# IN THE INCOME TAX APPELLATE TRIBUNAL
# MUMBAI BENCH "I",MUMBAI

## BEFORE SHRI VIKAS AWASTHY(JUDICIAL MEMBER)
## AND
## MS. PADMAVATHY S. (ACCOUNTANT MEMBER)

I.T.A. Nos.1333,1591 & 1592 /Mum/2021
(Assessment years : 2013-14, 2015-16 & 2016-17)

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| Assistant Commissioner of Income Tax (IT)-3(1)(1), Mumbai<br>Room No.1634, 16th Floor, Air India Building, Nariman Point, Mumbai-400 021 | vs | M/s Juniper Networks International B.V., C/o Dhruva Advisors LLP<br>101 & 1102, One India Bulls Centre, Tower 3B, 841, Senapati Bapat Marg, Elphinstone Road (W),<br>Mumbai-400 013<br>**PAN : AADCJ0974G** |
| **ASSESSEE** | | **RESPONDENT** |

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| Present for the Assessee | Shri J.D. Mistri & Vijay Mehta a/w Ms. Asmita Dsouza, Prachi Mehta, Mr. Sandeep Bhalla |
| Present for the Department | Shri Sandeep Raj (CIT – DR) |
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| Date of hearing | 10/08/2023 |
| Date of pronouncement | 26/09/2023 |

**O R D E R**

**Per Padmavathy S (AM)**

These three appeals of the Revenue are against the different orders of the Commissioner of Income-tax (Appeals)-57, Mumbai, dated 16/02/2021 for A.Y. 2015-16 & dated 18/06/2021 for AY 2013-14 and A.Y. 2016-17.

2. The common issue contended in all the appeals is the deletion of addition made by the Assessing Officer towards the income received by the assessee is in the nature of royalty and Fees for Technical Services. Since the issue contended is common, these appeals were heard together and disposed of by this common order.

3. The assessee is a company incorporated in the Netherlands and is a tax resident of Netherlands. Juniper Netherland is in the business of selling networking equipments and providing maintenance service (AMS). The networking equipments are sold through the third party distributors or value added resellers (collectively referred to as channel partners. The assssee is a licensed resale distributor for Juniper Networks equipments in 130 countries in Europe, the Middle East, African Region, Asia Pacific and Japan Region. The assessee is also engaged in providing Juniper Services with respect to Juniper Network equipments. The assessee enters into contract with Juniper Network third party contract, manufacturers based in Mexico, Malysia, Taiwan, China and USA for manufacturing of Juniper Network equipments which are distributed across various regions. The assessee renders Juniper Services in relation to the Juniper Network equipments sold to support service specialists (SSS) in Africa and Asia Pacific Region under the Support Service Specialists Agreement (SSSA). Juniper Services are provided to the SSS as per the terms and conditions mentioned in the Juniper Service Contract. Under the SSSA, SSS procures Juniper Services from the Assessee and provides Service Offerings to its customers (i.e. the end users of Juniper Networks equipments) in India. Under the SSS, the Assessee may also provide software update releases. The software update is governed by the End User

License Agreement ('EULA '). As per the EULA, there is no sale or transfer or conveyance of any right, title, or interest in the software to the SSS.

**ITA No.: 1333/Mum/2021 – A.Y. 2015-16**

4. The assessee, for the assessment year 2015-16 filed the return of income on 30/11/2015 declaring a total income of Rs.6,59,00,040/-. Further, the assessee revised its return on 14/07/2016 declaring total income at Rs.1,21,77,09,650/- for the reason that due to clerical error, the income received from support services specialists was not entered in the return of income. The return was selected for scrutiny under CASS and the statutory notices were duly served on the assessee. The Assessing Officer, during the course of assessment called on the assessee to furnish the details pertaining to the support services income received by the assessee. The assessee filed a detailed note with respect to the business activities. The assessee also furnished a copy of SSSA that the assessee entered into with SSS. The Assessing Officer, after analyzing the various clauses of the said agreement held that the income received by the assessee is in the nature of 'fees for technical services'. The assessee submitted before the Assessing Officer that the income received is exempt under clause 12 of the DTAA entered into between India and Netherlands, since the assessee, while rendering the services does not make available any technical knowledge to SSS and, therefore, not taxable in India. However, the Assessing Officer did not accept the submissions of the assessee and proceed to treat the income as FTS on account of the following basis:-

(1) The nature of services rendered are in the nature of consultancy services and there is no technology or technical expertise available or transferred by the assessee. Thus, the principle of 'make available' are not applicable;

(2) Without prejudice to the above, it is stated that knowledge being made available to the SSS under the SSSA which enables them to solve the problem on their own account.

5. The Assessing Officer further held that the payment made by the SSS to the assessee for Juniper Services are in the nature of royalty as per clause 12(5) of India Netherlands DTAA and thus, the clause with respective services being ancillary and subsidiary to the application or enjoyment of the right, property or information which is in the nature of royalty is applicable in the current case and accordingly, the same is taxable in India. The Assessing Officer also contended that the nature of services rendered by the assessee are covered by the definition of 'royalty' under section 9(1)(vii) of the Income-tax Act ('the Act') and liable to be taxed as per the provisions of the Act. The Assessing Officer further analysed the nature of services in the light of taxability under India Netherlands DTAA and held that –

- *There is no material difference between the provisions of the Act and the India- Netherlands DTAA with respect to definition of the term 'Royalty'.*
- *The retrospective amendment made in the Act vide Finance Act 2012 are required to be considered while interpreting the meaning of the term 'Royalty'as per the provisions of the India-Netherlands DTAA.*
- *The Assessee has given SSS (i) access and user rights in the software embedded in the Juniper Networks equipments for performing the Juniper Services; and (ii) access to troubleshooting software to the SSS which assists the SSS in resolving problems faced by the end users related to Juniper Networks equipments;*
- *Software program is a 'literary work' and its manifestation has to be understood in the context of literary work only;*
- *Grant of access to software/software application to SSS for use is akin to allowing commercial exploitation of the copy of the software application program*

*- Alternatively, it is observed by the AO that software/ software application is a property similar to', 'patent', 'invention', design', 'process', 'trademark', 'secret formula'.*

6. The CIT(A) held that the payments received by the assessee would fall within the definition of FTS and Royalty under the Act. However the CTI(A) held that the payment received are not within the purview of India-Netherlands DTAA definition of FTS and Royalty. The final findings of the Ld.CIT(A) allowing the appeal in favour of the assessee are extracted below:-

***"5. Final Findings:***

***Ground** No. **1:** It can be summarized that the assessee basically sells Juniper Networks equipments and also provides services to the users of these equipments. The services to end user is provided through SSS. For each user, separate AMC is signed.*

*The working of assessee can be compared with the sale of computer where software are uploaded on the computer. For any problem in the computer, the seller enters into an agreement with the buyer through AMC. Whenever the buyer has any problem he can access the software online and troubleshoot the problem. In some cases, the buyer does the same through the vendor or vendor's engineers. The engineers, of the vendor, contacts the engineers of the manufacturer online or telephonically to dissolve the issue. In such case, if the manufacturer of computer is situated outside India, whether the services provided by it through vendor can be treated as FTS / Royalty?*

*In my opinion, selling of software embedded in the hardware and trouble-shooting tools available online cannot be treated as Royalty. Similarly, in the case of FTS the services rendered by manufacturer are technical in nature. However, as the secret process or formula is not shared with the vendor, therefore the condition of "make available" as per DTAA is rot satisfied.*

*The assessee's case is almost identical to the above example.*

*Considering the above, I am of the opinion that payment received by the assessee from SSS is neither Royalty nor FTS as per the DTAA provisions between India and Netherland.*

*This ground of appeal is allowed."*

7. Aggrieved, the Revenue is in appeal before the Tribunal. The Ld.DR submitted that it is the channel partners, who render the services to the end-users based on the knowledge made available to them by assessee. The Ld.DR drew our attention to para 5.2 of AOs order in which the AO has given a detailed finding by analyzing the various clauses of the agreement entered into by the assessee with SSS. The Ld.DR submitted that the solutions to the problems that may arise in the Juniper Network Equipments are available to SSS through customer Service Centre (CSC) and the payments are made towards the use of this software programmes and, therefore, should be treated as royalty or FTS payments. These software applications that is, operating manuals / technical literature which is made available to SSS helps the SSS to solve the issues that may arise while using the Juniper Network equipments. The Ld.DR submitted that this knowledge bank made available exclusively for use by SSS and uses confidential data. The Ld.DR further submitted that services are rendered by SSS to the end-users using the technical knowledge made available to them by the assessee. The Ld.DR also submitted that the assessee periodically updates the knowledge bank whenever any new issues arise that might have been escalated by SSS to the assessee and SSS use the updated knowledge bank for resolving similar problems going forward. Therefore, the Ld.DR submitted that the knowledge is periodically made available to SSS and, therefore, the income received by the assesse is in the nature of FTS. With regard to the income being taxable for the reason that it is in the nature of royalty, the Ld.DR submitted that the CIT(A) has given a finding that the income received is in the nature of royalty under the provisions of section 9(1)(vii) of the Act but has given relief stating that the receipt does not fall within the definition of 'Royalty' under DTAA. However, the Assessing Officer has analysed the clauses of DTAA and has given a categorical finding that there is no material difference

between the provisions of the Act and the DTAA and, therefore, the income is taxable in India as the same is in the nature of royalty. Thus, the Ld.DR relied on the order of the Assessing Officer.

8. The Ld.AR, on the other hand, submitted that the assessee while supplying the networking equipments also provides only maintenance contracts which is part and parcel of the hardware supplied. The Ld.AR drew our attention to the various clauses in the agreement (SSSA) wherein it is stated that the issues that arose while using Juniper Network equipment depending on the criticality be escalated to Juniper Engineers who would intervene and solve the problems. The Ld.AR submitted that as per the terms of agreement, it is only the basic issues which does not require any expert knowledge are only handled by SSS and any issues which requires technical knowledge are escalated to Juniper Engineers, who resolve the issues. The Ld.AR drew our attention to the clause in the agreement where it is stated that depending on the criticality of the issue, the timeline agreed between assessee and SSS for solving the terms. The Ld.AR also drew our attention to clause in the agreement which states that each issue will be assigned a ticket, which will be approved by SSS and the Juniper Engineers would periodically update the status of resolution to SSS. The Ld.AR submitted that as per the agreement, it is the Juniper Engineers, who ultimately resolve the issue and the SSS co-ordinates the problem solving process between the end-user and the Juniper Engineers. The Ld.AR submitted that the AMC is taken by SSS year on year basis, which goes to prove the fact that no technical knowledge is made available to SSS and that such reason why the maintenance contracts are renewed year after year.

9. The Ld.AR also drew our attention to the finding of the CIT(A) where it is held that the amount received by the assessee for access to the on-line support for trouble shooting cannot be regarded as consideration for the transfer of any copyright. The Ld.AR further submitted that what SSS received is only the right to use the copyrighted process which does not fall within the definition of 'Royalty' as per DTAA. The Ld.AR also drew our attention to the decision of the co-ordinate bench in assessee's own case for A.Y. 2014-15 where the department has initiated revisionary proceedings under section 263 of the Act for the reason that the income received is in the nature of Royalty / FTS which has not been assessed to tax by the AO and to that extent, it is erroneous and prejudicial to the interest of the revenue. The Ld.AR submitted that the co-ordinate bench, while quashing the revisionary proceedings under section 263 has also given a finding that the services rendered by the assessee does not make available any technical services and thus, the services are not taxable under Article 12 of India Netherlands DTAA. The facts being identical for the year under consideration, the Ld.AR submitted that the ratio laid down by the co-ordinate bench in assessee's own case are clearly applicable to the year under consideration and on that ground also, the income is not taxable in India. The Ld.AR further relied on the decision of the co-ordinate bench in the case of M/s. Murex Southeast Asia Pvt. Ltd.vs DCIT ITA No.2338/Mum/2022 dated 08/05/2023 and also the decision of the Delhi Bench of the Tribunal in the case of Amazon Web Services Inc. vs ACIT in ITA Nos 522 & 523/Del/2023 dated 01/08/2023. The Ld.AR submitted that with regard to the contention of the Assessing Officer that the income received is in the nature of royalty, the CIT(A) has analysed the definition of 'royalty' as per the clauses of DTAA and has given a clear finding that the income received does not fall within the definition.

10. The Ld.DR, to counter the above argument, submitted that the assessee does not enter into service directly to the end-users, but only through SSS. The Ld.DR further argued that all the technical information with regard to the various issues that may arise in the Juniper Network Equipments are made available to SSS, which is having an exclusive access and, therefore, the knowledge has been made available to SSS. The Ld.DR also argued that the CIT(A) did not give any finding with regard to the last limb of the definition of 'royalty' as defined in the DTAA and the Assessing Officer has treated the income under the last limb as royalty. Accordingly, Ld.DR reiterated that the income received by the assessee from SSS is in the nature of royalty / FTS and the CIT(A) is not correct in treating the same as exempt.

11. We heard the parties and perused the material on record. The case of the Assessing Officer is that the services rendered by the assessee are in the nature of "Royalty" since the assessee has allowed SSS to use the software embedded in the network equipment and also the access to troubleshooting software to the SSS which assists the SSS in resolving problems faced by the end users related to Juniper Networks equipments. According to the Assessing Officer, software program is a "literary work" or alternatively software "is a property similar to', 'patent', 'invention',, design', 'process', 'trademark', 'secret formula'. While holding so the Assessing Officer stated that there is no material difference between the Act and DTAA when it comes to the definition of the term "Royalty" and accordingly the service fees received by the assessee is taxable in India as Royalty.

12 The CIT(A) held that the services rendered by the assessee are covered by the definition of "Royalty" under section 9(1)(vi) of the Act, and accordingly is liable to be taxed in India as per the provisions of the Act. However, the CIT(A)

held that payments made for the services rendered does not fall within the definition of "Royalty" as per the provisions of DTAA between India and Netherlands and accordingly gave relief to the assessee.

13. Therefore before proceeding further we will look at the definition of "Royalty" as per India-Netherlands DTAA. Royalty has been defined in Article 12(4) of the India-Netherlands DTAA as follow -

> *"4. 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, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience."*

14. In other words, 'Royalty' as per India-Netherlands DTAA means payments for the use of, or right to use:

- any copyright of a literary, artistic., or scientific work;
- any patent, trade mark, design or model, plan, secret formula or process; or
- for information concerning industrial, commercial or scientific experience.

15. Though there is no dispute with regard to the finding of the CIT(A) that the service fees received falls within the meaning of "Royalty" under the Act with the retrospective amendment to section 9(1)(vi), whether the definition of "Royalty" under the Act can be read into DTAA needs to be examined. It is a settled position that the definition of 'Royalty' as stated under the Act and under the DTAA are not parimateria with each other. Therefore the definition of royalty under DTAA has to be given the meaning as contained in the Article itself and no other meaning should be looked upon.

16. In the light of the above legal position we will recapitulate the nature of service rendered by the assessee to SSS from the submissions made by the ld AR in this regard.

> The Assessee is a licensed buy/sell distributor for Juniper Networks' equipments in 130 countries in Europe, the Middle East and Africa region ('EMEA') and the Asia Pacific and region ('APAC'). The Assessee is also engaged in providing Juniper Services with respect to Juniper Networks equipment. The Assessee enters into contracts with Juniper Network's third-party contract manufacturers for manufacturing of Juniper Networks equipment which are distributed in EMEA region and APAC region. The Assessee renders Juniper Services in relation to the Juniper Networks equipments sold to the SSS in the EMEA and APAC region under the SSSA. Juniper Services are provided to the SSS as per the terms and conditions mentioned in the Juniper Services Contract. Under the SSSA, SSS procures Juniper Services from the Assessee and provides Service Offerings to its customers (i.e. the end users of Juniper Networks equipments) in India. Under the SSS, the Assessee may also provide software update releases. The software update is governed by the End User License Agreement (EULA'). As per the EULA, there is no sale or transfer or conveyance of any right, title, or interest in the software to the SSS. The key Juniper Services provided by the assessee to the SSS under the SSSA include the following;
>
> - Juniper Networks Technical Assistance Centre ('JTAC')
> - Online support [i.e. through Customer Services Centre ('CSC')]
>
> **<u>Juniper Networks Technical Assistance Centre ('JTAC')</u>**
>
> JTAC is the focal point of contact for post sales technical and network-related questions with respect to Juniper Networks' equipments. JTAC provides support to the SSS to enable them to reserve critical/priority/time sensitive issues raised by the

end users by providing access to JTAC engineers (through phone and online). Where the query is time sensitive in nature or a query which cannot be solved through Online support (i.e. through the CSC), the SSS are requested to contact (through phone or online) *JTAC engineers are based globally to help diagnose the system problems (such as configuration, troubleshooting, and providing work-around solutions) of the end users*. Service request with JTAC are raised by the SSS either through phone or online. Once a service request has been opened, the SSS are kept updated on the progress status of the query via e-mail.

The process to be followed by the JTAC engineer once a service request has been initiated with Juniper Networks equipment is as follows:

- Take ownership of the service request
- Begin troubleshooting, diagnostics, and problem replication as appropriate
- Provide the SSS with periodic updates on problem status and escalate the problem as required according to escalation management guidelines
- Where required, generate a product replacement request in case of defective product (a Return Materials Authorization ('RMA') is issued and the Juniper Network equipment is replaced)
- Close the service request once the problem has been resolved.

**Online support (through CSC)**

Where the queries are general/routine in nature and are not time sensitive, SSS are requested to go through the Online support (i.e. through the CSC). The Offerings on the CSC include, but not limited to, the following:

**Educational base:** Provides information on the EULA, status of service requests raised through the JTAC, FAQs, etc

**Downloads:** Contains tools for troubleshooting general error messages, contains latest software releases

**Support:** Contains product specifications, expiry date of Juniper Networks equipments

**Community:** Contains blogs by SSS/end users, discussion forums

**Security Advisory:** Provides known security vulnerability issues to help avoid network

17. In summary, the general / routine issues in the Juniper Network equipments are resolved by SSS by using the online support service and time bound/critical issues are resolved through JTAC where SSS plays the role of the intermediary coordinating with JTAC team until resolution. The contention of the Assessing Officer is that the assessee allows SSS to use the software embedded in the networking equipment and the software tool used for trouble shooting and therefore the fees received is towards royalty. It is important to note here that the software embedded in the Juniper Networking Equipment which is allowed to be used is governed by the End User License Agreement (EULA) and during the course of hearing the ld AR drew our attention to the relevant clauses in EULA wherein it has been stated that nothing in the agreement constitutes a sale or transfer or conveyance of any right, title or interest in the software.

*"2. License Grant.*
*a. Subject to the terms and conditions of this Agreement, including, without limitation, this EULA, Juniper grants You a non-exclusive and non-transferable license, with no right to grant any sublicense. to use, solely during the License Term, (i) the Software, and (ii) each Update made available as part of Maintenance Service contracted for such Software license or Juniper Platform (for Embedded Software Licenses and its associated Feature Set Licenses), for up to the Licensed Units. Each Update, if any, shall be subject to the same terms and conditions as the Software to which such Update pertains,*
*.....*
*4. License Restrictions.*
*....*
*d. You may not sublicense, transfer, or assign, whether voluntarily or by operation of law, any right or license in or to the Software to any other person or legal entity, including an Affiliate, even if You transfer title to the Juniper Platform or when a lease to any Juniper Platform ceases. Any such attempted sublicense, transfer, or assignment shall be void. Title to Juniper Platforms may only be transferred after the deletion of the Software from such Juniper Platform. Transferred Juniper Platforms and subsequent sofhvare licensing are subject to the Service and Support Inspection and Reinstatement Policy that can be accessed at https://support. juniper. net/support/pdffguidelines/990222.pdf.*
*.....*

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*j. In the limited event that licensed Software includes source code, such source code is provided for reference purposes only unless expressly licensed otherwise by Juniper, or its/to*

*9. Ownership.*

*Juniper and Juniper's licensors, respectively, retain exclusive ownership of all right, title, and interest of all intellectual property and any and all other legal rights in and to the Software. Nothing in this Agreement constitutes a sale or other transfer or conveyance of any right, title, or interest in the Software. For the sake of clarity, the Software is licensed pursuant to the terms and conditions of this Agreement, including, without limitation, this EULA, and not sold.*

18. From the perusal of the above it is clear that the assessee retains exclusive ownership of all right, title, and interest of all intellectual property and all other legal rights in the software and that nothing in EULA constitutes a sale or other transfer or conveyance of any right, title, or interest in the software. Therefore we

see merit in the contention that except the right to use the Software embedded on the hardware, there is no other rights being transferred to the SSS.

19. Next we will look at the issue of whether the payment for troubleshooting software would be "royalty". We notice that SSS is provided access to Online support (i.e. through the CSC) wherein access is provided to product specifications, FAQs, status of service requests raised on JTAC, operating manuals, software updates, blogs, discussion forums, troubleshoot tools for resolving general error messages, etc. The ld AR in this regard submitted that the grant of access to the online support only entitles the licencee a non-exclusive user right in the said products which are hosted on the Online support (through the CSC), i.e., for its internal business purposes, with no right to commercially exploit the same. The contention of the Assessing Officer is that the 'software/ software application' [i.e. troubleshooting application and license of software] are in the nature of 'Copyright of literary work' and thus the payment which is received as consideration for the use of or the right to use the same are taxable as "Royalty' as per the India-Netherlands DTAA. It is therefore relevant to examine the term copy right as per section 14 of the Copyright Act which is extracted below –

> *"14. Meaning of copyright — For the purposes of this Act, 'copyright' means the exclusive right subject 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 from including the storing of it in any medium by electronic means;*
> >
> > *(ii) to issue copies 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 any 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-cls, (i) to (vi);*
*(b). in the case of a computer programme-*

*(i) to do any of the acts specified in cl (a);*
*(ii) to sell or give 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 compute programmes where the programme itself is not the essential object of the rental. ....."*

20. In the light of the above definition, when look at the SSSA, we notice that the SSSA entered into by the assessee with SSS provides that the software provided as part of Juniper Services is governed by the EULA (relevant extract reproduced in the earlier part of this order) wherein it has been stated that nothing in the agreement constitutes a sale or transfer or conveyance of any right, title or interest in the software. This would mean that there is no transfer of legal title in the copyrighted article and that all rights, title and interest in the online support (i.e. through the CSC) for troubleshooting / licensed software, are the exclusive property of the assessee. Further SSS does not have the authority to reproduce the software in any material form, to make any translation in the software or to make any adaptation in the software. In this regard we notice that the Hon'ble Delhi High Court in the case of DIT v Infrasoft Ltd [2013] 264 CTR 329 has considered a similar issue of payment towards use of software being treated as "royalty". The Hon'ble High Court observed the distinction between the use of copyright and the use of copyrighted article / literary work by holding that –

*"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 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 analyzing the character of the transaction for tax purposes. Payments in these types of transactions would he dealt with as business income in accordance with Article 7.*

*89. There is a clear distinction betweeen Royaltv 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 the copyright, is not the same thing as transferring or assigning rights in relation to the copyright. The environment 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 (hat the transferee/licensee should acquire rights either in entirety or partially coextensive with the owner/transferor who divests himself of the rights lot possesses pro tanto.*

***90. The license granted to the licensee permitting him to download the computer and storing it in the computer or his awn use is only incidental to the facility extended to the licensee to make use of the copyrighted product for his internal 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 bv 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 he in a position to do so.***

*91. There is no transfer of any right in respect of copyright by (he Assessessee 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.*

21. From the above it is clear that 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". 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. In assessee's case from the perusal of the terms of EULA, it is clear that SSS is given the mere access to use the troubleshooting / licensed software without the right to own or reproduce and the right to do so continued to be retained by the assessee. The grant of license to use the software cannot be construed as granting a right to utilize the copyright embedded in the software. Therefore we are of the considered view that the payments received by the assessee are towards the use of copy righted software and not towards acquisition of copy right or right to use the copy right.

22. One more contention of the Assessing Officer is that software is a 'literary work' and thus the same is taxable as per Article 12(4) of India-Netherlands DTAA. In this regard we notice that the coordinate bench in the case of the DDIT v Reliance Industries Limited [2016] 69 taxmann.com 311] (Mumbai Tribunal) has considered the issue of whether software / computer program is a literary work. The relevant observations of the Hon'ble Tribunal are extracted below –

> *36. A perusal of the above provisions of the Copyright Act reveals that the computer software is included in the definition of literary work and is covered under the purview and scope of copyright. The exclusive rights to do or authorize the doing of certain acts as mentioned in clause (a) and clause (b) of section 14 vests in the owner of the work such as to reproduce the work, to issue copies, to make translation or adaptation, to sell or give on commercial rental in respect of a work. The internal use of the work for the purpose it has been purchased does not constitute right to use the copy right in work.*
>
> *37. to 40.******
>
> *41. It is also pertinent to mention here that the Income Tax Act does not specifically include the 'computer software' in the term 'literary work' and under such circumstances, if we apply the provisions of Income Tax to define the scope of 'Literary Work', then perhaps the 'computer software' will be out of the scope of the term royalty as defined under the DTAA. However, if we apply the Copyright Act, then the 'computer software' will have to be included in the term 'literary work' but to constitute 'royalty' under the treaty, the consideration should have been paid for the use of or the right to use the copyright in the 'literary work' and not the 'literary work' itself.*

23 The computer software has been recognized as a separate item not only in second proviso to clause (vi) of section 9 of the Act but also in Explanation 4 to section 9 of the Act and has been included in the definition and within the scope of the words 'right', 'property' or 'information'. The 'literary work' has been covered within a separate limb of the section via-a-vis computer software. As laid down by the Hon'ble Tribunal under the Act, computer software is not a literary work and even if computer program is a literary work under the Copyright Act, the same

cannot constitute a Royalty under the DTAA since the consideration should have been paid for the use of or the right to use the copyright in the 'literary work' and not the 'literary work' itself.

24. It is also pertinent note that India while entering into DTAA with certain countries such as Morocco, Kazakhstan etc. has specifically included for 'software/computer software program' to be classified as Royalty. Therefore there is force in the argument that, where the intention of both the States was to include payment for 'software/ computer software' within the ambit of the definition of 'Royalty' under the DTAA the same would have been specifically negotiated between the parties and stated within the definition of 'Royalty' in the DTAA, as the same has not been specifically mentioned under the India-Netherlands DTAA, it was never the intention of both the States to include it with the definition of 'Royalty'.

25. Considering the above elaborated facts of the assessee's case and the ratio laid down by the Hon'ble High Court we hold that the payments received by the assessee towards Juniper Services are not in the nature of "royalty" under the DTAA between India and Netherlands and not liable to tax accordingly.

26. The Assessing Officer, besides holding the payments received by the assessee are in the nature of "Royalty" also held that the same would otherwise should be treated as Fees for Technical Services (FTS) and taxed in India accordingly. The main reason as quoted by the Assessing Officer is –

- *The nature of services rendered are in the nature of 'consultancy services' and there is no technology or technical expertise available or transferred by the Appellant Thus, the principles of make available arc not applicable;*

- *Without prejudice to the above, it is stated that knowledge is being made available to the SSS under the SSSA which enables them to solve the problem on their own account.*

27. The CIT(A) in the order has given a specific finding that the Juniper Services would fall within the definition of FTS under the Act and the ld DR during the course of hearing before us presented arguments stating that the nature of services are technical where the knowledge is made available by the assessee to SSS. Therefore we will not go into analysing whether the nature of services rendered are consultancy or technical since it is not the fact in dispute here.

28. Article 12(5) of the India-Netherlands DTAA has defined FTS to mean as under :

> *" For purposes of this Article, "fees for technical services" means payments of any kind to person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services:*
>
> > *(a) are ancillary and subsidiary to the application of enjoyment of the right, property* or *information for which a payment described in paragraph 4 of this Article is received; or*
> > *(b) make available technical knowledge, experience, skill, know-how or processes, or consist of the development and transfer of a technical plan or technical design. "*

29. From the plain reading of the above, it is clear that in order to be taxed as FTS under the India-Netherlands tax treaty conditions mentioned therein need to be **cumulatively** satisfied. It is trite law that the make available clause only applies when the recipient of the technology has been made competent and authorised to use the technology independently without any dependence on the provider of the service. In other words, services would fall within the scope of FTS only if they make available technical knowledge, experience, skill, know-how, or processes

and a technology is made available when there is a person is acquiring services. The Hon'ble Mumbai Bench of ITAT in the case of Raymond Ltd v DCIT (2003) 86 ITD 791, interpreted the expression 'make available' to state that the services can be considered to be 'make available' where the person utilizing the services is in a position to apply the technology for his own use in his business in future without recourse to the person rendering the services. The relevant extract of the ruling *is* reproduced below:

> *"92, We hold that the word "which" occurring in the article after the word "services" and before the words "make available" not only describes or defines more clearly the antecedent noun ("services") but also gives additional information about the same in the sense that it requires that the services should result in making available to the user technical knowledge, experience, skill, etc. Thus, the normal plain and grammatical meaning of the language employed, in our understanding, is that a mere rendering of services is not roped in unless the person utilising the services is able to make use of the technical knowledge etc. by himself in his business or for his own benefit and without recourse to that performer of the services in future. The technical knowledge, experience, skill etc, mast remain with the person utilisins thu services even after the rendering of the services has come to an end. A transmission of the technical knowledge, experience, skills etc, from the person rendering the services to the person utilising the same is contemplated bv the article. Some sort of durability or permanency of the result of the "rendering of services" is envisaged which will remain at the disposal of the person utilising the services. The fruits of the services should remain available to the person utilising the services in some concrete shape such as technical knowledge, experience, skills, etc.*
>
> *93. In the present case, as Mr. Dastur pertinently pointed out, after the services of the managers (Merrill Lynch and other co-managers) came to an end, the assessee-company is left with no technical knowledge, experience, skill etc. and still continues to manufacture cement, suitings etc.*
>
> *94. The Memorandum of Understanding appended to the DTA with USA and the Singapore DTA can he looked into as aids to the construction of the UK DTA. They deal with the same subject (fees for technical services, referred to in the US agreement as "fees for included services"). As noted earlier, it cannot be said that different meanings should be assiened to the US and UK agreements merely*

*because of the MOU despite the fact that the subject matter dealt with is the satne and both have been entered into bv the same country on one side, f India). The MoU supports the contention of the assesses regarding the interpretation of the words "make available". The portions of the MoU explaining para 4(b) of the relevant article, which we have extracted earlier in our order while adverting to the contentions of the assesses, fully support its interpretation. Example (4) given in the MoU also supports it. This is of a US company manufacturing wallboard for the assessee using assessee's raw material but using its own plant. No technical knowledge, experience, skills, plan or design is held to have been made available in such a case. However, in contrast, example (5) is of a US company rendering certain services in connection with modifying the software used by the Indian company to suit a particular purpose. A modified computer software programme, is supplied by the US company to the Indian company. It is therefore held that there is a transfer of a technical plan (i.e., computer software) which the US company has developed and made available to the Indian company. The fees are chargeable. These examples affirm the position by the assessee company before us as to the interpretation of the words "make available",*

30. The above principle was also relied upon by the Courts in the below judicial precedents

- *CIT v De Beers India Minerals Private Limited [2012] 346 1TR 467 (Kamataka High Court*
- *DDIT v Preroy A.G [201 0] 39 SOT 187 (Mumbai ITAT).*

31. From the perusal of SSSA we notice that the Juniper Services are made available to SSS on annual basis which would mean that the services are renewed every year. Therefore it cannot be said that SSS are able to carry out the services on their own without depending on the support of the assessee for resolving the issues arising in the Juniper Networks. During the course of hearing our attention was drawn to clause 5.7 of SSSA – Escalation Support, where the time lines for resolving the issues of various priority level is mentioned. As per the said clause we notice that even for low priority issues, the technical experts of the assessee are involved. Similarly from the perusal of the other clauses such as problem report

tracking system (clause 5.6.1), Support procedure (clause 5.6.2) also it becomes clear that the Juniper engineers are involved in resolving the issues with the Juniper Equipments installed in the end user sites. The contention of the ld DR was that in the Online support (i.e. through the CSC) through which issues are resolved the software gets updated once the problem is resolved thereby the knowledge regarding that problem gets imparted to SSS. However we notice that the Online support provides access to product specifications, FAQs, status of service requests raised oh JTAC, operating manuals, software updates, blogs, discussion forums, troubleshoot tools for resolving general error messages, etc., but does not in anyway enable SSS to independently apply any knowledge without assessee's support or resolve or diagnose the issues / errors / bugs / problems on their own in future. The SSS engineers continue to approach JTAC in case of critical / priority / time sensitive issues which are eventually resolved by Juniper engineers on the phone or through release of software updates. From these facts it is clear that the Juniper Services provided by the assessee does not result in any enduring benefit to the SSS as the SSSA between the SSS and the assessee is renewed upon the expiry of its tenure similar to any maintenance contract. In view of this discussion in our considered view the services rendered by the assessee to SSS does not make available any technical knowledge that would enable to SSS to resolve the technical issues independently in future and therefore does not fall within the definition to FTS under the India Netherlands DTAA. Accordingly the payment received by the assessee towards rendering Juniper Services is not taxable in India. This appeal of the revenue is dismissed.

**ITA.Nos.1592 /Mum/2021 - AY 2013-14**

32. For the assessment year 2013-14, the assessee filed the return of income on 31.03.2015, declaring Nil income. The assessment was completed under section 143(3) accepting the income returned by the assessee. Subsequent to the scrutiny proceedings for AY 2015-16, where the payments received by the assessee from SSS for Juniper Services, were treated as taxable as Royalty/FTS, the Assessing Officer issued a notice of re-opening the assessment under section 148 for AY 2013-14. The Assessing Officer stated that the payments received by the assessee for AY 2013-14 were towards the same services under the same terms and conditions for AY 2015-16 and since the income has not been offered to tax the assessment was reopened. The Assessing Officer completed the assessment under section 143(3) r.w.s.144C r.w.s.147 assessing the income of the assessee at Rs.20,87,95,209. On further appeal the CIT(A) deleted the addition and held the appeal in favour of the assessee.

33. The ld AR submitted that the assessing officer has reopened the assessment of 2013-14 for the reason the payments received by the assessee towards services are same as the payment received for AY 2015-16 and therefore submitted that the arguments submitted for AY 2015-16 would hold good for the year under consideration also.

34. We heard the parties. We notice from the perusal of records that the nature of services towards which the payments are received by the assessee and other terms in SSSA entered into by the assessee with SSS are also similar to AY 2015-16. This is evident from the findings given by the Assessing Officer and CIT(A) which are also identical to AY 2015-16. Since the facts are identical, our decision in AY 2015-16 are mutatis mutandis applicable to AY 2013-14 also. Therefore we uphold the order of the CIT(A) deleting the addition made by the assessing officer treating the payments received by the assessee towards Juniper Services as Royalty / FTS. This appeal of the revenue is dismissed.

**ITA.Nos.1591 /Mum/2021 - AY 2016-17**

35. For AY 2016-17, assessee filed the return of income on 25.11.2016, in which the assessee has claimed a sum of Rs.156,40,32,314 received from various SSS towards rendering Juniper Services under SSSA as exempt under the India Netherlands DTAA. The assessing Officer treated the same as royalty/FTS and made the addition accordingly. The CIT(A) relying on his decision in assessee's own case for AY 2015-16 allowed the appeal in favour of the assessee. We have in the earlier part of this order have upheld the order of the CIT(A) for AY 2015-16 and the facts being identical for the year under consideration also, our decision in AY 2015-16 are mutatis mutandis applicable to AY 2016-17 also. Accordingly we uphold the order of the CIT(A) for AY 2016-17 also where the CIT(A) has deleted the addition made by the assessing officer treating the payments received by the assessee towards Juniper Services as Royalty / FTS. This appeal of the revenue is dismissed.

36. In result the appeal of the revenue for AY 2013-14, 2015-16 and 2016-17 are dismissed.

**Order pronounced in the open court on 26/09/2023**

| **Sd/-** | **sd/-** |
|---|---|
| **(VIKAS AWASTHY)** | **PADMAVATHY S.** |
| **JUDICIAL MEMBER** | **ACCOUNTANT MEMBER** |

Mumbai, Dt :26th September, 2023
Pavanan

**<u>प्रतिलिपि अग्रेषितCopy of the Order forwarded to</u> :**

1. अपीलार्थी/The Assessee ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त CIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि., मुबंई/DR, ITAT, Mumbai
6. गार्ड फाइल/Guard file.

BY ORDER,

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Asstt. Registrar / Senior Private Secretary
**ITAT, Mumbai**