IN THE INCOME TAX APPELLATE TRIBUNAL
"I" Bench, Mumbai

Before Shri Pramod Kumar, Vice President
and Shri Ravish Sood, Judicial Member

ITA No. 7410/Mum/2017
(Assessment Year: 2013-14)

ITA No. 5271/Mum/2018
(Assessment Year: 2014-15)

Trimble Solutions Corporation C/0 SRBC & Associates LLP, 6th Floor., The Ruby 29 Senapati Bapat Marg, Dadar (W), Mumbai-400 028.	Vs.	Deputy Commissioner of Income Tax, Cir (IT)-(4)(1)(2), Mumbai, Room No. 1609, 16th Floor, Air India Building, Nariman Point, Mumbai-400 021.
PAN – AADCT2639Q		
(Appellant)		**(Respondent)**

Appellant by: Sh. Divesh Chawla, A.R
Respondent by: Sh. Avaneesh Tiwari, Sr. D.R

Date of Hearing: 18.06.2020
Date of Pronouncement: 30.06.2020

O R D E R

PER RAVISH SOOD, JM

The captioned appeals filed by the assessee company are directed against the respective orders passed by the A.O under Sec. 144C(13) r.w.s 143(3) of the Income Tax Act, 1961 (for short 'Act') for Assessment Years 2013-14 and 2014-15, dated Nil and 13.07.2028, respectively. As the issues involved in the captioned appeals are inextricably interlinked or in fact interwoven, therefore, the same are being taken up and disposed off by way of a common order. We shall first advert to the appeal of the assessee for A.Y 2013-14. The assessee has assailed the impugned order on the following grounds of appeal before us :

"Based on the facts and circumstances of the case, Trimble Solutions Corporation (hereinafter referred to as the' Appellant' or 'Trimble Corporation') respectfully craves to prefer an appeal against the order passed under Section 144C(13) read with Section 143(3) of the Income-tax Act, 1961 ('the Act') by the Deputy Commissioner of Income-tax (International Taxation) - 4(1)(2), Mumbai (hereinafter referred to as the 'AO') dated 16 October 2017 (received on 30 October 2017) in pursuance of the directions issued by the Hon'ble Dispute Resolution Panel - 2, Mumbai (hereinafter referred to as the 'DRP') on the following grounds:

General Ground

1. On the facts and circumstances of the case, the learned Aa has erred in determining the total taxable income of the Appellant for the subject AY at Rs 29,95,51,758/- as against 'Nil' income reported in the return of income filed by the Appellant for the subject AY;

Taxability of receipt from sale of 'off-the shelf' software amounting to Rs 28,39,87,816/- as 'Royalty'

2. On the facts and circumstances of the case, the learned At) has erred in holding that payments of Rs 28,39,87,816/- received by the Appellant towards sale of 'off-the shelf software are in the nature of 'Royalty' as per the provisions of Section 9(1)(vi) of the Act;

3. On the facts and circumstances of the case, the learned Aa has erred in holding that payments of Rs 28,39,87,816/- received by the Appellant towards sale of 'off-the shelf software are in the nature of 'Royalty' under the India-Finland Tax Treaty;

Taxability of receipt from maintenance and support services (including upgrades) amounting to Rs 57,98,262/- as 'Royalty'

4. On the facts and circumstances of the case, the learned AO has erred in holding that payments of Rs 57,98,262/- received by the Appellant towards maintenance and support services (including upgrades) are in the nature of 'Royalty' as per the provisions of Section 9(l)(vi) of the Act;

5. On the facts and circumstances of the case, the learned AO has erred in holding that payments of Rs. 57,98,262/- received by the Appellant towards maintenance and support services (including upgrades) are in the nature of 'Royalty' under Article 12 of the India-Finland Tax Treaty;

Taxability of receipt of management fees of Rs. 97,65,680/- as "Fees for Technical Services"

6. On the facts and the circumstances of the case, the learned A.O has erred in holding that the payment of Rs. 97,65,680/- received by the Appellant towards management fees are taxable as "Fees for Technical Services" under the provisions of Section 9(1)(vi) of the Act.

7. On the facts and the circumstances of the case, the learned A.O has erred in holding that the payment of Rs. 97,65,680/- received by the Appellant towards management fees are taxable as "Fees for Technical Services" under Article 12 of the India-Finland Tax Treaty.

Interest under Section 234A of the Act

8. On the facts and circumstances of the case, the learned AO has erred in upholding the levy of interest under Section 234A of the Act;

Interest under Section 234B of the Act

9. On the facts and circumstances of the case, the learned AO has erred in upholding the levy of interest under Section 234B of the Act; and

Penalty proceedings under Section 271(1)(c) of the Act

10. On the facts and circumstances of the case, the learned AO has erred in initiating penalty proceedings under Section 27I(I)(c) of the Act.

The Appellant respectfully submits that the above grounds of appeal are independent and without prejudice to each other.

The Appellant further prays that any other relief as the Hon'ble ITAT may deem fit be granted.

The Appellant craves leave to add, alter, omit or substitute any or all of the above grounds of appeal, at any time before or at the time of the appeal, to enable the Hon'ble ITAT to decide the appeal according to law."

2. Briefly stated, the assessee which is a foreign company incorporated in Finland is engaged in the business of developing and marketing specialized off-the-shelf software products which are used in industries like building and construction, energy distribution and infrastructure management. In India, the assessee markets and distributes the specialized software products to the end user customers through a distribution channel which inter alia consisted of its subsidiary. Return of income for A.Y 2013-14 was filed by the assessee company on 29.11.2013, declaring its total income at Rs. Nil. Subsequently, the case of the assessee was selected for scrutiny assessment under Sec. 143(2) of the Act.

3. During the course of the assessment proceedings it was observed by the A.O that the assessee in order to facilitate distribution of its software products in India had appointed its wholly owned subsidiary company viz. M/s Trimble Solutions India Private Limited (earlier known as Tekla India Pvt. Ltd.), vide an 'agreement' dated 28.01.2008, as its non-exclusive reseller/distributor for the Indian territory. On a perusal of the records, it was observed by the A.O that the assessee had during the year received the following payments from its distributors:

Sr. No.	Particulars	Amount
1.	Payment received for sale of off-the shelf software	Rs. 28,39,87,816/-
2.	Payment received for maintenance and support services (including upgrades)	Rs. 57,98,262/-
3.	Payment received for management fees	Rs. 97,65,680/-
	Total	**Rs. 29,95,51,758/-**

4. The assessee drawing support from the terms and conditions of its 'agreement' dated 28.01.2008 with its non-exclusive reseller/distributor for the Indian territory, viz. M/s Trimble Solutions India Private Limited (earlier known as Tekla India Pvt. Ltd.), had submitted before the A.O that it exclusively owned all the Intellectual Property Rights (IPR) in relation to the software and had merely granted the distributors the right to distribute a copyrighted article and not the copyright in the article. Accordingly, it was the claim of the assessee that the distributors did not use or had any right to use the copyright in the software programme. Referring to Article 12 of the India-Finland tax treaty, it was submitted by the assessee that the definition of the term 'royalty' therein envisaged receipt of payments of any kind as a consideration for the use of or the right to use certain specific works which could include intellectual properties (such as copyright, patents etc.) by the owner of such intellectual properties from any other person. Also, it was submitted by the assessee that the India-Finland tax treaty did not contain a definition of such intellectual properties that were included within the scope of 'royalty'. As such, it was the claim of the assessee that the software products provided to its distributors was for the purpose of resale/distribution to the end user customers for use as a 'copyrighted article' (i.e software products) and there was no right to use the copyright embedded in the software. On the basis of the aforesaid facts, it was submitted by the assessee that the amounts received from its distributor was not in the nature of 'royalty' but in the nature of sales revenue that was collected from it. It was submitted by the assessee, that for the purpose of categorizing an income from a transaction as amounting to 'royalty' what is to be seen is as to whether the transferee has the right of commercial exploitation of the Intellectual property contained therein. It was claimed that as the assessee had only granted the right to distribute the software products and not any right to reproduce or make copies of the software product, therefore, the amounts received from its distributors could not be held as 'royalty' in its hands. Also drawing support from the Copyright Act, it was submitted by the assessee that a transfer of the material object (i.e the software product) which is the subject of copyright did not necessarily involved a transfer of the copyright. Accordingly, it was the claim of the assessee that the right acquired by the transferee from the sale of the software was to use the 'copyrighted article' (i.e software product) and not the 'right to use' the copyright embedded in the software. In order to support its aforesaid claim, the assessee also relied on Para 14.4 of the OECD Commentary. As such, it was the claim of the assessee that the payments received by the assessee from its distributor for sale of a

copyrighted article did not tantamount to 'royalty' under the provisions of India-Finland tax treaty. As regards the exigibility to tax of the amounts received by the assessee from its distributors, it was submitted by the assessee that as the term 'royalty' has been defined under Article 12 of the India-Finland tax treaty, therefore, the insertion of 'Explanation 4' to Sec. 9(1)(vi) of the Act, vide the Finance Act, 2012 w.r.e.f 01.06.1976 cannot be read into the India-Finland tax treaty by resorting to Article 3 of the said tax treaty. As such, it was submitted by the assessee that the beneficial provisions of the tax treaty would be applicable as per the provisions of Sec. 90(2) of the Act. In sum and substance, it was the claim of the assessee that as per the beneficial provisions of the India-Finland tax treaty, the payments received from its distributors for sale of off-the shelf software license cannot be held to be in the nature of 'royalty' payment. However, the A.O was not persuaded to subscribe to the aforesaid claim of the assessee. On the basis of reliance placed on certain judicial pronouncements the A.O rejected the claim of the assessee that the payments for off-the-shelf software were towards sale of a "copyrighted article". It was observed by the A.O that the payments received by the assessee from its distributors were in nature of 'royalty' for certain reasons, viz. (i). that, Sec. 14 of the Copyright Act stated that transfer or use of a copyright in a computer program manifests itself in – (a). allowing the computer program to be stored on a medium by electronic means; or (b). selling or providing the computer program on commercial rental. Accordingly, the A.O was of the view that a mere grant of any right in a copyright as mentioned in Sec. 14 of the Copyright Act would suffice to fulfil the condition of clause (v) of Explanation 2 to Sec. 9(1)(vi) of the Act. It was observed by the A.O, that the acts of the assessee and the distribution under the 'agreements' to the end user customers through its distributors indicated the transfer or use of some of the copyrights as mentioned in Sec. 14 of the Copyright Act by the assessee to the distributors. Also, relying upon the Explanation 4 and 5 to Sec. 9(1)(vi), as had been made available on the statute vide the Finance Act, 2012 w.r.e.f 01.06.1976, the A.O was of the view that after the amendment it could safely be concluded that transfer of all or any rights to use a computer software (including the grant of a license) fell within the ambit of the term 'royalty' under Sec. 9(1)(vi) of the Act. Further, the A.O was of the view that the definition of 'royalty' under Article 12(3) of the India-Finland tax treaty was similar to the definition of 'royalty' under the provisions of the Act, and the insertion of Explanations 3, 4, 5 and 6 to the definition of 'royalty' under the Act had not expanded the scope of 'royalty' under the India-Finland tax

treaty. Further, the A.O observed that the doctrine of updating construction was required to be applied to the tax treaty and to the terms appearing in the tax treaty which not having been expressly defined in the treaty were to be understood with the changing environment.

5. Further, it was observed by the A.O that the assessee had also provided software upgrades, maintenance and support services with regard to its software, viz. "Trimble software" to the distributor, who in turn provided the same to the end user customer, as and where such end user customer had entered into a maintenance agreement with the distributor. It was observed by the A.O that the assessee during the year was in receipt of a payment of Rs. 57,98,262/- towards maintenance and support services (including upgrades). It was the claim of the assessee that as the payments received for software upgrades, maintenance and support services with regard to its software were not for transfer of any right in the copyright of the article, therefore, the same could not be held as 'royalty' under the India-Finland tax treaty as well as under the Act. However, the A.O rejected the aforesaid claim of the assessee. Observing, that the payments received by the assessee for maintenance and support services (including upgrades) were a part of and inextricably linked to the supply and use of the software, the A.O was of the view that the same were also in the nature of 'royalty' as per the Explanation 2 to Sec. 9(1)(vi) of the Act.

6. On the basis of his aforesaid observations, the A.O, vide his draft assessment order passed under Sec. 144C(1) r.w.s 143(3), dated 14.12.2016 being of the view that the payments received by the assessee for sale of specialized software and maintenance and support services (including upgrades) were in the nature of royalty, proposed to tax the same at 10% as per clause 2 of Article 12 of the India-Finland tax treaty.

7. The assessee objected to the additions proposed by the A.O, vide his draft assessment order passed under Sec.144C(1) r.w.s 143(3), dated 14.12.2016, before the Dispute Resolution Panel-2, Mumbai (for short 'DRP'). As regards the view taken by the A.O that the payments received by the assessee from its distributors for sale of specialized software and maintenance and support services (including upgrades) were in the nature of royalty which thus were to be taxed at 10% as per Clause 2 of Article 12 of the India-Finland tax treaty, the DRP did not find any infirmity in the same and rejected the objection of the assessee.

8. After receiving the order of the DRP under Sec. 144C(5), dated 21.09.2017, the A.O vide his final assessment order under Sec. 144C(13) r.w.s 143(3), dated Nil, therein treating the amounts received by the assessee from its distributor for sale of specialized software of Rs. 28,39,87,816/- and towards maintenance and support services (including upgrades) of Rs. 57,98,262/-, as 'royalty', therein included the same in the total income of the assessee. Apart from that, the A.O treated the management fees of Rs. 97,65,680/- received by the assessee as FTS. On the basis of his aforesaid deliberations the income of the assessee was determined at 29,95,51,758/-

9. The assessee being aggrieved with the order of the A.O under Sec. 144C(13) r.w.s 143(3), dated Nil, has carried the matter in appeal before us. The ld Authorised Representative (for short 'A.R') for the assessee at the very outset of the hearing of the appeal submitted, that he was not pressing Grounds of appeal Nos. 6 & 7. Accordingly, as per the concession of the ld. A.R the **Grounds of appeal No. 6 & 7** are dismissed as not pressed.

10. We shall now advert to the contentions advanced by the ld. A.R as regards the merits of the case. As observed by us hereinabove, the assessee which is a foreign company incorporated in Finland with its registered office at Metsanpojankuja 1, P1-02131 Esp, Finland, is engaged in the business of developing and marketing specialized software products which are used in industries like building and construction, energy distribution and infrastructure management. The assessee during the year had received the following payments from its non-exclusive reseller/distributor for the Indian territory viz. (i). M/s Trimble Solutions India Private Limited (earlier known as Tekla India Pvt. Ltd.):

Sr. No.	Particulars	Amount
1.	Payment received for sale of off-the shelf software	Rs. 28,39,87,816/-
2.	Payment received for maintenance and support services (including upgrades)	Rs. 57,98,262/-
3.	Payment received for management fees	Rs. 97,65,680/-
	Total	**Rs. 29,95,51,578-**

Observing, that the payments received by the assessee from its distributor for sale of specialized software and maintenance and support services (including upgrades) were in the nature of 'royalty' as per Article 12 of the India-Finland tax treaty, and also as per the Explanation 2 to Sec. 9(1)(vi) of the Act, the A.O/DRP had included the same in the total income of the assessee for the year under consideration.

11. The ld. A.R submitted that the solitary issue involved in the present appeal of the assessee i.e as to whether or not the payments received by the assessee from its distributor for sale of specialized software and maintenance and support services (including upgrades) could be held as 'royalty' as per Article 12 of the India-Finland tax treaty, and also as per the Explanation 2 to Sec. 9(1)(vi) of the Act, was squarely covered by the order of the Tribunal in the assessee's own case for A.Y 2010-11 (ITA No. 6481/Mum/2017) & A.Y 2011-12 (ITA No. 6482/Mum/ in Trimble Solutions Corporation Vs. Deputy Commissioner Of Income-tax, Circle (IT)(4)(1)(2), Mumbai. Dated 16.12.2019. It was submitted by the ld. A.R, that the Tribunal in its aforesaid consolidated order had after exhaustive deliberations concluded that that the amount received by the assessee from its distributors for sale of specialized software and maintenance and support services (including upgrades) cannot be held as 'royalty' under Article 12 of the India-Finland tax treaty. It was thus averred by the ld. A.R, that as the fact situation during the year under consideration remained the same, therefore, the issue was squarely covered by the aforesaid order of the Tribunal, and on the same reasoning the amount received by the assessee from its distributor for sale of specialized software and maintenance and support services (including upgrades) cannot be held as 'royalty' as per Article 12 of the India-Finland tax treaty.

12. Per Contra, the ld. Departmental representative (for short "D.R') relied on the orders of the lower authorities.

13. We have heard the authorised representatives for both the parties, perused the orders of the lower authorities and the material available on record, as well as the judicial pronouncements relied upon by them. As is discernible from the records, we find that the issue involved in the present appeal i.e as to whether the payments received by the assessee from its distributor for sale of specialized software and maintenance and support services (including

upgrades) could be held as 'royalty' as per Article 12 of the India-Finland tax treaty, and also as per the Explanation 2 to Sec. 9(1)(vi) of the Act, had came up for adjudication before the Tribunal in the assessee's own appeals for A.Y 2010-11 (ITA No. 6481/Mum/2017) & A.Y 2011-12 (ITA No. 6482/Mum/2017) viz. Trimble Solutions Corporation Vs. Deputy Commissioner Of Income-tax, Circle (IT)(4)(1)(2), Mumbai. The Tribunal after deliberating at length on the issue therein involved had in its aforesaid order, had concluded, that the amount received by the assessee from its distributors for sale of specialized software and maintenance and support services (including upgrades) cannot be held as being in the nature of 'royalty' as per Article 12 of the India-Finland tax treaty by observing as under:

"11. We shall now advert to the contentions advanced by the ld. A.R as regards the merits of the case. As observed by us hereinabove, the assessee which is a foreign company incorporated in Finland is engaged in the business of developing and marketing specialized off-the-shelf software products which are used in industries like building and construction, energy distribution and infrastructure management. The assessee during the year had received the following payments from its non-exclusive resellers/distributors for the Indian territory viz. (i). M/s Trimble Solutions India Private Limited (earlier known as Tekla India Pvt. Ltd.); and (ii). M/s DowCoMax Services India Limited :

Sr. No.	Particulars	Amount
1.	Payment received for sale of off-the shelf software	Rs. 7,81,72,583/-
2.	Payment received for maintenance and support services (including upgrades)	Rs. 2,22,46,237/-
3.	Payment received for management fees	Rs. 31,86,724/-
	Total	**Rs. 10,36,05,544/-**

Observing, that the payments received by the assessee from its distributors for sale of specialized software and maintenance and support services (including upgrades) were in the nature of 'royalty' as per Article 12 of the India-Finland tax treaty, and also as per the Explanation 2 to Sec. 9(1)(vi) of the Act, the A.O/DRP had included the same in the total income of the assessee for the year under consideration.

12. On a perusal of Article 12 of the India-Finland tax treaty, we find, that the definition of the term 'royalty' therein envisage payments received as a consideration for the use of, or the right to use certain specific works which could include intellectual properties (such as copyright, patents etc.) by the owner of such intellectual properties from any other person. For the sake of clarity, Article 12 of the India- Finland tax treaty is reproduced as under :

"ARTICLE 12

Royalties and Fees for Technical Services

1. Royalties or fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

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

3. (a) The term "royalties" as used in this article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, and films or tapes for television or radio 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, or for information concerning industrial, commercial or scientific experience,

(b) The term "fees for technical services" as used in this article means payments of any kind, other than those mentioned in articles 14 and 15 of this Agreement as consideration for managerial or technical or consultancy services, including the provision of services of technical or other personnel.

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

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

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

13. As is discernible from the records, we find, that the assessee company as per the terms and conditions of its respective 'agreements' with its non-exclusive resellers/distributors for the Indian territory, viz. (i). M/s Trimble Solutions India Private Limited, WOS of the assessee company; and (ii). M/s DowCoMax Services India Limited, had merely granted to the said distributors the right to distribute the copyrighted article (i.e software products) and not the copyright in the said article. In fact, we find that the assessee exclusively owned all the Intellectual Property Rights (IPR's) in relation to the software, viz. "Trimble software". As per the respective "agreements" entered into by the assessee with its resellers/distributors, we find, that the distributors did not use or had any right to use the copyright in the software programme. In our

considered view as the software provided by the assessee to its resellers/distributors was only for the purpose of resale/distribution to the end user customer for use as a 'copyrighted article' (i.e software product) with no right to use the copyright embedded in the software, therefore, it can safely or rather inescapably be concluded that the payments received by the assessee from its distributors were in the nature of sales revenue and not 'royalty'. On a perusal of the respective 'agreements' entered into by the assessee with its resellers/distributors the rights which were vested with them can briefly be culled out as under :

- the distributors were granted a non-exclusive license to market and distribute the software products developed by the assessee company;
- the distributors did not have a right to the source code of such software products;
- the distributors were not permitted to modify, translate or recompile, add to or in any way alter the software products including its documentation;
- the distributors were not permitted to create the source code of the software products supplied under the agreements;
- the distributors were not expressly permitted to reproduce or make copies of the software products under the agreements (except a backup copy as required by the customer);
- the distributors were not vested with any right of any nature in the Intellectual Property developed and owned by the assessee company in the software products;
- that all the trademarks and trade names which the distributors used in connection with the products supplied, remained the exclusive property of the assessee company which at all times had the title to all rights to Intellectual Property, software and proprietary information including all components, additions, modifications and updates; and
- the distributors did not have any authority to negotiate or to conclude contracts on behalf of the assessee company, act as its agent or in any way represent the assessee so as to bind it under any transaction.

As is borne from the records, the software provided by the assessee to its distributors was for the purpose of resale/distribution to the end user customers and there was no right to use the copyright embedded in the said copyrighted article (i.e software products). In our considered view, as the assessee had only granted the right to distribute the software products and not any right to reproduce or make copies of the software product, therefore, in the absence of vesting of any right of commercial exploitation of the Intellectual property contained in the copyrighted article (i.e software products) with the transferee, the amounts received by the assessee from its distributors was clearly in the nature of sales revenue and could not be held as 'royalty' in its hands. In sum and substance, we find that as the right acquired by the transferee from the sale of the software was to use the 'copyrighted article' (i.e software products) and not the right to use the copyright embedded in the software, therefore, the payments received by the assesee from its distributors could not be stamped as 'royalty' in the hands of the assessee. We also find substance in the claim of the ld. A.R that as per the Copyright Act, a transfer of the copyrighted article (i.e the software product) which is the subject of copyright would not necessarily involve a transfer of the copyright. As can be gathered from a perusal of the 'agreements' between the assessee and its distributors, the rights acquired by the transferee on the sale of the copyrighted article (i.e software products) is to use the copyrighted article and not the right to use the copyright embedded in the software. On the basis of our aforesaid observations, we are of the considered view that as the sale of the copyrighted article (i.e software products) by the assessee company cannot be regarded as a sale of copyright in the software, therefore, the payments received by the assessee on such sale of software would be its 'business income' and cannot be regarded as 'royalty' income under the provisions of India-Finland tax treaty. Our aforesaid view is fortified by the judgments of the **Hon'ble High Court of Delhi** in the case of **DIT Vs. Infrasoft Ltd. (2014) 264 CTR 329 (Del).** In

the said judgment the Hon'ble High Court had observed that the consideration received by the assessee on grant of licences for use of software is not taxable as 'royalty' within the meaning of Article 12(3) of the DTAA between India and the USA. Also, the **ITAT, Mumbai "L" Bench** in **DDIT Vs. Reliance Communications Ltd. (2018) 52 CCH 292 (Mum)** had in its recent order held, that as the payment made by the assessee was for copyrighted article i.e software and there was no transfer of copyright of the software in any manner, thus the same did not amount to 'royalty' within the definition of Article 12/13(3) of the respective tax treaties and resultantly the assessee remained under no obligation to deduct tax at source while making the remittances.

14. We shall now advert to the observations of the A.O/DRP, wherein they had through Article 3(2) of the India-Finland tax treaty tried to read the 'Explanation 4', 'Explanation 5' and 'Explanation 6' to Sec. 9(1)(vi) as had been made available in the Income-tax Act, 1961 by the legislature vide the Finance Act, 2012 w.r.e.f 01/04/1976, into the definition of 'royalty' contemplated in Article 12 of the India-Finland tax treaty. We are unable to persuade ourselves to subscribe to the aforesaid view of the lower authorities. Article 3(2) of the India-Finland tax treaty provides that as regards the application of the Agreement at any time by a Contracting State any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that State for the purposes of the taxes to which the Agreement applies. As such, if a particular term has been specifically defined in the tax treaty, then the amendment to the definition of such term under the Act would have no bearing on the definition of such term in the context of the convention, unless the tax treaty is also correspondingly amended. In our considered view, a country which is a party to the tax treaty cannot unilaterally alter its provisions. In fact, an amendment to the provision of the treaty can be made bilaterally after entertaining deliberations from both the countries who signed it. Accordingly, if there is no amendment to the provisions of the tax treaty but there is some amendment adverse to the assessee in the Act, which provision has been specifically defined in the tax treaty or there is no reference in the tax treaty to the adoption of such provision from the Act, then such amendment will have no effect on the tax treaty. On a perusal of the India-Finland tax treaty, we find, that the term 'royalty' has been defined in Article 12(3)(a). Such definition of the term 'royalty' as per the said article is exhaustive. We find that pursuant to the insertion of Explanation 4, Explanation 5 and Explanation 6 by the Finance Act, 2012 w.r.e.f 01/04/1976, no corresponding amendment has been made in the India-Finland tax treaty to bring the definition of 'royalty' therein envisaged at par with that provided under Sec. 9(1)(vi) of the Act. Accordingly, we are of the considered view that the retrospective insertion of Explanation 4, Explanation 5 and Explanation 6 to Sec. 9(1)(vi) of the Act as had been made available on the statute by the Finance Act, 2012 w.r.e.f 01/06/1976 cannot be read into the India-Finland tax treaty. Our aforesaid view is fortified by the judgment of the **Hon'ble High Court of Delhi** in **DIT vs. New Skies Satellite BV (2016) 382 ITR 114 (Del)**. In the said case it was observed by the Hon'ble High Court that no amendment to the Act, whether retrospective or prospective can be read in a manner so as to extend its operation to the terms of an international treaty. Further, it was observed that clarificatory or declaratory amendment, much less one which may seek to overcome an unwelcome judicial interpretation of law, cannot be allowed to have the same retroactive effect on an international instrument effected between two sovereign states prior to such amendment. Also, similar view had been taken by a coordinate bench of the **ITAT Mumbai "I" Bench, Mumbai** in the **ACIT (IT)- 4(1)(1), Mumbai vs. Reliance Jio Infocomm Ltd. [ITA No. 6331 to 6334/Mum/2018, dated 15/11/2019]** and the ITAT Delhi Bench 'B' in **Datamine International Ltd. Vs. Addl. DIT, Range 1, International Taxation, New Delhi [2016] 158 ITD 84 (Delhi)**. In the backdrop of our aforesaid deliberations, we are unable to persuade ourselves to subscribe to the view taken by the lower authorities that 'Explanation 4', 'Explanation 5' and 'Explanation 6' to Sec. 9(1)(vi) as had been made available in the Income-tax Act, 1961 by the

legislature vide the Finance Act, 2012 w.r.e.f 01/06/1976, are to be read into the definition of 'royalty' as envisaged in Article 12 of the India-Finland tax treaty.

15. As observed by us hereinabove, the assessee in addition to distribution of software products in India had also provided software upgrades, maintenance and support services with regard to its software to the distributors, who in turn provided the same to the end user customers who had entered into a maintenance agreement with the distributors. The assessee during the year had received an amount of Rs. 2,22,46,237/- from its distributors towards maintenance and support services (including upgrades). On a perusal of the records, we find, that the assessee would grant to its distributors a right of new official sub-release i.e a modification to a licensed software product which would incorporate the correctness and provide a functional or performance improvement. Also, the assessee would grant to its distributors a right of new official main release i.e an update to the existing software product with enhanced features, which the customers would prefer instead of buying new licensed software. Accordingly, the end user customers by entering into a maintenance agreement could access and download the updates offered by the assessee. As the payments received by the assessee towards distribution of sub-releases and main releases were also for a right to provide a copyrighted article i.e software updates, which was akin to the amounts received for distribution of the specialized off-the-shelf software products, and not for any right to use the copyright embedded in the said copyrighted article (i.e software products), therefore, the same too in our considered view cannot be construed as 'royalty' income, and would be the 'business income' of the assessee. On a similar footing, we find, that as per the distributors agreements, it was the responsibility of the distributors to resolve the end user customers queries. In case, the distributors would require assistance on issues as regards functionalities, trouble shooting and verifying error situations, the assessee would provide the same. The aforesaid queries would be resolved via e-mails or telephone calls by the employees of the assessee based in Finland. In our considered view, as the payments received by the assessee from rendering of the maintenance and support services does not fall within the scope and gamut of the definition of 'royalty' in Article 12 of the India-Finland tax treaty, therefore, the payments received by the assessee for providing such support services cannot be held as 'royalty' in the hands of the assessee.

16. In terms of our aforesaid observations, we are of the considered view that the amount received by the assessee from its distributors for sale of specialized software and maintenance and support services (including upgrades) cannot be held as being in the nature of 'royalty' as per Article 12 of the India-Finland tax treaty. Grounds of appeal Nos. 4 to 7 are allowed in terms of our aforesaid observations."

We have perused the aforesaid order of the Tribunal, and being in agreement with the claim of the ld. A.R that the issue therein involved squarely covers the issues involved in the present appal before us, respectfully follow the same. Accordingly, in the same terms, we herein conclude that that amount received by the assessee from its distributor for sale of specialized software and maintenance and support services (including upgrades) cannot be held as being in the nature of 'royalty' as per Article 12 of the India-Finland tax treaty. **Grounds of appeal Nos. 2 to 5** are allowed in terms of our aforesaid observations.

14. The **Ground of appeal No. 1** being general is disposed off in terms of our aforesaid observations.

15. The assessee has assailed the levy of interest u/ss. 234A and 234B of the Act. As the calculation of the interest liabilities would be consequential to the determining of the tax liability of the assessee, therefore, the same is being restored to the file of the A.O. **Grounds of appeal Nos. 8 & 9** are disposed off in terms of our aforesaid observations.

16. The assessee has assailed the initiation of the penalty proceedings u/s 271(1)(c), vide ground of appeal No. 10. As the said grievance of the assessee is premature, therefore the same is dismissed. **Ground of appeal No. 10** is dismissed.

17. The appeal of the assessee is partly allowed in terms of our aforesaid observations.

ITA No. 5271/Mum/2018
A.Y 2014-15

18. We shall now advert to the appeal of the assessee for A.Y 2011-12. The assesee has assailed the impugned order on the following grounds of appeal before us :

> "Based on the facts and circumstances of the case, Trimble Solutions Corporation (hereinafter referred to as the' Appellant' or 'Trimble Corporation') respectfully craves to prefer an appeal against the order passed under Section 144C(13) read with Section 143(3) of the Income-tax Act, 1961 ('the Act') by the Deputy Commissioner of Income-tax (International Taxation) - 4(1)(2), Mumbai (hereinafter referred to as the 'AO') dated 13 July 2018 (received on 24 July 2018) in pursuance of the directions issued by the Hon'ble Dispute Resolution Panel - 2, Mumbai (hereinafter referred to as the 'DRP') on the following grounds:
>
> General Ground
>
> 1. On the facts and circumstances of the case, the learned Aa has erred in determining the total taxable income of the Appellant for the subject AY at Rs 20,19,24,489/- as against 'Nil' income reported in the return of income filed by the Appellant for the subject AY;
>
> Taxability of receipt from sale of 'off-the shelf' software products and maintenance and support services amounting to Rs. 19,15,13,567/- as 'Royalty'
>
> 2. On the facts and circumstances of the case, the learned AO has erred in holding that payments of Rs 19,15,13,567/- received by the Appellant towards sale of 'off-the shelf software and maintenance and support services are in the nature of 'Royalty' as per the provisions of Section 9(1)(vi) of the Act;
>
> 3. On the facts and circumstances of the case, the learned Aa has erred in holding that payments of Rs 19,15,13,567/- received by the Appellant towards sale of 'off-the shelf software

'products and maintenance and support services are in the nature of 'Royalty' under the India-Finland Tax Treaty;

Taxability of receipt of management fees of Rs. 1,04,10,922/- as "Fees for Technical Services"

4. On the facts and the circumstances of the case, the learned A.O has erred in holding that the payment of Rs. 1,04,10,922/- received by the Appellant towards management fees are taxable as "Fees for Technical Services" under the provisions of Section 9(1)(vi) of the Act.

5. On the facts and the circumstances of the case, the learned A.O has erred in holding that the payment of Rs. 1,04,10,922/- received by the Appellant towards management fees are taxable as "Fees for Technical Services" under the India-Finland Tax Treaty.

Initiation of Penalty proceedings under Section 271(1)(c) of the Act

6. On the facts and circumstances of the case, the learned AO has erred in initiating penalty proceedings under Section 27I(I)(c) of the Act.

The Appellant respectfully submits that the above grounds of appeal are independent and without prejudice to each other.

The Appellant further prays that any other relief as the Hon'ble ITAT may deem fit be granted.

The Appellant craves leave to add, alter, omit or substitute any or all of the above grounds of appeal, at any time before or at the time of the appeal, to enable the Hon'ble ITAT to decide the appeal according to law."

19. Briefly stated, the assessee company had filed its return of income for A.Y 2014-15 on 29.11.2014, declaring its total income at Rs. Nil. Subsequently, the case of the assessee was selected for scrutiny assessment under Sec. 143(2) of the Act.

20. During the course of the assessment proceedings it was observed by the A.O that the assessee in order to facilitate distribution of its software in India had appointed its wholly owned subsidiary company viz. M/s Trimble Solutions India Private Limited (earlier known as Tekla India Pvt. Ltd.), vide an 'agreement' dated 28.01.2008, as its non-exclusive reseller/distributor for the Indian territory. On a perusal of the records, it was observed by the A.O that the assessee had during the year received the following payments from its distributor :

Sr. No.	Particulars	Amount
1.	Payment received for sale of off-the shelf software and maintenance and support services (including upgrades)	Rs. 19,15,13,567/-
3.	Payment received for management fees	Rs. 104,10,922/-
	Total	**Rs. 20,19,24,489/-**

21. The A.O, vide his draft assessment order passed under Sec. 144C(1) r.w.s 143(3), dated 14.11.2017, being of the view that the payments received by the assessee for sale of specialized software and maintenance and support services (including upgrades) of 19,15,13,567/- were in the nature of royalty, proposed to include the same in the scope of the total income of the assessee. Also, the A.O proposed to add the management fees of Rs. 1,04,10,922/- as FTS in the hands of the assessee.

22. Objections filed by the assessee before the DRP that the payments received by the assessee for sale of specialized software and maintenance and support services (including upgrades) of 19,15,13,567/- had wrongly been assessed as 'royalty' by the A.O, were however rejected by the DRP.

23. After receiving the order of the DRP under Sec. 144C(5), dated 14.06.2018, the A.O passed the final assessment order under Sec. 144C(13) r.w.s 143(3), dated 13.07.2018. The A.O included the amounts received by the assessee on sale of specialized software and maintenance and support services (including upgrades) of 19,15,13,567/-in the total income of the assessee. Apart from that, the A.O also assessed the management fees of Rs. 1,04,10,922/- received by the assessee as FTS. In the backdrop of his aforesaid deliberations the income of the assessee was assessed at a total income of Rs. 20,19,24,489/-.

24. The assessee being aggrieved with the assessment framed by the A.O under Sec. 144C(13) r.w.s 143(3), dated 13/07/2018 has carried the matter in appeal before us. It was submitted by the ld. A.R that the Grounds of appeal Nos. 4 & 5 were not being pressed. Accordingly, as per the concession of the ld. A.R the **Grounds of appeal Nos. 4 & 5** are dismissed as not pressed. As regards grounds of appeal nos. 2 & 3, it was submitted by the ld. authorised representatives for both the parties that the facts and the issues involved in the present appeal remained the same as were there before us in the appeal of the assessee for the immediately preceding year i.e A.Y 2013-14 in ITA No. 7410/mum/2017. As the facts and the issues involved in the present appeal of the assessee viz. ITA No. 5271/Mum/2018 for A.Y 2014-15 remains the same as were there before us in its appeal for A.Y 2013-14 in ITA No. 7410/Mum/2017, therefore, the order therein passed in context of the issues under consideration shall apply mutatis mutandis for the purpose of disposal of the present appeal

before us. As such, in terms of our observations recorded while disposing off the appeal of the assessee for A.Y 2013-14 in ITA No. 7410/Mum/2017, the present appeal of the assessee for A.Y 2014-15 in ITA No. 5271/Mum/2018 is partly allowed.

25. The appeal of the assessee is partly allowed in terms of our aforesaid observations.

26. Resultantly both the appeals of the assessee viz. ITA No. 7410/Mum/2017 for A.Y 2013-14 and ITA No. 5271/Mum/2018 for A.Y 2014-15 are partly allowed in terms of our aforesaid observations.

Order pronounced in the open court on 30.06.2020

Sd/-	Sd/-
(Pramod Kumar) VICE PRESIDENT	(Ravish Sood) JUDICIAL MEMBER

मुंबई Mumbai; दिनांक 30.06.2020

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**