**IN THE INCOME TAX APPELLATE TRIBUNAL**
**DELHI BENCH: 'A', NEW DELHI**

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER**
**AND**
**SHRI O.P. KANT, ACCOUNTANT MEMBER**

ITA No.6432/Del/2012
Assessment Year: 2009-10

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| Adobe Systems Software Ireland Ltd., 4-6, Riverwalk, Citywest Business Campus, Macquarie Park, Saggart, Dublin, 24IE | **Vs.** | ADIT, Circle-1(1), International Taxation, New Delhi |
| **PAN :AAHCA7203M** | | |
| **(Appellant)** | | **(Respondent)** |

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| Appellant by | Shri Ravi Sharma, Adv. |
| Respondent by | Shri Manoj Kr. Mahar, Sr.DR & Shri Sanjay Goel, CIT(DR) |

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| Date of hearing | 05.08.2019 |
| Date of pronouncement | 03.09.2019 |

**ORDER**

***PER O.P. KANT, A.M.:***

This appeal by the assessee is directed against order dated 26/10/2012 passed by the Ld. Assistant Director of Income Tax, Circle-1(1), International Taxation, New Delhi (hereinafter will be referred as 'the Assessing Officer') for assessment year 2009-10, pursuant to the direction of the learned Dispute Resolution Panel (DRP). The grounds raised by the assessee in the appeal are reproduced as under:

1. *That on the facts and in the circumstances of the case and in law, the Assistant Director of Income Tax, Circle 1(1), New Delhi ("Ld. AO") pursuant to DRP directions has erred in holding that the revenue earned by the Appellant from the sale of Adobe Products to the Indian Distributors is Royalty' under the Income Tax Act, 1961 ("Act") as well as under the India - Ireland tax treaty' by observing the following:*

   *1.1. That the computer software is treated as 'machinery & plant' under the Income Tax Rules,1962 and would be an equipment;*

   *1.2. That the consideration received for use of software is towards consideration for use of patented article which is taxable as royalty;*

   *1.3. That the consideration received by the assessee from sale of computer software is towards use of 'information developed out of scientific experience';*

   *1.4. That the consideration from sale of computer software by the assessee is towards right to use scientific work developed and hence the same is taxable as royalty; and*

   *1.5. That the consideration received by the assessee from sale of computer software is towards use of invention, secret formula or process and hence the same is taxable as Royalty under the Act.*

2. *That on the facts and in the circumstances of the case and in law, the DRP has erred in directing the Ld. AO that the consideration for supply of software shall qualify as 'Royalty' by virtue of retrospective amendment introduced by the Finance Act, 2012 in the definition of Royalty under section 9 (1) (vi) of the Act, without appreciating the fact that there is no corresponding change introduced in the definition of royalty under the DTAA.*

   *2.1. Without prejudice, the DRP has further erred in holding that the aforesaid amendment in the Act, have also to be read into the DTAA. based on authority drawn from the section 90(3) of the Act read with Explanation 3 there under.*

3. *That on the facts and in the circumstances of the case and in law, the Hon'ble DRJP and Ld. AO has failed to appreciate that the sale of software is sale of 'Copyrighted Article' and not 'Copyright' in Adobe products and accordingly, the revenue from sale of software is in the nature of business income not taxable under Article 7 of India- Ireland tax treaty in the absence of the 'Permanent Establishment' of the Appellant in India.*

4. *That on facts and in the circumstances of the case and in law, the Hon'ble DRP and Ld. AO have erred in disregarding OECD*

*commentaries, International tax commentaries, International] Revenue rulings, while interpreting tax treaties*

5. *Factual inaccuracies:*

5.1. *That on the facts and in the circumstances of the case and in law, the Hon'ble DRP and Ld. AO have failed in comprehending the facts of appellant's case and erroneously held the following:*

*a) That the appellant is engaged in licensing of software through independent distributors and not engaged in the business of sale of software;*

*b) That the appellant has agreed that payment is made only for the right to use the software, whereas appellant has always contended that payments are only for sale of software;*

*c) That software is licensed and not sold and that the payment by Indian distributors is for the use of copyright;*

6. *Without prejudice to the above, the Ld. AO has erred in not allowing the legitimate credit of taxes withheld by Indian distributors of Rs. 82,926,012 from payments made by them to Appellant while computing the tax demand payable by the Appellant.*

7. *On the facts and in the circumstances of the case and in law, the Ld. AO has erred in levying interest under section 234A and under section 234B of the Act without appreciating that there will be no tax demand after grant of TDS credit, and so the levy is illegal, bad in law and void ab initio.*

8. *On the facts and in the circumstances of the case and in law, the Ld. AO has erred in levying the interest under section 234B of the Act ' 44 Riverwaik Cttywest Business Campus Dublin 24 Ireland consideration in the hands of the assessee was subject to deduction of tax at source under section 195 of the Act.*

9. *That on facts and in the circumstances of, the case, Ld. AO has erred in law in initiating penalty proceedings u/s 27i(i)(c) of the Act for concealment of particulars of income and for furnishing inaccurate particulars thereof.*

10. *That on the facts and in the circumstance of the case and in law, the impugned order passed by the Ld. AO under section 143(3) read with section 144C(13) of the Act is bad in law.*

10.1. *That on the facts and in the circumstance of the case and in law, Ld. AO has erred in computing the total income of the Appellant at Rs. 82,64,11,741 as against Rs. 7,07,360 returned income and*

*further the assessment order passed by the Ld. AO is perverse on facts.*

*The above grounds of appeal are independent and without prejudice to each other.*

**2.** Briefly stated facts of the case are that the assessee, i.e., Adobe Systems Software Ireland Ltd. is a company incorporated under the laws of the Ireland and is engaged in distribution of computer software outside of North America including India. The assessee, being a tax resident of Ireland, claimed beneficial treaty provision of India-Ireland Double Tax Avoidance Agreement (DTAA). The assessee filed return of income on 29/10/2010 declaring total income of Rs.7,07,360/-. The case of the assessee was selected for scrutiny. The Assessing Officer noted the distributor agreement and other documents in respect of licensing of software. The Assessing Officer has observed that in assessment year 2008-09, assessee's income from licensing of software was held taxable at the rate of 10% as 'royalty' income. According to the Assessing Officer, the facts in the year under consideration being identical to assessment year 2008-09, the assessee was called upon to show cause, as why the revenue receipt from licensing of the software might not be treated as royalty income in the year under consideration also. After taking into consideration, submission of the assessee the Assessing Officer in the draft assessment order dated 23/12/2011 held that payment received by the assessee from licensing of the software was qualified to be 'royalty' as per the Indian Income Tax Act as well as India Ireland DTAA observing as under:

*"4.10 The payment received by the assessee from licensing of software is qualified to be royalty as per Indian Income Tax Act as well as DTAA because of the following:*

*(i) The software is licensed not sold. The copyright of the software remains with the assessee, however, it allows the use of copyright to the person making payment to it. As per the Indian Copyright Act, 1957 as amended in 1994, software is entitled to copyright protection. The assessee possesses Copyright in the software, which it can enforce in India if any violation of such right is notices by it. Further, the Indian Copyright Act recognizes 'copyright' as doing or authorizing the doing of any of the following acts in respect of a work or any substantial part thereof namely, - in case of a computer programme - to sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer program, it is therefore clear that the asses see has authorized the use of the copyright to the distributors in India.*

*(ii) The Software owned by the assessee is patented software. Consideration for allowing the use of the patented article falls within the definition or royalty payment. Even if it is considered that the software owned has not been patented, there is no denial of the fact that it is essentially an invention. The development of such software requires highly technical manpower, with highly sophisticated infrastructure and huge investments. Similarly, the software can also be considered as a scientific work. Therefore, the software can also be said to be information developed out of scientific experience.*

*(iii) The payment is also qualified for the use of secret formula or process. The Software of Adobe, when installed in a computer, responds to every instruction in a specific way. It recognizes the command and as per its programming, yields the desired result and reflects the same on the output devices. This argument is further strengthened from the fact that the cost of the medium, viz. Computer discs, floppies, etc., on which the programme is written is negligible as compared to the overall price of software. Had it not been a secret programming, anybody could have written these types of programs and could have sold the same at very low prices as compared to the price of the Adobe software.*

*(iv) The assessee's main argument is that there is a clear distinction between acquisition of copyright in the computer program on one hand and the acquisition of packaged software, which incorporates a copy of the copyrighted program, on the other hand. As per OTA A definition, even a partial use of the copyright by the end user will be treated as a royalty. Under the VPP Model of licensing of the appellant only single copy of software is sent to the organization and the same is copied on to numerous computers of various end users. In such licensing method, the copying rights are inherent, which are at par with*

*rights to OEM. Therefore in such method of licensing, even the copyright gets transferred. Therefore, the sale in this method of licensing is similar to OEM and is clearly taxable as royalty. Even in FPP licensing system the end user has a right to use the software to enable the user to operate the programme and to allow the user to copy the program to the user's computer hard drive. Therefore, the end user has acquired the limited rights to copy the software on its computer hard drive and the payment is towards the use of copyright of literary/scientific work. Therefore, it is immaterial whether the same is sold as shrink wrap or otherwise, the consideration for the same will still be treated as royalty. It is also immaterial whether the copying is 'infringement' under the Copyright Act or not. All the provisions of Copyright Act will not be relevant to determine the nature of payments under the DTAA or the I.T. Act. If the payment is for the use of any copyright, it will fall in the category of Royalty."*

**2.1** The assessee filed objection against the draft assessment order before the learned DRP. The learned DRP rejected the objection of the assessee and upheld the findings of the Assessing Officer in draft assessment order. Pursuant to the direction of the learned DRP, the Assessing Officer, completed assessment at total income of Rs.826,411,741/- taxable at the rate of the 10% being in the nature of the 'royalty' income.

**3.** At the outset, before us, the Ld. counsel of the assessee submitted that the Tribunal in ITA No.5433/Del/2011 for assessment year 2008-09 has deleted the addition made by the Assessing Officer treating the licensing/selling of the software as 'royalty'. He submitted that transaction being permeating from the same agreement, the transaction of licensing/selling of the software is not in the nature of the royalty under the India Ireland DTAA and thus, the addition in the year under consideration needs to be deleted.

**4.** The Ld. DR, on the other hand, relied on the order of the lower authorities, though he could not controvert the fact that Tribunal in the assessment year 2008-09 has deleted the identical addition made by the Assessing Officer.

**5.** We have heard the rival submission and perused the relevant material on record including the order of the Tribunal in ITA No. 5433/del/2011 for assessment year 2008-09. We find that the Assessing Officer in the impugned order has mentioned that the facts in the year under consideration are identical to the facts in assessment year 2008-09. The relevant part of the impugned assessment order is reproduced as under:

> *"2. The assessee is engaged in selling/ licensing of software through independent distributor to the end user. The assessment order for AV 2008-09 was passed in this case on 23.09.2011, wherein the assessee's income was assessed at Rs. 829,035,130/- taxable @10% as royalty income. The assessment order and the findings and conclusions arrived at in the assessment order were also confirmed by the Hon'bfe Disputes Resolution Panel. Accordingly, vide letter dated 11.11.2011, the assessee was asked as to whether during the subject assessment year, there was any change in the facts or in the business model from that in the immediately preceding Financial Year 2007-08 relevant to AY 2008-09. In response to this letter, vide reply dated 23.11.2011 filed on 02.12.2011, the assessee stated that there has been no change in its business model during the subject year as compared to the immediately preceding year, i.e. AY 2008-09. On similar facfs, on the basis of detailed discussion in the assessment order for AY 2008-09, the nature of payment made to the assessee was held to be royalty.*
>
> *Therefore, relying on the above, vide letter dated 11.11.2011, the assessee was asked to show cause as to why the revenue receipts from licensing of software may not be taxed as royalty income."*

**5.1** Further, we note that the Tribunal(supra) after considering detailed arguments of both the parties deleted the addition of treating the licensing of the software as royalty income, observing as under:

*"14. We have heard the rival submissions, perused the relevant findings given in the impugned orders as well as material referred to before us. The assessee Company is an Irish Tax Resident and has distributed Adobe Software Products to Indian distributors for onward sale and distribution to the customers in India. The copy of the agreements between the assessee and the Indian distributors has been placed in the paper book from pages 1 to 57. The relevant clauses of the said agreement had already been referred to while quoting from the DRP's order. However, for the sake of ready reference, relevant clauses are reiterated hereunder:-*

> ***"End User"*** *means a licensee of Software Products who acquires such products for use rather than distribution, and shall exclude distributors, Dealers, resellers, VARs, OEMs, third party vendors, systems integrators, commission agents, or other parties who have licensed tire product for distribution.*
>
> *"**End User License Agreement**" or "HULA" means Adobe's current Software Product End User license agreement for the relevant Software Product that is included with each Software Product generally in electronic form as part of a product installer.*
>
> *.....*
>
> *"**Intellectual Property"** means all intellectual property rights, similar and/or neighboring rights and sui generis rights inter alia, database protection, of whatever nature anywhere in the world and all rights pertaining thereto including but not limited to all present and future title to and/or interests therein, whether recorded or registered in any manner or otherwise, including without prejudice to the foregoing generality, trademarks and service marks and applications therefore, patents and patent applications, copyright, designs, design rights both registered and unregistered, design right applications, trade secrets, know-how, information, data, source codes and object codes, technology, specifications of materials, formulae and processes, production methods, discoveries, specifications, diagrams, research, methods of formulation, results of tests and field trials and composites of materials.*
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> *.....*
>
> *'**License Fee"** means the fee payable to Adobe by Distributor for the license for the Software Products, as notified to Distributor by Adobe from time to time. The License Fee includes the fee for the license to supply the Software Product in the Territory, which comprises the larger part of die License Fee, the remainder of the License Fee is comprised of the fee to use tangible items such as disks and documentation.*
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> *.....*

***"Software"*** *means the copy (ies) of the Adobe proprietary software in object code form.*

*"**Software Products**" means copies of the Software and tire User Documentation supplied to Distributor as shrink-wrap or TLP Products for the categories of Adobe Software listed in the License Fee Lists that arc supplied by Adobe to Distributor pursuant to this Agreement Software Products shall include TLP Products, End of Life Software Products, Upgrade Products, Unsaleable Software Products and Media."*

*.....*

*2.2* ***Nature of Appointment.*** *Subject to the terms and conditions set forth herein, Adobe hereby grants Distributor, and Distributor hereby accepts, a non-exclusive, non-transferable license to supply the Software Products in the Territory, and this shall include the right to license Dealers to supply the Software Products in the Territory. This Agreement is not to be interpreted or construed ns an agreement between Adobe and Distributor for the sale or license of the copyright in the Software Products. Distributor shall advise its Dealers and other customers that Distributor has a license to supply the Software Products but not the copyright in the Software Product. Distributor, its Dealers and customers are prohibited from duplicating, reverse engineering, selling or licensing the Software Product or the copyright in the Software Product, or using the Software Product, for any purpose other than of set out in this Agreement. Without prejudice to the foregoing, Adobe reserves the right to: deal directly in the Software Products in the Territory, including the right to license End Users directly, via Internet distribution or otherwise; License other distributors for the Software Products in the Territory; provide technical support in the Territory, and to enter into arrangements or agreements with third parties including but not limited to End Users, Dealers, OEMs, systems integrators or VARs in connection with the Software Products in the Territory.*

*2.3* ***List of Software Products****, future Adobe Software Products may be added to the License Fee List and Adobe shall use reasonable efforts to notify' Distributor within thirty (30) days of any such addition. Adobe reserves the right to discontinue the distribution or availability of any Software Product upon thirty (30) days prior notice to Distributor. If Adobe discontinues a Software Product so that it becomes an End of Life Software Product, Adobe shall provide Distributor with thirty (30) days prior notice. Returns of such End of lifc Software Products shall be governed by Clause 5.9 (New Versions). Notices by Adobe under this Clause 2.3 (List of Software Products) maybe made by Adobe's on-line sales portal at http://partners.adobe.com or similar partner communication web sites, by fax or via email.*

*2.4* ***Distribution under License.*** *Distributor agrees to use commercially reasonable efforts to: distribute tire Software Products under license in the Territory on a continuing basis, conduct its business in a manner that favourably reflects upon the Software Products and Adobe, and comply with good business practices and all laws and regulations relevant to this Agreement and its subject matter.*

*2.5* ***Anti-Piracy /Unauthorized Product Restrictions****. Distributor agrees that it will not deal in illegal copies of Adobe software products or Unauthorized Products. Adobe reserves the right to terminate this Agreement with immediate effect if Distributor is found to be dealing in illegal copies of Adobe software products or Unauthorised Products. Such termination would be without prejudice to 'adobe's other remedies if any Adobe products were involved. A breach of Clause 3.1 (Eligibility and Distribution Rights) prohibiting distribution of the Software Products outside the Territory shall also be deemed - breach of this Clause 2 5 (Anti- Piracy/Unauthorised Product Restrictions).*

*3.* ***Rights and Restrictions of Distributor.***

*3.1 Eligibility and Distribution Rights, Without prejudice to the provisions of Clause 2.2 (Nature of Appointment), Adobe grants Distributor a non exclusive, non-transferable license to distribute die Software Products in the Territory, and Distributor acknowledges dint each Software Product, including each TIP Product, is to be licensed to End Users in accordance with the terms and conditions of its current HULA. The terms of tile EULA are not negotiable end shah not be amended or modified for any End User. Distributor shall distribute die Software Products solely in the form and packaging in which they were obtained from Adobe. Distributor shall not alter die design or contents of any Software Product, or remove any item or document from the Software Product package, without Adobe's prior written approval. In addition, Distributor agrees to distribute Software Products that are "Collections" intact and not to separate any of the contents of "Collections" packages for individual distribution. Distributor agrees not to distribute the Software Products by rental or lease. Distributor shall not supply Software Products to Dealers outside the Territory, or to Dealers who Distributor knows, or by exercise of commercially reasonable efforts should know, will distribute Software Products outside the Territory. Any distribution by Distributor of Software Products outside the Territory shall be a material breach of this Agreement for which Adobe may terminate this Agreement under Clause 16.3 (Termination for Cause). Distributor is obligated to advise Dealers and other customers of this restriction, if Adobe makes Education Versions of the Software Products available to Distributor, such products are to*

*be distributed to Educational Establishments only. Distributor shall not supply Education Versions of the Software Products to customers who are not Educational Establishments, or to customers who will distribute such products to customers who are not Educational Establishments. Distributor is obligated to advise Dealers and other customers of this restriction.*

*3.2* ***Restrictions on Copying and Decompiling****. DISTRIBUTOR AGREES NOT TO TRANSLATE THE SOFTWARE INTO ANOTHER COMPUTER LANGUAGE, IN WHOLE OR IN PART. Distributor shall not make copies or make media translations of the Software Products including, without limitation, the User Documentation, in whole or in part without Adobe's prior written approval, Distributor that if, for any reason, it comes into possession of any source code, or portion thereof, for any Adobe product, not generally provided by Adobe as a part of a Software Product, it shall not use or disclose such source code and it shall immediately deliver nil copies of such source code to Adobe, Nothing contained in this Agreement shall be Interpreted so as to exclude or prejudice the rights (if any) of Distributor or any End User under the European Directive on the Legal Protection of Computer Programs (as implemented in the relevant jurisdiction) with respect to the Software Products.*

*.....*

*11.1.* ***Ownership.*** *The structure, organization and code of the Software is proprietary to Adobe, its licensors and suppliers, and the Software Products are the Intellectual Property of Adobe, its licensors and suppliers. Adobe, its licensors and suppliers retain exclusive ownership of the Intellectual Property rights vested in the Software and the Trade Marks. Distributor shall take all reasonable measures to protect the Intellectual Property rights of Adobe, its licensors and suppliers in the Software Products and the Trade Marks, including providing such assistance and taking such measures as arc reasonably requested by Adobe from time to time. Except as provided herein, Distributor is not granted any rights to any Intellectual Property or any other rights, franchises or licenses with respect to the Software, the User Documentation, die Software Products or the Trade Marks."*

*15. From a bare reading of the aforesaid clauses, it is seen that, what assessee has granted to the Indian distributors is, a non-exclusive, non-transferable license to supply the software products in the Indian Territory. There is no sale or license of the copyright in the software products albeit the distributor has license to supply product, but not the copyright in the software product. Apart from that, the distributors or its dealers or the customers are prohibited from duplicating, reverse engineering, selling or licensing the*

*software product or the copyright in the software product or using the software product for any purpose other than which has been set out in the agreement. The distributors can distribute the software solely in the form of product which has been obtained from the assessee and distributor shall not alter the design or contents of the said product. Further, the distributor is prohibited from translating the software in any other computer language in whole or in part. Thus, it is a clear cut sale of shrink-wrap software product from the assessee company to the Indian distributors and then to the end users. Now under this agreement, whether the payment received from sale of such a copyrighted software product can be reckoned as "royalty" under the India-Ireland DTAA? The relevant paragraph 3(a) of Article 12 of the said treaty 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 films 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."*

*16. The main emphasis is on payment 'for the use of or right to use any copyright of various nature, which connotes an exclusive right to use any* ***'copyright'*** *in an article which is in the nature of the terms defined therein and said use of copyright has to be given to the end user. The concept of 'copyright' first of all needs to be discerned. In a famous treatise on copyright,* ***Copinger and Skones James on copyright (1999 Edn.)*** *has defined copyright as; 'Copyright gives the owner of the copyright in a work of any description the exclusive right to authorize or prohibit the exploitation of the copyright work by the third parties. This includes the right to copy the work itself and also to use the work in other ways protected under the law'. Copyright alludes to some kind of negative right. Further passage from the same commentary is worth taking note of; 'It is important to recognize that ownership of copyright in a work is different from the ownership of the physical material in which the copyright work may happen to be embodied. Just as the owner of the physical material on which a copyright work is first recorded is not necessarily the first owner of the copyright, so the transfer of title to the original physical material does not by itself operate to transfer the title to the copyright……..' Thus, the rights associated with the copyright should be of such a nature which enables the recipients to commercially exploit the product and if such exclusive right for commercial exploitation of the product is not given, then it cannot be reckoned that 'use or right to use in a copyright' has been given by the recipient to the payer. A limited right to use a copyright product with a non exclusive license to the end user being some kind of license*

*program through the computer to the end user does not tantamount to the use of copyright or right to use the same. A distinction has to be drawn between the passing of a right to use and facilitating the use of a product for which the owner has the copyright. It is a sine qua non that some kind of enjoyment or all the rights which the copy right owner has, is necessary to trigger the concept of "royalty" as defined in the treaty. The non exclusive and non transferable license enabling the use of a copyrighted product cannot be construed as an authority to enjoy any or all of the enumerated rights ingrained in a copyright. The parting of some kind of intellectual property right inherent in and attached to the software product in favour of the licensee/customer is what has been contemplated in the phrase, use and right to use the copyright in the treaty.*

*17. Since copyright has not been specifically defined under the treaty, therefore, the courts have held that the definition as enshrined in 'Indian Copyright Act, 1957' has to be seen. The relevant section of the copyright Act reads as under:*

> *"14. **Meaning of copyright** - For the purpose of this Act, "copyright" means the exclusive right to the provisions of this Act, to do or authorize the doing of any of the following acts in respect of a work or any substantial part thereof namely;*
>
> *(a) In the case of a literary, dramatic or musical work, not being a computer programme, -*
> *i) to reproduce the work in any material form including the storing of it in any medium by electronic means;*
> *(ii) to issue copies of the work to the public not being copies already in circulation;*
> *(iii) to perform the work in public, or communicate it to the public;*
> *(iv) to make my cinematograph film or sound recording in respect of the work;*
> *(v) to make any translation of the work;*
> *(vi) to make any adaptation of the work;*
> *(vii) to do, in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in sub-clauses (i) to (vi);*
> *(b) in the case of a computer programme, -*
> *(i) to do any of the acts specified in clause (a);*
> *(ii) to sell or given on commercial rental or offer for sale or for commercial rental any copy of the computer programme;*
> *Provided that such commercial rental does not apply in respect of computer programmes where the programme itself is not the essential object of the rental];*

*The rights enshrined in the aforesaid section are exclusive in nature and anyone who carry out any of the activities as mentioned in the aforesaid section or authorizes someone else to carry any of such activity, will alone fall within the scope and definition of 'copyright'.*

*In other words, if any of these rights are parted with in favour of another so that the other person can enjoy that right in the same manner in which owner can, then it can be said that those specific rights concerning the use of copyright have been conferred on him. The nature of right which has been granted depends upon the type of work; however such activity must include the exclusive right to:*

*1) copy the work (reproduction right);*
*2) issue copies of the work to the public (distribution right);*
*3) rent or lend the work to the public (rental or lending right);*
*4) perform, show, or play the work in public (public performance right);*
*5) broadcast the work (broadcasting right);*
*6) include it in a cable-programme service (cable right);*
*7) make an adaptation of the work, or do any of the above acts in relation to an adaptation (right of adaptation);*
*8) the right to authorize others to carry out any of these activities.*

*18. Further section 51 of the Copyright Act enlists copyright in a work which shall be deemed to be infringed; and section 52 specifies the acts which do not construe infringement of copyright. For the sake of ready reference relevant portion of section 51 and 52 are reproduced hereunder:-*

*"51. When copyright infringed- Copyright in a work shall be deemed to be infringed-*

*(a) when any person, without a licence granted by the owner of the copyright or the Registrar of Copyrights under this Act or in contravention of the conditions of a licence so granted or of any condition imposed by a competent authority under this Act-*
*(i) does anything, the exclusive right to do which is by this Act conferred upon the owner of the copyright, or*
*(ii) permits for profit any place to be used for the communication of the work to the public where such communication constitutes an infringement of the copyright in the work, unless he was not aware that had no reasonable ground for believing that such communication to the public would be an infringement of copyright; or*
*when any person-*
*(i) makes for sale or hire, or sells or lets for hire, or by way of trade displays or offers for sale or hire, or*
*(ii) distributes either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright, or*
*(iii) by way of trade exhibits in public, or*
*(iv) imports into India,*
*any infringing copies of the work:*
*Provided that nothing in sub-clause (iv) shall apply to the import of one copy of any work for the private and domestic use of the importer.*

*Explanation - For the purposes of this Section, the reproduction of a literary, dramatic, musical or artistic work in the form of a cinematograph film shall be deemed to be an "infringing copy"*

*.....*

*52(a) xx xx xx xx xx xx xx xx*

*(aa) the making of copies or adaptation of a computer programme by the lawful possessor of a copy of such computer programme from such copy-*

*(i) in order to utilize the computer programme for the purpose for which it was supplied; or*

*(ii) to make back-up copies purely as a temporary protection against loss, destruction or damage in order only to utilize the computer programme for the purpose for which it was supplied;*

*(ab) the doing of any act necessary to obtain information essential for operating interoperability of an independently created computer programme with other programmes by a lawful possessor of a computer programme provided that such information is not otherwise readily available;*

*(ac) the observation, study or test of functioning of the computer programme in order to determine the ideas and principles which underline any elements of the programme while performing such acts necessary for the functions for which the computer programme was supplied;*

*(ad) the making of copies or adaptation of the computer programme from a personally legally obtained copy for non-commercial personal use. "*

*19. From the aforesaid provisions, it can be inferred that 'copyright' is not a positive right but a negative right, i.e., right to refrain others from exploiting the work without the copyright owners' consent or license. The copyright in a work remains with the copyright owner and the purchaser has not bought any part of it and he cannot lawfully enjoy any of those exclusive rights, reproduction, adaptation or the like, which ownership of the copyright preserves exclusively for the copyright owner. Purchaser may buy the copyrighted article and can use the article as he deems fit, but it does not enable him to use the article in a way which infringes the vendors' right.*

*20. Here in the present case, from the reading of the relevant clauses of the argument, it is quite ostensible that no use or right to use of a copyright in the software has been ever divested either to the distributors or to the end users. Even for the sake of argument, it is accepted that copyright has been transferred, then requirement of law is that, assignments of the copyrights has to be complied with as provided in sections 18 & 19 of the Copyright Act, which reads as under:*

*18. Assignment of copyright –*
*(1) The owner of the copyright in an existing work or the prospective / owner of the copyright in a future work may assign to any person the copyright either wholly or partially and either generally or subject to limitations and either for the whole of the copyright or any part thereof:*
*Provided that in the case of the assignment of copyright in any future work, the assignment shall take effect only when the work comes into existence.*

*(2) Where the assignee of a copyright becomes entitled to any right comprised in the copyright, the assignee as respects the rights so assigned and the assignor as respects the rights not assigned, shall be treated for the purposes of this Act as the owner of copyright and the provisions of this Act shall have effect accordingly.*

*(3) In this section, the expression "assignee" as respects the assignment of the copyright in any future work includes the legal representatives of the assignee, if the assignee dies before the work comes into existence.*

*19. Mode of assignment:*
*(1) No assignment of the copyright in any work shall be valid unless it is in writing signed by the assignor or by his duly authorised agent.*
*(2) The assignment of copyright in any work shall identify such work, and shall specify the rights assigned and the duration and territorial extent to such assignment.*
*(3) The assignment of copyright in any work shall also specify the amount of royalty payable, if any, to the author or his legal heirs during the currency of the assignment and the assignment shall be subject to revision, extension or termination on terms mutually agreed upon by the parties.*
*(4) Where the assignee does not exercise the right assigned to him under any of the other sub-sections of this section within a period of one year from the date of assignment, the assignment in respect of such rights shall be deemed to have lapsed after the expiry of the said period unless otherwise specified in the assignment.*
*(5) If the period of assignment is not stated, it shall be deemed to be five years from the date of assignment.*
*(6) If the territorial extent of assignment of the rights is not specified, it shall be presumed to extend within India.*
*(7) Nothing in sub-section (2) or sub-section (3) or sub-section (4) or sub-section (5) or sub-section (6) shall be applicable to assignment made before the coming into force of the Copyright (Amendment) Act, 1994]".*

*21. Thus, the mode of assignments should be by writing and subsection (2) of section 19 requires that the assignment of copyright*

*in any work must; identify such work; specify right assign; the duration of the assignment and the territorial extent of the assignment. In none of the agreements, it can be seen that there is any kind of assignment of copyright.*

*22. Coming to the commentary given in OECD Model Tax Convention, the relevant paragraph dealing with payment of 'royalty' are as under:-*

> *"12. Whether payments received as consideration for computer software may be classified as royalties poses difficult problems but is a matter of considerable importance in view of the rapid development of computer technology in recent years and the extent of transfers of such technology in recent years and the extent of transfers of such technology across national borders. In 1992, the Commentary was amended to describe the principles by which such classification should be made. Paragraphs 12 to 17 were further amended in 2000 to refine the analysis by which business profits are distinguished from royalties in computer software transactions. In most cases, the revised analysis will not result in a different outcome.*
>
> *12.1* ***Software may he described as a program, or series of programs, containing instructions for a computer required either for the operational processes of the computer itself (operational software) or for the accomplishment of other tasks (application software). It can be transferred through a variety of media, for example in writing or electronically****, on a magnetic tape or disk, or on a laser disk or CD-Rom. It may be standardised with a wide range of applications or be tailor-made for single users. It can be transferred as an integral part of computer hardware or in an independent from available for use on a variety of hardware.*
>
> *12.2* ***The character of payments received in transactions involving the transfer of computer software depends on the nature of the rights that the transferee acquires under the particular arrangement regarding the use and exploitation of the program.*** *The rights in computer programs are a form of intellectual property. Research into the practices of OECD member countries has established that all but one protects rights in computer programs either explicitly or implicitly under copyright law. Although the term "computer software" is commonly used to describe both the program in which the intellectual property rights (copyright) subsist and the medium on which it is embodied,* ***the copyright law of most OECD member countries recognises a distinction between the copyright in the program and software which incorporates a copy of the copyrighted program.***

***Transfers of rights in relation to software occur in many different ways ranging from the alienation of the entire rights in the copyright in a program to the sale of a product which is subject to restrictions on the use to which it is put.*** *The consideration paid can also take numerous forms. These factors may make it difficult to determine where the boundary lies between software payments that are property to be regarded as royalties and the other types of payment. The difficulty of determination is compounded by the ease of reproduction of computer software, and by the fact that acquisition of software frequently entails the making of a copy by the acquirer in order to make possible the operation of the software.*

*13. The transferees rights will in most cases consist of partial rights or complete rights in the underlying copyright (see paragraphs 13.1 and 15 below), or they may be (or be equivalent to) partial or complete rights in a copy of the program (the "program copy"), whether or not such copy is embodied in a material medium or provided electronically (see paragraphs 14 to 14.2 below) In unusual cases the transaction may represent a transfer of "know-how " or secret formula (paragraph 14.3).*

*13.1 Payments made for the acquisition of partial rights in the copyright (-without the transferor fully alienating the copyright rights) will represent a royalty where the consideration is for granting of rights to use the program in a manner that would, without such license, constitute an infringement of copyright. Examples of such arrangements include licenses to reproduce and distribute to the public software incorporating the copyrighted program, or to modify and publicly display the program. In these circumstances, the payments are for the right to use the copyright in the program (i.e. to exploit the rights that would otherwise be the sole prerogative of the copyright holder). It should be noted that where a software payment is properly to be regarded as a royalty there may be difficulties in applying the copyright provisions of the Article to software payments since paragraph 2 requires that software be classified as a literary, artistic or scientific work. None of these categories seems entirely apt. The copyright laws of many countries deal with this problem by specifically classifying software as a literary or scientific work. For other countries treatment as a scientific work might be the most realistic approach. Countries for which it is not possible to attach software to any of those categories might be justified in adopting in their bilateral treaties an amended version of paragraph 2 which either omits all references to the nature of the copyrights or refers specifically to software.*

*14. In other types of transactions, the rights acquired in relation to the copyright are limited to those necessary to enable*

*the user to operate the program, for example, where the transferee is granted limited rights to reproduce the program. This would be the common situation in transactions for the acquisition of a program copy. The rights transferred in these cases are specific to the nature of computer programs. They allow the user to copy the program, for example onto the user's computer hard drive or for archival purposes. In this context, it is important to note that the protection afforded in relation to computer programs under copyright law may differ from country to country. In some countries the act of copying the program onto the hard drive or random access memory of a computer would, without a license, constitute a breach of copyright However, the copyright laws of many countries automatically grant this right to the owner of software which incorporates a computer program. Regardless of whether this right is granted under law or under a license agreement with the copyright holder, copying the program onto the computer's hard drive or random access memory or making an archival copy is an essential step in utilising the program.* ***Therefore, rights in relation to these acts of copying, where they do no more than enable the effective operation of the program by the user, should be disregarded in analysing the character of the transaction for tax purposes. Payments in these types of transactions would be dealt with as commercial income in accordance with Article 7.***

*14.1* ***The method of transferring the computer program to the transferee is not relevant. For example, it does not matter whether the transferee acquires a computer disk containing a copy of the program or directly receives a copy on the hard disk of her computer via a modem connection.*** *It is also of no relevance that there may be restrictions on the use to which the transferee can put the Software.*

*14.2 The ease of reproducing computer programs has resulted in distribution arrangements in which the transferee obtains rights to make multiple copies of the program for operation only within its own business. Such arrangements are commonly referred to as "site licences", "enterprise licenses", or "network licences'". Although these arrangements permit the making of multiple copies of the program, such rights are generally limited to those necessary for the purpose of enabling the operation of the program on the licensee's computers or network, and reproduction for any other purpose is not permitted under the license. Payments under such arrangements will in most cases be dealt with as business profits in accordance with Article 7.*

*14.3 Another type of transaction involving the transfer of computer software is the more unusual case where a software house or computer programmer agrees to supply information about the ideas and principles underlying the program, such as logic, algorithms or programming languages or techniques. In these cases, the payments may be characterised as royalties to the extent that they represent consideration for the use of or the right to use, secret formulas or far information concerning industrial, commercial or scientific experience which cannot be separately copyrighted. This contrasts with the ordinary case in which a program copy is acquired for operation by the end user.*

*15. Where consideration is paid for the transfer of the full ownership of the rights in the copyright, the payment cannot represent a royalty and the provisions of the Article are not applicable. Difficulties can arise where there are extensive but partial alienation of rights involving:*

- *exclusive right of use during a specific period or in a limited geographical area;*
- *additional consideration related to usage;*
- *consideration in the form of a substantial lump sum payment.*

*16. Each case will depend on its particular facts but in general such payments are likely to be commercial income within Article 7 or a capital gains matter within Article 13 rather than royalties within Article 12. That follows from the fact that where the ownership of rights has been alienated in full or in part, the consideration cannot be for the use of the rights. The essential character of the transaction as an alienation cannot be altered by the form of the consideration, the payment of the consideration in instalments or, in the view of most countries, by the fact that the payments are related to a contingency."*

***[Emphasis in bold is ours]***

*22. Thus, in view of the OECD commentary also such a consideration received on the sale of copyrighted software product without any kind of transfer or assigning of fully or partially copyright therein to the end user does not amount to royalty. Such guideline of OECD can well be taken note of, since the treaty which is subject matter of consideration is India-Ireland treaty, which is based on OECD Model Convention, therefore, the interpretation of the term 'royalty' as given in the OECD Model Convention have some pervasive value. In any case, we have already held that in terms of Section 14 of the Copyright Act, none of the rights enshrined therein have been parted with the assessee in favour of the assessee or the end customer inasmuch as they can enjoy the right in the same manner in which the assessee can; and no such specific right concerning the use of copyright have been conferred by the assessee to these persons or end user. Assessee has not been given any of*

*the authority to do any of the act as contemplated in various sub clauses of Section 14. Thus, under the Indian copyright Act also, there is no passing of any kind of right to use by the assessee to the Indian distributor.*

*23. In any case, now this issue stands squarely covered by the judgment of Hon'ble Jurisdictional High Court in several cases like,* ***Nokia Networks (supra); DIT vs. Infrasoft Ltd. (supra);*** *and* ***CIT vs. Alcatel Lucent Canada, (2015) 231 taxmann 87.*** *The Hon'ble Delhi High Court in the case of DIT vs. Infrasoft have threadbare discussed this issue in the context of India-US, DTAA, which has by and large the same definition, to come to a conclusion that mere transfer of right to use copy righted material, i.e., software program cannot be taxed as 'royalty' in terms of Article 12(3). The Hon'ble High Court has also held that amendment in the domestic law even from retrospective effect cannot be rad into the treaty. The relevant observation and ratio laid down in sum and substance is summarised hereunder:-*

- *To be taxable as royalty income covered by article 12 of the DTAA the income of the assessee should have been generated by the "use of or the right to use" of any copyright.*
- *The Licensing Agreement shows that the license is non-exclusive, non-transferable and the software has to be used in accordance with the agreement. Only one copy of the software is being supplied for each site. The licensee is permitted to make only one copy of the software and associated support information and that also for backup purposes.*
- *It is also stipulated that the copy so made shall include Infrasoft's copyright and other proprietary notices. All copies of the software are the exclusive property of Infrasoft. The Software includes a licence authorisation device, which restricts the use of the Software. The software is to be used only for Licensees own business as defined within the Infrasoft Licence Schedule. Without the consent of the assessee the software cannot be loaned, rented, sold, sub-licensed or transferred to any third party or used by any parent, subsidiary or affiliated entity of Licensee or used for the operation of a service bureau or for data processing.*
- *The Licensee is further restricted from making copies, decompile, disassemble or reverse-engineer the Software without Infrasofts written consent. The software contains a mechanism which Infrasoft may activate to deny the licensee use of the Software in the event that the Licensee is in breach of payment terms or any other provisions of this Agreement. All copyrights and intellectual property rights in and to the Software, and copies made by Licensee, were owned by or duly licensed to Infrasoft.*

- *In order to qualify as royalty payment, it is necessary to establish that there is transfer of all or any rights (including the granting of any licence) in respect of copyright of a literary, artistic or scientific work. In order to treat the consideration paid by the Licensee as royalty, it is to be established that the licensee, by making such payment, obtains all or any of the copyright rights of such literary work.*
- *Distinction has to be made between the acquisition of a "copyright right" and a "copyrighted article" Copyright is distinct from the material object, copyrighted. Copyright is an intangible incorporeal right in the nature of a privilege, quite independent of any material substance, such as a manuscript.*
- *Just because one has the copyrighted article, it does not follow that one has also the copyright w it. It does not amount to transfer of all or any right including licence in respect of copyright. Copyright or even right to use copyright is distinguishable from sale consideration paid for 'copyrighted' article. This sale consideration is for purchase of goods and is not royalty.*
- *The license granted by the assessee is limited to those necessary to enable the licensee to operate the program. The rights transferred are specific to the nature of computer programs. Copying the program onto the computer's hard drive or random access memory or making an archival copy is an essential step in utilizing the program.*
- *Therefore, rights in relation to these acts of copying, where they do no more than enable the effective operation of the program by the user, should' be disregarded in analyzing the character of the transaction for tax purposes. Payments in these types of transactions would be dealt with as business income in accordance with article 7 of DTAA.*
- *There is a clear distinction between royalty paid on transfer of copyright rights and consideration for transfer of copyrighted articles. Right to use a copyrighted article or product with the owner retaining his copyright, is not the same thing as transferring or assigning rights in relation to the copyright. The enjoyment of some or all the rights which the copyright owner has, is necessary to invoke the royalty definition.*
- *Viewed from this angle, a non-exclusive and non-transferable licence enabling the use of a copyrighted product cannot be construed as an authority to enjoy any or all of the enumerated rights ingrained in Article 12 of DTAA. Where the purpose of the licence or the transaction is only to restrict use of the copyrighted product for internal business purpose, it would not be legally correct to state that the copyright itself or right to use copyright has been transferred to any extent.*
- *The parting of intellectual property rights inherent in and attached to the software product in favour of the licensee/customer is what is contemplated by the Treaty.*

*Merely authorizing or enabling a customer to have the benefit of data or instructions contained therein without any further right to deal with them independently does not, amount to transfer of rights in relation to copyright or conferment of the right of using the copyright.*

- *The transfer of rights in or over copyright or the conferment of the right of use of copyright implies that the transferee/licensee should acquire rights either in entirety or partially co-extensive with the owner- transferor who divests himself of the rights he possesses pro-tanto.*
- *The license granted to the licensee permitting him to download the computer programme and storing it in the computer for his own use is only incidental to the facility extended to the licensee to make use of the copyrighted product for his internal business purpose. The said process is necessary to make the programme functional and to have access to it and is qualitatively different from the right contemplated by the said paragraph because it is only integral to the use of copyrighted product. Apart from such incidental facility, the licensee has no right to deal with the product just as the owner would be in a position to do.*
- *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 Act or under the DTAA.*
- *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 would include Infrasoft copyright and all copies of the software would be exclusive properties of Infrasoft.*
- *Licensee was allowed to use the software only for its own business as specifically identified and was not permitted to loan/rent/sale/sub-licence or transfer the copy of software to any third party without the consent of Infrasoft.*
- *The licensee has been prohibited from copying, decompiling, de-assembling, or reverse engineering the software without the written consent of Infrasoft. The licence agreement between the Assessee Company and its customers stipulates that all copyrights and intellectual property rights in the software and copies made by the licensee were owned by Infrasoft and only Infrasoft has the power to grant licence rights for use of the software.*

- *The licence agreement stipulates that upon termination of the agreement for any reason, the licensee shall return the software including supporting information and licence authorization device to Infrasoft.*
- *The incorporeal right to the software, i.e., copyright remains with the owner and the same was not transferred by the assessee. The right to use a copyright in a programme is totally different from the right to use a programme embedded in a cassette or a CD which may be a software and the payment made for the same cannot be said to be received as consideration for the use of or right to use of any copyright to bring it within the definition of royalty as given in the DTAA.*
- *What the licensee has acquired is only a copy of the copyright article whereas the copyright remains with the owner and the licensees have acquired a computer programme for being used in their business and no right is granted to them to utilize the copyright of a computer programme and, thus, the payment for the same is not in the nature of royalty.*
- *It is not necessary to examine the effect of subsequent amendment to section 9(1)(vi) and also whether 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.*
- *The amount received by the assessee under the licence agreement for allowing the use of the software is not royalty under the DTAA.*
- *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.*
- *In view of above, it is concluded that the Tribunal was right in holding that the consideration received by the assessee on grant of licenses for use of software is not royalty within the meaning of article 12(3) of the DTAA between India and USA*

*24. The aforesaid observations and ratio as highlighted in the judgment clearly clinches the issue in favour of the assessee on the present facts. This ratio has been further reiterated in* ***Alcatel Lucent Canada {supra),*** *the relevant observation in this regard reads as under:-*

*"We have noticed, at the outset, that the ITAT had relied upon the ruling of this Court in DIT v. Ericsson A.B. [2012] 343 ITR 470/204 Taxman 192/[201 1]16 taxmann.com 371 wherein identical argument with respect to 'whether consideration paid*

*towards supply of software along with hardware - rather software embedded in the hardware amounted to royalty. After noticing several contentions of the revenue, this Court held in Ericsson A.B. {supra) as follows:—*

*'54. It is difficult to accept the aforesaid submissions in the facts of the present case. We have already held above that the assessee did not have any business connection in India. We have also held that the supply of equipment in question was in the nature of supply of goods. Therefore, this issue is to be examined keeping in view these findings. Moreover, another finding of fact is recorded by the Tribunal that the Cellular Operator did not acquire any of the copyrights referred to in Section 14 (b) of the Copyright Act, 1957.*

*55. Once we proceed on the basis of aforesaid factual findings, it is difficult to hold that payment made to the assessee was in the nature of royalty either under the Income-Tax Act or under the DTAA. We have to keep in mind what was sold by the assessee to the Indian customers was a GSM which consisted both of the hardware as well as the software, therefore, the Tribunal is right in holding that it was not permissible for the Revenue to assess the same under two different articles. The software that was loaded on the hardware did not have any independent existence. The software supply is an integral part of the GSM mobile telephone system and is used by the cellular operator for providing the cellular services to its customers. There could not be any independent use of such software. The software is embodied in the system and the revenue accepts that it could not he used independently. This software merely facilitates the functioning of the equipment and is an integral part thereof. On these facts, it would be useful to refer 10 the judgment of the Supreme Court in TATA Consultancy Services v. State of Andhra Pradesh [2004] 271 11 R 401 (SC), wherein the Apex Court held that software which is incorporated on a media would be goods and, therefore, liable to sales tax. Following discussion in this behalf is required to be noted:—*
*"In our view, the term "goods" as used in Article 366(12) of the Constitution of India and as defined under the said Act are very wide and include all types of movable properties whether those properties be tangible or intangible. We are in complete agreement 'with the observations made by this Court in Associated Cement Companies Ltd. (supra). A software programme may consist of various commands which enable the computer to perform a designated task. The copyright in that programme may remain 'with the originator of the programme. But the moment copies are made and marketed, it becomes goods, which are susceptible to sales tax. Even intellectual property, once it is put on to a media, whether it be in the form of books or canvas (In case of painting) or computer discs or*

*cassettes, and marketed would become "goods". We see no difference between a sale of a software programme on a CD/floppy disc from a sale of music on a cassette/CD or a sale of a film on a video cassette/CD. In all such cases, the intellectual property has been incorporated on a media for purposes of transfer. Sale is not just (if the media which by itself has very little value. The software and the media cannot be split lip. What the buyer purchases and pays Jar is not the disc or the CD, As in the case of paintings or books or music or films the buyer is purchasing the intellectual property and not the media i.e. the paper or cassette or disc or CD. Thus a transaction sale of computer software is clearly a sale of "goods" 'within the meaning of the term as defined in the said Act. The term "all materials, articles and commodities" includes both tangible and intangible/incorporeal property which is capable of abstraction, consumption and use and which can be transmitted, transferred, delivered, stored, possessed etc. The software programmes have all these attributes.*

*In Advent Systems Ltd. v. Unisys Corpn., (925 F. 2d 670 (3rd Cir. 1991)), relied on by Mr. Sorabjee, the court was concerned with interpretation of uniform civil code which "applied to transactions in goods", The goods therein were defined as "all things (including specially manufactured goods) which are moveable at the time of the identification for sale", It was held:*

*"Computer programs are the product of an intellectual process, but once implanted in a medium are widely distributed to computer owners. An analogy can be drawn to a compact disc recording of an orchestral rendition. The music is produced by the artistry of musicians and in itself is not a "good," but when transferred to a laser-readable disc becomes a readily merchantable commodity. Similarly, when a professor delivers a lecture, it is not a good, but, when transcribed as a book, it becomes a good.*

*That a computer program may be copyrightable as intellectual property does not alter the fact that once in the form of a floppy disc or other medium, the program is tangible, moveable and available in the marketplace. The fact that some programs may be tailored for specific purposes need not alter their status as "goods" because the Code definition includes "specially manufactured goods."*

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

*6. This Court also noticed that the 1TAT had in addition relied upon other judgment of this Court i.e. DIT v. Nokia Networks, [2013] 358 ITR 259"*

*25. Thus, in view of the aforesaid discussion and binding*

*judicial precedent of the Hon'ble Jurisdictional High Court, we hold that the nature of payment as received by the assessee from sale of Adobe Software products cannot be characterized as 'royalty', and therefore, the same is outside the purview of taxation in view of India-Ireland DTAA. Since, admittedly, assessee does not have a PE in India, therefore, such an income cannot be taxed as business income under Article 7 and further it is also not the case of the Revenue that such a payment is to be taxed as business income. Accordingly, the grounds raised by the assessee in grounds no.3 to 8 are allowed."*

**5.2** Thus, respectfully following the finding of the Tribunal, the ground Nos. 1 to 5 of the appeal of the assessee are allowed.

**6.** The ground No. 6 raised in the present appeal is in relation to credit of the withholding taxes not allowed to the assessee. In our opinion, the issue of allowing credit of withholding taxes (i.e. TDS) is issue of the verification at the hand of the learned Assessing Officer, therefore, we feel it appropriate to restore this issue to the file of the ld. Assessing Officer with the direction to allow the credit in accordance with law after verifying the documentary evidence in support of the claim of the credit filed by the assessee. It is needless to mention that the assessee shall be afforded adequate opportunity of being heard. The ground of the appeal is accordingly allowed for statistical purposes.

**7.** The ground Nos. 7 & 8 of the appeal are consequential in nature and, therefore, we are not required to adjudicate upon. Similarly, ground No. 9 of the appeal, in relation to initiation of penalty proceeding, is premature at this stage, and therefore, we are not required to adjudicate upon. The ground No. 10 of the appeal is general in nature, we are not required to adjudicate upon. Accordingly, ground Nos. 7 to 10 of the appeal are dismissed as infructuous.

**8.** In the result, the appeal of the assessee is allowed partly for statistical purposes.

***Order is pronounced in the open court on 3rd September, 2019.***

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| Sd/- | Sd/- |
| **[AMIT SHUKLA]** | **[O.P. KANT]** |
| **JUDICIAL MEMBER** | **ACCOUNTANT MEMBER** |

Dated: 3rd September, 2019.
RK/-[d.t.d.s]
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi