decision of Pune Bench of Tribunal in Cummins Inc. Vs. DDIT (2013) 38 taxmann.com 286 (Pune – Trib.) and also decision of the Hon'ble High Court of Karnataka in the case of CIT Vs. Samsung Electronics Co. Ltd. (2009) 185 taxmann.com 313 (Kar); but the CIT(A) does not rely on the decision of Pune Bench of Tribunal in Allianz SE Vs. ADIT (IT) (2012) 21 taxmann.com 62 (Pune) and judgment of the Hon'ble High Court of Delhi in DIT Vs. Infrasoftware Ltd. (2013) 39 taxmann.com 88 (Del). The learned Authorized Representative for the assessee then referred to DTAA between India and USA and referred to Article 12(3), which defined 'royalty' and pointed out that it deals with payment of any kind received for the use of or right to use any copyright of literary, artistic or scientific work, etc. He stressed that the said Article would be applicable when copyright was purchased but not when copyrighted article was purchased. The learned Authorized Representative for the assessee drew an example that if a person is using tally 'accounting software' but person cannot make changes to the software; though tally has given various features, but only data can be fed into it. The learned Authorized Representative for the assessee stressed that when software was purchased, then the assessee was not purchasing copyright of software and restrictions were placed upon the assessee. Our attention was drawn to sample copy of Software License Agreement entered into by Deera & Co. The said agreement is placed at pages 1 to 13 of factual Paper Book. The agreement was between Dakota Software Corporation, a New York Corporation (in short 'Dakota') and Deere & Company,

under which Dakota being the owner of certain softwares and provider of services, had provided Deera & Company, access and use software and services. As per clause 2.1, software and any user manuals or on-line help functions relating to the software could be used only by an authorized user. As per clause 2.2 it was clarified that there was no right to copy, modify the said software. Clause 4 further provides that no rights are conveyed while using software. He then referred to another agreement entered into by Deere & Co. with Altair Engineering Inc., copy of which is placed at pages 14 to 17 of factual Paper Book and pointed out that as per clause 2, a limited, non-exclusive, non transferrable license was granted and as per clause 3, there were restrictions on use, installation, copy, modify, etc., except as expressly authorized in the agreement. As per clause 4, the ownership rights in patents, copyrights, trademarks, etc. were owned by M/s. Altair Engineering Inc. and would remain sole and exclusive property of Altair Engineering Inc. He then referred to another agreement entered into by Deere & Co. with ANSYS, Inc., placed at pages 18 to 28 of factual Paper Book, under which also similar conditions were imposed while using software. The assessee also referred to agreement between SAP America Inc. and Deere & Co., placed at pages 166 to 176 of additional Paper Book, which was for the use of SAP, under which also software, source code for the software and documentation, even concept and techniques, ideas, etc. were sole property of licensor. Similar are the terms of agreement with Parametric Technology Corporation (in short 'PTC') and Deere & Co., copy of which is placed at pages 177 to 187 of additional Paper Book, wherein also PTC remains the owner of all software that it develops.

17. The learned Authorized Representative for the assessee pointed out that the issue of withholding tax on the payments made to Deere & Co. against purchase of software license and IT support services has been decided in turn, relying on the

ratio laid down by the Pune Bench of Tribunal in Cummins Inc. Vs. DDIT (supra). He however, pointed out that the said order of Tribunal has been recalled in MA Nos.28 & 29/PUN/2017, copy of which is placed at pages 308 to 316 of legal compilation. He then referred to the decision of Tribunal in Allianz SE Vs. ADIT (supra) and pointed out that factual aspects were same, in that case the issue which was decided was in respect of license to use software and it was held that the same was not copyright and did not amount to 'royalty'. Our attention was drawn to para 10 of the said decision, wherein reference was made to the decision of the Hon'ble High Court of Karnataka in the case of CIT Vs. Samsung Electronics Co. Ltd. (supra) and it was observed that the said decision dealt with a case of requirement to deduct tax at source under section 195(1) of the Act on amounts paid to foreign software supplier.

18. The learned Authorized Representative for the assessee further pointed out that different Benches of Tribunal have also taken a view that right to use software does not amount to 'royalty'. He then referred to the decision of the Hon'ble High Court of Delhi in DIT Vs. Infrasoftware Ltd. (supra) and elaborately took us through various paras of said judgment and pointed out that what was decided by the Hon'ble High Court of Delhi was difference between copyright and copyrighted article. He pointed out that sometimes a person can take backup of copyrighted article but that would not imply that person has acquired rights in such copyrighted articles. He then also pointed out that the Hon'ble High Court of Delhi in para 98 has distinguished the ratio laid down by the the Hon'ble High Court of Karnataka in the case of CIT Vs. Samsung Electronics Co. Ltd. (supra).

19. The learned Authorized Representative for the assessee then referred to the decision of the Hon'ble High Court of Delhi in Pr.CIT Vs. M. Tech India (P.) Ltd.

(2016) 67 taxmann.com 245 (Delhi), placed at pages 317 to 322 of legal compilation and also of Mumbai Bench of Tribunal in ADIT (IT) Vs. TII Team Telecom International (P) Ltd. (2011) 60 DTR 177 (Mumbai – Trib.). The learned Authorized Representative for the assessee pointed out that Mumbai Bench of Tribunal has referred to DTAA between India and Israel, which are similarly worded as DTAA between India and USA and has held that the decision of Delhi Bench of Tribunal in Gracemac Corporation Vs. ADIT (2010) 42 SOT 550 (Del) was not correct. The learned Authorized Representative for the assessee then referred to the decision of Pune Bench of Tribunal in M/s. AB Sandvik Materials Technology Vs. DCIT in ITA No.1719/PUN/2011, relating to assessment year 2008-09, order dated 24.03.2017, wherein it has been held that where the assessee was providing IT support and advisory services, then the same is not 'royalty' and in turn, has relied on the ratio laid down by the Hon'ble High Court of Delhi in DIT Vs. Infrasoftware Ltd. (supra).

20. The learned Authorized Representative for the assessee pointed out that second part of grounds of appeal No.1 to 3 is with regard to provision of IT support charges, wherein the assessee was paying for internet charges; use of e-mail facility; DP charges and backup support, etc. The learned Authorized Representative for the assessee pointed out that the CIT(A) had combined the same with royalty, in view of the ratio laid down by the Tribunal in Cummins Inc. Vs. DDIT (supra). However, IT support charges paid were not in 'royalty' as there was no use of copyrights or copyrighted articles. He stressed that at most, it may be considered as fees for included services under DTAA. However, fees for technical services talks of 'make available' of technology but there is no technical knowledge made available. This is only backup service provided. He stressed that there is no requirement for withholding tax out of such payments. In this regard, he relied on

the ratio laid down by Pune Bench of Tribunal in Sandvik Australia Pty. Ltd. Vs. DDIT (2013) 31 taxmann.com 256 (Pune – Trib.), wherein the issue was pursuant to DTAA between India and Australia. However, the terms of two DTAA i.e. DTAA between India and USA and DTAA between Indian and Australia were identical. He pointed out that main server group was in USA and server was used for storing data, it could not be said that payment was for royalty, as server was not under the domain of assessee. He then placed reliance on the decision of Ahmedabad Bench of Tribunal in DCIT Vs. Bombardier Transportation India (P.) Ltd. (2017) 77 taxmann.com 166 (Ahmedabad – Trib.). He also relied on the ratio laid down by Chennai Bench of Tribunal in ACIT Vs. Vishwak Solutions (P.) Ltd. (2015) 56 taxmann.com 158 (Chennai – Trib.) and pointed out that the ratio which has been laid down is that the payments made for data storage charges were not in the form of 'royalty'. Our attention was drawn to the breakup of expenses which are placed at pages 164 and 165 of factual Paper Book. The learned Authorized Representative for the assessee pointed out that software charges paid of ₹ 4,22,73,399/- in assessment year 2007-08 have been held to be payment of 'royalty'. Further, internet charges paid of ₹ 27,09,701/- have been held to be IT support services including service charges of ₹ 6,63,652/- and other charges like email, VPN charges and on-line meeting charges of ₹ 22,94,256/-. The learned Authorized Representative for the assessee pointed out that the amounts paid at best were mere reimbursement of expenses incurred by associated enterprise and it was definitely not 'royalty' and / or fees for technical services.

21. Coming to the next issue raised vide grounds of appeal No.4 and 5 i.e. deduction of tax at source on leased line charges, the learned Authorized Representative for the assessee pointed out that there were leased lines established between Pune office of assessee and US entity office. He pointed out

that both the authorities below had relied on the ratio laid down by the Hon'ble High Court of Madras in Verizon Communications Singapore Pte. Ltd. Vs. ITO (2014) 361 ITR 575 (Mad), which goes by amended definition in the Act, but do not apply to DTAA. He then referred to the ratio laid down by Pune Bench of Tribunal in M/s. T-3 Energy Services India Pvt. Ltd. Vs. JCIT in ITA No.826/PUN/2015, relating to assessment year 2010-11, order dated 02.02.2018 and pointed out that the Tribunal has held that such payments were not royalty under DTAA, so there was no TDS obligation. The Tribunal had referred to the decision of the Hon'ble High Court of Delhi in DIT Vs. (1) New Skies Satellite BV (2) Shin Satellite Public Co. Ltd. (2016) 382 ITR 114 (Del) and also Hon'ble High Court of Madras in Verizon Communications Singapore Pte. Ltd. Vs. ITO (supra) and decided the issue in favour of assessee. The learned Authorized Representative for the assessee thus, pointed out that there was no requirement to deduct TDS on leased line charges.

22. Coming to ground of appeal No.6, the learned Authorized Representative for the assessee refers to enhancement made by CIT(A), wherein it holds that reimbursement of salary and payments for web based training were both in the nature of fees for technical services and hence, were liable for tax deduction at source.

23. The grounds of appeal No.7 and 8, under which the issue was raised against what was training charges. The learned Authorized Representative for the assessee pointed out that training which was taken by the employees of assessee from associated enterprise was web based training, under which person read material on various facets of working on websites. Our attention was drawn to screen shots of training procedure, copies of which is placed at pages 56 to 58 of Paper Book and pointed out that the said training was only available to the

employees and once they log in, then only charges were charged. He pointed out that this was like reading book and there were none to answer query. He further pointed out that under DTAA, once technology is made available, then it is called as fees for included services and under the Income Tax Act, it is called fees for technical services. In this regard, he stated that the issue has been settled by Pune Bench of Tribunal in Sandvik Australia Pty. Ltd. Vs. DDIT (supra) and Ahmedabad Bench of Tribunal in ITO Vs. Veeda Clinical Research (P) Ltd. (2013) 35 taxmann.com 577 (Ahmedabad – Trib.). In this regard, he pointed out that when it is case of general training without any transfer of technical knowledge, then it is not fees for included services and hence, is not liable for tax deduction at source.

24. Coming to the grounds of appeal No.9 to 12, the learned Authorized Representative for the assessee pointed out that the CIT(A) had held the assessee liable for tax deduction at source out of salary paid to expats. He pointed out that associated enterprise deputed certain employees from USA to India to work as normal employees of Indian concern. However, salary was paid to Deere & Co., USA and TDS was deducted and deposited. He referred to the order of CIT(A) and in paras 3.2 to 3.7, the CIT(A) was of the view that it was fees for technical services and hence enhancement notice was given to the assessee in this regard. The learned Authorized Representative for the assessee stressed that the same cannot be charged twice as they were working as employees and not imparting any technical knowledge to a concern in India; hence it cannot be called as fees for technical services. It was also stressed by him that in case tax was deducted out of salary and also as FTS, then it would be charged twice, which is not the intention of Statute. Our attention was drawn to Secondment Agreement placed at pages 111 to 117 of facual Paper Book. He pointed out that CIT(A) had followed the ratio laid down by the Hon'ble High Court of Delhi in Centrica India Offshore (P.) Ltd. Vs. CIT

(2014) 44 taxmann.com 300 (Delhi). The learned Authorized Representative for the assessee referred to the order of Secondment Agreement placed at pages 112 to 114 of Paper Book and pointed out that under the said agreement, personnel were deployed, payment of whose salary was the responsibility of Deere & Co. However, during the term of their deployment in India, the said personnel were under exclusive and total control of assessee and had to act solely on behalf and for the benefit of assessee on assignment defined by it. This agreement was executed on 01.05.2005 effective from 01.09.2005. He pointed out that the factory of assessee was established in 1999. He then referred to the factual aspects of the case relied upon by the CIT(A) i.e. Centrica India Offshore (P.) Ltd. Vs. CIT (supra) and strongly pointed out that the facts were completely different, where a offshore entity had deputed technical personnel to train Indian employees and this was case where the operations in India required expats, hence there was 'make available' of skill behind services, to other party. He stressed that it was newly formed company which did not have necessary human resources and the associated enterprise deputed employees to train Indian employees; whereas this was not the case of assessee whose factory was established in 1999 and for specific purpose, certain personnel were deputed by Deere & Co. to perform activities in India. He pointed out that similar issue has been considered by the Ahmedabad Bench of Tribunal in the case of Burt Hill Design (P.) Ltd. (2017) 79 taxmann.com 459 (Ahmedabad – Trib.). He referred to the facts of said case and pointed out that in the said case also, TDS was deducted out of salary but it was held that there was no liability under section 201(1) of the Act. He pointed out that the Tribunal has further held that even if there was PE, it was not the income of PE and further the Tribunal had held that it was not case of fees for technical fees as no technology was made available. Further, reliance was placed on the ratio laid down by Mumbai Bench of Tribunal in ADIT Vs. M/s. Mark & Spencer Reliance India P. Ltd. in ITA

No.905/M/2012, relating to assessment year 2010-11, order dated 04.09.2013. Referring to the facts of said case, the learned Authorized Representative for the assessee pointed out that assessee was Joint Venture Co. between Marks & Spencer PLC and Reliance Retail Ltd. and it was case of initial phase, wherein four personnel were deputed on salary basis. Since no technical services were made available, it was held to be a not case of fees for technical services. The learned Authorized Representative for the assessee pointed out that the Hon'ble Bombay High Court had upheld the said order of Tribunal. The learned Authorized Representative for the assessee stressed that there was mere deputation of personnel to render day-to-day operations and no technical service was provided to the staff or no technical services were availed and / or no technical services were provided to the assessee. On the other hand, out of salary paid, TDS was deducted @ 30% and even it is held to be a case of providing services, then also there was no default as same rate of tax withholding applies.

25. With regard to ground of appeal No.13, the learned Authorized Representative for the assessee pointed out that the same was without prejudice wherein the Assessing Officer had grossed up, but under section 195A of the Act grossing up was not justified and only net amount had to be considered for the valuation of tax deduction at source. He further stated that section very clearly provided that if there is agreement, then grossing up, but in the absence of such agreement, only net amount has to be considered. The learned Authorized Representative for the assessee pointed out that even Pune Bench of Tribunal in *M/s. Tata Technologies Ltd. Vs. DDIT (IT) in ITA No.1433/PUN/2014*, relating to assessment year 2007-08, order dated 05.04.2018 has laid down similar proposition and the said ratio is fully applicable to the facts of present case, wherein the Tribunal had relied on the decision of *Allianz SE Vs. ADIT (IT) (supra)* and the

the Hon'ble High Court of Delhi in DIT Vs. Infrasoftware Ltd. (supra). He further referred to the decision of the Hon'ble High Court of Delhi in DIT Vs. Ericsson A.B. New Delhi (2011) 16 taxmann.com 371 (Delhi) and decision of the Hon'ble High Court of Andhra Pradesh in CIT Vs. Sundwiger EMFG & Co. (2003) 262 ITR 110 (AP) and pointed out that even if Pune Bench of Tribunal in Allianz SE Vs. ADIT (IT) (supra) had relied on the said decision.

26. The learned Authorized Representative for the assessee stressed that amended provisions of section 9(1)(vi) of the Act were not applicable since there is no amendment to definition of 'royalty' under DTAA and only the beneficial provisions are to be applied when both the provisions of the Act and all DTAA are attracted. He stressed that before amendment to section 9(1)(vi) of the Act, payments made for use of software were not covered as royalty and since the provisions of DTAA are not being amended, then there is no question of applying amended provisions of section 9(1)(vi) of the Act to the facts of present case. He then stressed that there is no merit in holding the assessee in default under section 201(1) and 201(1)(A) of the Act.

27. The learned Departmental Representative for the Revenue in reply stressed that the payments made by assessee for use of software were covered under the definition of 'royalty' both under the Act and DTAA. He stressed that even in pre-amended provisions of the Act, the said payment was duly covered. He then made reference to different agreements entered into by Deere & Co. and pointed to different facets of agreement, which were entered for the use of software. The first agreement is placed at pages 1 to 6 of Paper Book i.e. between Dakota Software Corporation and Deere & Co. He pointed out that software may be used only by the authorized user and then referred to the definition of 'authorized user' at page 7

of Paper Book. He then referred to agreement between Altair Engineering Inc. and Deere & Co. at page 14 onwards of Paper Book and pointed out that contention of learned Authorized Representative for the assessee was that it was non-exclusive license. However, whether license was exclusive or non-exclusive, it can make the same to be case of 'royalty'. He referred to Explanation 2(v) under section 9(1)(vi) of the Act and pointed out that if exclusive rights were sold, then it was not 'royalty'. In this regard, reliance was placed on the decision of Hon'ble High Court of Calcutta in CIT Vs. Davy Ashmore India Ltd. (1991) 190 ITR 626 (Cal), wherein it is held that where transferee retains the property rights in design, secret formula, etc. and allows use of such rights, consideration received from such user was in the nature of 'royalty' and where there was an outright sale or purchase, the consideration was for transfer of such design, secret formula and could not be treated as 'royalty'. He then referred to the ratio laid down by the Hon'ble High Court of Karnataka in CIT Vs. Synopsis International Old Ltd. (2012) 28 taxmann.com 162 (Kar), wherein it was held that to constitute 'royalty' under the Income Tax Act, it was not necessary that there should be transfer of exclusive right, any copyright and it was sufficient if there was transfer of any interest in the right and also license and consideration paid for grant of license constitute 'royalty'. The Hon'ble High Court further observed that in this background, the discussion whether payment was for copyright or copyrighted article would be totally irrelevant. He further referred to the said decision, which is dated 03.08.2010, under which the Hon'ble High Court has also interpreted what is license and pointed out that the same may be exclusive or non-exclusive and it has been held that even non-exclusive license was granted by an authority to do a present thing, but it never conveyed by itself an interest in the property. However, it enabled a person to do that which he could not otherwise do except unlawfully. He then referred to the conclusion of the said decision, wherein the Hon'ble High Court had held that

where there is transfer of certain rights which the owner of copyright possessed with the said computer software, then it is case of 'royalty' being paid and was within mischief of Explanation (2) of clause (vi) of section 9(1) of the Act and there was liability to pay tax.

28. Coming to the next contention of learned Authorized Representative for the assessee that source code was not with the assessee, the learned Departmental Representative for the Revenue has countered and pointed out that object code and source code both are protected copyrights under the Copy Right Act. When object code is transferred, so it becomes copyrightable subject matter. The learned Authorized Representative for the assessee stressed that is non-transferable. However, the learned Departmental Representative for the Revenue placed reliance on the ratio laid down by the Authority for Advance Rulings (Income Tax), New Delhi in the case of SkillSoft Ireland Ltd., In re\_\* (2015) 62 taxmann.com 304 (AAR – New Delhi), placed at pages 109 to 112 of legal compilation filed by learned Departmental Representative for the Revenue. He pointed out that the said decision is dated 20.07.2015 i.e. after decision of the Hon'ble High Court of Delhi in DIT Vs. Infrasoftware Ltd. (supra). The learned Departmental Representative for the Revenue stressed that case of DIT Vs. Infrasoftware Ltd. (supra) was also referred before the AAR. He further pointed out that next aspect is whether it is off the shelf and shrink RAP software purchased by assessee or not. He pointed out that simply because the assessee had entered into elaborate agreement, it cannot be case of off the shelf or shrink RAP software. In this regard, he placed reliance on the decision of the Hon'ble High Court of Karnataka in the case of CIT Vs. Samsung Electronics Co. Ltd. (supra). Meeting next contention of learned Authorized Representative for the assessee that software was utilized for its own use and not for copying and selling or sub-licensing, he referred to the ratio laid down by the

Hon'ble High Court of Karnataka in the case of CIT Vs. Synopsis International Old Ltd. (supra), wherein it has been held that storage on computer is copyright. He further placed reliance on the ratio laid down by Delhi Bench of Tribunal in Gracemac Corporation Vs. ADIT (2010) 42 SOT 550 (Del), wherein it is held that even grant of one right in respect of copyright or work would amount to transfer or use of copyright.

29. Coming to the next aspect of transaction, the learned Departmental Representative for the Revenue pointed out that it is case of re-selling and sub-leasing and hence, constitute 'royalty' as held by the Hon'ble High Court of Karnataka in the case of CIT Vs. Synopsis International Old Ltd. (supra) and also AAR in the case of EY Global Services Ltd. in AAR No.1043 of 2011, dated 10.08.2016. The learned Departmental Representative for the Revenue drew our attention to section 14 of the Copy Right Act with special emphasis on clause (b) sub-clause (2), wherein the term 'computer programme' includes to sell or give on commercial rental, offer for sale or for commercial rental any copy of computer programme.

30. He then again referred to the contention of learned Authorized Representative for the assessee that the assessee was getting right to use software product which is copyrighted article. In case such a right is bestowed upon the assessee, then it is case covered under the definition of 'royalty'. The learned Departmental Representative for the Revenue again strongly placed reliance on the ratio in the case of Gracemac Corporation Vs. ADIT (supra), wherein it has been held that though there is no definition of copyrighted article in the Copy Right Act, but the same is defined in OECD guidelines. The learned Departmental Representative for the Revenue placed on record the definition of

copyrighted article in OECD guidelines. It was brought to the knowledge of learned Departmental Representative for the Revenue that after the decision of the Delhi Bench of Tribunal in Gracemac Corporation Vs. ADIT (supra), there is contrary decision by the Hon'ble High Court of Delhi in DIT Vs. Infrasoftware Ltd. (supra). The learned Departmental Representative for the Revenue pointed out that AAR had referred to the decisions in Allianz SE Vs. ADIT (IT) (supra) and judgment of the Hon'ble High Court of Delhi in DIT Vs. Infrasoftware Ltd. (supra), which have been taken into account by AAR in the case of EY Global Services Ltd. (supra). Our attention was drawn to para 31 and he fairly admitted that AAR has not dealt with the ratio laid down in DIT Vs. Infrasoftware Ltd. (supra), but has decided the issue otherwise and it implies that the said decision has been taken into account. He further stressed that the facts in the case of EY Global Services Ltd. (supra) and the facts of present assessee were similar, wherein standard facility was created.

31. The learned Departmental Representative for the Revenue also placed reliance on the decision of AAR in the case of SkillSoft Ireland Ltd., In re\_\* (supra) with special reference to para 26, which talks of copyright versus copyrighted article. He pointed out that in DIT Vs. Infrasoftware Ltd. (supra) at page 29, the phrase used is copyright rights, which is not there anywhere in the Act. He also referred to the reliance placed upon by learned Authorized Representative for the assessee in Allianz SE Vs. ADIT (IT) (supra), which in turn, had relied on the decision of the Hon'ble High Court of Delhi in DIT Vs. Ericsson A.B. New Delhi (supra) and pointed out that in the facts of the said case, the purchase was of hardware and software and also the said concern had PE.

32. He further continued his arguments on the next date and pointed out that the issue in Allianz SE Vs. ADIT (IT) (supra) was whether it is royalty or not. He

admitted that the issue in Allianz SE Vs. ADIT (IT) (supra) was royalty or not however, he pointed out that reliance placed upon on the said decision was misplaced. It was brought to his knowledge that it would become judicial in-proprietary in case the same is not relied upon. Then referring to the next reliance on the decision of the Hon'ble High Court of Delhi in Pr. CIT Vs. M.Tech India (P.) Ltd. (supra), it was pointed out that facts are not similar as it was engaged in resale of software. However, payment made for use of software would amount to 'royalty'. In respect of ADIT (IT) Vs. TII Team Telecom International (P) Ltd. (supra), the learned Departmental Representative for the Revenue distinguished the said facts and pointed out that the said decision talks of process royalty, whereas the assessee's case was not process royalty. He admitted that Pune Bench of Tribunal in Sandvik Australia Pty. Ltd. Vs. DDIT (supra) had relied on DIT Vs. Infrasoftware Ltd. (supra) and held that it was not case of 'royalty'. The learned Departmental Representative for the Revenue strongly placed reliance on the decision of AAR in the case of EY Global Services Ltd. (supra), wherein the difference between copyright or copyrighted articles has been elaborated upon and then again placed reliance on the decision of the Hon'ble High Court of Karnataka in the case of CIT Vs. Synopsis International Old Ltd. (supra) and decision of AAR in the case of SkillSoft Ireland Ltd., In re\_\* (supra). The learned Departmental Representative for the Revenue pointed out that where the assessee had entered into an agreement with Dakota Software Corporation, it was like a case of book writer and publisher.

33. Now, coming to the next aspect of the decision of Hon'ble Bombay High Court in NGC Network (supra), he pointed out that second proviso of section 9(1)(vi) of the Act talks of only computer software plus computer hardware. He further pointed out that section 115A(1A) of the Act was on the Statute and the said section already was there, so definition of 'royalty' was covered. The amendment

brought in to section 9(1)(vi) of the Act was clarificatory in nature, for removal of doubts and cannot be said to be prospective application. He then pointed out that if it is literary work, then use of copyright is there, so provisions of section would apply since expression used is 'in respect of' which is very broad term. He concluded by holding that since in such scenario it was incumbent upon the assessee to deduct tax at source and in the absence of the same, the assessee had defaulted and was liable for charging of tax under section 201(1) of the Act and interest under section 201(1A) of the Act.

34. Coming to the next issue of IT support services, the learned Departmental Representative for the Revenue referred to the breakup of expenses provided at page 164 of Paper Book. He then referred to DTAA between USA and India with special reference to Article 12(4)(a) and pointed out that it is not known whether IT support services are 'royalty' or for enjoyment, in case it is for enjoyment, then Article 12(4)(a) and not Article 12(4)(b) is applicable. He admitted that there is no question of make available and reliance placed upon the learned Authorized Representative for the assessee in this regard was misplaced.

35. Coming to the next issue of leased line charges, he referred to the order of Assessing Officer, wherein he has talked about process royalty and equipment royalty. He then referred to section 9(1)(vi) Explanation 2(iii) and 2(iva) of the Act and pointed out that the Hon'ble High Court of Madras in Verizone Communications Singapore Pte Ltd. Vs. DDIT (supra) had discussed the issue of equipment royalty, whereas in M/s. T-3 Energy Services India Pvt. Ltd. Vs. JCIT (supra), on which the learned Authorized Representative for the assessee relied upon, the TPO had accepted reimbursement of expenses. He then referred to the said decision, wherein the Tribunal decided the issue of process royalty. He stressed that the

Hon'ble High Court of Madras in *Verizone Communications Singapore Pte Ltd. Vs. DDIT (supra)* has decided the issue of equipment royalty and the same was applicable.

36. Coming to grounds of appeal No.6 to 8, the learned Departmental Representative for the Revenue placed reliance on the observations of CIT(A) at page 23 and pointed out that the assessee had not supplied information and even the nature of services were not clear, so the question was of make available. He strongly relied on para 3.6.1.2 to 3.6.1.4 of CIT(A)'s order and pointed out that the reliance of learned Authorized Representative for the assessee on *Sandvik Australia Pty. Ltd. Vs. DDIT (supra)* was not correct as the issue before the Tribunal supports services rendered and not training services.

37. Coming to the next decision of Ahmedabad Bench of Tribunal in *ITO Vs. Veeda Clinical Research (P) Ltd. (supra)*, he admitted that it clearly decides the issue. In this regard, he again pointed out that the issue has been considered and decided by AAR in *Intertek Testing Services India (P.) Ltd., In re\_\* (2008) 307 ITR 418 (AAR)*, which has considered the issue of group services and in *Mersen India (P.) Ltd., In re\_\* (2013) 353 ITR 628 (AAR)* and also on *Shell India Markets (P.) Ltd., In re\* (2012) 342 ITR 223 (AAR)* and decision of Cochin Bench of Tribunal in *US Technology Resources (P.) Ltd. Vs. ACIT (2013) 39 taxmann.com 23 (Cochin – Trib.)* and pointed out that similar services have been provided by Deere & Co. to the assessee and hence, the same were liable to tax deduction at source and the assessee having not deducted the tax, was in default.

38. Coming to grounds of appeal Nos.9 to 12 raised by assessee which were against reimbursement of salaries of expats, the learned Authorized Representative

for the assessee pointed out that the said issue was squarely covered by the decision of the Hon'ble High Court of Delhi in *Centrica India Offshore Pvt. Ltd. Vs. CIT (supra)* which has been affirmed by the Hon'ble Supreme Court in (2014) 51 taxmann.com 386 (SC). In the facts of said case, the assessee and Indian company had entered into Secondment Agreement with overseas companies and sought employees on Secondment and the Hon'ble High Court had held that since the employees of those companies used their technical knowledge and skill while assisting the assessee in conducting its business of quality control and management, it amounts to reimbursement by assessee to overseas companies towards salaries of 300 employees and amounted to fees for technical services and liable to tax in India. He also pointed out that the facts of present case are also identical to the facts before the Bangalore Bench of Tribunal in *Flughafen Zurich, AG Vs. DDIT (2017) 79 taxmann.com 199 (Bangalore – Trib.)* and in the case of Secondment of skilled personnel for rendering services, amount received was taxable in the hands of overseas company and he stated that in such scenario, the assessee was liable to deduct tax at source. When the hearing was commenced on the next day, the learned Departmental Representative for the Revenue stressed that the facts before the Hon'ble High Court of Delhi in *Centrica India Offshore Pvt. Ltd. Vs. CIT (supra)* were identical to the facts of assessee though the learned Authorized Representative for the assessee has distinguished the same. However, he drew our attention to para 14 of said decision. He pointed out that as per the learned Authorized Representative for the assessee, there was no such clause in Secondment Agreement entered into by the assessee, whereas in the facts of the case, highly qualified personnel of the company were deputed to India. He admitted that the assessee had established its factory in 1999 but the assessee was in expansion mode and hence the services of overseas expats were availed but he countered the contention of learned Authorized Representative for the

assessee that the TDS deducted out of salaries paid to such expats under section 192 of the Act; but he questioned that once they were not on payroll of assessee company, where was the question of such deduction of tax.

39. Then coming to the last aspect i.e. reimbursement of expenses, the learned Departmental Representative for the Revenue has filed written submissions in this regard and placed reliance on various case laws and filed copies of relevant case laws, which we shall refer while deciding the said issue.

40. The learned Authorized Representative for the assessee then took up his rejoinder and pointed out that there were four issues arising in the present appeal (a) royalty on software and IT support services, (b) payment of leased line charges, (c) training charges and (d) reimbursement of salaries of expats. With regard to reimbursement of salaries of expats, he pointed out that learned Departmental Representative for the Revenue had relied on the ratio laid down in *Centrica India Offshore Pvt. Ltd. Vs. CIT (supra)*, which is confirmed by the Hon'ble Supreme Court; but he had pointed out that the case of *CIT Vs. Synopsis International Old Ltd. (supra)* was distinguishable on facts, hence the said ratio was not applicable. He further pointed out that he had placed reliance on *ADIT Vs. M/s. Mark & Spencer Reliance India P. Ltd. (supra)*, against which the learned Departmental Representative for the Revenue has not made any proposition. In respect of order of the Hon'ble Supreme Court in *Centrica India Offshore Pvt. Ltd. Vs. CIT (supra)*, he pointed out that the Hon'ble Supreme Court had only dismissed the SLP. He further stated that it is settled law, that, when SLP has been dismissed, it is not law of the land. In this regard, he placed reliance on the ratio laid down by the Hon'ble Supreme Court in *V.M. Salgaocar & Bros. (P.) Ltd. Vs. CIT (2000) 243 ITR 383 (SC)* and *Palam Gas Service Vs. CIT (2017) 81 taxmann.com 43 (SC)*. He then

stressed that the Hon'ble Supreme Court in the case of Centrica India Offshore Pvt. Ltd. Vs. CIT (supra), no ruling on principle has been laid down by the Hon'ble Supreme Court. He further pointed out that factually Centrica India Offshore Pvt. Ltd. was formed and various ventures /vendors were also formed, who had to be supported, so expats trained vendors were deputed and hence these payments to expats. He stressed that facts were absolutely different. On the other hand, he again relied on the decision of Ahmedabad Bench of Tribunal in the case of Burt Hill Design (P.) Ltd. (supra) and Mumbai Bench of Tribunal in ADIT Vs. M/s. Mark & Spencer Reliance India P. Ltd. (supra) and stressed that since TDS was deducted out of salary paid to the employees, tax due to the Department has been paid and there is no merit in the contention of Revenue authorities. He further pointed out that the decision of Mumbai Bench of Tribunal in ADIT Vs. M/s. Mark & Spencer Reliance India P. Ltd. (supra) has been confirmed by the Hon'ble High Court in Income Tax Appeal No.893 of 2014, judgment dated 03.05.2017, wherein the issue before the Hon'ble High Court was whether the payments made to expats were merely reimbursement of expenditure or it was fees for technical services as per provisions of DTAA. The Hon'ble High Court held that since the payment to employees was already subject to tax in India, therefore, there was no question of treating the assessee in default for non deduction of tax at source. The learned Authorized Representative for the assessee stressed that no adverse comments have been made by the learned Departmental Representative for the Revenue on the said decision of the Hon'ble Bombay High Court in DIT Vs. M/s. Mark & Spencer Reliance India P. Ltd. (supra).

41. Coming to next issue of training charges, the learned Authorized Representative for the assessee pointed out that there were various modules available on web; training was given on the web and there was no interactive

session, in case there was any query to be answered, but no person was available to answer the same. This was like reading a book. However, the learned Departmental Representative for the Revenue on the other hand, had relied on the decisions where interactive training was given, so it was held to be a case of fees for technical services. However, the facts of present case were different. He then gave an example of Gym instructor, wherein in two months, there was interactive session but that does not make available any technology, so no question of fees for technical services.

42. Coming to the next issue of lease line charges, he placed heavy reliance on the decision of Pune Bench of Tribunal in *M/s. T-3 Energy Services India Pvt. Ltd. Vs. JCIT (supra)* and pointed out that the said decision covers all aspects of the issue; on the other hand, the learned Departmental Representative for the Revenue placed reliance on decision of the Hon'ble High Court of Madras in the case of *Verizone Communications Singapore Pte Ltd. Vs. DDIT (supra)*, which has been taken care by the Pune Bench of Tribunal in *M/s. T-3 Energy Services India Pvt. Ltd. Vs. JCIT (supra)*.

43. Coming to the last issue of royalty on software, he pointed out that there was decision by the Hon'ble High Court of Delhi and there is decision by the Hon'ble High Court of Karnataka and both have different views. The learned Departmental Representative for the Revenue placed reliance on the decision of Hon'ble High Court of Delhi in *Pr. CIT Vs. M.Tech India (P.) Ltd. (supra)* and pointed out that the issue is decided against assessee, though the learned Authorized Representative for the assessee had also relied upon the same. He pointed out that the learned Departmental Representative for the Revenue has referred to only two lines in para 12, wherein it was observed that in case of right to use software, payment if so

made, would amount to 'royalty'; but entire para 12 of the said decision has to be read. The Hon'ble High Court has clarified later that it was necessary to make distinction between cases where the consideration is paid to acquire right to use patent or copyright and cases where payment is made to acquire patented or copyrighted product / material and it further goes on to say that later case would be treated as payment for purchase of product rather than consideration for use of patent or copyright. In para 13, the Hon'ble High Court referred to the decision of Coordinate Bench of Court in DIT Vs. Infrasoftware Ltd. (supra) and in para 14, they observed that the decision of the Hon'ble High Court of Karnataka has been distinguished upon by the Coordinate Court in DIT Vs. Infrasoftware Ltd. (supra). The learned Authorized Representative for the assessee stressed that the decision in the Hon'ble High Court was still in favour of assessee and not against the assessee as contended by learned Departmental Representative for the Revenue. He further pointed out that the assessee was basically relying on the definition of 'royalty' in DTAA, wherein in Article 12(3), expression used is 'use or right to use any copyright'. Referring to the decision of the Hon'ble High Court of Karnataka which observed that when you purchase CD, then purchased copyright. However, as per section 14 of the Copy Right Act, when you made re-engineered copy sale, then it is copyright and not otherwise. He referred to the decision of the Kolkata Bench of Tribunal in ITC Ltd. Vs. ADIT (2017) 79 taxman.com 206, wherein section 14 of the Copy Right Act has been referred to, which explains the meaning of copyright and vide paras 20 and 21, the issue has been explained and decided in favour of assessee and it has been held that the issue has to be decided in the light of definition of 'royalty', as contained in DTAA read with relevant provisions of the Copy Right Act. The Tribunal in ultimate has decided that the assessee is not in default under section 201(1) of the Act.

44. The learned Authorized Representative for the assessee again explained that when any person operates the tally, then you download the software and use it and there is no question of paying royalty for using such programme. However, the learned Departmental Representative for the Revenue on the other hand, argued that in case CTR CD is being used, then it is case of royalty; but when any person purchases CTR and ITR CDs or any products, then there is no question of paying any royalty and interest was only to read the decisions and how the said CD is being operated, is of no concern to the purchaser. The person reading books or CD, have no interest, so even for CTR CD, the same principle applies and hence, the contention of learned Departmental Representative for the Revenue in this regard fails. He stressed that how tally CD programme is developed was not concern of the person purchasing the said CD. It is only use / application which is of interest to the user. The object code is provided but same is only for translating the software into readable product. The source code was needed to the person operating it. The learned Authorized Representative for the assessee in this regard placed heavy reliance on the decision of Mumbai Bench of Tribunal in ADIT (IT) Vs. TII Team Telecom International (P) Ltd. (supra) and pointed out that while dealing with DTAA between India and Israel on identical facts, the issue has been considered in paras 15 to 17 of the said decision. He stressed that by grant of non-exclusive license, no exclusive rights over the product were given to the assessee. He countered the contention of learned Departmental Representative for the Revenue that if it is handing over of exclusive rights, then it is case of business or capital gain but all the decisions of various Benches of Tribunal hold otherwise. In case any exclusive right for geographical location and / or period of use are given then the same would amount to 'royalty' and not is the question. He further stressed that the AAR was binding only on the entity in the case of which decision was given and not on others. He in this regard, placed reliance on Hon'ble

Supreme Court in *Columbia Sportswear Company Vs. DIT* (2012) 346 ITR 161 (SC) and the Hon'ble Bombay High Court in *Prudential Assurance Company Ltd. Vs. DIT (International Taxation) & Anr.* (2010) 324 ITR 381 (Bom). He further pointed out that there is no question of royalty on IT support services being provided as it did not make available any technology. He further pointed out that the first thing to be decided is whether 'royalty' is on software and if not royalty, then clause 4(a) of Article 12 of DTAA was not applicable, as propounded by the learned Departmental Representative for the Revenue.

45. We have heard the rival contentions and perused the record. At the outset, we must complement both the learned Authorized Representatives in elaborately bringing to our attention different case laws on the issues and making submissions on each aspect of the issue arising in the present set of appeals. We have gone through the Paper Book filed by them and even case laws relied upon by them individually and have heard at length on different dates and now we proceed to decide the issues raised in the present appeals.

46. The issue which arises in the present case is in relation to payments made by assessee to its associated enterprise in respect of various aspects. The case of Revenue Department is that for all such payments as referred in orders of authorities below, were liable for tax deduction and since the assessee has failed to deduct tax at source out of payments made, hence has defaulted under section 201(1) and 201(1A) of the Act.

47. Section 201(1) of the Act provides that where any person who was required to deduct any sum in accordance with provisions of the Act or under section 192 of the Act being an employer, does not deduct or does not pay after deducting or fails

to pay the whole or part of tax as required by or under the Act, then, such person shall be deemed to be in default in respect of such tax. In addition, sub-section (1A) to section 201 of the Act provides that if any person or Principal Officer or company has defaulted as provided in sub-section (1), then he is liable to pay simple interest for the period of default in addition to the demand raised under sub-section (1). The authorities below have held the assessee to have defaulted in not deducting the tax at source and has raised demand under section 201(1) and interest under section 201(1A) of the Act.

48. With regard to grounds of appeal No.1 to 3, the case of authorities below was based on the amended provisions of section 9(1)(vi) of the Act, wherein Explanation has been inserted with retrospective effect, whereas the learned Departmental Representative for the Revenue has made submissions that even in the pre-amended provisions of the Act, payments made by assessee were akin to royalty or fees for technical services and were amenable to tax deduction at source. The case of assessee is multi-fold; first is that it is not royalty or fees for technical services and no technology has been made available and at best, it is case of reimbursement against some payments and hence provisions of section 9(1)(vi) or its amended provisions are not applicable. Secondly, even if you hold that the same is royalty, then provisions of DTAA having not been amended and being more beneficial to the assessee, would apply and the assessee has not defaulted by not deducting tax at source out of the aforesaid payments.

49. Let us look at the provisions of section 9(1)(vi) of the Act, which defines the term 'royalty' for the purpose of Income Tax Act. Section 9 (1) of the Act talks of the following incomes deemed to accrue or arise in India:-

**“Income deemed to accrue or arise in India**

9. (1) The following incomes shall be deemed to accrue or arise in India :—

(i) all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situate in India.

(ii) income which falls under the head "Salaries", if it is earned in India.

(iii) income chargeable under the head "Salaries" payable by the Government to a citizen of India for service outside India;

(iv) a dividend paid by an Indian company outside India;

(v) income by way of interest payable by—

(a) the Government ; or

(b) a person who is a resident, except where the interest is payable in respect of any debt incurred, or moneys borrowed and used, for the purposes of a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India ; or

(c) a person who is a non-resident, where the interest is payable in respect of any debt incurred, or moneys borrowed and used, for the purposes of a business or profession carried on by such person in India;

(vi) income by way of royalty payable by—

(a) the Government ; or

(b) a person who is a resident, except where the royalty is payable in respect of any right, property or information used or services utilised for the purposes of a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India ; or

(c) a person who is a non-resident, where the royalty is payable in respect of any right, property or information used or services utilised for the purposes of a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India:

(vii) income by way of fees for technical services payable by—

(a) the Government ; or

(b) a person who is a resident, except where the fees are payable in respect of services utilised in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India ; or

(c) a person who is a non-resident, where the fees are payable in respect of services utilised in a business or profession carried on by such person in India<sup>30</sup> or for the purposes of making or earning any income from any source in India:

50. Clause (vi) of section 9(1) of the Act talks about income by way of royalty payable the Government; or (b) a person who is a resident; or (c) a person who is a non-resident. The proviso lays down that the provisions of clause (vi) would not apply if the payment was made in pursuance to an agreement made before first day of April, 1976 and the agreement was approved by the Central Government.

51. The term 'royalty' is defined as per Explanation (2) under section 9(1) of the Act which reads as under:-

*“Explanation 2.—For the purposes of this clause, "royalty" means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head "Capital gains") for— (i) the transfer of all or any rights (including the granting of a licence) in respect of a patent, invention, model, design, secret formula or process or trade mark or similar property ; (ii) the imparting of any information concerning the working of, or the use of, a patent, invention, model, design, secret formula or process or trade mark or similar property ; (iii) the use of any patent, invention, model, design, secret formula or process or trade mark or similar property ; (iv) the imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill; (iva) the use or right to use any industrial, commercial or scientific equipment but not including the amounts referred to in section 44BB; (v) the transfer of all or any rights (including the granting of a licence) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, but not including consideration for the sale, distribution or exhibition of cinematographic films ; or (vi) the rendering of any services in connection with the activities referred to in sub-clauses (i) to (iv), (iva) and (v).”*

52. The Assessing Officer observed that in the facts of the present case, the payment made by assessee would fall under any of the clauses (i) to (iii) under Explanation 2 to section 9(1)(vi) of the Act.

53. Explanation 3 reads as under:-

*“Explanation 3.—For the purposes of this clause, "computer software" means any computer programme recorded on any disc, tape, perforated media or other information storage device and includes any such programme or any customized electronic data.”*

54. Further, the Finance Act, 2012 with retrospective effect from 01.06.1976 has inserted Explanations 4, 5 and 6 which read as under:-

*“Explanation 4.—For the removal of doubts, it is hereby clarified that the transfer of all or any rights in respect of any right, property or information includes and has always included transfer of all or any right for use or right to use a computer software (including granting of a licence) irrespective of the medium through which such right is transferred.*

*Explanation 5.—For the removal of doubts, it is hereby clarified that the royalty includes and has always included consideration in respect of any right, property or information, whether or not— (a) the possession or control of such right, property or information is with the payer; (b) such right, property or information is used directly by the payer; (c) the location of such right, property or information is in India.*

*Explanation 6.—For the removal of doubts, it is hereby clarified that the expression "process" includes and shall be deemed to have always included transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal), cable, optic fibre or by any other similar technology, whether or not such process is secret.”*

55. The case of Revenue is that payment made by the assessee is for use of software and amounts to payment of royalty, in view of the amendment made by the Finance Act, 2012 with retrospective effect from 01.06.1976. The case of the learned Departmental Representative for the Revenue before us has enlarged the meaning of 'royalty' and stated that even if we do not look at the retrospective amendment by the Finance Act, 2012, even in the earlier definition of the term 'royalty', the payments made by the assessee stands covered by the provisions of section 9(1)(vi) of the Act and hence, the assessee was liable to deduct tax at source out of such payments made to its associated enterprises.

56. On the other hand, the learned Authorized Representative for the assessee stressed that the payment made by assessee in no way could be termed as 'royalty' paid by the assessee to its associated enterprises for various reasons which have been raised by him. He has referred to various facets of the said clause and the amendments made by way of insertion of Explanations and even the definition covered by existing definition and pointed out that what has been paid by assessee cannot be termed as 'royalty' and hence, there was no liability under the tax deduction provisions. The learned Authorized Representative for the

assessee has also stressed that in any case the terms of DTAA have not been rectified or amended and in the absence of the same, since under the earlier provisions, the payment made by assessee did not akin to payment of 'royalty' and applying the provisions of DTAA which are more beneficial to the assessee, the assessee could not be held to be in default.

57. Before proceeding further, we may also refer to Article 12 of DTAA between India and USA, which has been reproduced under paras 6 to 8 of the order of Assessing Officer. The assessee has filed on record the copies of agreement, under which it has purchased software from different entities and the learned Authorized Representative for the assessee has exhaustively taken us through various terms and conditions of said agreements and has pointed out that under the aforesaid terms and conditions, the payment made by assessee was for copyrighted article and for other purposes, cannot be termed as 'payment of royalty'. It is not covered under the umbrella of 'royalty' under DTAA agreement and since more beneficial provisions are to be applied to the assessee, then as per DTAA terms, the assessee cannot be held to be liable for payment of TDS under the provisions of section 9(1)(vi) of the Act.

58. Both the learned Authorized Representatives have elaborately referred to various case laws which are in favour and against on the aforesaid issue.

59. Before proceeding further, we may point out that the CIT(A) had rejected the claim of assessee in turn, relying on the ratio laid down by Pune Bench of Tribunal in Cummins Inc Vs. DCIT (2014) 146 ITD 460 (Pune), order dated 08.08.2013 and also on the ratio laid down by Mumbai Bench of Tribunal in DDIT Vs. Reliance Infocom Ltd. (supra), order dated 06.09.2013. Vide order dated 06.12.2017 in MA

Nos.28 & 29/PUN/2017, relating to assessment years 2004-05 & 2006-07 in the case of Cummins Inc Vs. ACIT, Tribunal has held that there was a mistake apparent from record in the order of Tribunal, which needs to be rectified, wherein the Tribunal in its order had failed to consider the decision of Co-ordinate Bench in the case of Allianz SE Vs. ADIT (2012) 51 SOT 399 (Pune) and also the decision of Hon'ble High Court of Delhi in DIT Vs. Ericsson A.B. & two others (2012) 343 ITR 470 (Del). Thus, the Tribunal vide order dated 06.12.2017 has recalled its order in Cummins Inc. (supra). It may also be noted that Mumbai Bench of Tribunal in bunch of Miscellaneous Applications had also recalled its order in DIT Vs. Reliance Infocom Ltd. / Lucent Technologies Hindustan Ltd., against which the Revenue filed Writ Petition before the Hon'ble Bombay High Court, which was also dismissed by the Hon'ble High Court vide order dated 08.08.2017 and approved the decision of Tribunal in recalling its earlier order in proceeding under section 254(2) of the Act. Once both the decisions on which the CIT(A) had relied on to dismiss the plea of assessee stands recalled, then we need to re-look at the issue.

60. Now, we shall deal with the first aspect of the issue raised as to whether the payment made by assessee for purchase of software was in fact for purchase of copyrighted article or thing or for purchase of copyright. The case of assessee before us has been that it had purchased copyrighted software from third parties, hence the payment made by it does not fall within ambit of 'royalty'. In order to adjudicate the said issue, we shall refer to the terms of Software License Agreement entered into by Deere & Co. with different concerns, pursuant to which the said software was purchased and was being used by assessee. The first agreement which has been relied upon by the learned Authorized Representative is between Dakota Software Corporation and Deere & Co.

Under clause (1), it is recognized that Dakota Software Corporation was the owner of certain software and was provider of services. The assessee wanted to access and use the software and services.

Clause (2) provided that the said software and any user manuals or online help functions relating to software may be used only by authorized user i.e. a person to whom Deere & Co. provides user ID and password; and representation in this regard had to be made by Deere & Co. to Dakota Software Corporation. In clause (2) itself it is provided that Deere & Co. was responsible to ensure that each authorized user agrees to comply with the terms of agreement.

Under clause 2.2.1, it is categorically mentioned that Deere & Co. could not copy, modify or create derivative works based upon the software or documentation. Further, it is provided that Deere & Co. would not hack, illegally gain access to or reverse engineer the software in whole or in part or attempt to do so; further it is provided that Deere & Co. would solicit the agreement to the End User License before use of software and it would not defeat, disable or circumvent any protection mechanism related to the software. It has been specifically provided that Deere & Co., USA has no right to sell, lease, license, distribute, sub-license or rent to any third party any portion of software or documentation.

Clause 2.2.5 clearly provides that except authorized user, information would not be disclosed, permitted access to, or make available to any third party other than an authorized user, any portion of software or the documentation or in particular, do not allow any party to use the software.

In order to provide services outside the scope of statement of work, by clause 2.2.6, export the software in violation of any US Department of Commerce, Export Administration Regulations or other laws or regulations.

Under the confidential information as referred in clause (3), during the term of agreement, each party undertook to treat confidentially any document or other information which had been provided to it and designated in writing as confidential information by the other party. The said clause also provided that the terms and conditions of this agreement and any statement of work hereunder constitute confidential information of both parties and the software and documentation constitutes confidential information of Dakota Software Corporation.

Under clause (4), it is specifically provided that except for the rights expressly granted hereunder, the agreement conveys no right, title or interest, expressly or by implication, in the software, or in any other copyright, patent, trademark, trade secret or other intellectual property or proprietary right in the software, the confidential information or the documentation. Dakota Software Corporation retains sole and exclusive right to all portions of software, documentation, its confidential information and copies thereof.

On the other hand, as per clause 4.3, Deere & Co. shall retain all right, title and interest in the Client Content. It is specifically agreed that Deere & Co. understood that some Client Content may be translated into certain formats to be processed by the software. So, Dakota Software Corporation granted a non-exclusive, non-transferrable, royalty-free right and license to store, create derivative works from and otherwise process Client Content as required in the performance of Dakota Software Corporation. In case of any unauthorized use or access to the software, it was incumbent upon Deere & Co. to notify Dakota Software Corporation immediately and to cooperate in any litigation proceedings, etc. to protect the rights of Dakota Software Corporation. Thereafter, other terms of said agreement and terms of

warranty and limitation, assignments, dispute resolution and miscellaneous provisions are provided.

61. Exhibit-A to the said agreement is Dakota End User License. Under the said agreement, it is provided that End User License was legal agreement between Deere & Co. and Dakota Software Corporation granting certain rights to access and use Dakota's software and any user manuals or online help functions relating to the software. In case, either party did not agree to the terms of End User License, then the same should not be accessed and the same should be clicked on cancel button.

As per clause (1), End User License was granted by Dakota Software Corporation under and subject to Master Agreement, as referred in the paras above and statement of work between Dakota Software Corporation and any other legal entity which was licensing access and use of software and instruction to access or use software.

Then under clause 2.1 it is provided the access and use of software and document was non-transferrable and non-exclusive.

Clause 2.2 enlists the acts which are not to be done; first being not to copy, modify or create derivative works based upon software / documentation, hack, illegally gain access to, or reverse engineer the software in whole or in part or admit to do so.

Then clause 2.2.3 prohibits and provides defeat, disable or circumvent any protection mechanism related to the software, including, without limitation any code which necessitates or solicits agreement to End User License before use of software or attempt to do so.

It is further provided by clause 2.2.4 that Deere & Co. is not to sell, lease, license, distribute, sub-license or rent to any third party any portion of the software or the documentation. Then, it is provided that unless authorized in writing, the Deere & Co. was not to disclose, permit access to, or make available to any third party other than the authorized user, any portion of software or the documentation, which was further clarified as not to allow any party to use software in order to provide services outside the scope of statement of works; or export the software in violation of any US Department of Commerce, Export Administration Regulations or other Laws or Regulations.

As per clause 4, it is reiterated that except for the rights expressly granted, the End User License transfers to Deere & Co, no right, title or interest in the software, the documentation, or any copyright, patent, trademark, trade secret or other intellectual property or proprietary right in the software or the documentation. It is specifically provided that 'Dakota' retains sole and exclusive title to all portions of software and documentation and any copies thereof.

62. Now, coming to the second agreement which has been referred to by both the learned authorized representatives, which is placed at pages 14 to 17 of Paper Book, which is between Altair Engineering, Inc. and Deere & Co. Under the said agreement also, Altair Engineering, Inc. grants and licensee accepts a limited, non-exclusive, non-transferrable license to install the products on the License (Network) Server(s) for use. It is further provided that same would be used solely by the employees of licensee or its permitted users who agreed to the terms of agreement. It was understood that the users would make backup copies of products, provided that Altair's Proprietary Rights notices were reproduced on each such backup copy.

It is also provided that licensee would freely modify and use Templates, and create interfaces to Licensee's proprietary software for internal use only. However, such modification shall not be subject to Altair's warranties, indemnities, support or other obligations, etc. It is further agreed that licensee shall indemnify, defend and hold harmless Altair for the actions of its permitted users. As per clause (3), there are restrictions on use, wherein licensee shall not (a) install, use, copy, modify, merge or transfer copies of products except as expressly authorized in the agreement; (b) use any backup copies of products other than to replace original copies provided by Altair, in case it is destroyed or damaged; (c) disassemble, decompile or 'unlock', reverse translate, reverse engineer, or in any manner decode the software or ISV software for any reasons and beside others, not to allow third parties to access or use the products wide area network, internet location or time sharing arrangement. Further, the licensee i.e. Deere & Co. acknowledged that all applicable rights in patents, copyrights, trademarks, service marks, and trade secrets embodied in the products were owned by Altair or its suppliers. Then, there is confidentiality clause, under which is agreed upon between the parties beside other terms of the said agreement. It is specified in the confidentiality clause that licensee acknowledges that all applicability rights in patents, copyrights, trademarks, service marks and trade secrets embedded in the products are owned by Altair and / or its suppliers. The licensee further acknowledges that the products and all copies thereof, shall remain sole and exclusive property of Altair and / or its suppliers.

63. Similarly, Deere & Co. had entered into an agreement with another concern ANSYS, Inc. and the terms of said agreement were similar as to the other agreements. As per clause 3.2, it was provided that the license grants no title or rights of ownership, copyright or any other intellectual property right in or related to the products though under the license, it was permitted for making reasonable

number of copies for internal backup, archival, disaster recovery and security purposes. The licensee was also permitted to install and use the products for installation testing, disaster recovery testing, disaster recovery, internal classes and training exercises at no charge. It was specifically agreed that the licensee does not permit the product to be loaned, sold, transferred, or sublicensed to any third party, etc.

64. In such facts and circumstances, where the assessee was one of the permitted users by Deere & Co. of the aforesaid software; the question which arises is whether such use of software by the assessee is covered under the term 'royalty' as provided in section 9(1)(vi) of the Act or Article 12 of the DTAA. Article 12 of DTAA with USA stipulates and defines what is royalty and fees for technical services. The term 'royalty' as per clause 3 of Article 12 means payment of any kind received as consideration for the use of, or the right to use, any copyright of a literary, artistic, or scientific work, including gains derived from the alienation of any such right or property which are contingent on the productivity, use or disposition thereof. The term 'royalty' has been defined by clause 3 of Article 12 as payment received for the use of, or the right to use any copyright. Section 9(1)(vi) of the Act defines 'royalty' and we have already reproduced relevant portion of the said section in the paras hereinabove. The authorities below were of the view that because of insertion of Explanation 5 to section 9(1)(vi) of the Act with retrospective effect from 01.06.1976, where the meaning of term 'royalty' has been extended to include use of copyright or copyrighted article is to be applied and on such application, the assessee was held to be in default. The case of learned Departmental Representative for the Revenue is that even under the pre-amended provisions of the Act, Explanation 2 to section 9(1)(vi) of the Act involves transfer of some rights in respect of copyright and would cover the issue which is raised in the

present appeal. The case of assessee on the other hand, is that since it had not received any copyright but was only receiving copyrighted article in the form of software, then it is not royalty and was not covered under the provisions of section 9(1)(vi) of the Act. In the alternate, it is submitted by the learned Authorized Representative for the assessee that since the definition of 'royalty' has not been amended in DTAA and the said provisions being beneficial, then provisions of Article 12(3) of DTAA with USA would apply and the assessee's case would fall within non amended provisions of definition of 'royalty' under Article 12(3) of DTAA.

65. The Hon'ble High Court of Delhi in DIT Vs. Infrasoftware Ltd. (supra) have noted that under the license agreement, license was non-exclusive, non-transferrable and the software had to be used in accordance with agreement; the licensee was permitted to make only one copy of software and associated support information and that also for backup purpose. All copies of software were the exclusive property of 'Infrasoftware' and it was stipulated that copy shall include 'Infrasoftware' copyright and all copies of software also; and without consent of the licensor, the software could not be loaned, rented, sold, sub-licensed or transferred to any third party. The Hon'ble High Court further went on to hold that distinction had to be made between acquisition of copyright and copyrighted article; copyrighting was distinct from material object.

66. The Hon'ble High Court in DIT Vs. Infrasoftware Ltd. (supra) vide its decision dated 22.11.2013 was of the view that where the assessee was governed by Indo-US DTAA, the income of assessee would be chargeable to tax in terms of provisions of Indo-US DTAA and if the same was more advantageous or beneficial, then definition of the word 'royalty' as defined in Explanation 2 to section 9(1)(vi) of the Act could not be applied. The Hon'ble High Court vide paras 64 and 65 held as under:-

*“64. To be taxable as royalty income covered by Article 12 of the DTAA the income of the Assessee should have been generated by the "use of or the right to use of" any copyright.*

*65. The issue whether consideration for software was royalty came up for consideration before the Special Bench of the Tribunal in Delhi in the case of MOTOROLA INC VS DEPUTY CIT (2005) 147 TAXMAN 39 (DELHI). The Tribunal has held as under:*

*155. It appears to us from a close examination of the manner in which the case has proceeded before the Income-tax authorities and the arguments addressed before us that the crux of the issue is whether the payment is for a copyright or for a copyrighted article. If it is for copyright, it should be classified as royalty both under the Income-tax Act and under the DTAA and it would be taxable in the hands of the Assessee on that basis. If the payment is really for a copyrighted article, then it only represents the purchase price of the article and, therefore, cannot be considered as royalty either under the Act or under the DTAA. This issue really is the key to the entire controversy and we may now proceed to address this issue.*

*156. We must look into the meaning of the word "copyright" as given in the Copyright Act, 1957. Section 14 of this Act defines "Copyright" as "the exclusive right subject to the provisions of this Act, to do or authorize the doing of any of the following acts in respect of a work or any substantial part thereof, namely:*

*-----*

*It is clear from the above definition that a computer programme mentioned in Clause (b) of the section has all the rights mentioned in Clause (a) and in addition also the right to sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer programme. This additional right was substituted w.e.f. 15.1.2000. The difference between the earlier provision and the present one is not of any relevance. What is to be noted is that the right mentioned in Sub -clause (ii) of Clause (b) of Section 14 is available only to the owner of the computer programme. It follows that if any of the cellular operators does not have any of the rights mentioned in Clauses (a) and (b) of Section 14, it would mean that it does not have any right in a copyright. In that case, the payment made by the cellular operator cannot be characterized as royalty either under the Income-tax Act or under the DTAA. The question, therefore, to be answered is whether any of the operators can exercise any of the rights mentioned in the above provisions with reference to the software supplied by the Assessee.*

*157. We may first look at the supply contract itself to find out what JTM, one of the cellular operators, can rightfully do with reference to the software. We may remind ourselves that JTM is taken as a representative of all the cellular operators and that it was common ground before us that all the contracts with the cellular operators are substantially the same. Clause 20.1 of the Agreement, under the title "License", says that JTM is granted a non - exclusive restricted license to use the software and documentation but only for its own operation and maintenance of the system and not otherwise. This clause appears to militate against the position, if it were a copyright, that the holder of the copyright can do anything with respect to the same in the public domain. What JTM is permitted to do is only to use the software for the purpose of its own operation and maintenance of the system. There is a clear bar on the software being used by JTM in the public domain or for the purpose of commercial exploitation.*

158. Secondly, under the definition of "copyright" in Section 14 of the Copyright Act, the emphasis is that it is an exclusive right granted to the holder thereof. This condition is not satisfied in the case of JTM because the license granted to it by the Assessee is expressly stated in Clause 20.1 as a "non exclusive restricted license". This means that the supplier of the software, namely, the Assessee, can supply similar software to any number of cellular operators to which JTM can have no objection and further all the cellular operators can use the software only for the purpose of their own operation and maintenance of the system and not for any other purpose. The user of the software by the cellular operators in the public domain is totally prohibited, which is evident from the use of the words in Article 20.1 of the agreement, "restricted" and "not otherwise". Thus JTM has a very limited right so far as the use of software is concerned. It needs no repetition to clarify that JTM has not been given any of the seven rights mentioned in Clause (a) of Section 14 or the additional right mentioned in Sub-clause (ii) of Clause (b) of the section which relates to a computer programme and, therefore, what JTM or any other cellular operator has acquired under the agreement is not a copyright but is only a copyrighted article.

159. Clause 20.4 of the supply contract with JTM is as under:

20.4 In pursuance of the foregoing JT MOBI LES shall:

- (a) not provide or make the Software or Documentation or any portions or aspects thereof (including any methods or concepts utilized or expressed therein) available to any person except to its employees on a "need to know" basis;
- (b) not make any copies of Software or Documentation or parts thereof, except for archival backup purposes;
- (c) when making permitted copies as aforesaid transfer to the copy/copies any copyright or other marking on the Software or Documentation.
- (d) Not use the Software or Documentation for any other purpose than permitted in this Article 20, Licence or sell or in any manner alienate or part with its possession.
- (e) Not use or transfer the Software and/or the Documentation outside India without the written consent of the Contractor and after having received necessary export or re-export permits from relevant authorities.

This clause places stringent restrictions on the cellular operator so far as the use of software is concerned. It first says that the cellular operator cannot make the software or portions thereof available to any person except to its employees and even with regard to employees it has to be only on a "need to know basis" which means that even the employees are not to be told in all its aspects. What the Assessee can do is only to tell the particular employee what he has to know about the software for operational purposes. The cellular operator has been denied the right to make copies of the software or parts thereof except for archival backup purposes. This means that the cellular operator cannot make copies of the software for commercial purposes. This condition is plainly contrary to Section 14(a)(i) of the Copyright Act which permits the copyright holder to reproduce the work in any material form including the storing of it in any medium by electronic means. We may also notice Section 52(1)(aa) of the Copyright Act which lists out certain acts which cannot be considered as infringement of copyright. The particular clause permits the making of copies or adaptation of a computer

*programme by the lawful possessor of the copy and the computer programme in order to utilize the public programme for the purpose for which it was supplied or to make backup copies purely as a temporary protection against loss, destruction or damage. Therefore, merely because the cellular operator has been permitted to take copies just for backup purposes, it cannot be said that it has acquired a copyright in the software.*

160. Clause 20.4(c) makes it mandatory for the cellular operator, while making copies of the software for backup purposes, to also mark the copied software with copyright or other marking to show that the rights of the Assessee are reserved. This is one more indication that what the cellular operator acquired is not a copyright.

161. Clause 20.4(d) says that the cellular operator cannot use the software for any other purpose than what is permitted and shall not also license or sell or in any manner alienate or part with its possession. This has to be read with Clause 20.5 which says that the license can be transferred, but only when the GSM system itself is sold by the cellular operator to a third party. This in a way shows that the software is actually part of the hardware and it has no use or value independent of it. This restriction placed on the cellular operator (not to license or sell the software) runs counter to Section 14(b)(ii) of the Copyright Act which permits a copyright holder to sell or let out on commercial rental the computer programme. For this reason also it cannot be said that JTM or any cellular operator acquired a copyright in the software.

162. A conjoint reading of the terms of the supply contract and the provisions of the Copyright Act, 1957 clearly shows that the cellular operator cannot exploit the computer software commercially which is the very essence of a copyright. In other words a holder of a copyright is permitted to exploit the copyright commercially and if he is not permitted to do so then what he has acquired cannot be considered as a copyright. In that case, it can only be said that he has acquired a copyrighted article. A small example may clarify the position. The purchaser of a book on income-tax acquires only a copyrighted article. On the other hand, a recording company which has recorded a vocalist has acquired the copyright in the music rendered and is, therefore, permitted to exploit the recording commercially. In this case the music recording company has not merely acquired a copyrighted article in the form of a recording, but has actually acquired a copyright to reproduce the music and exploit the same commercially. In the present case what JTM or any other cellular operator has acquired under the supply contract is only the copyrighted software, which is an article by itself and not any copyright therein.

163. We may now briefly deal with the objections of Mr. G.C. Sharma, the learned senior counsel for the Department. He contended that if a person owns a copyrighted article then he automatically has a right over the copyright also. With respect, this objection does not appear to us to be correct. Mr. Dastur filed an extract from Iyengar's Copyright Act (3rd Edition) edited by R.G. Chaturvedi. The following observations of the author are on the point:

*"(h) Copyright is distinct from the material object, copyrighted:*

*It is an intangible incorporeal right in the nature of a privilege, quite independent of any material substance, such as a manuscript. The*

*copyright owner may dispose of it on such terms as he may see fit. He has an individual right of exclusive enjoyment. The transfer of the manuscript does not, of itself, serve to transfer the copyright therein. The transfer of the ownership of a physical thing in which copyright exists gives to the purchaser the right to do with it (the physical thing) whatever he pleases, except the right to make copies and issue them to the public" (underline is ours).*

*The above observations of the author show that one cannot have the copyright right without the copyrighted article but at the same time just because one has the copyrighted article, it does not follow that one has also the copyright in it. Mr. Sharma's objection cannot be accepted.*

*164. It is not necessary, therefore, to consider the alternative argument of Mr. Dastur, namely, that even assuming that the Department is right in saying that if you have the copyrighted article, you also have the copyright right therein, still it would mean that the copyright rights are transferred (acquired by JTM) and it would not be a case of merely giving the right to use and consequently Article 13 of the DTAA would not apply. Mr. Dastur, however, was fair enough to concede that if the Department is right in saying that if you have the copyrighted article, you also have the copyrighted rights, then Clause (v) of Explanation 2 below Section 9(1) of the Income-tax Act will apply because his clause ropes in "transfer of all or any rights" and is not restricted to "use" or "right to use", the copyright. However, he added that since the basic proposition of the Department has been demonstrated to be wrong, Clause (v) of Explanation 2 below Section 9(1) is not an impediment to accepting the assessee's contention.*

*165. We may also usefully refer to the Commentary on the OECD Model Convention (dated 28.1.2003) which is of persuasive value and which throws considerable light on the character of the transaction and the treatment to be given to the payments for tax purposes. Paragraph 14 of the Commentary, a copy of which was filed in Paper book No. V is relevant:*

#### COMMENTARY ON ARTICLE 12 - PAPER BOOK V

*"14. In other types of transactions, the rights acquired in relation to the copyright are limited to those necessary to enable the user to operate the program, for example, where the transferee is granted limited rights to reproduce the program. This would be the common situation in transactions for the acquisition of a program copy. The rights transferred in these cases are specific to the nature of computer programs. They allow the user to copy the program, for example onto the user's computer hard drive or for archival purposes. In this context, it is important to note that the protection afforded in relation to computer programs under copyright law may differ from country to country. In some countries the act of copying the program onto the hard drive or random access memory of a computer would, without a license, constitute a breach of copyright. However, the copyright laws of many countries automatically grant this right to the owner of software which incorporates a computer program. Regardless of whether this right is granted under law or under a license agreement with the copyright holder, 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 commercial income in accordance with Article 7."*

166. We may also usefully refer to the proposed amendments to the regulations of the Internal Revenue Service (IRS) in the USA.

Again these regulations may not be binding on us but they have a persuasive value and throw light on the question before us, namely the difference between a copyright right and a copyrighted article. These regulations have been placed at pages 136 to 157 of Paper book No. II. The actual regulations as well as the explanatory Note explaining the object and the purpose of the proposed regulations have also been given. In paragraph 1 of the Note titled "Background", it has been stated that the proposed regulations require that a transaction involving a computer programme may be treated as being one of the four possible categories. Two such categories are the transfer of copyright rights and the transfer of a copyrighted article. The U.S. regulations distinguished between transfer of copyright rights and transfer of copyrighted articles based on the type of rights transferred to the transferee. Briefly stated, if the transferee acquires a copy of a computer programme but does not acquire any of the rights identified in certain sections (of the U.S. Regulations), the regulation classified the transaction as the Transfer of a copyrighted article. Paragraph 3 of the Explanatory Note says that if a transfer of a computer programme results in the transferee acquiring any one or more of the listed rights, it is a transfer of a copyright right.

167. Paragraph 4 says that if a person acquires a copy of a computer programme but does not acquire any of the four listed copyright rights, he gets only a copyrighted article but no copyright.

168. The actual regulations bring out the distinction very clearly between the copyright right and a copyrighted article. They also specify the four rights which, if acquired by the transferee, constitute him the owner of a copyright right. They are:

- (a) 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 publically display the computer programme.

169. A copyrighted article has been defined in the regulation (page 147 of the paper book) as including a copy of a computer programme from which the work can be perceived, reproduced or otherwise communicated either directly or with the aid of a machine or device. The copy of the programme may be fixed in the magnetic medium of a floppy disc or in the main memory or hard drive of a computer or in any other medium.

170. So far as the transfer of copyrighted articles and copyright rights are concerned, the regulation goes on to say (page 148 of the paper book) that the question whether there was a transfer of a copyright right or only of a copyrighted article must be determined taking into account all the facts and circumstances of the case and the benefits and burden of ownership which

*have been transferred. Several examples have been given below these regulations to find out whether a particular transfer is a transfer of a copyright right or a transfer of a copyrighted article.*

*171. The Commentary of "Charl P. du TOIT" on this question has been placed at pages 202 to 204 of Paper book No. II. The Commentary is titled "Beneficial ownership of royalties in Bilateral Tax Treaties." He has opined that articles such as Books and Records are copyrighted articles and if they are sold, the user does not obtain the right to use any significant rights in the underlying copyright itself, which is what should determine the characterization of the revenue as sale proceeds rather than royalties. He has further opined that consideration relating to sale of software can amount to royalty only in limited circumstances.*

*172. For the above reasons, we are of the view that the payment by the cellular operator is not for any copyright in the software but is only for the software as such as a copy righted article. It follows that the payment cannot be considered as royalty within the meaning of Explanation 2 below Section 9(1) of the Income-tax Act or Article Article of the DTAA with Sweden.*

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*184. In view of the foregoing discussion, 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 be considered as royalty either under the Income-tax Act or the DTAA."*

67. The Hon'ble High Court while referring to the decision of Tribunal in Motorola Inc Vs. DCIT (supra) in the said case noted that the Tribunal had held and rightly so, that the question whether there was a transfer of a copyright right or only of a copyrighted article must be determined taking into account all the facts and circumstances of the case and the benefits and burden of ownership which have been transferred.

68. The learned Departmental Representative for the Revenue had pointed out that there is no term as copyright right but we find no merit in the stand of learned Departmental Representative for the Revenue in this regard; especially if we look at paras 66 and 67 of the said judgment, wherein it is very clearly mentioned that if a person acquires copy of computer programme, but it has not acquired any of the four listed copyright rights, he gets only copyrighted article but no copyright; then they have elaborated on the four rights being:-

*(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 publically display the computer programme.*

69. The judgment has to be read as a whole and it is not desirable to pick up one word and point out the defects because the word has to be seen in the context and if we look at the context, then the Hon'ble High Court very clearly decided whether in the given case, person had got copyrighted articles and no copyright right in the said articles.

70. The Hon'ble High Court of Delhi in DIT Vs. Infrasoftware Ltd. (supra) then refers to the decision of the Hon'ble High Court of Delhi itself in DIT Vs. Ericsson A.B. (2012) 343 ITR 470 (Del), wherein it was held that once it is held that payment in question is not royalty which would come within the mischief of clause (vi), the Explanation will have no application and that the question of applicability of the Explanation would arise only when payment is to be treated as "royalty" within the meaning of clause (vi) or "fee for technical services" as provided in clause (vii) of the Act. After referring to different terms of Licensing Software Agreement, the Hon'ble High Court observed as under:-

*"85. The Licensing Agreement shows that the license is non-exclusive, non-transferable and the software has to be used in accordance with the Agreement. Only one copy of the software is being supplied for each site. The licensee is permitted to make only one copy of the software and associated support information and that also for backup purposes. It is also stipulated that the copy so made shall include Infrasoftware's copyright and other proprietary notices. All copies of the Software are the exclusive property of Infrasoftware. The Software includes a licence authorisation device, which restricts the use of the Software. The software is to be used only for Licensee's own business as defined within the Infrasoftware Licence Schedule. Without the consent of the Assessee the software cannot be loaned, rented, sold, sublicensed or transferred to any third party or used by any parent, subsidiary or affiliated entity of Licensee or used for the operation of a service bureau or for data processing. The Licensee is further restricted from making copies, decompile, disassemble or reverse-engineer the Software without Infrasoftware's written consent.*

*The Software contains a mechanism which Infrasoftware may activate to deny the Licensee use of the Software in the event that the Licensee is in breach of payment terms or any other provisions of this Agreement. All copyrights and intellectual property rights in and to the Software, and copies made by Licensee, are owned by or duly licensed to Infrasoftware.”*

71. The Hon'ble High Court concluded by holding as under:-

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

*88. The license granted by the Assessee is limited to those necessary to enable the licensee to operate the program. The rights transferred are specific to the nature of computer programs. Copying the program onto the computer's hard drive or random access memory or making an archival copy is an essential step in utilizing the program. Therefore, rights in relation to these acts of copying, where they do no more than enable the effective operation of the program by the user, should be disregarded in analyzing the character of the transaction for tax purposes. Payments in these types of transactions would be dealt with as business income in accordance with Article 7.*

*89. There is a clear distinction between royalty paid on transfer of copyright rights and consideration for transfer of copyrighted articles. Right to use a copyrighted article or product with the owner retaining his copyright, is not the same thing as transferring or assigning rights in relation to the copyright. The enjoyment of some or all the rights which the copyright owner has, is necessary to invoke the royalty definition. Viewed from this angle, a non-exclusive and non-transferable licence enabling the use of a copyrighted product cannot be construed as an authority to enjoy any or all of the enumerated rights ingrained in Article 12 of DTAA. Where the purpose of the licence or the transaction is only to restrict use of the copyrighted product for internal business purpose, it would not be legally correct to state that the copyright itself or right to use copyright has been transferred to any extent. The parting of intellectual property rights inherent in and attached to the software product in favour of the licensee/customer is what is contemplated by the Treaty. Merely authorizing or enabling a customer to have the benefit of data or instructions contained therein without any further right to deal with them independently does not, amount to transfer of rights in relation to copyright or conferment of the right of using the copyright. The transfer of rights in or over copyright or the conferment of the right of use of copyright implies that the transferee/licensee should acquire rights either in entirety or partially co-extensive with the owner/ transferor who divests himself of the rights he possesses pro tanto.*

*90. The license granted to the licensee permitting him to download the computer programme and storing it in the computer for his own use is only incidental to the*

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

*91. There is no transfer of any right in respect of copyright by the Assessee and it is a case of mere transfer of a copyrighted article. The payment is for a copyrighted article and represents the purchase price of an article and cannot be considered as royalty either under the Income Tax Act or under the DTAA.”*

72. The Hon'ble High Court then referred to the decision of the Hon'ble High Court of Karnataka in CIT Vs. Samsung Electronics Co. Ltd. (supra) and distinguished the same holding as under:-

*“98. We are not in agreement with the decision of the Andhra Pradesh High Court in the case of SAMSUNG ELECTRONICS CO. LTD(SUPRA) that right to make a copy of the software and storing the same in the hard disk of the designated computer and taking backup copy would amount to copyright work under section 14(1) of the Copyright Act and the payment made for the grant of the licence for the said purpose would constitute royalty. The license granted to the licensee permitting him to download the computer programme and storing it in the computer for his own use was only incidental to the facility extended to the licensee to make use of the copyrighted product for his internal business purpose. The said process was necessary to make the programme functional and to have access to it and is qualitatively different from the right contemplated by the said provision because it is only integral to the use of copyrighted product. The right to make a backup copy purely as a temporary protection against loss, destruction or damage has been held by the Delhi High Court in DIT v. M/s Nokia Networks OY (Supra) as not amounting to acquiring a copyright in the software.”*

73. Further, both the learned Authorized Representatives had relied on the decision of the Hon'ble High Court of Delhi in Pr.CIT Vs. M.Tech India (P) Ltd. (supra). The question which was raised before the Hon'ble High Court was whether where the assessee acquires right to use software, the payments so made would amount to 'royalty'. The learned Departmental Representative for the Revenue had pointed out that the Hon'ble High Court had held that where the assessee acquires right to use software, the payments so made would amount to 'royalty'; but the learned Authorized Representative for the assessee has strongly pointed out that para 12 of the said decision has to be read in whole, which reads as under:-

*“12. In the cases where an Assessee acquires the right to use a software, the payment so made would amount to royalty. However in cases where the payments are made for purchase of software as a product, the consideration paid cannot be considered to be for use or the right to use the software. It is well settled that where software is sold as a product it would amount to sale of goods. In the case of Tata Consultancy Services v. State of Andhra Pradesh: (2004) 271 ITR 401 (SC), the Supreme Court examined the transactions relating to the purchase and sale of software recorded on a CD in the context of the Andhra Pradesh General Sales Tax Act. The court held the same to be goods within the meaning of Section 2(b) of the said Act and consequently exigible to sales tax under the said Act. Clearly, the consideration paid for purchase of goods cannot be considered as ‘royalty’. Thus, it is necessary to make a distinction between the cases where consideration is paid to acquire the right to use a patent or a copyright and cases where payment is made to acquire patented or a copyrighted product/material. In cases where payments are made to acquire products which are patented or copyrighted, the consideration paid would have to be treated as a payment for purchase of the product rather than consideration for use of the patent or copyright.”*

74. The Hon’ble High Court has thus, made distinction between the cases where consideration is paid to acquire right to use, patent or copyright and cases where payment is made to acquire patented or copyrighted products / material and has held that where the payment is made to acquire products which are patented or copyrighted, consideration paid would have to be treated as payment for purchase of product rather than consideration for use of patent or copyright. In para 13, the Hon’ble High Court in Pr.CIT Vs. M.Tech India (P) Ltd. (supra) refers to earlier decision of Coordinate Bench of the Hon’ble High Court of Delhi in DIT Vs. Infracsoft Ltd. (supra) and also refers to the reliance placed upon by the Revenue on the decision of the Hon’ble High Court of Karnataka in CIT Vs. Samsung Electronics Co. Ltd. (supra) and holds that the Bench in DIT Vs. Infracsoft Ltd. (supra) has unequivocally expressed its view that it was not in agreement with that decision. The question was thus, decided holding the consideration paid could not be considered as ‘royalty’ for use or right to use software.

75. Now, coming to the next reliance placed upon by the learned Departmental Representative for the Revenue i.e. on the decision of the Hon’ble High Court of Karnataka in CIT Vs. Synopsis International Old Ltd. (supra). The said decision is

dated 03.08.2010 and the Hon'ble High Court had held that in case exclusive or non-exclusive license and even where there is transfer of certain rights, then it was case of royalty being paid and was thus, within mischief of Explanation 2 to section 9(1)(vi) of the Act and there was liability to pay tax.

76. The proposition laid down by the Hon'ble High Court of Delhi in DIT Vs. Infrasoftware (supra) as pointed out is with regard to the definition of 'royalty' on the basis of Explanation 2 to section 9(1)(vi) of the Act, which talks of transfer of some rights including the granting of license in respect of copyright and the Hon'ble High Court has settled the issue in favour of assessee. The said decision is dated 26.11.2013 and has decided the issue.

77. Here, reference may also be made to earlier decision of the Hon'ble High Court of Delhi in DIT Vs. Ericsson A.B. (supra). Relying on the ratio laid down by the Hon'ble Supreme Court in Tata Consultancy Services Vs. State of Andhra Pradesh (2004) 271 ITR 401 (SC), the Hon'ble High Court of Delhi in DIT Vs. Ericsson A.B. (supra) had held as under:-

*"56. A fortiori when the assessee supplies the software which is incorporated on a CD, it has supplied tangible property and the payment made by the cellular operator for acquiring such property cannot be regarded as a payment by way of royalty.*

.....

*59. Be that as it may, in order to qualify as royalty payment, within the meaning of section 9(1)(vi) and particularly clause (v) of Explanation 2 thereto, it is necessary to establish that there is transfer of all or any rights (including the granting of any licence) in respect of copyright of a literary, artistic or scientific work. Section 2(o) of the Copyright Act makes it clear that a computer programme is to be regarded as a "literary work". Thus, in order to treat the consideration paid by the cellular operator as royalty, it is to be established that the cellular operator, by making such payment, obtains all or any of the copyright rights of such literary work. In the present case, this has not been established. It is not even the case of the Revenue that any right contemplated under section 14 of the Copyright Act, 1957, stood vested in this cellular operator as a consequence of article 20 of the supply contract. Distinction has to be made between the acquisition of a "copyright right" and a "copyrighted article".*

60. Mr. Dastur is right in this submission which is based on the commentary on the OECD Model Convention. Such a distinction has been accepted in a recent ruling of the Authority for Advance Ruling (AAR) in Dassault Systems KK 229 CTR 125. We also find force in the submission of Mr. Dastur that even assuming the payment made by the cellular operator is regarded as a payment by way of royalty as defined in Explanation 2 below Section 9 (1) (vi), nevertheless, it can never be regarded as royalty within the meaning of the said term in article 13, para 3 of the DTAA. This is so because the definition in the DTAA is narrower than the definition in the Act. Article 13(3) brings within the ambit of the definition of royalty a payment made for the use of or the right to use a copyright of a literary work. Therefore, what is contemplated is a payment that is dependent upon user of the copyright and not a lump sum payment as is the position in the present case.

*We thus hold that payment received by the assessee was towards the title and GSM system of which software was an inseparable parts incapable of independent use and it was a contract for supply of goods. Therefore, no part of the payment therefore can be classified as payment towards royalty.”*

78. The Hon'ble High Court of Delhi in DIT Vs. Infrasoftware Ltd. (supra) has taken note of the said decision of DIT Vs. Ericsson A.B. (supra) in para 71 and in para 72 held as under:-

*“72. The Delhi High Court further in ERICSSON CASE (SUPRA) further held that once it is held that payment in question is not royalty which would come within the mischief of clause (vi), the Explanation will have no application and that the question of applicability of the Explanation would arise only when payment is to be treated as "royalty" within the meaning of clause (vi) or "fee for technical services" as provided in clause (vii) of the Act.”*

79. Further, the learned Departmental Representative for the Revenue before us has stressed that the issue stands covered by the decision of Authority for Advance Rulings (Income Tax), New Delhi in the case of SkillSoft Ireland Ltd., In re\_\* (supra) and had strongly pointed out that the said decision is dated 20.07.2015 i.e. after the decision of the Hon'ble High Court of Delhi in DIT Vs. Infrasoftware Ltd. (supra) and hence, the said ratio is to be applied. He also pointed out that the case of DIT Vs. Infrasoftware Ltd. (supra) was also referred by the AAR.

80. The Hon'ble Bombay High Court in Prudential Assurance Company Ltd. Vs. DIT (supra) has held that the Ruling of AAR binds the applicant, CIT(A) and IT

authorities subordinate to him and shall apply in relation to transactions in which Ruling is sought.

81. The Mumbai Bench of Tribunal in G.D. Metal Steel Pvt. Ltd. Vs. ACIT (2011) 12 taxmann.com 165 (Mum) has laid down that Rulings given by AAR, not being part of Judicial hierarchy cannot lay down the binding precedence for anyone. *The Rulings indeed deserves highest respect and consideration, it cannot be open to anyone to treat this as binding judicial precedent. The Tribunal further held that in sharp contrast with binding Rulings, which are binding even if the Rulings have not dealt with a particular argument is raised later.*

82. In such scenario, the proposition laid down by AAR is not binding for deciding the issue raised before us especially where the issue has been elaborately decided by the Hon'ble High Court of Delhi in DIT Vs. Infrasoftware Ltd. (supra). The learned Departmental Representative for the Revenue pointed out that the said decision of the Hon'ble High Court of Delhi in DIT Vs. Infrasoftware Ltd. (supra) was also referred before AAR but while deciding the issue, no cognizance of the said decision has been taken by AAR. Before the Hon'ble High Court of Delhi in DCIT Vs. M.Tech India (P) Ltd. (supra), the Senior Counsel for Revenue had placed reliance on SkillSoft Ireland Ltd., In re\_\* (supra); but the Hon'ble High Court relied on DIT Vs. Infrasoftware Ltd. (supra) for the proposition that what was transferred was not copyright or right to use copyright but limited right to use copyrighted material and that did not give rise to any royalty income, rejecting case of Revenue to tax the receipts on sale of licensing of certain software as 'royalty'. The learned Departmental Representative for the Revenue has also placed reliance on the decision of AAR in the case of EY Global Services Ltd. (supra), which at best has

persuasive value and cannot be relied upon when the issue has been settled by the Hon'ble High Court of Delhi in DIT Vs. Infrasoftware Ltd. (supra).

83. Before AAR in the case of EY Global Services Ltd. (supra), though the reliance was placed in the case of Allianz SE (supra) and judgment of the Hon'ble High Court of Delhi in DIT Vs. Infrasoftware Ltd. (supra), but the AAR has not dealt with said ratio laid down and has decided the issue otherwise. In such scenario, submissions of learned Departmental Representative for the Revenue that the facts in the case of EY Global Services Ltd. (supra) were similar would not stand since AAR has failed to consider the settled decision as laid down by the Hon'ble High Court of Delhi in DIT Vs. Infrasoftware Ltd. (supra). It may be put on record that the issue has been decided by the Pune Bench of Tribunal in the case of Allianz SE (supra), in turn, relying on the ratio laid down in DIT Vs. Ericsson A.B. (supra) and the said ratio is squarely applicable to the facts of the present case. Similarly, reliance placed upon by the learned Departmental Representative for the Revenue on Gracemac Corporation Vs. ADIT (supra), which is Tribunal's decision of Delhi Bench is misplaced, since the Hon'ble High Court of Delhi in DIT Vs. Infrasoftware Ltd. (supra), in later decision has already decided the issue.

84. Now, we may also refer to other aspects raised by the Assessing Officer and CIT(A) to hold that the payment was in the nature of 'royalty' as defined under section 9(1)(vi) of the Act under Explanation 2. The Assessing Officer has referred to section 2(o) of the Copyright Act, which defines literary work to include computer programs, tables and compilations, etc. According to the Assessing Officer, it was literary work under the Copyright Act. He further goes on to hold that since source code was kept confidential, then software invariably was to be included in the category of secret formula or process. He was of the view that it could even qualify

as scientific work. The issue thus raised is whether it falls within Copyright Act. The plea of learned Departmental Representative for the Revenue in this regard was that both object code and source code were protected copyrights under the Copyright Act and when object code is transferred, it becomes copyrightable subject matter. He also referred to the decision of the Hon'ble High Court of Karnataka in the case of CIT Vs. Synopsis International Old Ltd. (supra) for the proposition that storage in computer was copyright. He further placed reliance on the decision in the case of Gracemac Corporation Vs. ADIT (supra) for this proposition. We find no merit in the objections raised by the learned Departmental Representative for the Revenue. First of all, reliance placed upon by the learned Departmental Representative for the Revenue for the said proposition especially where the Hon'ble High Court of Delhi in DIT Vs. Infrasoftware Ltd. (supra) has decided the issue and as far as the Delhi Bench of Tribunal in Gracemac Corporation Vs. ADIT (supra) is concerned, then the jurisdictional High Court has held otherwise and the said proposition is to be applied. The decision of the Hon'ble High Court of Karnataka in the case of CIT Vs. Synopsis International Old Ltd. (supra) is on the same basis as in the case of the Hon'ble High Court of Karnataka in the case of CIT Vs. Samsung Electronics Co. Ltd. (supra) which has been overruled by the Hon'ble High Court of Delhi in a later decision in DIT Vs. Infrasoftware Ltd. (supra).

85. The Kolkata Bench of Tribunal in ITC Ltd. Vs. ADIT (supra) had referred to the provisions of the Indian Copyright Act, 1957 and had made special reference to the term 'literary work' and observed that it includes computer programmes, tables and compilations including computer data base. It further held that *therefore, the computer software has been recognized as literary work in India, if they are original intellectual creations*. Then, reference was made to section 14 of the Copyright Act, which explained the meaning of copyright and it was observed as under:-

*“19. What is the right that was given to the Appellate by NPL under the agreement dated 15.12.2008 and whether the said right can be said to right to use copyright in computer software. Section 14 of the Copyright Act, 1957 explains the meaning of “Copyright” as under:*

*“14. Meaning of copyright - For the purposes of this Act, ‘copyright’ means the exclusive right subject to the provisions of this Act, to do or authorize the doing of ay of the following acts in respect of a work or any substantial part thereof, namely:*

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

*(i) to reproduce the work in any material from including the storing of it in any medium by electronic means;*

*(ii) to issue copies the work to the public not being copies already in circulation;*

*(iii) to perform the work in public, or communicate it to the public;*

*(iv) to make any cinematograph film or sound recording in respect of the work;*

*(v) to make any translation of the work; (vi) to make any adaptation of the work;*

*(vii) to do, in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in sub-cl. (i) to (vi);*

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

*(i) to do any of the acts specified in cl. (a);*

*(ii) to sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer programme:*

*Provided that such commercial rental does not apply in respect of computer programmes where the programme itself is not the essential object of the rental.”*

*20. A perusal of the above provisions of the copyright Act reveals that the computer software is included in the definition of literary work and is covered under the purview and scope of copyright. The exclusive rights to do or authorize the doing of certain acts as mentioned in clause (a) and clause (b) of section 14 vests in the owner of the work such as to reproduce the work, to issue copies, to make translation or adaptation, to sell or give on commercial rental in respect of a work. The internal use of the work for the purpose it has been purchased does not constitute right to use the copy right in work. A combined reading of clause-3 and clause-8 of the Agreement dated 15.12.2008 between the appellant and NPL, clearly shows that the Appellant had only a right to use the computer software and did not have right to use copyright in the computer software. In other words none of the rights as is envisaged under Sec.14(a) or (b) of the Copyright Act, 1957 was conveyed by the agreement dated 15.12.2008. Therefore the payment in question made by the Assessee to NPL cannot be regarded as “Royalty”. As we have already observed the Act does not specifically include “computer software” in the term “literary work” and under such circumstances, if we apply the provisions of Act to define the scope of “Literary Work”, then perhaps the “computer software” will be out of the scope of the term royalty as defined under the DTAA. However, if*

*we apply the Copyright Act, then the “computer software” will have to be included in the term “literary work” but to constitute “royalty” under the DTAA, the consideration should have been paid for the use of or the right to use the copyright in the “literary work” and not the right to use “literary work” itself.”*

86. Now, coming to another issue of grant of exclusive or non-exclusive rights, wherein the case of Revenue was that even if non-exclusive rights were given, then it is to be considered as payment for ‘royalty’. We find that Mumbai Bench of Tribunal in ADIT (IT) Vs. TII Team Telecom International (P) Ltd. (supra) had pointed out that by grant of non-exclusive license, no exclusive rights over the product were given to the assessee and held as under:-

*“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 Explan. 2 to s. 9(1)(vi) which also covers consideration for “transfer of all or any rights (including the granting of a licence) in respect of any copyright, literary, artistic or scientific work” a provision which is clearly larger in scope than the provision of art. 12(3) of the Indo-Israel tax treaty. The word “of” between ‘copyright’ and ‘literary, artistic or scientific work’ is also missing in the statutory provision. The treaty provision that we are dealing with are thus certainly not in pari materia with this statutory provision, and, by the virtue of s. 90(2) of the Act, the provisions of India Israel tax treaty clearly override this statutory provision. In Gracemac decision (supra), the Co-ordinate Bench was of the view that the provisions of the applicable tax treaty and the IT Act are “identical”—a position which does not prevail in the situation before us. We, therefore, see no reasons to be guided by Gracemac decision (supra). The next issue that we need to consider is whether a payment for software can be said to be a payment for “process” as a computer program is nothing but a set of instruction lying in the passive state and this execution of instructions is ‘a process’ or ‘a series of processes’. No doubt, in terms of the provisions of s. 2(ffc) of the Indian Copyright Act, 1957, a computer program, i.e. software, has been defined as “a set of instructions expressed in words, codes, schemes or in any other form, including a machine readable medium, capable of causing a computer to perform a particular task or achieve a particular result”, but the moot question is as to what is that a customer pays for when he buys, or to put it in technical terms ‘obtains licence to use’ the software—for the process of executing the instructions in the software, or for the results achieved on account of use of the software. To draw an analogy, it is akin to a situation in which a person hires a vehicle, and the question could be as to what does he pay for—for the use of the technical know-how on the basis of which vehicle operates, or for the use of a product which carries passengers or goods from one place to another. The answer is obvious. When you pay for use of vehicle, you actually pay for a product which carries the passengers or goods from one place to another and not the technical know-how on the basis of which such a product operates. Same is the case with the software, when someone pays for the software, he actually pays for a product which gives certain results, and not the process of execution of instructions embedded therein. As a matter of fact, under standard terms and conditions for sale of software, the buyer of software is not even allowed to tinker with the process on the*

*basis of which such software runs or to even work around the technical limitations of the software. In Asia Satellite Telecommunications Co. Ltd. vs. Dy. CIT (2003) 78 TTJ (Del) 489, a Co-ordinate Bench of this Tribunal did take the view that when an assessee pays for transponder hire, he actually pays for the process inasmuch as transponder amplifies and shifts the frequency of each signal, and, therefore, payment for use of transponder is in fact a payment for process liable to be treated as 'royalty' within meaning of that expression under Expln. 2 to s. 9(1)(vi) of the IT Act. However, when this decision came up for scrutiny of Hon'ble Delhi High Court, in the case reported as Asia Satellite Telecommunications Co. Ltd. vs. Director of IT (2011) 238 CTR (Del) 233 : (2011) 51 DTR (Del) 1 : (2011) 332 ITR 340 (Del), their Lordships, after a very erudite and detailed discussion, concluded that "we are unable to subscribe to the view taken by the Tribunal in the impugned judgment on the interpretation of s. 9(1)(vi) of the Act". It cannot, therefore, be open to us to approve the stand of the Revenue to the effect that the payment for software is de facto a payment for process. That is a hyper-technical approach totally divorced from the ground business realities. It is also important to bear in mind the fact that the expression 'process' appears immediately after, and in the company of, expressions "any patent, trademark, design or model, plan, secret formula or process". We find that these expressions are used together in the treaty and as it is well-settled, as noted by Maxwell in Interpretation of Statutes and while elaborating on the principle of noscitur a sociis, that when two or more words which are susceptible to analogous meaning are used together they are deemed to be used in their cognate sense. They take, as it were, their colours from each other, the meaning of more general being restricted to a sense analogous to that of less general. This principle of interpretation of statutes, in our considered view, holds equally good for interpretation of a treaty provision. Explaining this principle in more general terms, a very distinguished former colleague of ours Hon'ble Shri M.K. Chaturvedi, had, in an article 'Interpretation of Taxing Statutes' (AIFTP Journal: Vol. 4 No. 7, July, 2002, at p. 7), put it in his inimitable words as follows :*

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

87. Now, we have to look into the effect of insertion of Explanation 5 to the definition of 'royalty' under section 9(1)(vi) of the Act by Finance Act, 2012 with retrospective effect from 01.06.1976. In such scenario, the question which needs adjudication is whether the definition of 'royalty' as provided under the Income Tax Act is to be taken or that which has been provided in DTAA between India and USA. As far as definition of 'royalty' as provided under Explanation 2 to section

9(1)(vi) of the Act is concerned, we have already adjudicated the issue in the paras hereinabove and referred to various judicial propositions on the point. Applying the ratio laid down primarily by the Hon'ble High Court of Delhi in DIT Vs. Ericsson A.B. New Delhi (supra), DIT Vs. Infracsoft Ltd. (supra) and Pr.CIT Vs. M. Tech India (P.) Ltd. (supra), we hold that payment made by the assessee for purchase of software is for purchase of copyrighted article and is not for the purchase of copyright in the said article and hence, provisions of section 9(1)(vi) of the Act are not attracted.

88. The Hon'ble High Court of Delhi in DIT Vs. Nokia Networks OY (2013) 358 ITR 259 (Del) had held that Explanation 4 was added to section 9(1)(vi) of the Act by Finance Act, 2012 with retrospective effect from 01.06.1976 to provide that all consideration for use of software shall be assessable as 'royalty'. However, the definition in DTAA has been left unchanged. It is an admitted fact that though Explanation 5 has been inserted in section 9(1)(vi) of the Act but no amendment has been made to the definition under DTAA, since the provisions of DTAA are beneficial to the assessee, then the said provisions would be applied. In this regard, we find support from the ratio laid down by the Pune Bench of Tribunal in T-3 Energy Services India Pvt. Ltd. Vs. JCIT (supra), wherein it was held as under:-

*"17. The Hon'ble High Court of Delhi in DIT Vs. (1) New Skies Satellite BV (2) Shin Satellite Public Co. Ltd. (2016) 382 ITR 114 (Del) has elaborated on the general principles relating to international transactions of DTAA vis-à-vis royalty and also the amendment in the Income-tax Act widening the scope of royalty. In the facts before the Hon'ble High Court, the assessee was a company incorporated in Thailand, which was engaged in the business of providing digital broadcasting services as well as consultancy services to its customers, who consist of both Residents and Non-residents. The services were provided through satellites and the assessee had derived income from lease of transponders of its satellites. The assessee therein was the service provider and the receipts were sought to be taxed under section 9(1)(vi) of the Act. The Hon'ble High Court considered the pre-amended and post-amended provisions of the said section and observed that though the Revenue authorities considered the income from data transmission services as taxable as royalty under section 9(1)(vi) of the Act; however, the Tribunal on the basis of ratio laid down in Asia Satellite Telecommunications Co. Ltd. Vs. DIT (supra) did not. The Hon'ble High Court in that case had held that receipts earned from providing data transmission services through provision of space segment capacity on satellites did not constitute royalty within the meaning of*

section 9(1)(vi) of the Act. It was further held that while providing transmission services to its customers, control of satellite always remained with satellite operator and the customers were only given access to transponder capacity and hence, the payment could not be termed as royalty for the use of a process or equipment. The said decision was in the context of section 9(1)(vi) of the Act and the provisions of DTAA were not considered therein. The Hon'ble High Court in the case of *New Skies* then took note of the amendment by the Finance Act, 2012, which inserted Explanations 4, 5 and 6 under section 9(1)(vi) of the Act. The Revenue before the Hon'ble High Court claimed that the said Explanations were clarificatory and it had settled the matter i.e. reasoning in *Asia Satellite Telecommunications Co. Ltd. Vs. DIT (supra)* could not stand because the basis of that ruling had been undone. The second proposition which was raised was whether DTAA applied and resulted rendering activity non taxable was also argued by the Revenue would not arise, since the DTAA predated the amendment. The Counsel for the assessee therein however, contended that the matter was no longer *res integra*. It was argued that the Revenue could not contend that any change in the substantive law would automatically result any like change in respect of taxability of transaction or service which was otherwise taxed in terms of DTAA, or which was subject to lower rate of tax mandated by a treaty. Reliance in this regard was placed on the ratio laid down by the Hon'ble Bombay High Court in *CIT Vs. Seimens Aktiongesellschaft (2009) 310 ITR 320 (Bom)* and the Hon'ble High Court of Andhra Pradesh in *Sanofi Pasteur Holding SA Vs. Dept. of Revenue and Others (2013) 354 ITR 316 (AP)*. Reliance was also placed on the ratio laid down by the Hon'ble High Court of Delhi in *DIT Vs. Nokia Networks OY (2013) 358 ITR 259 (Del)*, wherein the context was the efficacy of interpretation given to Statute i.e. Explanation inserted to section 9(1)(vi) of the Act vis-à-vis DTAA. The Hon'ble High Court had rejected that any amendment could change the situation and render the service or activity taxable. The Hon'ble High Court thereafter took note of various decisions on the issue including that of Hon'ble High Court of Madras in *Verizon Communications Singapore Pte. Ltd. Vs. ITO (supra)* and declined to conclusively determine or record a finding as to whether amendment to section 9(1)(vi) of the Act indeed was clarificatory as the Revenue suggested or prospective, give what its nature may truly be. The Hon'ble High Court further commented that the issue of taxability of income of assessee may be resolved without redressal of above question purely because the assessee did not press the said line of argument and had instead stated that ultimate taxability of income shall rest on the interpretation of terms of DTAA. The Hon'ble High Court vide para 39 onwards then took note of Article 12 of the DTAA, under which the State of Residence had the primary right to tax royalty; the Source State shall concurrently have the right to tax the income, to the extent of 15% of total income. The Hon'ble High Court also observed that before the amendment brought about by the Finance Act, 2012, the definition of 'royalty' under the Act and DTAA were treated as *pari materia*. Again reference was made to the ratio laid down in *Asia Satellite Telecommunications Co. Ltd. Vs. DIT (supra)* and observed that the question was whether in an attempt to interpret the two definitions uniformly i.e. domestic definition and the treaty definition, the amendments will have to be read into the treaty as well. The Hon'ble High Court held as under:-

"41. This court is of the view that no amendment to the Act, whether retrospective or prospective can be read in a manner so as to extend in operation to the terms of an international treaty. In other words, a clarificatory or declaratory amendment, much less one which may seek to overcome an unwelcome judicial interpretation of law, cannot be allowed to have the same retroactive effect on an international instrument effected between two sovereign states prior to such amendment. In the context of international law, while not every attempt to subvert the obligations under the treaty is a breach, it is nevertheless a failure to give effect to the intended trajectory of the treaty. Employing interpretive amendments in domestic law as a means to imply contoured effects in the enforcement of treaties is one such attempt, which falls just short of a breach, but is nevertheless, in the opinion of this court, indefensible."

18. Referring to the decision of Apex Court in *Union of India Vs. Azadi Bachao Andolan & Arn.* (2003) 263 ITR 706 (SC) and *The Vienna Convention on the Law of Treaties, 1969*, the Hon'ble High Court held the amendments to a treaty must be brought about by an agreement between the parties. Unilateral amendments to treaties are therefore, categorically prohibited. The Hon'ble High Court held that the words in the treaty would be controlled by definition of those 'words' in the treaty, if they are so provided. In case they are not provided, then the domestic law shall mandatorily supply the import to be given to the 'word' in question. The Hon'ble High Court concluded by holding that the amendments to domestic law cannot be read into treaty provisions without amending the treaty itself. It was thus, held that mere amendment to section 9(1)(vi) of the Act could not result in a change and it was imperative that such amendment was brought about in the agreement as well and hence, the amendments were not applicable to DTAA. The finding of the Hon'ble High Court was thus, as under:-

*"60. Consequently, since we have held that the Finance Act, 2012 will not affect article 12 of the double taxation avoidance agreement, it would follow that the first determinative interpretation given to the word "royalty" in Asia Satellite, when the definitions were in fact pari materia (in the absence of any contouring explanations), will continue to hold the field for the purpose of assessment years preceding the Finance Act, 2012 and in all cases which involve a double taxation avoidance agreement, unless the said double taxation avoidance agreement are amended jointly by both parties 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 taxation avoidance agreement."*

19. The above judgment was delivered by the Hon'ble High Court on 08.02.2016."

89. Applying the said proposition, the Tribunal in *M/s. Tata Technologies Ltd. Vs. DDIT (IT)(supra)* had decided the issue of governance under DTAA between two countries and in the absence of any amendment to the definition of 'royalty' in the said DTAA, whether the assessee could be held to be in default in non deduction of tax at source out of payments made on account of payments made to Non-resident entities. The relevant findings of Tribunal are as under:-

*"24. The next aspect of the issue raised before us is whether where transactions between the assessee and Non-resident was governed by DTAA between the two countries and where there was no amendment to the definition of 'royalty' in the said DTAA, then can the assessee be held to be in default for not withholding tax out of payments made to the Non-resident entities. Before the Assessing Officer, the assessee had made elaborate submissions in this regard. The Assessing Officer vide para 5.1 has observed that Non-resident licensor i.e. suppliers of software were taxed residents of USA, Greece and Singapore. He further observed that definition of 'royalty' was common in DTAA with these countries. The Assessing Officer also held that literary or scientific work has referred to in the*

definition of 'royalty' under DTAA, obviously includes software and he further observed that there was no requirement of transfer of copyright for treating the payment as 'royalty' under DTAA. The Assessing Officer further observed that the payment received for supply of software was taxable as 'royalty' and in turn, relied on different decisions including the decision of the Hon'ble High Court of Karnataka in CIT Vs. Samsung Electronics Co. Ltd. (supra). In the absence of agreement being available with the Assessing Officer, the findings of Assessing Officer that software was in nature of literary or scientific work, cannot stand. When going into the aspect of purchase of software being royalty or not, the issue which has to be seen is whether the assessee had purchased copyright or copyrighted articles. The purchase of software by a person cannot be held to be work of literary or scientific work. There is no merit in the observations of Assessing Officer in this regard and the same are dismissed.

25. Before us, the learned Authorized Representative for the assessee strongly stated that the Hon'ble High Court of Karnataka does not deal with the amendment to section but otherwise holds it be 'royalty'. He placed reliance on different decisions of the Hon'ble High Court of Delhi contrary to the same. The learned Departmental Representative for the Revenue on the other hand, pointed out that the amendment was clarificatory in nature as held by the Hon'ble High Court of Madras in Verizon Communications Singapore Pte. Ltd. Vs. ITO (supra). The learned Authorized Representative for the assessee in this regard, pointed out that the Hon'ble High Court of Madras analyzed the applicability of Explanations 5 and 6 to section 9(1)(vi) of the Act. However, the applicability of Explanation 4 to section 9(1)(vi) of the Act was not before the Hon'ble High Court of Madras. Further, the clarificatory nature of amendment to section 9(1)(vi) of the Act was neither questioned nor decided, but was applied to assessment year pre-dating the amendment. However, reliance was placed on the decision of the Hon'ble High Court of Delhi in DIT Vs. New Skies Satellite BV (supra), wherein it was held that the amendment to section 9(1)(vi) of the Act by insertion of Explanation 4 would not have any effect on the interpretation of the term 'royalty' under the respective DTAA's.

26. We have already adjudicated similar issue in the case of M/s. T-3 Energy Services India Pvt. Ltd. Vs. JCIT in ITA No.826/PUN/2015, relating to assessment year 2010-11, order dated 02.02.2018 and held as under:-

"16. The second connected issue is whether such payments made to associated enterprise for the lease line charges are 'royalty' or 'FTS' and hence, liable to tax deduction at source within the meaning of DTAA with USA read with provisions of the Income-tax Act.

17. The Hon'ble High Court of Delhi in DIT Vs. (1) New Skies Satellite BV (2) Shin Satellite Public Co. Ltd. (2016) 382 ITR 114 (Del) has elaborated on the general principles relating to international transactions of DTAA vis-à-vis royalty and also the amendment in the Income-tax Act widening the scope of royalty. In the facts before the Hon'ble High Court, the assessee was a company incorporated in Thailand, which was engaged in the business of providing digital broadcasting services as well as consultancy services to its customers, who consist of both Residents and Non-residents. The services were provided through satellites and the assessee had derived income from lease of transponders of its satellites. The assessee therein was the service provider and the receipts were sought to be taxed under section 9(1)(vi) of the Act. The Hon'ble High Court considered the pre-amended and post-amended provisions of the said section and observed that though the Revenue authorities considered the income from data transmission services as taxable as royalty under section 9(1)(vi) of the Act; however, the Tribunal on the basis of ratio laid down in

*Asia Satellite Telecommunications Co. Ltd. Vs. DIT (supra)* did not. The Hon'ble High Court in that case had held that receipts earned from providing data transmission services through provision of space segment capacity on satellites did not constitute royalty within the meaning of section 9(1)(vi) of the Act. It was further held that while providing transmission services to its customers, control of satellite always remained with satellite operator and the customers were only given access to transponder capacity and hence, the payment could not be termed as royalty for the use of a process or equipment. The said decision was in the context of section 9(1)(vi) of the Act and the provisions of DTAA were not considered therein. The Hon'ble High Court in the case of *New Skies* then took note of the amendment by the Finance Act, 2012, which inserted Explanations 4, 5 and 6 under section 9(1)(vi) of the Act. The Revenue before the Hon'ble High Court claimed that the said Explanations were clarificatory and it had settled the matter i.e. reasoning in *Asia Satellite Telecommunications Co. Ltd. Vs. DIT (supra)* could not stand because the basis of that ruling had been undone. The second proposition which was raised was whether DTAA applied and resulted rendering activity non taxable was also argued by the Revenue would not arise, since the DTAA predated the amendment. The Counsel for the assessee therein however, contended that the matter was no longer *res integra*. It was argued that the Revenue could not contend that any change in the substantive law would automatically result any like change in respect of taxability of transaction or service which was otherwise taxed in terms of DTAA, or which was subject to lower rate of tax mandated by a treaty. Reliance in this regard was placed on the ratio laid down by the Hon'ble Bombay High Court in *CIT Vs. Siemens Aktiengesellschaft* (2009) 310 ITR 320 (Bom) and the Hon'ble High Court of Andhra Pradesh in *Sanofi Pasteur Holding SA Vs. Dept. of Revenue and Others* (2013) 354 ITR 316 (AP). Reliance was also placed on the ratio laid down by the Hon'ble High Court of Delhi in *DIT Vs. Nokia Networks OY* (2013) 358 ITR 259 (Del), wherein the context was the efficacy of interpretation given to Statute i.e. Explanation inserted to section 9(1)(vi) of the Act vis-à-vis DTAA. The Hon'ble High Court had rejected that any amendment could change the situation and render the service or activity taxable. The Hon'ble High Court thereafter took note of various decisions on the issue including that of Hon'ble High Court of Madras in *Verizon Communications Singapore Pte. Ltd. Vs. ITO* (supra) and declined to conclusively determine or record a finding as to whether amendment to section 9(1)(vi) of the Act indeed was clarificatory as the Revenue suggested or prospective, give what its nature may truly be. The Hon'ble High Court further commented that the issue of taxability of income of assessee may be resolved without redressal of above question purely because the assessee did not press the said line of argument and had instead stated that ultimate taxability of income shall rest on the interpretation of terms of DTAA. The Hon'ble High Court vide para 39 onwards then took note of Article 12 of the DTAA, under which the State of Residence had the primary right to tax royalty; the Source State shall concurrently have the right to tax the income, to the extent of 15% of total income. The Hon'ble High Court also observed that before the amendment brought about by the Finance Act, 2012, the definition of 'royalty' under the Act and DTAA were treated as *pari materia*. Again reference was made to the ratio laid down in *Asia Satellite Telecommunications Co. Ltd. Vs. DIT (supra)* and observed that the question was whether in an attempt to interpret the two definitions uniformly i.e. domestic definition and the treaty definition, the amendments will have to be read into the treaty as well. The Hon'ble High Court held as under:-

"41. This court is of the view that no amendment to the Act, whether retrospective or prospective can be read in a manner so as to extend

*in operation to the terms of an international treaty. In other words, a clarificatory or declaratory amendment, much less one which may seek to overcome an unwelcome judicial interpretation of law, cannot be allowed to have the same retroactive effect on an international instrument effected between two sovereign states prior to such amendment. In the context of international law, while not every attempt to subvert the obligations under the treaty is a breach, it is nevertheless a failure to give effect to the intended trajectory of the treaty. Employing interpretive amendments in domestic law as a means to imply contoured effects in the enforcement of treaties is one such attempt, which falls just short of a breach, but is nevertheless, in the opinion of this court, indefensible.”*

18. Referring to the decision of Apex Court in *Union of India Vs. Azadi Bachao Andolan & Arn.* (2003) 263 ITR 706 (SC) and *The Vienna Convention on the Law of Treaties, 1969*, the Hon'ble High Court held the amendments to a treaty must be brought about by an agreement between the parties. Unilateral amendments to treaties are therefore, categorically prohibited. The Hon'ble High Court held that the words in the treaty would be controlled by definition of those 'words' in the treaty, if they are so provided. In case they are not provided, then the domestic law shall mandatorily supply the import to be given to the 'word' in question. The Hon'ble High Court concluded by holding that the amendments to domestic law cannot be read into treaty provisions without amending the treaty itself. It was thus, held that mere amendment to section 9(1)(vi) of the Act could not result in a change and it was imperative that such amendment was brought about in the agreement as well and hence, the amendments were not applicable to DTAA. The finding of the Hon'ble High Court was thus, as under:-

*“60. Consequently, since we have held that the Finance Act, 2012 will not affect article 12 of the double taxation avoidance agreement, it would follow that the first determinative interpretation given to the word "royalty" in Asia Satellite, when the definitions were in fact pari materia (in the absence of any contouring explanations), will continue to hold the field for the purpose of assessment years preceding the Finance Act, 2012 and in all cases which involve a double taxation avoidance agreement, unless the said double taxation avoidance agreement are amended jointly by both parties 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 taxation avoidance agreement.”*

19. The above judgment was delivered by the Hon'ble High Court on 08.02.2016.

20. The learned Authorized Representative for the assessee relied on various decisions of the Hon'ble High Courts for the proposition that telecommunication services rendered by Non-residents outside were not taxable in India. The learned Departmental Representative for the Revenue on the other hand, pointed out that the payment to Non-residents on account of it being routed through holding or related company abroad, was taxable. Both learned Authorized Representatives have relied on series of decisions for the proposition as to whether the payments to Non-residents paid directly or routed through a third party on account of lease line charges falls within

*amended definition of 'royalty', which is to be applied retrospectively. In view of the ratio laid down by the Hon'ble High Court of Delhi in DIT Vs. New Skies Satellite BV (supra) and Delhi Bench of Tribunal in Shin Satellite Public Co. Ltd. Vs. DDIT (IT) (2011) 12 taxmann.com 6 (Del), we are not going into the aspect of the amendment to section 9(1)(vi) of the Act, under which Explanations 4, 5 and 6 have been added, which inter alia, amends the definition of 'royalty' with retrospective effect. We hold that the same need not to be gone into since the issue otherwise stands decided in favour of assessee. The Hon'ble High Court of Delhi in DIT Vs. New Skies Satellite BV & Ors. (supra) have held that even though the term 'royalty' as used in section 9(1)(vi) of the Act has been amended by introducing Explanation retrospectively, but in view of no change in the definition of 'royalty' in DTAA, the beneficial provisions of DTAA would apply. The amendment made under the Act does not affect the terms of DTAA unless and until the same is amended by two Contracting States."*

27. *In the present case before us the Assessing Officer has held that the payment made by the assessee was 'royalty' as per definition of 'royalty' under the DTAA also. We find no merit in the said stand of Assessing Officer, in view of the issue being so held in DIT Vs. Infrasoftware Ltd. (supra). We further hold that payment made for purchase of software was not royalty as per definition of 'royalty' under the DTAA between India and USA, Germany and Singapore, since the term 'royalty' under the DTAA with these different countries had not been amended. Even if the definition of 'royalty' under the Act stands amended but the assessee was not liable to withhold tax on the payments made to Non-resident entities on account of purchase of software. We have already in paras above decided the applicability of provision brought in 2012, with retrospective effect, being not applicable to instant assessment year.*

28. *We are not going into different decisions of the Tribunal on this aspect, in view of the ratio laid down by the Hon'ble High Court of Delhi in DIT Vs. New Skies Satellite BV (supra), which though is not jurisdictional High Court but the issue decided in the said appeal is similar to the issue raised before us in the present appeal. We may also point out that the Hon'ble High Court of Delhi had also taken note of the ratio laid down by the Hon'ble Bombay High Court in CIT Vs. Siemens Aktiengesellschaft (supra), which in turn, has applied the ratio of the Hon'ble Supreme Court of Canada in R Vs. Melford Developments Inc., 82 DTC 6281 (1982) and observed as under:-*

*"The ratio of the judgment, in our opinion, would mean that by a unilateral amendment it is not possible for one nation which is party to an agreement to tax income which otherwise was not subject to tax. Such income would not be subject to tax under the expression 'laws in force'. . .*

*While considering the Double Tax Avoidance Agreement the expression 'laws in force' would not only include a tax already covered by the treaty but would also include any other tax as taxes of a substantially similar character subsequent to the date of the agreement as set out in article 1(2). Considering the express language of article 1(2) it is not possible to accept the broad proposition urged on behalf of the assessee that the law would be the law as applicable or as defined when the double taxation avoidance agreement was entered into."*

29. *In the facts of the case before the Hon'ble Bombay High Court the word 'royalty' was not defined in German Treaty and in that context, the Hon'ble Bombay High Court held that they were unable to accept the assessee's contention that law applicable would be law which existed at the time the DTAA was entered into. In the facts of the case before us, the word 'royalty' is defined in Treaties entered into*

*between USA and India, Greece and Singapore with India, and applying the ratio in CIT Vs. Seimens Aktiongesellschaft (supra), we hold that once a term has been defined in DTAA, then the said term is to be applied unless and until the parties to the DTAA amend the same. The Hon'ble High Court of Delhi in DIT Vs. Nokia Networks OY (supra) had applied the proposition laid down by the Hon'ble Bombay High Court in CIT Vs. Seimens Aktiongesellschaft (supra) and held that the amendments could not be read into the treaty. Unilateral amendment by the Indian Government to the term 'royalty' by way of amendment to section 9(1)(vi) of the Act cannot be extended to the meaning of the term 'royalty' defined under DTAA.*

30. *Applying the principle laid down by the Hon'ble High Court of Delhi in DIT Vs. New Skies Satellite BV (supra), we hold that where the provisions of DTAA overrides the provisions of Income-tax Act being beneficial and the definition of 'royalty' having not undergone any amendment in DTAA, the assessee was not liable to withhold tax on the payments made for purchase of software. The amended provisions of section 9(1)(vi) of the Act brought into force by the Finance Act, 2012 are applicable to domestic laws and the said amended definition cannot be extended to DTAA, where the term 'royalty' had been defined originally and not amended. As per the definition of 'royalty' under the DTAA, purchase of software does not fall in realm of 'royalty'. Accordingly, there was no liability on the assessee to withhold tax and the assessee cannot be held to be in default. The demand created under section 201(1) and interest under section 201(1A) of the Act is thus, cancelled. The grounds of appeal No.1 to 6 are thus, partly allowed."*

90. In conclusion, we hold that purchase of software by the assessee being copyrighted article is not covered by the term 'royalty' under section 9(1)(vi) of the Act. Where the assessee did not acquire any copyright in the software, is not covered under Explanation 2 to section 9(1)(vi) of the Act. We further hold that amended definition of 'royalty' under the domestic law cannot be extended to the definition of 'royalty' under DTAA, where the term 'royalty' originally defined has not been amended. As per definition of 'royalty' under DTAA, it is payment received in consideration for use or right to use any copyright of literary, artistic or scientific work, etc.; thus, purchase of copyrighted article does not fall in realm of 'royalty'. We also hold that since the provisions of DTAA overrides the provisions of Income Tax Act and are more beneficial and the definition of 'royalty' having not undergone any amendment in DTAA, the assessee was not liable to deduct tax for payments made for purchase of software. In such scenario, the assessee cannot be held to be in default and the demand created under section 201(1) and interest charged under section 201(1A) of the Act is thus, cancelled.

91. Now, coming to second part of grounds of appeal No.1 to 3, wherein the payment made by the assessee with regard to provision of IT support charges i.e. internet charges, use of e-mail charges, backup support services, etc. was held to be 'royalty', in view of the ratio laid down by the Pune Bench of Tribunal in the case of Cummins Inc (supra). The said decision has been recalled by the Tribunal in Miscellaneous Application filed and hence, the said proposition was not applicable. In the facts of the case, the main server of the group was established in USA and that server was used for storing data, which was admittedly not under the domain of assessee. The question which arises is that whether the payments made by the assessee for use of such facility would amount to 'royalty'. First of all, we hold that the aforesaid payments of IT support services, support charges are not in the realm of 'royalty' as no technology was made available to the assessee. It is service provided to the assessee by associate entity in USA and there is no merit in holding that the assessee was liable to deduct tax at source out of such payments to its associated enterprises. In this regard, we find support from the ratio laid down by the Pune Bench of Tribunal in Sandvik Australia Pty. Ltd. Vs. DDIT (supra), by Ahmedabad Bench of Tribunal in DCIT Vs. Bombardier Transportation India (P.) Ltd. (supra) and also on the ratio laid down by Chennai Bench of Tribunal in ACIT Vs. Vishwak Solutions (P.) Ltd. (supra), wherein it has been held that payments made for data storage charges were not in the realm of 'royalty'. The Pune Bench of Tribunal in Sandvik Australia Pty. Ltd. Vs. DDIT (supra), wherein agreement existed for providing backup services and IT support services and the Non-resident company receives payment thereof, since no technical knowledge had been made available to the Indian subsidiary, then such services rendered by Non-resident company to its Indian group company were held to be not covered under para 3(g)

of Article 12 of India-Australia Treaty and hence, was not taxable in India. The Tribunal had clearly elaborated upon the term 'make available' and held as under:-

*"13. We are concerned with para No.3 of Article 12, which defines the term Royalty. Under the IT Act, the term royalty and expression FTS are classified as two different connotations, i.e. 9(1)(vi) and 9(1)(vii). So far as Article 12 is concerned, FTS is included in the term "royalty" for the purpose of deciding in which contracting state the income from the same is to be taxed. Clause (g) in Article 12(3) goes to the roots of the issue. Main thrust of the argument of the Ld. Counsel is that it is not only sufficient to render the services but the same should be made available to the recipient and this particular important aspect is missed by the DRP/TPO. We find that the expression "making available" is very much important to decide in which contracting state the amount received for rendering the services relating to the technical know-how is to be taxed. The expression "make available" is used in the context of supplying or transferring technical knowledge or technology to another. It is different than the mere obligation of the person rendering the services of that persons own technical knowledge or technology in performance of the services. The technology will be considered as made available when the person receiving the services is able to apply the technology by himself."*

92. The Tribunal further vide para 16 held that where no technical knowledge was made available or expertise was made available to the recipient of Indian company, then such case is not covered in clause (g) of para 3 to Article 12 of India and Australia Treaty. It was further observed that where the assessee had only provided backup facilities and IT support services for solving IT related problems to its Indian subsidiaries and where no technical services were made available, the same could not be taxable in India. It was further held that the amount received by assessee could not be treated as 'royalty' even under normal provisions of the Income Tax Act. The terms of DTAA between India and Australia and India and USA are similar and applying the said ratio to the facts of present case, we hold that the amount paid by assessee for internet charges, use of e-mail facility and backup support services is not 'royalty' under Article 12 of DTAA between India and USA and is also not 'royalty' under section 9(1)(vi) of the Act.

93. The assessee has filed breakup of expenses at pages 164 and 165 of factual Paper Book. Accordingly, we hold that internet charges paid of ₹ 27,09,701/-, line charges of ₹ 39,87,960/-, service charges of ₹ 6,63,652/- and

other charges i.e. VPN charges, online meeting charges, etc. of ₹ 22,94,256/- are not payment of 'royalty' and are not even for make available of any technical services and hence, there was no requirement to deduct tax at source out of such payments. In the said breakup, the assessee has also pointed out that software charges paid were to the tune of ₹ 4,22,73,399/-, which we have already held in the paras hereinabove, not liable for deduction of tax at source.

94. Before parting, we may also again point out that the order of CIT(A) needs to be reversed as it has placed reliance on the decision of Pune Bench of Tribunal in the case of Cummins Inc (supra), which has been recalled by Miscellaneous Application and there is no basis for such reliance. Accordingly, grounds of appeal No.1 to 3 are allowed in favour of assessee.

95. The next issue raised vide grounds of appeal No.4 and 5 is against payment on account of lease line charges and non deduction of tax at source. The perusal of assessment order in para 16 reflects the deliberations of taxability of payment for lease line charges. In first paragraph, the Assessing Officer points out that receipts on account of lease line could be termed as for use of various industrial, commercial or scientific equipment used for WAN, data connectivity, internet services. He thus, points out that it is 'royalty' as per Explanation 2 (iva) under section 9(1)(vi) of the Act. Further, vide para 6.2, the Assessing Officer talks about payment being for transmission of data by cable/optic fibre i.e. payment for process as defined in Explanation 6 to section 9(1)(vi) [though mentioned by Assessing Officer as 9(1)(vii)] of the Act and hence, also 'royalty' for the use or right to use process. Then, he goes on to refer to the contention of assessee that expenses charged by Deere & Co. were in the nature of reimbursement and such reimbursement of expenses was not liable to TDS. The Assessing Officer holds the

assessee to have defaulted within meaning of section 9(1)(vi) and 9(1)(vii) of the Act and within meaning of Article 12 of DTAA between India and USA and hence the assessee to have defaulted in terms of section 201(1) and 201(1A) of the Act.

96. The assessee before us has explained that lease lines were established between Pune office of assessee and US entity office. The authorities below had relied on the decision of the Hon'ble High Court of Madras in the case of Verizon Communications Singapore Pte Ltd. Vs. DDIT (supra). However, we find that the issue raised in the present appeal is squarely covered by the order of Pune Bench of Tribunal in M/s. T-3 Energy Services India Pvt. Ltd. Vs. JCIT (supra), wherein it has been held that payment made for such lease line charges was not royalty under DTAA and hence, there was no obligation to deduct tax at source. The Tribunal in turn, had relied on the decision of the Hon'ble High Court of Delhi in DIT Vs. (1) New Skies Satellite BV (2) Shin Satellite Public Co. Ltd. (supra). The Hon'ble High Court of Delhi had decided the issue on the general principles relating to international transactions of DTAA vis-à-vis royalty and also the amendment in the Income Tax Act widening the scope of royalty.

97. The learned Departmental Representative for the Revenue has pointed out that the issue raised in the present appeal is case of equipment royalty which is squarely covered by order of the Hon'ble High Court of Madras in the case of Verizon Communications Singapore Pte Ltd. Vs. DDIT (supra).

98. We find that objections raised by the learned Departmental Representative for the Revenue are not fully correct. The Assessing Officer had held it to be a case of both equipment and process royalty. As far as the issue of process royalty is concerned, admittedly, the issue stands covered by the ratio laid down by the

Tribunal in M/s. T-3 Energy Services India Pvt. Ltd. Vs. JCIT (supra), which in turn, had relied on the ratio laid down in DIT Vs. (1) New Skies Satellite BV (2) Shin Satellite Public Co. Ltd. (supra). The Tribunal after referring to the decision in DIT Vs. (1) New Skies Satellite BV (2) Shin Satellite Public Co. Ltd. (supra) in paras 17 to 20 had further vide paras 21 and 22 held that where the term 'royalty' under DTAA between India and USA was not amended, then the assessee was not liable to withhold tax on payments made to its associated enterprises on account of lease line charges and in turn, relying on the decision of Hon'ble Bombay High Court in the Hon'ble High Court in DIT Vs. WNS UK Ltd. (2013) 214 taxman 317 (Bom), held as under:-

*"21. In the present case also, though definition of 'Royalty' under the Act had been amended, but the term 'Royalty' under the DTAA between India and USA is not amended. In the absence of the same, we hold that in view of the definition of 'royalty' under DTAA, the assessee is not liable to withhold tax on the payments made to its associated enterprise on account of lease line charges. We are not going into different decisions of the Tribunal on this aspect, in view of the ratio laid down by the Hon'ble High Court of Delhi, which though is not jurisdictional High Court but the issue raised in the said appeal is similar to the issue raised before us in the present appeal. We may also point out that the Hon'ble High Court of Delhi had also taken note of the ratio laid down by the Hon'ble Bombay High Court in CIT Vs. Seimens Aktiongesellschaft (supra), which in turn, has applied the ratio of the Hon'ble Supreme Court of Canada in R Vs. Melford Developments Inc., 82 DTC 6281 (1982) and observed as under:-*

*"The ratio of the judgment, in our opinion, would mean that by a unilateral amendment it is not possible for one nation which is party to an agreement to tax income which otherwise was not subject to tax. Such income would not be subject to tax under the expression 'laws in force'. . .*

*While considering the Double Tax Avoidance Agreement the expression 'laws in force' would not only include a tax already covered by the treaty but would also include any other tax as taxes of a substantially similar character subsequent to the date of the agreement as set out in article 1(2). Considering the express language of article 1(2) it is not possible to accept the broad proposition urged on behalf of the assessee that the law would be the law as applicable or as define when the double taxation avoidance agreement was entered into."*

*22. In the facts of the case before the Hon'ble Bombay High Court the word 'royalty' was not defined in German Treaty and in that context, the Hon'ble Bombay High Court held that they were unable to accept the assessee's contention that law applicable would be law which existed at the time the DTAA was entered into. In the facts of the case before us, the word 'royalty' is defined in DTAA entered into between USA and India and applying the ratio in CIT Vs. Seimens Aktiongesellschaft (supra), we hold that once a term has been defined in DTAA, then the said term is to be applied unless and until the parties to the DTAA amends*

the same. The Hon'ble High Court of Delhi in *DIT Vs. Nokia Networks OY (supra)* had applied the proposition laid down by the Hon'ble Bombay High Court in *CIT Vs. Seimens Aktiongesellschaft (supra)* and held that the amendments could not be read into the treaty. Unilateral amendment by the Indian Government to the term 'royalty' by way of amendment to section 9(1)(vi) of the Act cannot be extended to the meaning of the term under DTAA. Hence, we hold reliance of learned Departmental Representative for the Revenue on Mumbai Bench of Tribunal in *Viacom 18 Media (P.) Ltd. Vs. ACIT (supra)* and Bangalore Bench of Tribunal in *Vodafone South Ltd. Vs. DDIT (IT)* and also Mumbai Bench of Tribunal in *C.U. Inspections (I) (P) Ltd. Vs. DCIT (supra)* are not to be applied in view of the issue being settled by the Hon'ble High Court of Delhi.

23. The assessee on the other hand, has relied on the decision in *WNS North America Inc. Vs. ADIT (supra)* i.e. decision of Mumbai Bench of Tribunal, which has been approved by the Hon'ble High Court in *DIT Vs. WNS UK Ltd. (2013) 214 taxman 317 (Bom)*. The issue before the Hon'ble High Court of Delhi was in the hands of recipient of lease line charges. The assessee therein had recovered internal telecommunication charges from WNS charges and the Tribunal held the amount in question was received by the said assessee as reimbursement of lease line charges and would not qualify either as 'royalty' or as income attributable to PE in India and hence, it was held that there was no income earned by the assessee. The question before the Hon'ble High Court was whether the amount received on account of reimbursement of lease line charges would qualify as 'royalty' under Article 12 of India – UK Treaty and the second question was in respect of charges being attributable to PE in India. The Hon'ble High Court vide para 5 had noted the decision of Tribunal but had held that since the decision of Tribunal was based on the findings of fact, there was no reason to entertain question Nos.4 and 5.

24. Applying the principle laid down by the Hon'ble High Court of Delhi in *DIT Vs. New Skies Satellite BV (supra)*, we hold that where the provisions of DTAA overrides the provisions of Income-tax Act and the definition of 'royalty' having not been undergone any amendment in DTAA, the assessee was not liable to withhold tax on the lease line charges paid by it. The amended provisions of section 9(1)(vi) of the Act brought into force by the Finance Act, 2012 are applicable to domestic laws and the said amended definition cannot be extended to DTAA, where the term has been defined originally and not amended."

99. The Tribunal further decided the issue of whether expenditure incurred by assessee was reimbursement of charges and held as under:-

"25. Now, coming to the next aspect of the issue that reimbursement of charges is not subject to tax in India. The basic principle underlying the same is that where reimbursement of expenses do not include any income element, then the same is not subject to tax in India. The assessee before us has filed extensive evidence in this regard i.e. *Qwest Communications Inc* had raised charges upon T-3, USA and the portion allocable to the assessee was charged on cost to cost basis. Hence, it cannot be said that there was any income element which has arisen in the case and consequently, we hold that where the assessee had reimbursed the expenses having no income element, there is no requirement to withhold tax out of such payments. The case of Revenue in this regard is that it is not case of reimbursement but is a case of payment to third party through its associated enterprise and hence, the need for withholding tax. We have already decided this issue in the paras hereinabove that under the provisions of DTAA, the term 'royalty' is defined and it does not cover any such services availed and payment made and hence, there is no merit in the stand of Revenue in this regard and the same is

*dismissed. In any case, the privity of contract is between Qwest Communications Inc, the service provider and T-3, USA, who in turn had received bandwidth and passed on the services to various entities of group on cost to cost basis. The assessee as recipient of services had reimbursed the same and in the absence of profit / income element, there is no liability to deduct tax at source. Hence, the assessee cannot be held to be in default.*

*26. The Assessing Officer had also raised the issue of payment being in the nature of fees for technical services. However, in the final analysis disallowance has been made in the hands of assessee for non deduction of tax at source on the payments being made in the nature of royalty i.e. amended provisions of the Income-tax Act. We have already decided the said issue in the paras hereinabove and accordingly, we hold that there is no merit in invoking the provisions of section 40(a)(i) of the Act for non withholding of tax on the amount of charges paid for reimbursing associated enterprise for lease line charges.”*

100. As far as case of equipment royalty is concerned, the issue stands covered against the assessee by the decision of the Hon'ble High Court of Delhi in Asia Satellite Telecommunications Co. Ltd. vs. Director of IT (2011) 332 ITR 340 (Del), wherein the case of Revenue was that Non-resident was providing equipment for use of Transponder facility of Satellite to television companies outside India. However, the Hon'ble High Court held that there was no lease of equipment but only use of broadband facilities and applying the said ratio to the facts of present case, we hold that in the case of assessee, there is no question of any equipment royalty where the assessee was only using lease lines for transmitting data and it cannot be said to be a case of equipment royalty.

101. Applying the said propositions to the facts of present case, we hold that the assessee has not defaulted in non deduction of tax at source out of payments made for lease line charges. We also uphold the alternate plea of assessee that the said lease line charges are at best reimbursement of expenses and hence, not liable for deduction of tax at source. The grounds of appeal No.4 to 5 are allowed.

102. The next issues which are raised vide grounds of appeal No.6 to 12 are in respect of training fees paid to Deere & Co. of ₹ 63.92.707/-, which as per the

Assessing Officer was even for technical services under the Income Tax Act as well as under DTAA between India and USA. Vide grounds of appeal No.7 and 8, the assessee has raised the said issue. Vide grounds of appeal No.9 to 12, the authorities below have held the assessee to be in default for non deduction of tax at source on charges paid to Deere & Co. on account of reimbursement of salary of expat employees of ₹ 4,58,66,353/-. The learned Authorized Representative for the assessee explained that these were the payments which were not considered by Assessing Officer in assessment order, but enhancement was made by CIT(A). The first payment was in respect of training expenses, wherein the learned Authorized Representative for the assessee explained that employees of assessee company were enrolled for various e-learning courses which were available on John Deere Learning Portal and the employees had just to login to the portal, search for the courses, which were available and meet his or her training needs and enroll for the course. The assessee pointed out that these were not in the nature of fees for included services as nothing was being made available by way of technical knowledge, experience, skill, know-how or process. The second set of payments were for reimbursement of salaries, wherein Deere & Co. USA had deputed staff to assessee company, as per Secondment Agreement between assessee and Deere & Co.

103. The case of Revenue in all these grounds of appeal starting from grounds of appeal No.6 to 12 is that the payments made by assessee were fees for technical services and hence, it was the obligation of assessee to deduct tax at source. It may be pointed out herein itself that the fees for technical would arise in cases where the technical services are provided by provider to the recipient. In the absence of providing any technical services, it cannot be held to be case of fees for technical services and the assessee is not liable to deduct tax at source.

104. Now, first coming to training fees paid by the assessee, wherein various modules were available on web and training could be obtained by the personnel of assessee on web itself. It was not case of interactive session and it was akin to reading an article or book and even if the person availing services had a query, there was no facility to answer the same on web. The question which arises in such circumstances, is whether there was any liability to deduct tax at source.

105. In this regard, we find support from the ratio laid down by the Ahmedabad Bench of Tribunal in ITO Vs. Veeda Clinical Research (P) Ltd. (supra), wherein identical issue arose before the Tribunal and it was held as under:-

*“5. The law is by now settled so far as the connotations of ‘make available’ clause in the definition of fees for technical services in the contemporary tax treaties are concerned. It is held to be a condition precedent for invoking this clause that the services should enable the person acquiring the services to apply technology contained therein. There are at least two non-jurisdictional High Court decisions, namely Hon’ble Delhi High Court in the case of DIT Vs Guy Carpenter & Co Ltd (346 ITR 504) and Hon’ble Karnataka High Court in the case of CIT Vs De Beers India Pvt Ltd (346 ITR 467) in support of this proposition, and there is no contrary decision by Hon’ble jurisdictional High Court or by Hon’ble Supreme Court. We, therefore, hold that unless there is a transfer of technology involved in technical services extended by the UK based company, the ‘make available’ clause is not satisfied and, accordingly, the consideration for such services cannot be taxed under Article 13(4)(c) of India UK tax treaty. No doubt, as pointed out by the learned Assessing Officer, there can indeed be situations in which technical training is imparted resulting in transfer of technology, even consideration for rendering of training services will be covered by the definition of ‘fees for technical services’ but what is really the decisive factor is not the fact of training services per se but the training services being of such a nature that it results in transfer of technology. In the present case, the training services rendered by the service provider are general in nature as the training is described as ‘in house training of IT staff and medical staff’ and of ‘market awareness and development training’. Clearly this training does not involve any transfer of technology. In any case, in order to successfully invoke the coverage of training fees by ‘make available’ clause in the definition of fees for technical services, the onus is on the revenue authorities to demonstrate that these services do involve transfer of technology. That onus is not at all discharged by the Assessing Officer, or even by the learned Departmental Representative. In the written submissions filed before us, main thrust of the arguments is that “the services provided were in the nature of ‘fees for technical services’ as defined in Explanation 2 to Section 9(1)(vii) of the Income Tax Act”, that “the AO has finally held that the service provider has provided or made accessible the services of its technical knowledge and experience to the assessee company and, therefore, the payment was covered by the definition of ‘fees for technical services’ as per Article 13 of tax treaty between India and United Kingdom”, and that, therefore, “the aforesaid payments were held taxable by virtue of both the provisions of the Income Tax Act and (the applicable) tax treaty.....”. These submissions overlook the fundamental position that the provisions of the Income Tax Act apply in a treaty*

*situation only to the extent they are more favourable, vis-à-vis the provisions of tax treaties, to the assessee. Accordingly, when case of the revenue authorities fails on the tests of the treaty provisions, there is no occasion at all for their leaning upon the provisions of the Income Tax Act. The case of the revenue authorities, as discussed above, does not succeed on the provisions of the tax treaty as there is nothing to establish, or even indicate, that there is any transfer of technology in the present case. In view of these discussions as also bearing in mind entirety of the case, in our considered view, the fees for training services of general nature, which does not seem to involve any transfer of technology, cannot be brought to tax under section 13(4)(c) of India UK tax treaty.”*

106. In the facts before Ahmedabad Bench of Tribunal, where services rendered by service provider were general in nature and which did not involve any transfer of technology, it was held that where the onus was on Revenue authorities to demonstrate that these services too involve any transfer of technology and since that onus was not discharged, then the payment was not covered by the definition of 'Fees for Technical Services'. The facts of the said case are similar to the facts before us, wherein training availed by employees of assessee were web based services available on internet and no technical knowledge was being imparted by service provider and the Revenue has failed to demonstrate that the services did involve transfer of technology and in the absence of same, it cannot be said to be payments in the nature of Fees for Technical Services. Applying the said ratio, we hold that there was no liability upon the assessee to deduct tax at source on the aforesaid payments and hence, assessee cannot be held to be in default under section 201(1) and 201(1A) of the Act. The grounds of appeal No.6 to 8 are thus, allowed.

107. Now, coming to last issue raised vide grounds of appeal No.9 to 12 against reimbursement of salary of expat employees. The case of assessee before us is that it had deducted tax at source out of said salary payments under section 192 of the Act; whereas the case of Revenue is that it is the case where assessee was required to deduct tax at source as the said payments constitute 'Fees for

Technical Services' and for non deduction had defaulted under section 201(1) and 201(1A) of the Act. Both the authorities below have relied on various case laws in this regard, but first we must look at the Secondment Agreement entered into between the parties, which is placed at pages 111 to 117 of factual compilation. The scope of agreement is that Deere & Co. would provide assessee with professionals in accordance with qualifications, requirements set by assessee for performance of appropriate functions on behalf of assessee in its interest. The assessee has pointed out that it had established its unit in 1999 and this agreement was entered into between the parties in the year under consideration.

108. The learned Authorized Representative for the assessee has relied on the ratio laid down by the Hon'ble Bombay High Court in DIT Vs. M/s. Marks & Spencer Reliance India Pvt. Ltd. in Income Tax Appeal No.893 of 2014, judgment dated 03.05.2017, wherein in similar case of reimbursement of salary, the Hon'ble High Court has held that where the payment to employees was already subject to tax in India, therefore there was no question of treating assessee in default for non deduction of tax at source. In the facts of said case, there was agreement drawn up for providing assistance between the two companies and the Tribunal had given a finding that there was no rendering of services within meaning of DTAA and it was clear case of deputing the officials / employees for promotion of business of assessee. The Hon'ble High Court took note of the fact that the assessee in India had already deducted tax at source out of payments made to employees and held that there was no default for non deduction of tax at source. In the present set of facts before us also, the assessee had deducted tax at source out of salary paid to the said employees deputed in India for providing assistance to it and hence, the assessee could not be held to be in default.

109. The learned Departmental Representative for the Revenue has placed reliance on the ratio laid down by the Hon'ble High Court of Delhi in the case of *Centrica India Offshore Pvt. Ltd. Vs. CIT (supra)* and pointed out that the issue was decided against assessee. He also pointed out that SLP filed by assessee has been dismissed in the said case.

110. On the other hand, the learned Authorized Representative for the assessee has pointed out that factual aspects of said case were entirely different, where a offshore entity had deputed technical personnel to train Indian employees and hence, it was case of 'make available of skill behind services', to other parties. In this regard, he has placed reliance on the ratio laid down by the Ahmedabad Bench of Tribunal in the case of *Burt Hill Design (P.) Ltd. (supra)*, wherein tax was deducted out of salary and it was held that there was no liability to deduct tax under section 201(1) of the Act. In respect of ratio laid down by the Hon'ble High Court of Delhi in the case of *Centrica India Offshore Pvt. Ltd. Vs. CIT (supra)*, it was pointed out that where SLP has been dismissed, then it cannot be held to be law of land as propounded by the Hon'ble Supreme Court in *V.M. Salgaocar & Bros. (P.) Ltd. Vs. CIT (supra)* and *Palam Gas Service Vs. CIT (supra)*. Accordingly, we hold that where the Hon'ble Supreme Court has only dismissed SLP, then no ruling on principle being laid down by the Apex Court, the proposition laid down by the jurisdictional High Court of Bombay in *DIT Vs. M/s. Mark & Spencer Reliance India P. Ltd. (supra)* would rule. Accordingly, we further hold that the assessee having deducted tax at source out of salary paid to employees deputed, has not defaulted under section 201(1) / 201(1A) of the Act. The grounds of appeal No.9 to 12 are thus, allowed.

111. The ground of appeal No.13 is on without prejudice basis and the same does not stand in view of our allowing various grounds of appeal raised by assessee on different issues.

112. The facts and issues in ITA Nos.906/PUN/2015 to 908/PUN/2015 are identical to the facts and issues in ITA No.905/PUN/2015 and our decision in ITA No.905/PUN/2015 shall apply *mutatis mutandis* to ITA Nos.906/PUN/2015 to 908/PUN/2015.

113. In the result, all the appeals of assessee are allowed.

Order pronounced on this 23<sup>rd</sup> day of January, 2019.

**Sd/-**  
**(ANIL CHATURVEDI)**  
लेखा सदस्य / ACCOUNTANT MEMBER

**Sd/-**  
**(SUSHMA CHOWLA)**  
न्यायिक सदस्य / JUDICIAL MEMBER

पुणे / Pune; दिनांक Dated : 23<sup>rd</sup> January, 2019.

GCVSR

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

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. आयकर आयुक्त(अपील) / The CIT(A)-13, Pune;
4. The CIT(IT/TP), Pune;
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "बी"  
/ DR 'B', ITAT, Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

वरिष्ठ निजी सचिव / Sr. Private Secretary  
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune