

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D": NEW DELHI
(Through Video Conferencing)**

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

ITA No. 1185/Del/2019
Asstt. Year 2014-15

Qliktech International AB C/o Quiktech India Pvt. Ltd. No. 1 & 2, Millennia Towers 4 th Floor, Murphy Road, Bangalore Karnataka Pin 560 008 PAN AAACQ2234R	V s.	DCIT (International Taxation) Room No. 419, E-2, Dr. S.P. Mukherjee Civic Centre, JLN Marg, New Delhi 110 002.
(Appellant)		(Respondent)

Assessee by:	Shri Vishal Kalra, Advocate
Department by :	Shri Satpal Gulati, CIT(DR)
Date of Hearing	07/10/2020
Date of pronouncement	20/10/2020

ORDER

PER R.K. PANDA, AM

This appeal filed by the assessee is directed against the

order dated 1.11.2018 of Ld. CIT(A)43 New Delhi relating to assessment year 2014-15.

2. Facts of the case, in brief, are that the assessee is a company incorporated in Sweden and is engaged in the business of sale of software products and rendering information technology services. The business of the assessee includes software materialization, marketing and support of the software material Qlikview for which it enjoys all intellectual property rights such as patent, trademark and copy rights. The assessee has entered into an agreement with its subsidiary QlikTech India Private Ltd. for onward sale of shrink wrapped software to the end users/ customers in India as per the distribution / license agreement. As per the said agreement Qlik India will promote and resell QlikTech products to the end users within the prescribed territory in accordance with the terms and conditions set forth in the agreement.

2.1 The assessee filed its return of income on March 30, 2016 declaring NIL income. The AO in the draft assessment order passed on 15th December 2016 held that the entire receipts

amounting to Rs. 7,01,62,491/- from sale of software products is taxable as royalty under Article 12 of the India-Sweden Double Taxation Avoidance Agreement and u/s 9(1)(vi) of the Act. The assessee did not file any objection before the DRP but communicated that it would prefer an appeal before the Ld. CIT(A). The AO accordingly passed the draft assessment order on 27th January 2017 computing the tax @ 10% on gross receipts amounting to Rs. 7,01,62,491/- as per the DTAA.

3. In appeal, the Ld. CIT(A) upheld the action of the AO holding the receipts of royalty income being in nature of payment for use of copyright in a process and transfer of information of commercial or industrial nature.

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

1. *“The order passed by the Commissioner of Income Tax (Appeals)-43, New Delhi [“CIT(A)“] under section 250(6) of the Income-tax Act, 1961 (“the Act“) for the Assessment Year (“AY“) 2014-15, in so far as it is prejudicial to the interests of the Appellant, is bad in law and on facts.*

Treatment of the consideration as payment for use of copyright in a process and for transfer of information of commercial or industrial nature

2. *The learned CIT(A) has erred in law and on facts by treating the consideration received by the Appellant for sale of software as consideration for the sale of a process or for the transfer of information of commercial or industrial nature and therefore treating it as 'royalty' under the provisions of section 9(i)(vi) of the Act as well as under Article 12 of the India-Sweden Double Taxation Avoidance Agreement ("DTAA").*
3. *The learned CIT(A) has erred in law and on facts by stating that the sale of software by the Appellant to end-users through distributors/ re-sellers has to be treated same as the supply of software by the Appellant to the end-users directly*
4. *The learned CIT(A) has erred in law in relying on evidence (which is unverified) from the internet, some of which are only Analysts' comments.*
5. *The learned CIT(A) has erred in law and on facts in coming to*

a completely new conclusion, not canvassed by the Assessing Officer ("AO").

Without prejudice to the above -

6. *The learned CIT(A) has erred in law and on facts in concluding that the consideration received by the Appellant is for the transfer of information of commercial or industrial nature without appreciating the fact that what is being distributed is only a software, as a product, and not any commercial or industrial information as such.*

Copyright vs Copyrighted Article

7. *The learned AO and the CIT(A) have erred in law and on facts in holding that the sale of software products by the Appellant to its Indian distributors for further sale to end-users is in the nature of transfer of "copyright" and therefore taxable in hands of the Appellant as 'royalty' under the provisions of section 9(i)(vi) of the Act as well as under Article 12 of the India-Sweden DTAA*
8. *The learned AO and the CIT(A) have erred in law and on*

facts in failing to appreciate that the sale of software is in nature of sale of "copyrighted article" and not in nature of transfer of "copyright" and therefore mere transfer of a copyrighted article, without transferring the right in the copyright, shall not be held as payment towards "royalty" and consequently, cannot be taxed in the hands of the Appellant.

9. *The learned AO and the CIT(A) have erred in law and on facts in failing to appreciate that only payments made to use/acquire a right to use a copyright of a literary, artistic, or scientific work is covered within the definition of royalty and that payments made for acquiring the right to use the **product** itself without allowing any right to use the copyright in the product, patent, secret formula or process, is not covered within the scope of "royalty"*
10. *The learned AO and the CIT(A) have erred in law and on facts by not following the various rulings of jurisdictional Delhi High Court ("DHC") by stating that the same do not apply to the Appellant.*
11. *The learned AO and the CIT(A) have erred in law and on*

*facts in failing to appreciate the fact that the amendments made to section 9(l)(vi) of the Act **vide** Finance Act 2012 would be rendered inapplicable considering the beneficial provisions under the India-Singapore DTAA which have not been amended.*

12. *The learned CIT(A) has therefore erred in law by confirming the addition of Rs 69,539,924 as made by the AO on account of consideration received by the Appellant from the resellers by treating the same as 'royalty' under the provisions of section 9(i)(vi) of the Act as well as under Article 12 of the India-Sweden DTAA.*

13. *The Learned AO and the CIT(A) have therefore erred in law and on facts in concluding that the Appellant has concealed particulars of income and in initiating penalty proceedings by issuing notice under section 274 read with section 271 of the Act,*

Each of the above grounds is independent and without prejudice to the other grounds of appeal preferred by the Appellant.”

5. Ld. Counsel for the assessee did not press ground of appeal No. 1 being general in nature and ground of appeal No. 13 being consequential in nature for which Ld. DR has no objection. Therefore the above two grounds are dismissed as not pressed.

5.1 So far as the remaining grounds are concerned the Ld. Counsel for the assessee submitted that assessee is a tax resident of Sweden, therefore, in view of Section 90(2) of the Act or the DTAA whichever is more beneficial to the assessee shall apply. He submitted that since the definition of royalty provided under Article 12 of the India-Sweden DTAA is more beneficial as compared to the provisions of Section 9(1)(vi) of the Act, therefore, the DTAA shall apply. He submitted that the Tribunal in assessee's own case for the immediately preceding asstt. Year i.e asstt. Year 2012-13 and 2013-14 had held that what is being provided by Qlik India to end users is neither the copyright in the software nor the use of the copyright in the software but right to use the copyrighted material or article which is clearly distinct from the rights in a copyright. It has held that the right that is being 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. He submitted that the QlikTech Software product in question in the current year and also in the preceding assessment year is the same, He further submitted that the sale of software in the instant case cannot be held to be “use of process” or “information concerning Industrial, commercial or scientific experience” because the end users do not have any access to the source code and what is available merely for their use is software product as such and not the process embedded in it and all intellectual property rights and other rights relating to the QlikTech products at all times is the exclusive property of the assessee.

6. Referring to the decision of the Delhi Bench of the Tribunal in the case of Datemine International Ltd. Vs. ADIT reported in 48 ITR 229 he submitted that the Tribunal in the said decision has held that computer software cannot be taxed as royalty under the DTAA by treating it either as a “process” or as “information concerning commercial experience”. Referring to various other decisions he submitted that computer software cannot be taxed as royalty by treating it as a consideration for use of “process”. He accordingly submitted that sale of software

in the instant case cannot be taxed as “Royalty” in view of Article 12 of DTAA.

7. So far as ground No. 7 to 12 are concerned he submitted that the same relates to taxability of receipts from the sale of software as royalty. He submitted that assessee in the instant case has merely transferred the right to use the copyrighted article. He submitted that AO and the Ld. CIT(A) relying on the decision of Hon’ble Karnataka High Court in the case of CIT vs. Samsung Electronics Ltd. 345 ITR 494 and CIT vs Lucent Technologies vide ITA No. 168/2004 has held that sale of software is taxable as royalty. The lower authorities have held that the receipt from transfer of copyright through sale and granting of software license by the assessee to its customers in India amounts to use of copyright in the software, therefore, the same is required to be considered taxable as royalty under the provisions of DTAA and required to be taxed in India. He submitted that the consideration received by the assessee during the impugned assessment year is for sale of ‘*off-the-shelf*’/ ‘*shrink-wrapped*’ software which is in the nature of consideration for the use of a copyrighted article and not a copyright. Referring

to the decision of the Tribunal in assessee's *own case for the immediately preceding assessment years, ie, 2012-13 and 2013-14, he submitted that the Tribunal has negated the stand of the AO and has held that what has been 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. He submitted that the amendment in the DTAA unilaterally cannot be enforced, therefore, the provisions of Section 9(1)(vi) are not applicable to the instant case. Relying on various other decisions he submitted that the courts have held that in the case of sale of software the payment is towards the sale of copyrighted article and not towards the copyright and therefore, do not get covered by the definition of royalty as per the DTAA and therefore, not taxable in India. He accordingly submitted that payments received by the assessee during the subject assessment year from the sale of software would not be taxable under section 9(1)(vi) of the Act read with Article 12 of the India-Sweden DTAA.*

8. Ld. DR on the other hand strongly relied on the order of the Ld. CIT(A). He submitted that Ld. CIT(A) has distinguished the case of the assessee by highlighting that it is not a case of sale of simplicitor software. He submitted that Ld. CIT(A) using the information available in public domain found that the assessee has effectively delivered technology driven process to the end user which was secret process for the user. However, in the cited case by the Ld. Counsel for the assessee, no such distinction was highlighted. He submitted that there are two different level of processes involved in technology driven business solution. At one level, the process is in the context of the manner of writing a computer program. In simpliciter sale of software, the process is used to define the computer program and the same has been dealt with by Tribunal. However, the term “process” at other level is the technology driven process which is available for use by the end user. . The instance of supply of software is distinguishable from the delivery of complete solution where the solution is confirmed as per the specific requirements of the clients. He accordingly submitted that the order of Ld. CIT(A) being in consonance with law should be upheld and the grounds raised by the assessee should be dismissed.

9. We have heard the rival submissions made by both the sides, perused the order of the AO and Ld. CIT(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find the issue to be decided in the grounds raised by the assessee is in relation to taxability of income of the assessee M/s. Qliktech International AB on account of delivery of software to its clients in India through its resellers. We find the AO in the instant case following his order for earlier years held that receipts from the sale of software are taxable in India u/s 9(1)(vi) of the Act and Article 12 of the India Sweden DTAA. We find the Ld. CIT(A) upheld the action of the AO on the ground that the product or the application being delivered by the assessee has a scope which is far wider than an off the shelf software product. According to him the assessee is certainly offering a business solution which involves the implementation of a process and also transfer of information of commercial or industrial nature and the consideration received is precisely for this purpose. According to him the definition of Royalty within the DTAA with Sweden and also in Section 9 of the Income Tax

Act clearly provide the consideration for use of process or consideration for Industrial or commercial knowledge.

10. We find an identical issue had come up before the Tribunal in assessee's own case in the immediately preceding assessment years. We find in those two years the revenue had come up before the Tribunal challenging the order of the Ld. CIT(A) wherein he had held that receipts of the assessee from sale of software are not taxable as royalty although by selling software assessee has transferred the rights to use to software. Ld. CIT(A) in those two years have held that receipts of the assessee from sale of software are not taxable as royalty even when explanation 4 to section 9(1)(vi) of the Act clearly states that consideration in respect of transfer of all or any rights for use or right to use a computer software irrespective of the medium through which such right is taxable as royalty. We find the Tribunal after considering various decisions including the decision of Hon'ble Delhi High Court in the case of DCIT Vs Infracsoft Ltd. 264 CTR 329 and in the case of DIT Vs M/s Nokia Networks (358 ITR 259) has decided the issue as under :-

"6. In this background the points to be adjudicated would be

- a) *Whether the receipts from sale of software be treated as royalty or not.*
- b) *Whether the effect of amendment in Section 9(1)(vi) brought about by the Finance Act, 2012 can be read into the treaty or not.*

7. *We have heard the arguments of both the parties and perused the material on record.*

8. *We find from the judgment of the Jurisdictional High Court, in the case of DCIT Vs Infrasoftware Ltd. 264 CTR 329 has elaborately explained as to what constitutes licensing agreement, its exclusivity, non-transferability, as to what constitutes a copyright and how the amounts paid for transfer of copyright and amounts paid for royalty differ in connection with the Article 7 and Article 12 of the DTAA. The judgments also dealt with the licenses, copyrights, loan rent sale, sublicense, transfer of copy of software as well as royalties. The judgments also considered the decision of the Hon'ble Karnataka High Court in the case of Samsung Electronics Co. Ltd. with regard to copyright and royalty. The operative portion of the said judgment of the Hon'ble High Court of Delhi is as under:*

“85. 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 Infracsoft's copyright and other proprietary notices. All copies of the Software are the exclusive property of Infracsoft. The Software includes a licence authorisation device, which restricts the use of the Software. The software is to be used only for Licensee's own business as defined within the Infracsoft Licence Schedule. Without the consent of the Assessee the software cannot be loaned, rented, sold, sublicensed or transferred to any third party or used by any parent, subsidiary or affiliated entity of Licensee or used for the operation of a service bureau or for data processing. The Licensee is further restricted from making copies, decompile, disassemble or reverse-engineer the Software without Infracsoft's written consent. The Software contains a mechanism which Infracsoft may activate to deny the Licensee use of the Software in the event that the Licensee is in breach of payment terms or any other provisions of this Agreement. All copyrights and intellectual property rights in and to the Software, and copies made by Licensee, are owned by or duly licensed to Infracsoft.

86. The Licensing Agreement shows that the license is non-exclusive, non-transferable and the software has to be uses in accordance with the agreement. Only one copy of the software is being supplied for each site. The licensee is permitted to make only one copy of the

software and associated support information and that also for backup purposes. It is also stipulated that the copy so made shall include Infracsoft's copyright and other proprietary notices. All copies of the Software are the exclusive property of Infracsoft. The Software includes a licence authorisation device, which restricts the use of the Software. The software is to be used only for Licensee's own business as defined within the Infracsoft Licence Schedule. Without the consent of the Assessee the software cannot be loaned, rented, sold, sublicensed or transferred to any third party or used by any parent, subsidiary or affiliated entity of Licensee or used for the operation of a service bureau or for data processing. The Licensee is further restricted from making copies, decompile, disassemble or reverse-engineer the Software without Infracsoft's written consent. The Software contains a mechanism which Infracsoft may activate to deny the Licensee use of the Software in the event that the Licensee is in breach of payment terms or any other provisions of this Agreement. All copyrights and intellectual property rights in and to the Software, and copies made by Licensee, are owned by or duly licensed to Infracsoft.

87. In order to qualify as royalty payment, it is necessary to establish that there is transfer of all or any rights (including the granting of any licence) in respect of copyright of a literary, artistic or scientific work. In order to treat the consideration paid by the Licensee as royalty, it is to be established that the licensee, by making such payment, obtains all or any of the copyright rights of such literary work. Distinction has to be

made between the acquisition of a "copyright right" and a "copyrighted article". Copyright is distinct from the material object, copyrighted. Copyright is an intangible incorporeal right in the nature of a privilege, quite independent of any material substance, such as a manuscript. Just because one has the copyrighted article, it does not follow that one has also the copyright in it. It does not amount to transfer of all or any right including licence in respect of copyright. Copyright or even right to use copyright is distinguishable from sale consideration paid for "copyrighted" article. This sale consideration is for purchase of goods and is not royalty.

88. The license granted by the Assessee is limited to those necessary to enable the licensee to operate the program. The rights transferred 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.

89. There is a clear distinction between royalty paid on transfer of copyright rights and consideration for transfer of copyrighted articles. Right to use a copyrighted article or product with the owner retaining

his copyright, is not the same thing as transferring or assigning rights in relation to the copyright. The enjoyment of some or all the rights which the copyright owner has, is necessary to invoke the royalty definition. Viewed from this angle, a nonexclusive 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 coextensive with the owner/transferor who divests himself of the rights he possesses pro tanto.

90. The license granted to the licensee permitting him to download the computer programme and storing it in the computer for his own use is only incidental to the facility extended to the licensee to make use of the copyrighted product for his internal business purpose. The said

process is necessary to make the programme functional and to have access to it and is qualitatively different from the right contemplated by the said paragraph because it is only integral to the use of copyrighted product. Apart from such incidental facility, the licensee has no right to deal with the product just as the owner would be in a position to do.

91. There is no transfer of any right in respect of copyright by the Assessee and it is a case of mere transfer of a copyrighted article. The payment is for a copyrighted article and represents the purchase price of an article and cannot be considered as royalty either under the Income Tax Act or under the DTAA.

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

93. *The licensee has been prohibited from copying, decompiling, de-assembling, or reverse engineering the software without the written consent of Infracsoft. 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 Infracsoft and only Infracsoft 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 Infracsoft.*

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

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

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

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

98. *We are not in agreement with the decision of the Andhra Pradesh High Court in the case of SAMSUNG ELECTRONICS CO. LTD (SUPRA) that right to make a copy of the software and storing the same in the hard disk of the designated computer and taking backup copy would amount to copyright work under section 14(1) of the Copyright Act and the payment made for the grant of the licence for the said purpose would constitute royalty. The license granted to the*

licensee permitting him to download the computer programme and storing it in the computer for his own use was only incidental to the facility extended to the licensee to make use of the copyrighted product for his internal business purpose. The said process was necessary to make the programme functional and to have access to it and is qualitatively different from the right contemplated by the said provision because it is only integral to the use of copyrighted product. The right to make a backup copy purely as a temporary protection against loss, destruction or damage has been held by the Delhi High Court in DIT v. M/s Nokia Networks OY (Supra) as not amounting to acquiring a copyright in the software.

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

9. Since, the matter stands settled by the order of the Hon’ble High Court, we hereby uphold the Id. CIT (A) observation that the right to use granted through licensing of a software does not fall within the meaning of “Royalty” as provided for in the domestic law or the DTAA. Any consideration for the same is not taxable as Royalty under section 9(1)(vi) or the relevant DTAA. Thus what has been transferred by the appellant 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.

10. Regarding the applicability of amendment in Section 9(1)(vi) brought out by Finance Act, 2012, we find that this issue of applicability has been examined in the case of DIT Vs New Skies Satellite BV by the Hon'ble Delhi High Court in ITA 473/2012. The Hon'ble Court observed that the only manner in which change in position of the provisions of the treaty can be relevant only if such change is incorporated into the agreement itself and not otherwise. A change in executive position cannot bring about a unilateral legislative amendment into a treaty concluded between two sovereign states. It is fallacious to assume that any change made to domestic law to rectify a situation of mistaken interpretation can spontaneously further their case in an international treaty. Therefore, mere amendment to Section 9(1)(vi) cannot result in a change. It is imperative that such amendment is brought about in the agreement as well. The Hon'ble High Court's observation is relevant to the instant case with regard to the amendment to the Act even though the judgment was given in the case of

determination of royalty of payment of transponder fee, it adequately dealt with the issue of Section 9(1)(vi). The relevant extract of the said order read as under:

“74. Even when we look into the matter from the standpoint of Double Taxation Avoidance Agreement (DTAA), the case of the appellant gets boost. The Organization of Economic Cooperation and Development (OECD) has framed a model of Double Taxation Avoidance Agreement (DTAA) entered into by India are based. Article 12 of the said model DTAA contains a definition of royalty which is in all material respects virtually the same as the definition of royalty contained in clause (iii) of Explanation 2 to Section 9(1) (vi) of the Act. This fact is also not in dispute.

77. The Tribunal has discarded the aforesaid commentary of OECD as well as Klaus Vogel only on the ground that it is not safe to rely upon the same. However, what is ignored is that when the technical terms used in the DTAA are the same which appear in Section 9(1)(vi), for better understanding all these very terms, OECD commentary can always be relied upon. The Apex Court has emphasized so in number of judgments clearly holding that the well-settled internationally accepted meaning and interpretation placed on identical or similar terms employed in various DTAAAs should be followed by the Courts in India when it comes to construing similar terms occurring in the Indian Income Tax Act.....

59. On a final note, India’s change in position to the OECD Commentary cannot be a fact that influences the interpretation of the words defining royalty as they stand today. The only manner in which such change in position can

be relevant is if such change is incorporated into the agreement itself and not otherwise. A change in executive position cannot bring about a unilateral legislative amendment into a treaty concluded between two sovereign states. It is fallacious to assume that any change made to domestic law to rectify a situation of mistaken interpretation can spontaneously further their case in an international treaty. Therefore, mere amendment to Section 9(1)(vi) cannot result in a change. It is imperative that such amendment is brought about in the agreement as well. Any attempt short of this, even if it is evidence of the State's discomfort at letting data broadcast revenues slip by, will be insufficient to persuade this Court to hold that such amendments are applicable to the DTAAAs."

11. From the above judgment, it can be concluded that the amendment in the DTAA unilaterally cannot be enforced, hence, the provisions of Section 9(1)(vi) are not applicable to the instant case. The contention of the Assessing Officer cannot be upheld.

12. In the result, both the appeals of the revenue are dismissed."

11. Since the facts of the instant assessment year are identical to the facts of the two preceding assessment years decided by the Tribunal in assessee's own case, therefore, respectfully following the decision of the coordinate bench of the Tribunal we set aside the order of the Ld. CIT(A) and hold that consideration received by the assessee for sale of software cannot be treated as royalty under the provision of section 9(1)(vi) of the Act as well as Article

12 of the India-Sweden DTAA and that the sale of software products by the assessee to its Indian distributors for further sale to end users is not in the nature of transfer of “copyright” and therefore not taxable in the hands of the assessee as “royalty” under the provision of section 9 (1)(vi) of the Act as well as Article 12 of the India-Sweden DTAA.

12. The grounds raised by the assessee are accordingly allowed.

13. In the result the appeal filed by the assessee is partly allowed.

Order pronounced on 20th October, 2020.

sd/-

sd/-

**(SUCHITRA KAMBLE)
JUDICIAL MEMBER**

**(R.K. PANDA)
ACCOUNTANT MEMBER**

Dated: 20/10/2020

Veena

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi