IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : F : NEW DELHI

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA No.7231/Del/2017
Assessment Year : 2014-15

Qualcomm Technologies Inc., S.R. Batliboi & Co., Oval Office, 18, iLabs Centre, Hitech City, Madhapur, Hyderabad.	Vs.	DCIT, Circle 3(1)(1), International Taxation, New Delhi.

PAN: AAACQ3149D

(Appellant) (Respondent)

Assessee by : Shri Nishant Thakkar, Advocate
Revenue by : Shri G.K. Dhall, CIT, DR

Date of Hearing : 07.02.2019
Date of Pronouncement: 12.02.2019

ORDER

PER R.K. PANDA, AM:

This appeal by the assessee is directed against the order dated 21st September, 2017 of the CIT(A)-23, New Delhi, relating to assessment year 2014-15.

2. The facts of the case, in brief, are that the assessee Qualcomm Technologies Inc. (QTI) is a company incorporated in the United States of America and is a wholly owned subsidiary of Qualcomm Incorporated, USA ('Qualcomm'). Pursuant to a corporate restructuring with effect from 1st October, 2012, substantially all the

principal business units of Qualcomm (i.e., Qualcomm CDMA Technologies ('QCT'), Qualcomm Wireless & Internet ('QWI'), Qualcomm Strategies Initiatives ('QIS') etc., are now operated by QTI and its direct and indirect subsidiaries. QTI is engaged in the business of design, development and marketing of digital wireless telecommunications products and services based on Code Division Multiple Access ('CDMA'), Orthogonal Frequency Division Multiple Access ('OFDMA') and other technologies. It filed its return of income on 30th September, 2014 declaring nil income and claiming a refund of Rs.27,57,260/-. The Assessing Officer, during the course of assessment proceedings, observed that the assessee has provided services and received revenues from the following customers:-

S. No.	Customer	Nature of Services	Amount Received
01	Sistema Shyam Teleservices Ltd.	BREW	1,79,27,054/-
02.	Tata Teleservices Limited	BREW	1,76,74,580/-
03.	Tata Teleservices (Maharashtra) Ltd.	BREW	49,23,473/-
		TOTAL	4,05,25,107/-
04.	Sohamsaa Systems Private Limited	Software License fee – Royalty	14,43,952/-
05	Real Image Media Technologies Pvt. Ltd.	Software License fee – Royalty	55,61,980/-
06.	AllGo Embedded Systems Pvt. Ltd.	Software License fee – Royalty	6,11,000/-
07	Smartplay Technologies (India) Pvt. Ltd.	Software License fee – Royalty	6,25,000/-
		TOTAL	82,41,932/-
08	Alcatel Lucent India Limited ('Alcatel')	Test Tools	13,89,543/-
09	Aricent Technologies (Holdings) Limited ('Aricent')	Test Tools	20,01,000/-
10	Tata Teleservices Limited	Test Tools	11,14,957/-
11	Tech Mahindra Limited	Test Tools	15,62,000/-
12	Wipro Limited	Test Tools	8,75,855/-
		TOTAL	69,43,355/-

3. He observed that the assessee has offered the income mentioned in Sl.Nos.4 to 7 to tax in India as royalty. However, the payments made to persons mentioned at Sl.Nos.1 to 3 was stated to be not taxable in India. Similarly, it was explained that the amount received from persons mentioned at Sl.Nos. 8 to 12 of the above table on account of test tools are also not taxable in India. It was argued that based on the nature of services rendered by the assessee and the provisions of Article 12 of the Indo-US DTAA, the revenue received by the assessee under the BREW Agreements are not in the nature of royalty/fees for included services. Therefore, the revenue received under BREW Operator Agreement (BOA) and BREW Carrier Agreement is not liable to be taxed in India. It was submitted that the revenue received from all the above persons except at Sl.Nos.4 to 7 represents amount paid towards BREW select alliance membership fees and such payment does not fall under the definition of 'royalty' or 'fees for included services' under the purview of Article 12 of the Indo-USA DTAA and, hence, the same is not liable to be taxed in India. However, the Assessing Officer was not satisfied with the arguments advanced by the assessee and asked the assessee to explain: (i) why the revenue received by QTI under the BREW agreements should not be taxable in India?; (ii) Why the revenue received under the limited use of Tools and Development Test and deployment products standard terms and conditions (Test Tool Agreements) should not be taxable in India?; (iii) to file the reconciliation of TDS as reported in return of income and appearing in 26AS; and (iv) why the assessment may not be completed on the basis of assessment for A.Y. 2013-

14 in case of the assessee company as the assessee is providing the services on the basis of same agreement after reorganization of the group. The assessee filed detailed reply. However, the Assessing Officer was not satisfied with the explanation given by the assessee. The Assessing Officer followed the reasoning given in the earlier years' orders in the case of M/s Qualcomm, which were confirmed by the CIT(A) and DRP, for the current year also and brought to tax an amount of Rs.4,05,25,107/- being royalty from Tata Teleservices Limited, Systema and Tata Teleservices (Maharashtra) Limited under BREW agreement taxable @ 10.56% as per IT Act 1961 and Rs.69,43,355/- being Royalty from M/s Alcatel Lucent Technologies India Pvt. Ltd., Aricent Technologies, TTSL, Tech Mahindra and Wipro Limited as test tools taxable @ 10.56%. The observations of the Assessing Officer at para 10 of the assessment order is relevant which is being reproduced as under:-

> (a) "The payment received by the assessee under the BREW Operator Software agreements qualifies as royalty as per Indian Income Tax Act as well as India- US DTAA. The reasons have been mentioned in detail in the assessment orders for AY 2008-09 and 2011-12.
>
> (b) The income of the assessee from licensing of BREW software Indian operators is taxable under section 9(1) (vi) of the I.T. Act and under article 12 of Indo - US DTAA.
>
> (c) (i) Section 9(1)(vi) of the I.T. Act is a deeming provision seeking to tax royalty payable by one non-resident to another non-resident in relation to income earned from a source in India. Under the provisions of section 9(1) (vi) (c) of the I.T. Act, it is not mandatory to bring the payer to tax before initiating the proceedings against the person receiving royalty income.
>
> (ii) In terms of Article 12(7) (b) of the DTAA between India and USA, the royalty arising to QTI is clearly taxable in India. The relevant article is re-produced as under:-
>
> "Where under sub-paragraph (a), royalties or fees for included services do not arise in one of the contracting states, and the royalties relate to the use of, or the right to use, the right or property, or the fees for included services relate to

services performed, in one of the contracting states, the royalties or fees for included services shall be deemed to arise in that contracting state."

In view of above, Hon'ble DRP has confirmed the proposed additions of Royalty made on account of revenue received through BREW Operator Agreements in earlier years in case of M/s Qualcomm Incorporated.

Hence, the reasoning given in the earlier years orders in case of M/s Qualcomm Incorporated as confirmed by CIT (A) and DRP is followed in the current year also."

4. In appeal, the ld.CIT(A) upheld the action of the Assessing Officer holding that the payment under consideration received by the assessee pursuant to the BREW Agreements is very much taxable not only u/s 9(1)(vi) of the IT Act but also under Article 12 of the Indo-USA DTAA. So far as the payment received in connection with Test Tools Agreement is concerned, he also upheld the action of the Assessing Officer in holding that the Test Tools Agreement formed part of the BREW Agreement and the nature of transaction under Test Tools Agreement is akin to the main transaction regarding supply of BREW system.

5. Aggrieved with such order of the CIT(A), the assessee is in appeal before the Tribunal by raising the following grounds:-

"Each of the grounds given below is independent and without prejudice to the other grounds of appeal preferred by the Appellant.

On the facts and in the circumstances of the case, the Learned Commissioner of Income Tax (Appeals), 23, Delhi ('Ld. CIT (A)')

Ground No. 1 - Revenue received by the Appellant under the BREW agreements is towards sale of a copyrighted article and not for light to use copyright

1. Erred in upholding the application of provisions of section 9(l)(vi)(b) of the Income-tax Act, 1961 (the 'Act') and Article 12 of lndia-US tax treaty (Tax treaty') for taxing the income of the Appellant earned towards sale of copyrighted article i.e. BREW software to telecom operators in India.

2. Erred in principle in holding that the sale of a copyrighted article shall be governed by the Sale of Goods Act, 1930 and the Indian Customs Act in case of import of an article and considering the transaction under BREW Operator agreement is not subject to Indian Customs Act, the sale of BREW software is not a copyrighted article.

3. Erred in comparing the transaction of sale of BREW software by QTI with grant of right by an author to a publisher for printing and making of copies, without appreciating the fact that there is no grant of right to use copyright by QTI to the telecom operators. Whereas in the case of a publisher, the right to use copyright is granted by the author for printing and making copies in exchange of royalty.

4. Grossly erred in concluding that QTI grants a right to use copyright to the telecom operators under the BREW Operator agreement and by disregarding the fact that the telecom operators are not permitted to make copies under the BREW agreement except for the purposes of back-up and archival.

5. Erred in not following the principles of judicial discipline and disregarding the judgement of the jurisdictional Hon'ble ITAT in the case of QUALCOMM Incorporated on similar facts.

6. Erred in irrelevantly presuming that the Appellant has conceded to the taxability under the Act merely because the Appellant has sought to rely on the beneficial scope of provisions under the Treaty.

No. 2 - Revenue received by the Appellant under the Test Tools agreements is towards upgrades of software not for right to rise copyright

7. Erred in not considering the fact that the income under the Test Tools agreements for AY 2013-14 was offered by the Appellant to tax in order to buy peace and not to concede the position of non-taxability.

8. Erred in irrelevantly concluding that the Test Tools agreements form part of BREW agreements stating the nature of transaction under Test Tools is akin to the main transaction regarding supply of BREW system.

9. Erred in holding that the AO had returned certain findings of facts, whereas the AO had not furnished any facts or placed anything on record to distinguish the arguments of the Appellant.

Ground No. 3 - Erroneously interpreting the amendments of the Act to be applicable to the provisions of the Treaty

10. Erred in disregarding the arguments of the Appellant that the

amendments in the Act cannot be read into Treaty by not following the decisions upheld by the jurisdictional High Court.

Ground No. 4 - Erroneous initiation of penalty under section 271(l)(c) of the Act

11. Erred in confirming the action of the Assessing Officer for initiation of penalty proceedings under section 271 (1) (c) of the Act.

The Appellant craves for leave to add, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any ttime before or at the time of hearing of the appeal."

6. The ld. counsel for the assessee, at the outset, did not press ground of appeal No.3 for which the ld. DR has no objection. Accordingly, ground No.3 is dismissed as not pressed. Ground No.4 being premature at this juncture is not being adjudicated and is being dismissed.

7. So far as Ground No.1 and 2 are concerned, the ld. counsel for the assessee, referring to the order of the Tribunal for assessment year 2005-06 to 2008-09 vide ITA No.3701 & 3702/Del/2009, 5343/Del/2010 and 4608/Del/2011, order dated 20th February, 2015, submitted that the Tribunal in the consolidated order has held that royalty from Brew Operators Agreement is not chargeable to tax in the hands of the assessee u/s 9(1)(vi) of the Act as well as Article 12 of the Indo-US Treaty. He submitted that following the above decision the Tribunal, again, in assessee's own case in ITA Nos.5353/Del/2012, 1241/Del/2014, 7064/Del/2014 & 189/Del/2016 from assessment year 2009-10 to 2012-13 vide consolidated order dated 16th April, 2018 has followed the same and held that royalty from BREW Operators Agreement is not chargeable to tax in the hands of the assessee u/s 9(1)(vi) of the Act as well as Article

12 of the IT Act. He accordingly submitted that this being a covered matter in favour of the assessee by the decision of the Tribunal in assessee's own case for past so many years, the order of the CIT(A) should be set aside and the grounds raised by the assessee should be allowed.

8. The ld. DR, on the other hand, heavily relied on the order of the Assessing Officer and CIT(A).

9. We have heard the rival submissions and perused the relevant material available on the record. We find, the Assessing Officer, in the instant case, following his order for the earlier years, brought royalty from Brew Operators Agreement to tax in the hands of the assessee u/s 9(1)(vi) of the Act as well as Article 12 of the Indo-USA DTAA. The ld.CIT(A) upheld the action of the Assessing Officer. We find the issue stands decided in favour of the assessee by the decision of the Tribunal in assessee's own case from assessment year 2005-06 to 2012-13. We find the Tribunal, in the consolidated order dated 16th April, 2018 for assessment year 2009-10 to 2012-13, vide para 46 of the order, has discussed the issue and held that the royalty from BREW Operators Agreement is not chargeable to tax in the hands of the assessee u/s 9(1)(vi) of the Act as well as Article 12 of the Indo-US DTAA. The relevant observations of the tribunal from para 46 onwards read as under:-

> "46. Now we come to ground No. 3 of the appeal of the assessee with respect to revenue received by appellant under BREW operator agreement and BREW carrier agreement what is taxed as Royalty' income in India u/s 9(1)(vi)(c) of the Act and article 12 of the India-US Treaty. This issue has been dealt with extensively by the coordinate bench in second order for Assessment Year 2005-6 to 2008-09 dated 20thFebruary 2015 in paragraph No. 102 to 108 as under:-

"102.That takes us to ground no. 4, as raised by the assessee, against holding that the revenues received by the Appellant under the BREW Operator Agreement and BREW Carrier Agreement is taxable as royalty income in India under section 9(1)(vi) of the Act and Article 12 of the India-USA tax treaty. The assessee contends that in doing so, the AO has failed to appreciate that the provision of BREW software to Tata and Tata Teleservices (Maharashtra) Limited and Reliance Communications Infrastructure Limited results in sale of 'Copyrighted Article' and not licensing of a 'Copyright'.

103.So far as this grievance of the assessee is concerned, only a few facts are required to be taken note of. During the course of the assessment proceedings, the Assessing Officer noted that the assessee has invoiced an amount of Rs 2,52,70.569 to Tata Teleservices Limited under BREW (Binary Runtime Environment forWireless) agreement. It was noted that it is an application development platform, developed by Qualcomm, for mobile phones that enables users to download and run applications for playing games, sending messages and sharing photos etc. It was also noted that this platform runs between the application and wireless device's chip operating system so that programmers can develop applications for wireless device without the code for system interface or understanding operating systems. It was also noted that end users of BREW customers are the carriers who pay an enablement fees based on device sales or a revenue share for application software that are downloaded. On these facts, the Assessing Officer proceeded to bring the same to tax by observing as follows:

> I have perused the submissions made by the assessee. However, this hypothesis is not correct as Software is licensed and not sold. Furthermore as per the terms of the BOA as reproduced above, the assessee has given TATA Teleservices the license to reproduce and install the copyrighted software. The license fee for the right to reproduce and use the BREW Software cannot be anything else but royalty. There is a distinction between sale and license since in a sale no agreement is entered into between buyer and seller, however in case of licensing of software an agreement is entered into between copyright holder and the user.
>
> Grant of license is granting the user a right to use the software. The assessee's submission that in cases where rights acquired are limited and necessary only to enable the user to operate the program and allow the user to copy the program on the user's computer hard drive, payments would not be treated as towards royalty but as towards business income is not acceptable. The assessee itself agrees that payment is made for only the right to

use the software and no other title or interest in the software is transferred to the payer. There is no transfer of ownership rights. Various decisions of the Supreme Courts and High Courts clarify that sales constitutes out and out transfer, whereas in license there is only right to use. Some of these decision are at 69 ITR 692 (SC), 236 ITR 314 (ASC), 811 ITR 243, 671 ITR227. Thus this reasoning of the assessee has no legal or factual basis. In this case, the user only has a right and gets a license to use the software.

Even in the OECD commentary it is mentioned that the character of payments received in transactions involving the transfer of computer software depends upon the nature of rights that the transferee acquires under the particular arrangement, regarding the use and exploitation of the program. The rights in computer programme are in the form of intellectual property. It has further mentioned "payments made for the acquisition of partial right inthe copyright (without the transferor fully alienating the copyrights) will represent a royalty, where the consideration is for granting of rights to use the program in a manner, that would without such licenses constitute the infringement of copyrights."Under the laws of the country, if the software owned by the assessee is used without licenses, it becomes infringement of the copyright. Therefore arguments of the assessee regarding applicability of OECD commentary fail on this count as well.

104.The assessee did raise a grievance before the DRP but without any success. The assessee is not satisfied and is in appeal before us.

105.We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

106. We find that the payment in question is admittedly the payment is for a software which is for a copyrighted article and not the copyright itself. There is nothing on record to suggest that the payment is for the copyright itself. In this view of the matter, the issue is clearly covered, in favour of the assessee, by Hon'ble Delhi High Court's judgment in the case of DIT v.Infrasoft Ltd. [2014] 220 Taxman 273/[2013] 39 taxmann.com 88wherein Their Lordships have, inter alia, observed as follows:

'85. The Licensing Agreement shows that the license is non-exclusive, non-transferable and the software has to be uses 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 Infrasoft's copyright and other proprietary notices. All copies of the Software are the exclusive property of Infrasoft. The Software includes a licence authorisation device, which restricts the use of the Software. The software is to be used only for Licensee's ownbusiness as defined within the Infrasoft 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 orused 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 Infrasoft's written consent. The Software contains a mechanism which Infrasoft 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 Infrasoft.

86. The Licensing Agreement shows that the license is non-exclusive, non-transferable and the software has to be uses 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 Infrasoft's copyright and other proprietary notices. All copies of the Software are the exclusive property of Infrasoft. The Software includes a licence authorisat ion device, which restricts the use of the Software. The software is to be used only for Licensee's own business as defined within the Infrasoft 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 servicebureau or for data processing. The Licensee is further restricted from making copies, decompile, disassemble or reverse-engineer the Software without Infrasoft's written consent. The Software contains a mechanism which Infrasoft 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 Infrasoft.

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 arespecific 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, wherethey 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.

92. The licensees are not allowed to exploit the computer software commercially, they have acquired under licence agreement, only the copy righted software which by itself is an article and they have not acquired any copyright in the software. In the case of the Assessee company, the licensee to whom the Assessee company has sold/licensed the software were allowed to make only one copy of the software and associated support information for backup purposes with a condition that such copyright shall include Infrasoft copyright and all copies of the software shall be exclusive properties of Infrasoft. Licensee was allowed to use the software only for its own business as specifically identified and was not permitted to

loan/rent/sale/sub-licence or transfer the copy of software to any third party without the consent of Infrasoft.

93. The licensee has been prohibited from copying, de - compiling, de-assembling, or reverse engineering the software without the written consent of Infrasoft. The licence agreement between the Assessee company and its customers stipulates that all copyrights and intellectual property rights in the software and copies made by the licensee were owned by Infrasoft and only Infrasoft has the power to grant licence rights for use of the software. The licence agreement stipulates that upon termination of the agreement for any reason, the licencee shall return the software including supporting information and licence authorization device to Infrasoft.

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

95. We have not examined the effect of the subsequent amendment to section 9 (1)(vi) of the Act and also whether the amount received for use of software would be royalty in terms thereof f or the reason that the Assessee is covered by the DTAA, the provisions of which are more beneficial.

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

97.What is transferred is neither the copyright in the software nor the use of the copyright in the software, but what is transferred is the right to use the copyrighted material or article which is clearly distinct from the rights in a copyright. The right that is transferred is not a right to use the copyright but is only limited to the right to use the copyrighted material and the same

does not give rise to any royalty income and would be business income.

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

99. In view of the above we accordingly hold that what has been transferred is not copyright or the right to use copyright but a limited right to use the copyrighted material and does not give rise to any royalty income.'

107.Learned Departmental Representative, even as he vehemently relied upon and supported the stand of the authorities below, could not point out any distinguishing feature in this case.

108.In view of the above discussions, and respectfully following the esteemed views of Hon'ble jurisdictional High Court, we uphold the grievance of the assessee and direct the Assessing Officer to delete the impugned addition of Rs 2,52,70.569. The assessee gets the relief accordingly."

47.Therefore, respectfully following the second order of the coordinate bench we hold that royalty from BREW operator agreement of Rs. 67848685/-and 15% thereof amounting to Rs. 10177303/-is not chargeable to tax in the hands of the assessee u/s 9(1)(vi) of the Act as well as Article 12 of the Indo-USA Tax Treaty. Accordingly, ground No. 3 of the appeal of the assessee is allowed."

10. Respectfully following the order of the Tribunal in assessee's own case and in absence of any distinguishable feature brought to our notice by the ld. DR, we hold that the royalty from BREW Operator Agreement is not chargeable to tax in the hands of the assessee u/s 9(1)(vi) of the IT Act as well as Article 12 of the Indo-USA DTAA. Following similar reasonings, we also hold that the CIT(A) is not justified in upholding the action of the Assessing Officer in bringing to tax the royalty from Test Tools Agreement. The grounds raised by the assessee are accordingly allowed.

11. In the result, the appeal filed by the assessee are partly allowed.

The decision was pronounced in the open court on 12.02.2019.

Sd/-	Sd/-
(SUCHITRA KAMBLE) JUDICIAL MEMBER	(R.K. PANDA) ACCOUNTANT MEMFBER

Dated: 12th February, 2019

dk

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1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asstt. Registrar, ITAT, New Delhi