

IN THE INCOME-TAX APPELLATE TRIBUNAL “L” BENCH MUMBAI
BEFORE SHRI G. S. PANNU, VICE-PRESIDENT AND
SHRI PAWAN SINGH, JUDICIAL MEMBER

ITA No. 1701/Mum/2014 (Assessment Year 2009-10)

ITA No. 1439/Mum/2015 (Assessment Year 2010-11)

ITA No. 1995/Mum/2016 (Assessment Year 2011-12)

NetCracker Technology Solutions Inc. (Formerly known as Convergys Information Management Group Inc.) 201, 6 th Floor, East Fourth Street, Cincinnati, Ohi-45202, USA PAN: AACCC8990N	Vs.	Asst. DIT Circle-1(1), International Taxation, Mumbai-400020.
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Appellant

Respondent

Appellant by

: Shri Dhanesh Bafna with
Miss. Hiral Desai (ARs)

Respondent by

: Shri Samuel Darse CIT-DR
and Sh. Manish K. Singh (Sr DR)

Date of Hearing

: 21.06.2019

Date of Pronouncement

: 30.08.2019

ORDER UNDER SECTION 254(1) OF INCOME TAX ACT

PER PAWAN SINGH, JUDICIAL MEMBER;

1. This group of three appeals by assessee are directed against the assessment order passed under section 143(3) rws 144C(13) dated 21.01.2014, passed in pursuance of direction of Disputes Resolution Penal-II (DRP) Mumbai, dated 9.12.2013 for assessment year 2008-09, 2010-11 and 2011-12. In all the appeals the assessee has raised certain common grounds of appeal, therefore, with the consent of parties all appeals were clubbed, heard and

are decided by common order to avoid the conflicting decision. With the consent of parties the appeal for assessment year 2009-10 was treated as a lead case. In appeal for assessment year 2009-10, the assessee has raised following grounds of appeal:

1. That in the facts and circumstances of the case & in law, the Ld. AO/DRP erred in assessing the income of Appellant at Rs. 8,55,40,120 against the returned income of Rs. 47,94,030.
2. That in the facts and circumstances of the case & in law, the Ld. DRP/AO erred in making an addition of Rs. 1,36,31,094 received on account of International Private Leased Circuit (IPLC) charges by stating that link charges constitute as Fee for Technical/Included Services ('FTS') as well as Royalty under section 9 the provisions of the Act read with the provisions of Article 12 of the India USA Double Taxation Avoidance Agreement ('DTAA').
3. That in the facts and circumstances of the case & in law, the Ld. DRP/AO erred in characterising the income received from sale of shrink wrapped software as Royalty under the provisions of the Act read with the provisions of Article 12 of the DTAA amounting to Rs. 4,05,24,300/-.
4. That the Ld. DRP/AO grossly erred on facts and in law in making an addition to the returned income in respect of support and maintenance fees, amounting to Rs. 2,29,63,770/- by stating that the receipts on account of support and maintenance fees being ancillary and subsidiary to the enjoyment of right to use the software, are taxable as FTS under para 4(a) of Article 12 of DTAA.
5. That the Ld. DRP/AO grossly erred on facts and in law in proposing a variation to the returned income on account of service fees, amounting to Rs. 36,26,925/- by stating that the receipts on account of service fees, are ancillary and subsidiary to the enjoyment of right to use the software, are taxable as FTS under para 4(a) of Article 12 of DTAA.
6. That the Ld. AO erred on facts and in law in levying interest under sections 234B of the Act.
7. That on the facts and circumstances of the case, and in law, the Ld. AO erred in proposing to initiate the penalty proceedings under section 271 (1)(c) of the Act.

2. The brief facts of the case are that assessee is a company incorporated and tax resident of United States of America (USA), and engaged in the business of managing, providing and developing billing information and software, filed its return of income for assessment year 2009-10 on 29th September 2009 declaring total income at ₹ 47,94,030/-. In the return of income the assessee has shown receipt on account of data access/link charges which is also known as international private leased circuits (IPLC) charges from its subsidiary in India i.e. Convergys Information Management India Private Limited (CIM) aggregating of ₹ 1,36,31,094/-. The assessee also entered into transaction with Tata consultancy Ltd(TCS) and Tata complication Ltd(TCL) for the following services;

Serial No.	Particulars	Amount Rs.
1	Supply of software	4,05,24,300/-
2	Support and maintenance fees	2,29,63,770/-
Total	Service fees	36,26,925/-

3. In the return the assessee claimed that the all receipts earned by assessee are not taxable in India in term of India US Double taxation Avoidance Agreement (India USA tax treaty) as the income neither qualified as 'Royalty' nor fees for technical services/ fees for included services (FTS/ FIS). The return of income was selected for scrutiny. The assessing officer after granting opportunity of hearing to the assessee passed the draft assessment order under section 143(3) rws 144C(1) dated 28th March 2013.

The assessing officer treated the aforesaid receipts as 'Royalty'/ fees for technical services (FTS)/ fee for included services (FIS) under the income tax Act as well as under the India US tax treaty and taxed the said receipts in the hand of assessee as taxable in India. The assessing officer also taxed the receipt of sale of shrink- wrapped software as Royalty and payments for support and maintenance services as fee for included services (FIS). The assessee exercised its option to file objections before the dispute resolution panel (DRP). The DRP upheld the action of assessing officer in its direction dated 9th December 2013. On receipt of direction of DRP, the assessing officer pass the final assessment order under section 143(3) read with section 144C(13) dated 21st January 2014. Aggrieved by additions in final order of assessment, the assessee has filed present appeal before this Tribunal.

4. We have heard the submission of the learned authorised representative (Id.AR) of the assessee and the learned departmental representative (Id. DR) for the revenue and perused the material available on record. Ground No. 1 of the appeal is general in nature and needs no specific adjudication, hence dismissed.
5. Ground No. 2 relates to taxability of IPLC as fees for technical services/ fees for included services (FTS/ FIS) and 'Royalty' under the Income tax Act and India US tax treaty. The learned AR of the assessee submits that during the year under consideration the assessee obtained certain

communication lines/links which are commonly known as 'IPLC' from third-party telecom/internet services provider like AT&T and Sprint. IPLC provides a two-way transmission of voice and data through telecom bandwidth for assessee groups at various global offices. IPLC is a point-to-point private line used by an organisation to communicate between offices that are geographically dispersed throughout the world. IPLC is used for internet access, business exchange, videoconferencing and any other form of telecommunication. This service entitles the customer to high speed connectivity anywhere in the world via submarine cables. The assessee had negotiated for such circuit lines with third-party service providers like AT&T and Sprint in bulk at a cheaper rate as the requirement for a number of circuit was high. The telecom/service provider raise an invoices on the assessee, a portion of which is allocated to various group companies based on the circuits used. During the year under consideration, such amount was allocated to the Indian entity-CIM of USD 293,676 corresponding to ₹1,36,31,094/-. The said receipt is not taxable in India as the same is neither constitutes "royalty" or FIS/FTS under India US tax treaty. The assessing officer while passing the draft assessment order proposed to tax that IPLC charges by taking view that receipts were for the 'right to use a process' and hence, the same was 'Royalty' in terms of Article 12(3) of India USA tax treaty. The assessing officer also took his view that services under consideration were technical in nature and therefore, the receipts

constitute FIS/FTS in terms of Explanation 2 to section 9(1)(vii) of the Act as well as Article 12(4) of India USA tax treaty. The assessee filed objections before the learned DRP against the aforesaid action of the assessing officer however, the learned DRP upheld the action of assessing officer, accordingly the assessing officer tax the said receipts in the final assessment order.

6. The learned AR of the assessee submits that assessee is incorporated under the law in USA and is a non-resident company for the purpose of Indian tax laws. The assessee is tax resident of USA as per Article 4 of India US tax treaty and therefore, basis the provision of section 90(2) of the Act and is entitled to invoke the provisions of India USA tax treaty, to the extent they are more beneficial to them. This view has been confirmed by Hon'ble Apex Court of India in case of Union of India Versus Azadi Bachao Andolan (263 ITR 706 SC) and by Hon'ble Delhi High Court in case of DIT Versus Rio Tinto Technical Services (340 ITR 507 Delhi).
7. For the treatment of receipt as 'Royalty' as per Article 12(3) of the India US tax treaty as the same is for right to use a 'process'. The learned AR of the assessee would submit that the term "Royalty" has been defined in Article 12(3) of the India US tax treaty. The learned AR invited our attention to the definition of "Royalty" as prescribed under Article 12(3) of the India USA tax treaty and would submit that a plain reading of the definition of Royalty, it is evident that payment can be held to be the

Royalty only when there is “use” or ‘right to use’ of a process. The assessee company and the Indian entity-CIM do not have any assess or control over the communication lines or the process involved in such communication and accordingly, no right to use has been granted to the assessee or Indian entity to use such communication lines or the process involved. The third-party service provider i.e. AT&T and Sprint are merely using their own equipment and own process to provide such services to the assessee and Indian entity-CIM. The learned AR for assessee further submits that the DRP concluded that payment received toward IPLC charges is for ‘equipment royalty’. Against which the learned AR for assessee submits that third-party service provider were merely using their own equipment while rendering the services to its customers including the assessee and Indian entity and there is no transfer of the right to use either to the assessee or to the Indian entity. The assessee has merely procured services and provided the same to the Indian entity and no part of the equipment was leased to the Indian entity. The Indian entity, who avails the services from the service providers, neither intended, nor obtained any right to use the underlying infrastructure maintained and used by the service provider for providing the services. The assessee or Indian entity do not have any control or possession over the equipment i.e. network facilities are under the control of and maintained by the service provider. Accordingly the IPLC connectivity charges to not qualify as ‘Royalty’ in term of Article

- 12(3) of India US tax treaty. In support of his submission the learned AR of the assessee relied upon the decision of the Tribunal in assessee's group entity case in Convergys Customer Management Group Inc. (ITA No. 1443 /Del/2012 & 5243 /Del/2011) and would submit that the Tribunal held that provision of IPLC a merely amounts to provision of service and therefore does not constitute Royalty under the provision of article 12(3) of India US tax treaty.
8. For taxability of IPLC charges as FTS/FIS, the learned AR submits that assessing officer also tax the IPLC charges received by assessee from Indian entity for FTS/FIS. The learned AR carried us through the definition of 'FIS' as provided under Article 12(4) of India US tax treaty and would submit that in term of Article 12(4) of tax treaty, the receipt should be of a technical nature and the service should be of 'make available' technical knowledge, experience skilled, know-how or process or consist of the development and transfer of technical plan or technical and design.
9. Whether the IPLC connectivity services are technical in nature, the learned AR of the assessee submits that clause (b) of Article 12(4) of India US tax treaty shall apply only in respect of services that are technical in nature. Although, the total 'technical services' has neither been defined in the act nor under the tax treaty, a mere provision of a standard services would not qualify as a 'technical services'. Mere use of technology/sophisticated equipment in rendering service does not lead the services to be classified as

‘technical services’. The provision of IPLC connectivity does not involve technology. Such services in a standard facility which is provided by third-party telecom/Internet services provided to various customers. The facilities neither sophisticated nor exclusive and does not cater to the individual requirement of the customer and they remained the same as for all customers who avails the facility. The learned AR for the assessee explained by giving an example that mere use of telephone lines by making payments of telephone bills by a customer does not tantamount to payment of provision for technical services to telecom service provider, the payment by customer is for a ‘facility’ which is provided by a telecom service provider which is available to one and all. Similarly, in case of assessee, the payment is only for use of a standard facility provided by AT&T and Sprint. Such service provider only ensures that sufficient bandwidth is available on an ongoing basis to the ultimate user. Neither the assessing officer nor the DRP have made out a case that services under consideration are ‘technical in nature’ they have simply presumed that the services are technical in nature the learned AR this submits that the IPLC connectivity service do not qualify as technical services.

10. On the point where the technology is made available in the provision of IPLC connectivity services. The learned AR in alternative and without it is submission submits that IPLC connectivity services do not qualify as a technical services, it was further submitted that it does not qualify as ‘FIS’

under the India USA tax treaty as the 'make available' test is not satisfied. To strengthen its submission the learned AR shown us the memorandum of understanding (MOU) to the India US tax treaty. The learned AR further submits that DRP while holding that IPLC connectivity services qualifies the 'make available' test has relied on the decision of Perfetti Van Melle Holding BV reported vide (340 ITR 200 AAR) and in Raymond's Ltd versus DCIT (89 ITD 791 Mumbai Tribunal). It was submitted that the decision of authority of advance ruling in (AAR) in Perfetti Van Melle Holding BV (supra) has been set aside by Hon'ble Delhi High Court reported in (228 Taxman 201 Delhi). The learned AR for the assessee further submits that the decision of Mumbai Tribunal Raymond Ltd (supra) support the case of assessee wherein it was held that mere rendering of technical services cannot be equated with making available technical services.

11. In support of his submission the learned AR of the assessee further relied upon the decision of Geo Connect Ltd Vs DCIT (54 ITR 481 Delhi tribunal) and Cable & Wireless network India P Ltd (315 ITR 72 AAR) and Inerroute Communication Ltd versus DCIT (179 TTJ 355 Mumbai tribunal)

12. The learned AR of the assessee further submit that there would be no impact on change in the definition of 'Royalty' under the Income -tax Act, by Finance Act, 2012, as there is no corresponding change introducing the definition of 'Royalty' under India-US Tax Treaty, and the assessee, being

a tax resident of USA, is as eligible for the beneficial provision of the tax treaty which contain a more restrictive definition of Royalty as compared to the Income tax Act. Accordingly subject receipt cannot be make taxable as Royalty unless it is covered by the definition of Royalty in the India-US Tax Treaty, even if it is covered in the definition of 'Royalty' under the Act, the ld AR for assessee relied upon the decision in New Sky Satellite BV (ITA No. 473/Mumbai/2012, AP Moller Maersk (374 ITR 497 Bombay) and B 4 U International holding (ITA No. 3326/Mumbai/2006). On the issue of deputation of personnel, the ld. AR submits that Assessing Officer has alleged that assessee has deputed personnel and provided equipment for efficient use of IPLC services. The DRP upheld the finding of Assessing Officer holding that assessee has not provided positive evidence to rebut the finding of Assessing Officer. The ld. AR further submits that no personnel were deputed by assessee in connection with provision of IPLC connectivity. The allegation of Assessing Officer is completely baseless and based on assumption. It is not possible for assessee to provide negative evidence as held by DRP.

13.The ld. AR for assessee submits that in assessment for A.Y. 2007-08 & 2008-09, the Assessing Officer held that the IPLC connectivity charges to be taxable in India. The assessee filed letters before the Assessing Officer stating that the assessee does not except the view taken by Assessing Officer about the taxability of IPLC charges in India. However, the

assessee has decided not to contest the issue as to avoid the protected litigation and to buy-peace. Mere not filing appeal before higher authority should not be construed as acceptance/admission on behalf of assessee.

14. On the other hand, the ld. DR for the revenue supported the order of lower authorities. The ld. DR further submits that DRP in para-6.2 & 6.3 of its order considered the similar submission of assessee. During the assessment, the assessee has not claimed that the link charges is not taxable in India and claimed the same is cost to cost reimbursement. It was argued that similar addition was made against assessee for A.Y. 2007-08 & 2008-09 and no appeal or objection was filed by assessee before higher authorities. No documentary evidence was furnished by assessee that link charges was reimbursement except some sample invoices. The ld. AR submits that in reply to the other submission of assessee he relied upon the order of Assessing Officer and that of DRP.

15. We have considered the submissions of the parties and have gone through the orders of the lower authorities below. We have also deliberated on various case laws relied by the parties and the lower authorities. The Assessing Officer, during the assessment noted that assessee has received an amount of Rs. 1,36,31,094/- from Convergys Information Management (India) Pvt. Ltd. (CIM). The assessee claimed that the receipt is for reimbursement for providing link charges and not subject to tax in India in accordance with the provision of Income Tax Act and India-US Tax Treaty.

The assessee was asked to substantiate that such receipt are in the nature of reimbursement and why it should not be treated as FTS. The assessee furnished its reply as recorded by Assessing Officer in para-4 of the Draft Assessment Order. In reply the assessee specifically stated that CIM has used certain communication links which are comely known as IPLC. IPLC provided point to point private line used for organization for communication for internet access, business data exchange, video conferencing and other form of telecommunication. These IPLCs were procured by the assessee from third party provider. The cost of such link charges incurred by assessee in connection with business of CIM was allocated to CIM. The assessee also stated that the link charges do not qualify for FTS or Royalty. The contention of assessee was not accepted by Assessing Officer. The Assessing Officer treated the same receipt for 'right to use a process' and hence same is Royalty in term of Article -12(3) of India-US Tax Treaty. The Assessing Officer also held that consideration were technical in nature, therefore, receipt construed FTS/FIS in term of Explanation 2 to section 9(i)(vii) of the Act as well as Article-12(4) of India-US Tax Treaty. The DRP confirmed the action of Assessing Officer. The DRP while confirming the action of assessing officer in holding that IPLC connectivity services qualifies the 'make available' test has relied on the decision of Perfetti Van Melle Holding BV reported vide (340 ITR 200 AAR) and in Raymond's Ltd versus DCIT (89 ITD 791 Mumbai Tribunal).

On receipt of direction of ld. DRP, the Assessing Officer in a final assessment taxed such receipt.

16. Article 12(3) of India-US Tax Treaty defines the term 'Royalty'. As per definition of 'Royalty' under Article 12(3)(a) the payments of any kind received as a consideration for the use of, or the right to use, any copyright of a literary, artistic, or scientific work, including cinematograph films or work or film, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trademark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience, including gains derived from the alienation of any such right or property which are contingent on the productivity, use, or disposition thereof. Clause-(b) of Article 12(3) also prescribed that payment of any kind received as a consideration for use of, or right to use, an industrial, commercial or scientific equipment other than payment derived by an enterprises described in paragraph 1 of Article 9 (Shipping and Air Transport) from activities described in paragraph 2(c) or 3 of Article 8. A plain reading of the above definition, it is evident that the payment can be held to be Royalty only when there is "use" or "Right to use" of a process. The assessee claimed that the Indian Entity-CIM do not have any access or control over the communication line involved in such communication and accordingly, no right to use has been granted to assessee or Indian Entity to use such communication line or

process involved. The third party i.e. AT & T and Sprint are merely using their own equipment.

17. The Id. AR of the assessee vehemently relied upon the decision of Delhi Tribunal in assessee's group entity in Convergys Customer Management Group Inc. (supra) wherein on similar provision of IPLC, the co-ordinate bench of Tribunal held that, the provision of IPLC merely amount to provision of services and therefore, does not constitute 'Royalty' under the provisions of Article 12 of India-US Tax Treaty. The relevant part of decision of co-ordinate bench is extracted below:

“13. Adverting to the issue of taxability of link charges as 'Equipment Royalty' in terms of Article 12(2) read with Article 12(3)(b) of the DTAA. This issue is common to both assessment year 2006-07 and 2008-09. In this regard, the Id. AR of the assessee submitted that the link charges pertain to leased lines (under sea cables) that allow a dedicated capacity for a private, secure communication link from India to the US which enables CIS to communicate with the customers. The assessee makes payment for such link charges to telecom service providers in the USA and cross charges the portion of the cost incurred by it in connection with the India half link to CIS, which is accordingly reimbursed by CIS to CMG. Ld. counsel also referred to the invoice of raised by the assessee on CIS on Page 349 of paper book volume I and the basis of cross charged at page 828 of paper book volume III and placed reliance on the decision of the Hon'ble Delhi High Court in the case of *Expeditors International India (P.) Ltd. (supra)* on reimbursement of common expenses incurred by the parent company.

13.1 AO made an addition on account of link charges by stating that they were taxable as 'Equipment Royalty' in terms of Article 12(2) read with Article 12(3)(b) of the DTAA and accordingly taxed it @ 10% on gross basis. CMG/CIS, who availed the services from the service providers, have neither

intended to nor have obtained any right to use the underlying infrastructure maintained and used by the service providers for providing the services. It is important to see whether there was any intention to transfer the right to use or not. In the present set of facts, CMG/CIS do not have any control or possession over the equipment i.e. the network facilities are under the control of and maintained and operated by the service providers. CMG/CIS merely avail a service. Accordingly, we hold that the link charges do not qualify as 'Equipment Royalty' in terms of Article 12 of the DTAA and hence are not taxable in India. Useful can be drawn from the following judgments:

Bharat Sanchar Nigam Ltd.'s case (supra)

Dell International Services India (P.) Ltd. 's case (supra)

Cable & Wireless Networks India (P.) Ltd. 's case (supra) (The special leave petition filed against this ruling has been dismissed by the Supreme Court)

Asia Satellite Telecommunications Co. Ltd. 's case (supra)

Yahoo India (P.) Ltd. 's case (supra)

Standard Chartered Bank case (supra)

13.2 CIT (A) in his order has accepted the contention of the assessee that the third party service provider was merely using its own equipment itself while rendering the services to its customers including the assessee and CIS and there is no transfer of the right to use, either to the assessee or CIS. The assessee has merely procured services and provided the same to CIS and no part of the equipment was leased out to CIS. The Ld. CIT (A) held that the payment for link charges do not constitute Royalty under the provisions of Article 12 of the DTAA.

13.3 The provisions of Equipment Royalty are also contained in Explanation 2(iva) of section 9(1)(vi) of the Income Tax Act, 1961 ('Act') which is similar to the provisions of Article 12(3)(b) of DTAA.

13.4 Besides, though *Asia Satellite Telecommunications Co. Ltd.'s case (supra)* is a decision on the domestic law but also makes an observation regarding DTAA. In para 74 of the judgment, it is specifically mentioned that " Even when we look into the matter from the standpoint of Double Taxation Avoidance

Agreement (DTAA), the case of the assessee gets a boost". This observation supports the case of assessee.

13.5 In view of the foregoing observations we hold that there is no transfer of the right to use, either to the assessee or to CIS. The assessee has merely procured a service and provided the same to CIS, no part of equipment was leased out to CIS. Even otherwise, the payment is in the nature of reimbursement of expenses and accordingly not taxable in the hands of the assessee. Therefore, it is held that the said payments do not constitute Royalty under the provisions of Article 12 of the tax treaty and the ground is allowed in favour of assessee."

18.The DRP while confirming the action of Assessing Officer that IPLC connectivity services qualify the "make available text" relied upon the decision of authority of advance ruling (AAR) in Perfetti Van Melle Holding BV (supra). The aforesaid decision has been reversed by Hon'ble Delhi High Court in Perfetti Van Melle Holding BV vs. AAR reported in 228 Taxman 201 (Del.).

19.We have further noted that DRP has also relied upon the decision of Raymond Ltd. (supra) held that section 9(1)(vii) stops with the "rendering" of technical services, the DTA goes further and qualifies such rendering of services with words to the effect that the services should also make available technical knowledge, experience, skills etc. to the person utilising the services. These words are "which make available". The meaning ascribed by Mr. Kapila for the Department is that these words merely mean "to allow somebody to make use of, whether actually made use of or not", but in our opinion and with respect, this meaning does not take due note of the addition of such words to the "rendering of any technical or consultancy

services". The meaning suggested by Mr. Kapila is embedded in the "rendering" of the services itself. When somebody "renders" services, it presupposes that somebody else is "making use" of the same. But the "making use of" should be contrasted with the "making available". The "making available", in our opinion, refers to the stage subsequent to the "making use of" stage. The qualifying word is "which" the use of this relative pronoun as a conjunction is to denote some additional function the "rendering of services" must fulfil. And that is that it should also "make available" technical knowledge, experience, skill etc. In our view the conclusion arrived by the Tribunal does not support the view taken by the lower authorities.

20. Further, the co-ordinate bench of Delhi Tribunal in *Geo Connect vs. DCIT* (supra) while examining the taxability of IPLC charges paid to AT & T also held that agreement was only for the provision of services and not for "use" or "right to use" any industrial, commercial or scientific equipment or process between the non-resident and assessee for use of dedicated private bandwidth in underwater sea cable and therefore, consideration paid to AT & T would not constitute 'Royalty'. The Tribunal further held that payment to ICLC charge does not constitute FTS either under the Act or the Treaty. The relevant part of decision is extracted below:

“10.13 In the case of instant assessee, the control of equipment was with the non-resident parties and they have not leased the equipments, i.e. the undersea cable etc. to the assessee. The equipments were owned and used by the non-resident

parties only and therefore it cannot be said that the consideration paid was for use of equipment by the assessee. Similarly the non-resident parties have not provided use of any process to the assessee, which are of patentable nature having exclusive ownership rights. The assessee was not concerned with any of the process involved in transmission or connectivity of call data. The only concern of the assessee was transmission of call data beyond the boundaries of India to the person in USA to whom call was made.

10.15 Further the assessee in support of the proposition that amendment under section 9(1)(vi) of the Act by finance Act 2012 has no bearing on the provisions of DTAA has relied on the decision of the Hon'ble Delhi High Court in the case of *New Sky Satellite BV, (supra)* in ITA 473/2012. In the instant case also the assessment year involved is 2002-2003, and thus the *Explanation-5* and *6* and Memorandum of *Explanation* cannot be brought into action as there has not been any corresponding change in the definition of the term royalty in the DTAA between India and the USA. Accordingly, we are of the opinion that under the DTAA, the restricted meaning of the royalty shall continue to operate despite the amendment in law.

10.16 As far as the assessee is concerned, in case of difference between provisions of the Act and an agreement under section 90 i.e. (DTAA), the provisions of the agreement shall prevail over the provisions of the Act.

10.17 In view of our discussion above, we hold that the payments made by the assessee are not in the nature of royalty either under the domestic law or relevant DTAA

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19. Further in para- 40 of the decision in the case of *Bharti Airtel Ltd. (supra)*, the Tribunal has held that where make available clause is found in the treaty and there is no imparting as contemplated in the treaties, the payment cannot be treated as Fee for Technical Services (FTS) under the DTAA. The relevant paragraph of the decision is reproduced as under:

'40. The second aspect of the issue are before us, is without prejudice to the finding under the Domestic Law, whether the payment to FTOs for "IUC" is fee for technical services under the DTAA, wherever 'make available clause' is

found in these agreements. In view of our finding that the payment is not fee for technical services under the Act, it would be an academic exercise to examine whether the payment in question would be fee for technical services under DTAA's. Suffice to say wherever treaties contain "making available" clause, then in terms of the judgment of the Hon'ble Karnataka High Court in the case of *CIT & Ors. v. De Beers India Minerals (P.) Ltd.* [2012] 346 ITR 0467; the payment cannot be treated as FTS under the DTAA as ITA Nos. 3593 TO 3596/Del/2012 [*Bharti Airtel Ltd. v. ITO(TDS)*] & ITA Nos. 4076 TO 4079/Del/2012 [*ITO(TDS) v. Bharti Airtel Ltd.*] there is no imparting as contemplated in the Treaties. Similar are the propositions on the issue of "make available" in the decisions in the case of *Mahindra & Mahindra Ltd. v. DCIT* 313 ITR 263; *Raymond Ltd. v. DCIT* 86 ITD 791; *Cable and Wireless Networks India P. Ltd.* [2009] 315 ITR 72.'

20. We find that in the DTAA between India and the USA the make available clause is in existence. The article 12(4) of the treaty is reproduced as under:

'For purposes of this Article, "fees for included services" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services:

(a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received ; or

(b) make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design.'

21. Since in the call connectivity and transmission from end of the Indian Territory at Mumbai to the termination of call in USA, no technical knowledge has been made available to the assessee, respectfully following the decision of the Tribunal in the case of *Bharti Airtel Ltd. (supra)*, we hold that payment for the services of call transmission through dedicated bandwidth provided by the non-resident parties to the assessee, cannot be termed as Fee for Technical services under the treaty also, in the hands of the recipients.”

21.The Mumbai Tribunal in *Interoute Communication Ltd. vs. DDIT (supra)*

held as under:

9. Essentially, the role played by the interroute facility is connecting the call to the end operator, and, in that sense, it works like a clearing house. Similarly, in the case of incoming calls, calls originating from Europe and USA, which are to end in India, are routed to the respective operators. In the present fact situation, the payment made by the Indian entities can be held to be royalty only when it is payment for scientific work, any patent, trademark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience. It is not for a payment for a scientific work nor there is any patent, trademark, design, plan or secret formula or process for which the payment is made. There can hardly be any dispute that the payment is made for a service, which is rendered with the help of certain scientific equipment and technology, rendered by the assessee. The service is connectivity to the telecom operators in the call end jurisdiction. The facility is a standard facility which is used by other telecom companies as well. As for the dedicated ports, these things only provide a certain level of capacity in access but the payment is for the service nevertheless. Merely because the payment involves a fixed as also a variable payment does not alter the character of service. Dealing with such a type of consideration, a coordinate bench of this Tribunal, in the case *Kotak Mahindra Primus Ltd. v. Dy. DIT* [\[2007\] 11 SOT 578 \(Bom.\)](#), had held that "This type of pricing of a service, by segregating the fixed and variable price, is not unusual". That does not, however, alter the character of arrangement. The payment continues to be for service alone. The assessee may charge a fixed amount to cover its costs in employing enhanced capacity so as not to incur losses when this capacity is not used, but what the customer is paying for is a service and not the use of equipment involved in additional capacity, nor, as we have seen above, for any scientific work, any patent, trademark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience. It cannot, therefore, be taxed as royalty under article 13 of the Indo-UK tax treaty. The payment for a service can be brought to tax under article 13 only when it makes available the technology in the sense that recipient of service is enabled to perform the same service without recourse to the service provider. As held by this Tribunal, in the case of *C.E.S.C. Ltd. v. Dy. CIT* [\[2003\] 87 ITD 653 \(Kol.\) \(TM\)](#), "...in order to be covered by the provisions of Art. 13(4)(c) of the India-UK DTAA, not only the services should

be of technical in nature but such as to result in making the technology available to the person receiving the technical services. We also agree that merely because the provision of the service may require technical input by the person providing the service, it cannot be said that technical knowledge, skills, etc. are made available to the person purchasing the service. As to what are the connotations of 'making the technology available to the recipient of technical services', as is appropriately summed up in protocol to Indo-US DTAA, "generally speaking, technology will be considered 'made available' when the person acquiring the service is enabled to apply the technology." In the case before us, no services are made available in the sense that the recipient of service is enabled to apply the technology, and do the same work without recourse to the service provider. There is no transfer of technology here, and in that sense technical services are not made available. Undoubtedly, the services rendered by the assessee requires technical inputs, but that alone, as we have seen above, does not bring it in the ambit of fees for technical services taxable under article 13 of India-UK tax treaty.

22. In view of the above factual and legal discussions, we are of the view payment made by the assessee is only in respect of standard services provided by AT&T and Spinet, which cannot be held to be 'Royalty'. Only those payment, when it made for scientific work, any patent, trademark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience, which is absolutely missing in the present case. The payment in the present case is not for a payment for a scientific work nor there any patent, trademark, design, plan or secret formula or process for which the payment made. The service is connectivity to the telecom operators in the call end jurisdiction. The facility is a standard facility which is used by other

telecom companies as well. Therefore, the action of the assessing officer, which was upheld by Id. DRP, in treating the receipt as fee for FIS/ FTS or for the Royalty is not justified. In the result the ground No. 2 of the appeal is allowed.

23. Ground No. 3 relates to taxability of income from sale of shrink- wrapped software as 'Royalty'. The Id AR for the assessee submits that the assessee sold certain off-the self /shrink wrapped software to TCS for an amount of Rs. 4,05,24,300/-. The main features of contract for sale of shrink wrapped software by assessee to TCS were viz, (i) the assessee granted a personal, non-transferable and non-exclusive license to TCS, (ii) the assessee is the owner of the patents, copyright, trade secret, trademark and any other intellectual property right which subsist in the software, (iii) the title of the software shall remain with the assessee, (iv) the TCS was not allowed to make copy or print out of the software except for reasonable number of copies but only for its own internal back-up, archival, development, training and testing purpose, (v) TCS was not allowed to reverse engineer, decompile or disassemble the software,(vi) TCS was not allowed to sell, assigned, licensing lease, rent, lend, transmit network or otherwise distribute, transfer or make available the software in any manner to the third party, (vi) the Software was to be used for internal purpose only and was not allowed to use the software to provide services through a service bureau or other arrangements,(vii) TCS was expressly prohibited from

adapting, modifying merging, revising, improving, translating, upgrading, enhancing and creating derivative works of the software for any purpose, including error correction or any other type of maintenance.

24. In the return of income the assessee claimed that income arising from the sale of software was not taxable in India as the same was not covered within the definition of 'Royalty'. The assessing officer treated the said consideration for the right to use the copyright of software and accordingly proposed to tax the income from sale of software as 'Royalty', under the Income tax Act and India USA tax treaty. On objections before DRP, the action of the assessing officer was upheld.

25. The learned AR of the assessee submits that the assessing officer treated the sale of software as 'Royalty', by taking view by virtue of retrospective amendment introduced in Explanation 4 in the definition of 'Royalty' under section 9 (1)(vi) of Income tax Act by virtue of Finance Act 2012. The assessing officer failed to appreciate that there was no corresponding change introduced in the definition in the term 'Royalty' under the India USA tax treaty. The assessee being tax resident of USA, is eligible for beneficial provision of India USA tax treaty in term of section 90(2) of the Act. Therefore, even if the consideration for sale of software is covered within the definition of 'Royalty' under the Act, it cannot be taxed as such unless it falls within the definition of "Royalty" as defined in India USA tax treaty, therefore the assessee is entitled for availing beneficial provision

of India USA tax treaty. To support their contention that payment received from TCS for sale of product is not liable to tax in India as 'Royalty' income. Article 12(3) of India US tax treaty defined the Royalty payment made for the use of right to use of copyright of a literary, artistic or scientific work. Accordingly, in order to qualify as 'Royalty payment as income, provided in Article 12 of India USA tax treaty, the income of the appellant should have been generated by use of or right to use of any copyright of a literary, artistic or scientific work. TCS should have acquired all or any right in the copyright which the copyright holder has. A distinction has to be made between 'copyright' and a 'copyrighted article'. A copyright is an intangible right independent of copyrighted article. The assessee has transferred to copyrighted article and there is no transfer of any copyright. A right to use copyright is distinguishable from the sale consideration paid for copyrighted article. The licensing agreement between the assessee and the TCS shows that license is non-exclusive non-transferable and that software is to be used in accordance with the agreement, only one copy of software is supplied by the assessee to TCS.

26.To strengthen his submission the learned AR for the assessee also relied upon the decision of Delhi High Court in DIT Versus Infracsoft Ltd (264 CTR 329), PCIT Vs M. Tech India P. Ltd (2016) 382 ITR 31 (Delhi), Mumbai Tribunal in Tata Communications Ltd. (ITA No. 1473 /Mumbai /2009 and Delhi Tribunal in assessee's group case in Converges Customer

Management Group Inc Versus ADIT (ITA No. 1443/Delhi/2012 and 5 to 43/Delhi/2011).

27. On the other hand the learned AR for the revenue supported the order of lower authorities. The ld. DR for the revenue further submits that the software supplied by the assessee is not a copyrighted article. On the point of the issue of amendment in section 9(1)(vi) the ld DR submits that the amendment is clarificatory in nature. In support of his submission the learned DR of the revenue relied upon the decision of honourable Karnataka High Court in case of Samsung Electronics Co Ltd (2009) (185 Taxman 313).

28. We have considered the rival submission of the parties and perused the material available on record. In the return of income, the assessee has shown a receipt of Rs. 4.05 crore on account of supply of software to TCS. The assessee claimed that said software is the nature of Shrink Wrapped Software and no use or right to use any copyright or intellectual copy right in the software was granted to the TCS. The TCS was provided a copyrighted article; the said arising of said software is not taxable in India as the same is not covered by the definition of Royalty under India-US Tax Treaty. The Assessing Officer treated the said receipt for the use of copyright and proposed to tax in the form of sale of software as Royalty under India-US Tax Treaty. The DRP upheld the action of Assessing Officer. We have gone through the licence agreement wherein the assessee

granted licence to TCS in accordance with the term and condition of the agreement. The term and condition of the licence is provided under clause 2.1. Further, in clause 4 of the agreement, the assessee has put a restriction on licence. The perusal of licensing agreement further shows that licence is non-exclusive, non-transferable and that the software is to be used strictly in accordance with agreement, and only one copy of software is supplied to the TCS. The TCS is only permitted to make one copy of software for internal back and archival purposes. Further, software is to be used by TCS only for its own business and cannot be rented, sold sub-licence or transfer to any third party as the TCS is restricted from making copies, decompile disassemble or reverse engineer the software. The title and ownership of the software is with the assessee. We have noted that Article 12(3) of the India-US Tax Treaty define the Royalty as a payment made for use of a copyright of a literary, artistic or scientific work. Therefore, for taxing Royalty Income covered by Article 12 of India-US Tax Treaty. The income should have been generated by the 'use of' or 'right to use of' any copyright. In our view, the payment received by assessee is for the sale of software, which cannot be treated as consideration for transfer of any copyright and cannot be treated as Royalty under Article 12 of the India-US Tax Treaty. The Delhi Tribunal in Converges Customer Management Group Inc. (supra) held that the consideration received for sale of Shrink Wrapped Software does not constitute Royalty as the same is for the sale of

copyrighted article and not for the use of copyright. Further, Mumbai Tribunal in case Tata Communication Ltd. (supra) also held that payment made for copyrighted article and not copyright *per se* and hence, the same is not taxable in India.

29. The Hon'ble Delhi High Court in DIT vs. Infrasoftware Ltd. (supra) also held that when they right transfer is not the right to use the copyright but it is limited to right to use the copyrighted material and the same does not give rise to Royalty Income and would be business income. It was also held that consideration received by assessee on grant of licence for use of software is not Royalty within the meaning of Article 12(13) of India-US Tax Treaty. The decision relied by Id. DR in Samsung Electronics (supra) has been distinguished by Hon'ble Delhi High Court in DIT vs. Infrasoftware Ltd. (supra). The relevant part of decision of Hon'ble Delhi Court is extracted below:

“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.”

30. In view of aforesaid discussion, we are of the view that the receipt on account of sale of copyrighted/Shrink Wrapped Software is not taxable as per Article 12(14) of India-US Tax Treaty. Further, the receipt is also not taxable under the provisions of Income-tax Act as the assessee is eligible for beneficial provision of India-US Tax Treaty in term of section 90(2) of Income-tax Act. Moreover, after the amendment introduced in Explanation (4) in definition of Royalty under section 9(1)(6) by Finance Act, 2012, there is no corresponding change made in definition in term of Royalty under India-US Tax Treaty. Therefore, in view of the aforesaid discussion, the ground no.3 of the appeal is allowed in favour of assessee.

31. Ground No. 4 relates to taxability of support and maintenance services as FIS. The learned AR of the assessee submits that during the year under consideration the assessee received Rs. 2,29,63,770/- from TCS and TCL in relation to support and maintenance services rendered in connection with the software supplied by the assessee. Under the contract with TCS, the assessee was to render the support and maintenance services in the form of version updates, bugs fixing, call support etc, in connection with the software supplied to TCS. The support and maintenance services were rendered remotely from outside India. The main feature of the contract

consists of viz, (i) to addresses standard software code product defect, bug, issue or technical query,(ii) the problem include but is not limited to new standard software problem, related problem, re- occurrence of all problems, duplicate problems or problems that we are similarities to issue which have been previously raised, and any technical quarries on standard core software, (iii) the problem was to be reported either by way of telephone or by email. The agreement specifically mentioned that assessee shall not be under no obligation to provide support and maintenance service in respect viz,(a) problem resulting from any modification of customisation if the software is not made by the assessee list of any software other than software supplied by assessee, (b) any software other than the software supplied by the assessee, (c) incorrect or unauthorised use of the software supplied by the assessee or operation is not in accordance with the documentation, (d) any fault in the equipment on which software is installed, (e) any programme used in conjunction with software supplied, (f) use of element of the software supplied in any combination other than those specified in the documentation, (g) use of software supplied with computed hardware, operating stem or other supporting software other than those specified in the documentation. Accordingly the support and maintenance services rendered by assessee work only in connection with the software supplied and ancillary and subsidiary as well as inextricably and essentially linked to software supplied.

32. In the return of income the assessee claimed that said receipt were not taxable in India under India US tax treaty. The assessing officer in the draft assessment held that support and maintenance fees were ancillary and subsidiary to enjoyment of 'right to use' of the software for which royalties being paid and hence proposed to tax the amount as FIS in term of Article 12(4)(a) of India US tax treaty. The learned DRP rejected the objection of assessee and confirm the view taken by assessing officer.

33. The learned AR of the assessee submits that assessee, being tax resident of USA is eligible for beneficial provisions of India USA tax treaty which contains more restrictive definition of FTS as compared to the Act. Accordingly, the subject receipt cannot be taxable as FTS unless it is covered by the definition of FTS in the India US tax treaty, even if discovered by the definition of FTS under the Act. The learned AR of the assessee again reiterated the provision of Article 12 of India USA taxability wherein definition of royalty and 'fees for included' services is defined.

34. The learned AR further submit that it is an undisputed fact that the support and maintenance services are ancillary and subsidiary, as well as inextricably and essentially linked, to the software supplied, therefore, the services would be dependent on the taxability of software supplied. The services can be considered as FTS under clause- (a) of paragraph 4 of Article 12, only if the software is taxable as Royalty under paragraph 3 of Article 12 of the tax treaty. It was argued that in case ground No. 2 is allowed in favour

of assessee, support and maintenance services cannot be taxable under Article 12(4) of Tax Treaty.

35. The learned AR in alternative submission submit that the receipt on account of support and maintenance service are not taxable under article 12(4)(b) of tax treaty as the service do not make a available technical knowledge, experience, skill for no or process. The learned AR also relied upon the MOU to the India US tax treaty. In support of his submission the learned AR of the assessee also relied upon the decision of Karnataka High Court in case of CIT v/s De Beers India minerals Ltd 2012 346 ITR 467(Karnataka), decision of Pune Tribunal in Sandvik Australia Pty Ltd Vs DDIT (ITA No. 93/Pune/2011), Bharti AXA General Insurance Co. Ltd (2010) 326 ITR 477 (AAR). The assessee has also placed on record the copy of software licence agreement dated 15.11.2007 with TCS (page no. 126 to 137 of PB).
36. On the other hand the learned AR for the revenue supported the order of assessing officer and the direction of the DRP. The ld. DR for the revenue further submits that this ground of appeal is linked to the Ground No.3.
37. We have considered the submission of both the parties produce the orders of authorities below. We have also deliberated on various case laws relied by lower authorities and the learned AR of the assessee. We have noted that the assessee provided support and maintenance services linked with the software supplied. Accordingly, the taxability of such services is dependent on the

taxability of software supplied. As we have held that the receipt earned on sale of software is not taxable under Article 12 of India-US Tax Treaty, therefore, the services the receipt from support and maintenance services are also not taxable under 12(4)(b) of India US Tax Treaty. In the result, this ground of appeal is allowed.

38. Ground No. 5 relates to taxability of service fee as FTS. During the year under consideration, the assessee rendered certain services to TCS. The services comprised of in Geneva health check for retail instances (Geneva billing system performance tuning) and other professional and consultancy services. These services were claimed to have been subcontracted by assessee to Indian entity CIM on a principal to principal basis. In the return of income the assessee claimed that the said receipt is not taxable in India under the India US tax treaty. However the assessing officer in the assessment order held that services are ancillary and subsidiary to the enjoyment to use the software for which royalties being paid and hence proposed to tax the amount as FIS. On objection before DRP the action of assessing officer was upheld. The learned AR of the assessee submits that the services rendered by assessee are neither ancillary and subsidiary to the application or enjoyment of the right, property or information for which a royalty payment is described in Article 12(3) of Tax Treaty is received nor do they make available technical knowledge, experience, skill, know-how or process or consist of the development of transfer of technical plan or

technical design. The learned AR further submits that unless, the services satisfy a make available test, the same could not be taxed as FIS income.

The learned AR retreated the contents of MOU to the India US tax treaty.

39. On the other hand learned AR for the revenue supported the order of lower authorities.

40. We have considered the rival submission of the parties and perused the order of lower authorities. During the relevant period for A.Y. under consideration, the assessee rendered certain services to TCS. Those services were sub-contracted by assessee to Indian Entity CIM on Principle to Principle Basis in the return of income, the assessee claimed said receipt are not taxable in India. The Assessing Officer treated the said receipt as subsidiary and ancillary to the right to use of software which is Royalty and proposed to tax as FIS under Article 12(4)(a). The objection of assessee was rejected by DRP. The DRP concluded that payment have been received for providing specialized technical input services rendered by assessee and will be covered by the definition of FIS/FTS.

41. The Fees for included services is defined in Article 12(4) of India-US Tax Treaty, wherein 'Fees for included services' means payment of any kind to any person in consideration for rendering of any technical or consultancy services (including through the provision of services of technical or other personnel' if services are ancillary and subsidiary to the application or enjoyment or right, property or information for which payment is received

or make available technical knowledge, experience, skill no-how or process or consist of development and transfer of a technical plan or technical design. We have noted that the assessee has claimed that services rendered are ancillary and subsidiary and inextricably essentially linked with the software supplied. In our view, unless the services satisfy the make available test, the same cannot be taxed as FIS. Further, mere fact that provision of service may require technical input by the person providing services does not *per se* mean the technical knowledge. In our view, the receipt on account of support and maintenance services are not taxable under Article 12 as the services do not make available technical knowledge, experience, skill, know-how or process or consist of any development and transfer of any design. In the result, ground no.5 of the appeal is allowed.

42. Ground No. 6 relates to levy of interest under section 234B of the Act. The learned AR of the assessee submits that in the assessment order, the assessing officer levied interest under section 234B of the act amounting to ₹ 37,58,522/- on account of shortfall in payment of advance tax and self assessment tax. The learned AR submitted that the assessee being tax resident of India and is foreign company under the income tax laws, accordingly, as per section 195 of the act taxes deductible at the source on all its received. Therefore there can be no liability to pay advance tax under section 208 of the act in absence of any liability to pay advance tax. The

provision of section 234B of the act cannot be involved. In support of his submission the learned AR of the assessee relied upon the decision of honourable Bombay High Court in case of DIT versus NGC Network Asia LLC (313 ITR 187)

43. On the other hand the learned AR for the revenue submits that suitable direction may be given to the assessing officer to recompute the interest as per law.

44. We have considered the rival submission of the parties and find that assessee is a foreign company and tax resident of USA and as per section 195 of the act taxes deductible at source on all its received and accordingly the assessee was not liable to pay advance tax. Therefore we direct the assessing officer to recompute the tax by following the decision of the jurisdictional High Court in case of NGC network Asia LLC (supra).

ITA No. 1439/Mum/2015 For AY 2010-11.

45. The assessee has raised the following ground of appeal:

- (i) General Ground
- (ii) Taxability of IPLC/Link Charges as FTS/FIS and Royalty under the Act and India-USA DTAA.
- (iii) Taxability of sale of software as Royalty under the Act and in India-USA DTAA.
- (iv) Taxability of support and maintenance fees as FIS under Article 12(4)(a) of India-USA DTAA.
- (v) Levy of interest under section 234B and 234C.

46. We have noted that in appeal for A-Y 2010-11, the grounds of appeal No. 2 to 5 are identical as has raised by assessee in appeal for AY 2009 - 10,

which we have allowed in favour of assessee. Therefore, following the principle of consistency all the grounds of appeal raised by assessee are allowed with similar direction.

ITA No. 1995/Mum/2015 fort AY 2011-12

47.The assessee has raised the following grounds of appeal:

- (i) General Ground
- (ii) Taxability of IPLC/Link Charges as FTS/FIS and Royalty under the Act and India-USA DTAA.
- (iii) Taxability of support and maintenance fees as FIS under Article 12(4)(a) of India-USA DTAA.
- (iv) Levy of interest under 234B and 234C.

48.Ground No.1 is general in nature, hence needs no adjudication.

49.We have noted that the ground No. 2 of the appeal for A-Y 2011-12 is identical to the ground No. 2 of the appeal for A-Y 2009-10, which we have allowed, further ground No. 3 of the present appeal is identical to the ground No. 4 of appeal for AY 2009-10 and ground no.4 of the appeal is identical to the ground no.5 of appeal for A.Y. 2009-10, which we have allowed. Therefore, following the principle of consistency both the grounds of appeal are allowed with similar directions.

50.In the result appeals of all the assessment years are allowed.

Order pronounced in the open court on 30/08/2019.

Sd/-
G.S. PANNU
VICE-PRESIDENT
Mumbai, Date: 30.08.2019
SK

Sd/-
PAWAN SINGH
JUDICIAL MEMBER

Copy of the Order forwarded to :

1. Assessee
2. Respondent
3. The concerned CIT(A)
4. The concerned CIT
5. DR "L" Bench, ITAT, Mumbai
6. Guard File

BY ORDER,

**Dy./Asst. Registrar
ITAT, Mumbai**