IN THE INCOME TAX APPELLATE TRIBUNAL "C", BENCH KOLKATA

BEFORE SHRI S. S. GODARA, JM &DR. A.L.SAINI, AM

आयकरअपीलसं./ITA No.313/Kol/2017

(निर्धारणवर्ष / Assessment Year:2013-14)

Ixia Technologies International Ltd. C/o Ixia Technologies Internaitonal Pvt. Ltd. Infinity Towers-II, Sector-V, 4th Floor, Block-GP, Sector-V, Salt Lake, Kolkata-700091..	**Vs.**	**ACIT(IT), Circle-1(2), Kolkata**
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: **AACCI 3401 L**		
(Assessee)	**..**	**(Revenue)**

Assessee by :Shri Prashant Mehar Chandani, Advocate
Respondent by : Dr. P. K. Srihari, CIT DR

सुनवाईकीतारीख/ **Date of Hearing** **: 07/02/2019**

घोषणाकीतारीख/**Date of Pronouncement** **: 30/04/2019**

आदेश / O R D E R

Per Dr. A. L. Saini:

The captioned appeal filed by the assessee, pertaining to assessment year 2013-14, is directed against a fair assessment order passed by the assessing officer under section 143(3) / 153(1) / 144C(13) of the Income Tax Act, 1961 (in short the Act) dated 10.12.2016, which incorporates the direction given by the Hon`ble Dispute Resolution Panel u/s 144C(5) of the Act, 1961, dated 28.11.2016.

2. The grievance raised by the assessee are as follows:

1. *That on the facts and in the circumstances of the case the order passed by the learned Assistant Commissioner of Income Tax (International*

Taxation)-Circle-1(2), (hereinafter referred to as learned Assessing Officer) and the directions of the learned Dispute Resolution Panel (hereinafter referred to as learned DRP) are erroneous and bad in law.

2. *That on the facts and in the circumstances of the case the A.O. erred in taxing revenue earned by company, being a non-resident, from sale of software to Indian customers as 'royalty' and the learned DRP grossly erred in confirming the action of the A.O.*

3. *That on the facts and in the circumstances of the case the A.O. and the ld. DRP failed to appreciate that sale of software is not 'royalty' within the provisions contained in Article 12 of the India-Ireland DTAA.*

4. *That on the facts and in the circumstances of the case both the A.O. and the Learned DRP had failed to appreciate the difference between 'copy righted article' and 'copyright right' while holding the software income to be in the nature of Royalty.*

5. *That the assessee craves leave to add, to amend, modify, rescind, supplement or alter any of the grounds stated hereinabove, either before or at the time of hearing of this appeal.*

3. However, in this appeal the assessee has raised a multiple grounds of appeal, but at the time of hearing, the Solitary grievance of the Assessee has been confined to the issue whether the consideration received by a non-resident entity for the licensing of copyrighted article/software, i.e. consideration for use of or for granting the right to use a computer software amounts to royalty under Article 12(3) of the India-Ireland DTAA?

4. The brief facts qua the issue are thatassessee company,"M/s Ixia Technologies International Limited" is anon-resident foreign company registered in Dublin, Ireland. The principal line of activity of the company is design, development, marketing, sales and support including warranty and maintenance of advanced software based test systems andintegrated suites of testing applications which seek to optimize networks and data centres to accelerate, secure and scale the delivery of applications and services for worldwide customers outside of the United States.Theassessee company has filed a return of income for A. Y. 2013-14, on 29/11/2013, disclosing total income at Rs. 33,13,930/- being the receipts from rendering technical services. Later on, the assesse filed revised return declaring

total income at Rs. NIL,vide revisedreturn dated 30/03/2015. The assessee claimed that it did not have PE in India. The assessee had receipts from various activities in India, it claimed income from these activities to be nil as the income did not accrue and arise in India. The total receipts are as under:

Sl. No.	Receipt (activity)	Amount	Taxability in India
1	Annual Maintenance charges	9,48,42,578	Taxable
2	Rental	3,35,957	Taxable
3	Sale of Hardware	110,20,86,345	Not Taxable
4	Sale of software	9,84,51,776	Not Taxable

The assessing officer held that the Sale of Software was nothing but receipt of royalty as per section 9(1) of the Income Tax Act and made addition of Rs. 9,84,51,776/-.

5. Aggrieved by the addition made by the assessing officer, the assessee filed the objections before the Ld Dispute Resolution Panel-2, New Delhi, who has upheld the order of the assessing officer. The findings of theldDRP is given below:

> *"Theassessee sold software licenses to Indian customers. The A.O has observed that the sale of software was not merely licensing of software. As per the sales invoice the assessee transferred right to use the software for ever. Terms of sales as mentioned in the invoice were as under:*
>
> > *"Notwithstanding anything in the Sale Agreement to the contrary all Software and Professional Services deliverables, are licensed and not sold and the use of terms such as sale and "purchase" herein in connection with those items will be understood as a reference to the licensing to those items. With the exception of lest scripts and related documentation (collectively "TestScripts"), all software is licensed pursuant to the applicable end user license agreement (each a "EULA "). For Test Scripts and for all Professional services deliverables that do not constitute Software, Ixia hereby grants to Buyer a limited, non-exclusive, non-transferable, perpetual, worldwide license to copy and use such items only for Buyer's internal business purposes. As between Ixio and Buyer, Ixia is and shall remain the exclusive owner of all intellectual property rights in or related to any of the Products. "*

The buyer's right to use the software is absolute and is perpetual i.e. forever. The buyer thus becomes the owner of that copy of the software with limitations like the buyer cannot resale the software. The buyer can customise the software to suit it needs but cannot modify the software the software are generally encrypted, only exe files are sold, source code remains with the seller. Hence it is not possible for the buyer to modify or make any change in the software. It is similar to purchase of copyrighted book with additional condition that the book cannot be further resold or rented. The A.O has mentioned that sale of software is covered under Section 9(1)(vi) of the Act. Article 12(3) of the DTAA between India and Ireland. Article 12(3) of the DTAA between India and Ireland reads as under:

3. *(a).The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of or the right to use, any copyright of literary artistic or scientific work including cinematograph film or films or tapes for radio or television broadcasting, any tent, trade mark. design or model, plan, secret formula or process or tor the use of or the right use industrial, commercial or scientific equipment other than an aircraft, or for information concerning industrial commercial or scientific experience;*

   (b) The term "fees for technical services" means payment of any kind in consideration for the rendering of any managerial, technical or consultancy services including the provision of services by technical or other personnel but does not include payments for servuces mentioned in article 14 and 15 of this convention.

The assessee claimed that the case was squarely covered by the Delhi High Court judgment in the case of DIT vs. Infrasoft Ltd. 220 Taxmann 273. It has been gathered that the department has not accepted the order and has challenged it in the Supreme Court. It has to be borne in mind that the panel is an extension of the assessment process and the A.O. is now bound by the directions of DRP. Accordingly, the matter needs to be kept alive in view of its pendency before the Apex Court. The panel accordingly upholds addition by the A.O. in this matter."

6. Aggrieved by the order of the DRP/AO, the assessee is in appeal before us.

7. Before us, the ld. Counsel for the assessee submitted that the amount earned from sale of software aggregating to 9,84,15,776/-, is not taxable as Royalty in India. The assessee company is a tax resident of Ireland, therefore, the beneficial provisions of Double Taxation Agreement entered into between India-Ireland ('Treaty' or 'DTAA') would be applicable. In this regard, the ld counsel drew our attention to Article 12 of the India-Ireland DTAA, an extract of which is reproduced as under:

"The term 'royalties' as used in this Article mean payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph film or films or tapes for radio or television broadcasting, any patent, trade mark, design or model, plan, secret

formula or process or for the use of or the right to use industrial, commercial or scientific equipment, other than an aircraft, or for information concerning industrial, commercial or scientific experience".

Based on a reading of Article 12 of the India-Ireland DTAA, in the given case of the company, the consideration received for sale of software would only be classified as "royalty" if the company has allowed the use or right use the 'copyright' in the software supplied to the Indian customers. In the backdrop of the above discussion, the company would like to submit that in view of the definition provided in the Article-12 of India-Ireland DTAA for 'royalty', which means consideration for use orrightto use any copyright.There is a distinction between 'copyrighted article' and 'copyright right'. The term 'copyright' as has been used in the DTAA has not been specifically defined anywhere in the Act or the DTAA. Therefore, it is important to examine the term 'copyright' as used in any other statute. Reference in this regard, can be made to Section 14 of the Copyright Act, 1957, which prescribes the following conditions, the fulfillment of anyone of which is required for bringing the grant of 'use' or 'right to use' any work, under the ambit of the term 'copyright':

-to reproduce the work;

-to issue copies of the work to the public;

-to perform the work in public, or communicate it to the public;

-to make any Cinematograph film or sound recording in respect of the work;

-to make any translation of the work;

-to make any adaptation of the work;

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

Given the meaning of the term 'copyright' as has been used in the Indian statue, the ld counsel submitted that it does not provide any of the rights as mentioned in the Copyright Act (referred to here-in-above), to any of its customers in India, with respect of the software supplied. Hence, receipts against the supply of software in India would not constitute as 'royalty' within the meaning provided in Article 12 of DTAA, since the consideration is not for the use or right to use any copyright.

Rather, the receipts against supply of software in India can at best be termed as receipt towards granting the use of a copy righted article which is not covered within the definition provided in the DTAA.

The view differentiating 'copyrighted article' and 'copyright right' also draws support from the ruling of the Hon'ble Delhi High Court in the case of DIT Vs. Infrasoft Ltd. reported in 220 Taxman 273, wherein the Court while dealing with the taxability of payments received against granting of licensed software, as royalty, has elaborately discussed the provisions of the Act and the India-US Tax Treaty and demarcated between 'copyright right' and 'copyrighted article'. The High Court after examining a catena of judgments already laying down principles relating to taxability of any remittance, as royalty, concluded in the facts of the case 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."Similarly, in another judgment pronounced in the case of DIT Vs. Ericsson A.B. 343 ITR 470, wherein the issue was relating to taxability of payments received against supply of GSM mobile telephone system, which consisted of both hardware and software, the Hon'ble Delhi High Court held that there was no wayin which an independent use of software could have been made. The High Court observed that the embedded software merely facilitated the functioning of the equipment and the GSM supply contract could not be bifurcated into hardware and software. The High Court then went on to record the principle towards taxability of payments made against supply of software and concluded that there is a difference between copyrighted article and copyright right. In the facts of the case it was decided that the payment was for mere usage of copyrighted software and therefore such payments were not covered under the definition of royalty provided under DTAA in the India-Sweden treaty as it only includes consideration for copyright and not for copyrighted article. For this, the ld Counsel relied on the following judgments:

(i). ADIT Vs. Bartronics India Ltd, 43 taxmann.com 16 (Hyderabad Tribunal)

(ii). Motorola Inc Vs. DCIT 95 ITD 269 (Delhi Trib-SB)

Therefore, ld Counsel submitted that consideration for use of 'copyrighted article' will not be construed as "royalty" as defined in the respective DTAA`s and hence the addition made by assessing officer of Rs. 9,84,51,776/- may be deleted.

8. On the other hand, the ld. DR for the Revenue submitted before us that the assessee company sold software licenses to Indian customers and the assessing officer has rightly observed that the sale of software was not merely licensing of software. As per the sales invoice the assessee transferred right to use the software forever. Terms and conditions of sales as mentioned in the sale invoices clearly speak that it is royalty arrangement. The ld DR pointed out that the buyer's right to use the software is absolute and is perpetual i.e. forever. The buyer thus becomes the owner of that copy of the software with limitations like the buyer cannot resale the software. The buyer can customize the software to suit it needs but cannot modify the software, the software are generally encrypted, only exe files are sold, source code remains with the seller. Hence it is not possible for the buyer to modify or make any change in the software. It is similar to purchase of copyrighted book with additional condition that the book cannot be further resold or rented. Therefore, the sale of software is covered under amendedsection9(1)(vi) of the Act, thus it is a 'royalty'. The term "royalties" means payments of any kind received as a consideration for the use of or the right to use, any copyright of literary artistic or scientific work, hence the AO has rightly concluded that the Sale of Software was nothing but receipt of royalty as per section 9(1) of the Income Tax Act and therefore, the addition of Rs. 9,84,51,776/- made by the AO should be sustained.

9. We have heard both the parties and perused the material available on record. First of all, we deal with Article 12 of the India vs. Ireland DTAA which deals with "Royalties and Fees for Technical Services" the same is reproduced below for ready reference:

"India - Ireland - ARTICLE 12 - ROYALTIES AND FEES FOR TECHNICAL SERVICES
1. Royalties or fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

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

3. (a) The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph film or films or tapes for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process or for the use of or the right to use industrial, commercial or scientific equipment, other than an aircraft, or for information concerning industrial, commercial or scientific experience;

(b) The term "fees for technical services" means payment of any kind in consideration for the rendering of any managerial, technical or consultancy services including the provision of services by technical or other personnel but does not include payments for services mentioned in Articles 14 and 15 of this Convention.

4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the royalties or fees for technical services, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties or fees for technical services arise through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the right or property in respect of which the royalties or fees for technical services are paid is effectively connected with such permanent establishment or fixed base. In such case the provisions of Article 7 or Article 14, as the case may be, shall apply.

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

6. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the royalties or fees for technical services, having regard to the use, right or information for which they are paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Convention."

After going through Article 12 of India vs. Ireland DTAA,as mentioned above, we note that the term'royalty' is defined to meanpayments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph film or films or tapes for radio or

television broadcasting, any patent, trade mark, design or model, plan, secret formula or process or for the use of or the right to use industrial, commercial or scientific equipment, other than an aircraft, or for information concerning industrial, commercial or scientific experience.

It is abundantly clear and we also note that from a consideration of the various decisions of the Supreme Court and the High Courts and the Circular No. 333, dated 2-4-1982, it would be clear that where the provisions of the DTAA are more beneficial than provisions of the Act, the provisions of the DTAA would prevail.

We note that in the assessee`s case under consideration, the buyers of the software are not allowed to sell/distribute the copies of the software to the third parties. What the buyers get, is merely a right to use the software (which is a copyrighted article) and not the copyright in that software. Therefore, the sale of software is not 'Royalty'. Moreover, any incidental copy made while using the software for its proper use does not amount to acquisition of copyright which has been held by the Hon`ble High Court of Delhi in the case ofDIT Vs. Infrasoft Ltd., 220 Taxman 273. The relevant observations are extracted below:

*"**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 copyrighted 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-license or transfer the copy of software to any third party without the consent of Infrasoft.*

***93.** The licensee has been prohibited from copying, decompiling, de-assembling, or reverse engineering the software without the written consent of Infrasoft. The license 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 license agreement stipulates that upon termination of the agreement for any reason, the licensee shall return the software including supporting information and license authorization device to Infrasoft.*

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

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

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

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

98. *We are not in agreement with the decision of the Karnataka 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 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.*

100. *The question of law is thus answered in favour of the Assessee and against the Revenue that the Income-tax Appellate Tribunal was right in holding that the consideration received by the respondent Assessee on grant of licences for use of software is not royalty within the meaning of Article 12(3) of the Double Taxation Avoidance Agreement between India and the United States of America."*

We note that the Ld. DRP did not deny that the present case is not covered by the Delhi High Court decision in Infrasoft (supra) but did not follow it merely on the ground that the department is in appeal against the said decision before the Hon'ble Supreme Court. We note that an appeal before the higher forum doesn't vitiates the validity of the said judgment of Hon`ble Delhi High Court in the case ofInfrasoft (supra).The mere fact, that further appeal has been filed, in no way, means that thesaid judgment of Hon`ble Delhi High Court in the case of Infrasoft (supra), under consideration is not operational and effective. Unless and until the judgment of Hon`ble Delhi High Court is reversed by Hon`ble Supreme court, the same has to be given due effect. Judicial discipline demands that once an order has been passed in the assessee's own case, lower authorities are duty bound to act in accordance with the same. Therefore, we are of the view the ld DRP erred in not following the judgment of the Hon`ble Delhi High Court in the case of Infrasoft (supra).

10. We note that the assessee, a non-resident company, has earned revenue from supply of software to its Indian customers. As per the terms of the contract, the assessee provided a licensed software to its customers (vide point 2 at Page nos. 17 of the paper book). Further, it may be noted that the software supplied were exclusively for the internal use of the customers [vide para 1 at Page Nos. 36 of the paper book). We note that the Ld. AO has merely reproduced the Assessee's submissions and the relevant provisions i.e., Section 9(1)(vi) of the Income Tax Act, 1961 and has not examined the definition of 'royalty' as per Article 12(3) ofthe Indo-Ireland Treaty. Further, there has been no finding as to how the use of software by the buyers as per the license agreement constitute use/right to use the Assessee's copyright in the said software. Therefore, theorder of the assessing officer is cryptic and has been passed without providing any reasons for the proposed additions. (vide para 5.5 of the Assessment Order). We note that the Hon'ble DRP has given a perverse observation that the buyer of software license has been granted perpetual and absolute rights and therefore, the buyer becomes the owner of the software (vide page 3 of the DRP directions) which is completely

opposite to what the terms of the agreement state. The 'perpetual' rights are not provided for the use of software but for Test Scripts and other professional services which doesn't constitute software. It is also clear from the terms attached to invoice/bill of the assessee,the same is reproduced, as follows:

"For Test Scripts and for all Professional services deliverables that do not constitute software, Ixia hereby grants to Buyer a limited, non-exclusive, non-transferable, perpetual, worldwide license to copy and use such items only for buyer's internal business purposes. As between Ixia and Buyer, Ixia is and shall remain the exclusive owner of all intellectual property rights in or related to any of the Products."

We note that Coordinate Bench of ITAT Kolkata in the case of ITC Limited Vs ADIT. IT – 2(1), reported in [2017/185 TTJ 145 (Kol-Trib.], on similar facts held that payment made by assessee an Indian company to a Singapore based company for right to use software could not be regarded as royalty, as assessee only had a right to use computer software and did not have right to use copyright in computer software. The important findings of the coordinate bench is given below:

"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.*

21. *What is the effect of insertion of Explanation 4 in the definition of "Royalty" in Sec.9(1)(vi) of the Act by the Finance Act, 2012, w.e.f. 1-6-1976. The Hon'ble Delhi High Court in the case of "DIT v Nokia Networks OY" [2012] 25 taxmann.com 225/[2013] 212*

Taxman 68/358 ITR 259 has held that though 'Explanation 4' was added to section 9(1)(vi) by the Finance Act 2012 with retrospective effect from 1.6.1976 to provide that all consideration for user of software shall be assessable as "royalty", the definition in the DTAA has been left unchanged. That in CIT v."SiemensAktiongesellschaft [2009] 310 ITR 320/177 Taxman 81 (Bom.) , it was held that amendments cannot be read into the treaty. As the assessee has opted to be assessed by the DTAA, the consideration cannot be assessed as "royalty" despite the retrospective amendments to the Act. The relevant findings of the Hon'ble Delhi High Court as given in para 23 of the said decision, for the sake of convenience are reproduced as under:

> *"However, the above argument misses the vital point namely the assessee has opted to be governed by the treaty and the language of the said treaty differs from the amended Section 9 of the Act. It is categorically held in CIT Vs. Siemens Aktiongesellschaft, 310 ITR 320 (Bom) that the amendments cannot be read into the treaty. On the wording of the treaty, we have already held in Ericsson (supra) that a copyrighted article does not fall within the purview of Royalty."*

***22.** Further, in a recent judgment in the case of "DIT v New Skies Satellite BV" [2016] 382 ITR 144/238 Taxman 577/68 taxmann.com 8 (Delhi), the Hon'ble Delhi High Court has observed that no amendment to the Act, whether retrospective or prospective can be read in a manner so as to extend its 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 affected between two sovereign states prior to such amendment. That an amendment to a treaty must be brought about by an agreement between the parties. Unilateral amendments to treaties are therefore categorically prohibited. Even the Parliament is not competent to effect amendments to international instruments. As held by the Hon'ble Supreme Court in Union of India v. Azadi BachaoAndolan [2003] 263 ITR 706/132 Taxman 373, these treaties are creations of a different process subject to negotiations by sovereign nations. Therefore insertion of Explanation 4 in the definition of "Royalty" in Sec. 9(1)(vi) of the Act by the Finance Act, 2012, w.e.f. 1-6- 1976, has no effect whatsoever and the issue has to be decided in the light of the definition of "Royalty" as contained in the DTAA read with the relevant provisions of the Copyright Act, 1957.*

***23.** The learned counsel for the Assessee also addressed arguments to the effect that the right to use the software in the present case is akin to sale of copyrighted article rather than sale of copyright. Reference was made to the decision of the Hon'ble Delhi High Court in the case of DIT v. Ericsson A.B. [2012] 343 ITR 470/204 Taxman 192/[2011]16 taxmann.com 371, wherein it was held that the license granted to the licensee permitting him to download the computer programme and storing it in computer for its own use is only incidental to the facility extended to the licensee to make use of the copyrighted product for his internal business purposes. The said process is necessary to make the program functional and to have access to it. 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. The Hon'ble Delhi High Court has observed that in such a case there is no transfer of any right in respect of copyright to the assessee and it is a case of 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. The Hon'ble Delhi High Court has further held that what is transferred is neither can be right in the software nor the use of the copyright in the software, but is the right to use copyrighted material or article which is clearly distinct from the rights in a copyright and the same does not give rise to any royalty income and would be the 'business income' of the non-resident. The learned*

DR however placed reliance on the decision of the Hon'ble Karnataka High Court in "CIT v. Samsung Electronics Co. Ltd." [2012] 345 ITR 494/[2011] 203 Taxman 477/16 taxmann.com 141 wherein it has been observed that under the agreement, what had been transferred was only a license to use the copyright belonging to the non-resident subject to the terms and conditions of the agreement and that the non-resident supplier continued to be the owner of the copyright and all other intellectual property rights; license is granted for making use of the copyright in respect of software under the respective agreement and that the same would amount to transfer of part of the copyright. The learned counsel for the Assessee submitted that there is no decision of the Hon'ble Calcutta High Court rendered on the issue and therefore where two views are possible on an issue, the view favourable to the Assessee should be followed. It was his contention that following the view expressed by the Hon'ble Delhi High Court in the case of Ericsson AB (supra), which is favourable to the Assessee, it should be held that the consideration received by the NPL was not royalty. The receipts would constitute income from business in the hands of NPL and since NPL did not admittedly have a permanent establishment in India its' income from business cannot be taxed in India in the absence of a permanent establishment.

***24.** We are of the view that the view expressed by the Hon'ble Delhi High Court in the case of Ericsson AB (supra), which is favourable to the Assessee, should be followed and therefore we hold that the consideration received by the Assessee for software was not royalty. The receipts would constitute business receipts in the hands of the NPL. Admittedly NPL does not have a permanent establishment and therefore business income of the NPL cannot be taxed in India in the absence of a permanent establishment.*

***25.** The learned DR submitted that the Appellant, whose obligation is to deduct tax at source u/s.195 of the Act, cannot place reliance on the DTAA as NPL could do in defence of non taxability in India of income deemed to accrue and arise in India and in this regard relied on the decision of the decision rendered by the ITAT Bangalore Bench in the case of Vodafone South (supra). We have perused the said decision and we find that the observations of the Tribunal were made in the context of dispute raised by the revenue that the payee was not tax resident of a country, the benefits of DTAA between India and the said country were sought to be pressed into service by the payer. This is clear from a complete reading of paragraph 37 of the said decision. In the present case there is no dispute raised by the revenue that NPL was not a tax resident of Singapore and that the benefits of DTAA between India and Singapore cannot therefore be available to the appellant. We are of the view that the decision in the case of Vodafone South (supra) is therefore of no help to the plea of the revenue before us. The decision rendered by the Chennai bench of ITAT in the case of Organization Development (P.) Ltd. (supra) is again in the context of FTS and the findings in that case is on the facts of that case. The learned DR was neither able to establish nor do we see any parity of facts between the aforesaid decision and the facts of the present case before the Tribunal.*

***26.** For the reasons given above, we hold that the amount paid by the appellant to NPL is not in the nature of royalty within the meaning of the DTAA between India and Singapore and therefore the amount received by NPL would be in the nature of business income which would be chargeable to tax in India under Article 7(1) of the DTAA only if NPL has a Permanent Establishment (PE) in India. Admittedly NPL did not have a PE in India and therefore the payment in question is not chargeable to tax in India and therefore there was no obligation on the part of the appellant to deduct tax at source u/s.195 of the Act. Consequently, the Assessee could not be treated as an Assessee in default u/s.201(1) of the Act nor could interest be levied on tax not deducted at source on tax not deducted*

at source till date of payment to the account of the Central Government u/s.201(1A) of the Act. The orders u/s.201(1) and 201(1A) of the Act are accordingly cancelled."

11. We note that in the case of Union of India Vs Azadi Bachao Andolan reported in 263 ITR 706, the Hon'ble Apex Court has inter-alia held that the provisions of the DTAA would override the provisions of the Act (even if the DTAA contains provisions which are inconsistent with the provisions of the Act) to the extent they are beneficial to the assessee. We note that the assessee is covered by the beneficial provisions of the India-Ireland DTAA as per section 90(2) of the Income Tax Act, 1961 ('Act'). As per Article 12(3)(a) of the DTAA, 'royalties' means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph film or films or tapes for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process or for the use of or the right to use industrial, commercial or scientific equipment, other than an aircraft, or for information concerning industrial, commercial or scientific experience.

We note that terms of the definition of 'royalty' provided in Article 12, ordinarily the receipt for sale of software shall be treated as 'royalty' only if it is for the use of a 'copyright'. Given the meaning of theterm 'copyright' as has been discussed above in the Copyright Act, 1957, we note that the revenue accruing from supply of software in India is not chargeable to tax in India based on reading of the Article 12(3) of the India-Ireland DTAA. The amount received by the assessee towards sale of software is on account of sale of 'copyrighted article' and not on transfer of any 'copyright right'. The right to use any copyright in the software was never transferred by the company in favor of the Indian customers. Hence, the said sale proceeds cannot be characterized as 'Royalty' as per Article 12 of the India-Ireland DTAA, as the same is towards the use of 'copyrighted article' and not towards the use of 'copyright'. The sale proceeds is also not towards the use of or right to use any industrial, commercial or scientific equipment, as per the provisions ofthe India-Ireland DTAA. Further, as per the Licensing Agreement

entered into between the assessee and its Indian customers, it is apparent that the assessee has not given any right to the customers to use the copyright in the software. The copy of Licensing Agreement is enclosed at pages 16 to 22 of the paper-book vide para 3(b) of the agreement. Payments for any license for simple use of computer software i.e., where the end-user acquires only the right to run the programme, whether on a single computer or on the licensee's computer network, and does not acquire any rights to use the copyright in the programme may not be construed as 'royalties'.

12.Our view is fortified by the judgment of the Coordinate bench of Mumbai in the case of Intec Billing Ireland Vs. ADIT reported in 90 taxmann.com94 (Mumbai Tribunal) decided on January 8,2018 while examining various decisions cited above and Article 12 of the Indo- Ireland DTAA held as follows:

" ... we hold that the receipts from supply of software are not taxable in the hands of Intec-Ireland as Royalty under new Ireland tax treaty. Intec-Ireland does not have PE in India and accordingly amounts received by Intec-Ireland towards supply of software are not liable to tax in India. Therefore, in view of the above discussion and respectfully following the said decisions we hold that payment received by the assessee was not in the nature of Royalty and cannot be therefore brought to tax"

Therefore, we note that since assessee`s case is covered by beneficial provisions of the India-Ireland DTAA, hence the retrospective amendment made in the provisions of section 9(1)(vi) of the Act, which provides that royalty would include consideration for transfer of all or any rights in respect of any right property, (including granting of software)etc, will not override the provisions of the India-Ireland DTAA. We note that the retrospective amendment made in the Act cannot override, the provision of Treaty, finds support from the principles laid down in the case of Director of Income vs Nokia Networks OY reported in 358 ITR 259 (Delhi HC) and CIT Vs Siemens Aktiongesellschaft reported in 310 ITR 320.The amount received by the assessee towards sale of software is on account of sale of 'copyrighted article' and not on transfer of any 'copyright right'. As we have noted above that the right to use any copyright in the software was never transferred by the company in favor of the Indian customers. Hence, the said sale

proceeds cannot be characterized as 'Royalty' as per Article 12 of the India-Ireland DTAA. Therefore, we delete the addition of Rs. 9,84,51,776/-.

13. In the result, the appeal of the assessee is allowed.

Order pronounced in the Court on 30.04.2019

Sd/-	**Sd/-**
(S.S. GODARA)	**(A.L.SAINI)**
न्यायिकसदस्य / JUDICIAL MEMBER	**लेखासदस्य / ACCOUNTANT MEMBER**

कोलकाता /Kolkata;
दिनांक/ Date: 30/04/2019
(*SB, Sr.PS*)

Copy of the order forwarded to:
1. Ixia Technologies International Ltd.
2. ACIT(IT), Circle-1(2), Kolkata
3. C.I.T(A)-
4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.
6. Guard File.

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By Order

Assistant Registrar
ITAT, Kolkata Benches