IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH : BANGALORE

BEFORE SHRI ABRAHAM P. GEORGE, ACCOUNTANT MEMBER
AND SHRI VIJAY PAL RAO, JUDICIAL MEMBER

IT(TP)A No.6/Bang/2011
Assessment year : 2007-08

TNT Express Worldwide (UK) Limited, P.O. Box 99, Stubbins Vale Mill Stubbins Vale Road Ramsbottom, Bury Lancashire UK – BL8 9BF **PAN: AACCT 8709J**	Vs.	The Deputy Director of Income Tax (International Taxation), Circle 1(1), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri Chavali S. Narayan, CA
Respondent by	:	Shri G.R. Reddy, CIT-I(DR)

Date of hearing	:	30.03.2016
Date of Pronouncement	:	29.04.2016.

O R D E R

Per Vijay Pal Rao, Judicial Member :

This appeal by the assessee is directed against the assessment order dated 29.10.2010 passed u/s. 143(3) r.w.s. 144C(5) of the Income-tax Act, 1961 [in short "the Act"] in pursuance of the directions of DRP dated 20.9.2010 for the assessment year 2007-08.

2. The assessee has raised the following grounds:-

"1. The ld. Assessing Officer has erred, in law and in facts, in assessing the total income of the appellant at Rs.99,912,153 as against Rs.NIL, based on the return of income filed by the appellant.
2. The ld. Assessing Officer has erred, in law and in facts, in not holding that the fee from management and administrative support services of the appellant is not subject to tax in India; and
3. The ld. Assessing Officer has erred, in law and in facts, in characterizing the fee from management and administrative support services earned by the appellant as Royalty as defined in Article 13 of the Convention for avoidance of double taxation and prevention of fiscal evasion between India and United Kingdom of Great Britain and Northern Ireland.
The appellant submits that each of the above grounds is independent and without prejudice to one another.
The appellant craves leave to add, alter, amend, vary omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of the appeal, so as to enable the Hon'ble Tribunal to decide on the appeal in accordance with the law."

3. The only issue that arises for consideration in this appeal of the assessee is, whether the payment received by the assessee from TNT India Pvt. Ltd. under Management and Administrative Services (in short "MAS"] agreement is in the nature of royalty as per provisions of section 9(1)(vi) as well as Article 13 of the Indo-UK DTAA?

4. Brief facts leading to the controversy are that the assessee is a foreign company incorporated in UK and tax resident of UK. The TNT group is engaged in the business of international express distribution of freight, parcels and documents. The assessee had entered into MAS agreement with TNT (India) Pvt. [in short "TNT India"] effective from 1.7.2004 under which the assessee provided services to TNT

India. The description of services provided by the assessee under the agreement has been given in Schedule-2 of the agreement as under:-

" Schedule 2

The Services

1.	Advice on questions of business policy of a Party.
2.	Management Information and other automated system services.
3.	Assistance in evaluation of the development in the international market.
4.	New process information, including specifications and application notes.
5.	Assistance with evaluating new business opportunities.
6.	Provision of opening up business relations with foreign countries.
7.	Marketing, market research and market analysis including advice on questions of advertising in local media and the co-ordination of the latter with other related firms but excluding any services covered by Agreements between Group companies relating to Intangible Property.
8.	Sales support.
9.	Development of trading relationships with agents, customers and suppliers.
10.	Assistance with strategic management in order to maximize the long term future of a party.
11.	Assistance in legal and tax matters / risk management / treasury but excluding any services covered by Agreements between Group companies relating to financial or treasury arrangements.
12.	Provision of assistance in human resource, education and training of staff.
13.	Ancillary support and assistance.
14.	Other services as may be requested and agreed from time to time.
15.	Advising the management of the party on financial matters.
16.	Drawing up finance plans and assistance in procuring funds.
17.	Statistical evaluations and cost comparison between different enterprises.
18.	Advice in working out guidelines for accounting and cost accounting, as well as supervising the execution.
19.	Opening up sources of favourable credit.

20.	Providing procedures for accounting and financial control including effective management accounting procedures.
21.	Liaison with professional advisers.
22.	Centralised documentation services and archiving facilities.
23.	Lobbying activities and co-ordination with trade associations.

5. The assessee invoiced TNT India for an amount of Rs.9,99,12,153/- for providing the services under the agreement on which TNT India has deducted tax at source amounting to Rs.1,95,46,550 u/s. 195 of the Act, before making remittance of the said amount. The assessee filed its return of income on 28.3.2008 declaring NIL taxable income and claimed refund/credit for the tax deducted at source. The assessee claimed that it does not have any presence in India so as to constitute a Permanent Establishment (PE) and therefore income earned from the provision of MAS would not be taxable in India u/s. 9(1) of the Act as well as under Article 13 of the Indo-UK DTAA.

6. The Assessing Officer while passing the draft assessment order held that provision of services rendered by the assessee under the MAS agreement has provision for know-how and such services would fall within the purview of royalty.

7. The assessee challenged the action of AO before the DRP and contended that the consideration received by assessee does not fall under the purview of royalty, as it was received against the provision of commercial services and not imparting of any know-how or secret formula or other information. The DRP did not accept the contention of assessee and confirmed the view of the AO in treating the said receipt/income as royalty.

8. Before us, the ld. AR of the assessee has submitted that the assessee has received an amount of Rs.9.99 crores from TNT India under MAS agreement for providing such MAS services. The amount accruing to the assessee under the MAS agreement is a business income and since the assessee does not have a PE in India, therefore, the said income will not be chargeable to tax in India in accordance with Article 7 of Indo-UK DTA. The ld. AR has emphasized that the services provided by the assessee under the agreement does not amount to imparting commercial knowledge or any information concerning technical, industrial, commercial or scientific knowledge, experience or skill. The information/advise rendered by the assessee

is not in the nature of technical, industrial or scientific knowledge, so as to fall within the purview of commercial knowledge and therefore it would not constitute as 'royalty'. The information/advise provided by the assessee to TNT India in the course of Managerial and Administrative Support services is only for the purpose of improving the management and administrative efficiency of TNT India. Therefore, the services provided by the assessee do not fall under the realm of royalty. Ld. AR has referred to the judgment of Hon'ble Madhya Pradesh High Court in the case of *CIT v. HEG Ltd., 263 ITR 230 (MP)* and submitted that the Hon'ble High Court has held that every information would not have the status of royalty. Solely because of an entry of commercial nature would not make it royalty. Therefore, the Hon'ble Court has observed that every information if it concerns industrial or commercial venture, would not be a royalty.

9. The ld. AR has also relied on the judgment of Hon'ble Bombay High Court in the case of *Diamond Services International (P) Ltd. v. UOI & Ors., 308 ITR 201 (Bom)* and submitted that when there is no imparting of experience in favour of the client, but the clients receive

report prepared by the use of its commercial/technical knowledge, it cannot be said to be imparting of information by the person, who possess such information. He has also relied on the decision of the coordinate Bench of the Tribunal in the case of *Spice Telecom v. ITO, 113 TTJ 502* and submitted that payment for liaisoning with legal and financial advisors is purely for services and not covered under the term 'payment for technical services' as per the DTA or royalty for rendering such services, when one is not imparting information concerning technical, industrial, commercial or scientific knowledge, experience or skill. The ld. AR then relied on the decision of the Mumbai Bench of the Tribunal in the case of *GECF Asia Ltd. v. DDIT, 34 ITR (Trib) 303 (Mum)*. Thus, it has been asserted that information and advise provided by the assessee to TNT India in the course of rendering management and administrative support services does not amount to imparting know-how, experience or information concerning technical, industrial, commercial or scientific knowledge and consequently would not fall within the purview of royalty as defined under the Act as well as under Indo-UK DTAA.

10. The ld. AR has referred to the OECD Model Tax Convention and submitted that the Mumbai Bench of the Tribunal in the case of *GECF Asia Ltd. (supra)* after considering the OECD commentary on the Model Tax Convention has decided an identical issue.

11. On the other hand, the ld. DR has submitted that even general services may be a know-how for the other entity depending upon the nature of requirement and use of the services by the recipient. He has further submitted that the assessee did not furnish break-up of his various services provided to TNT India and expressed its inability to provide such break-up as it was not available. He has further contended that the details of billing are also not provided before the AO, despite the AO asking to furnish the details. The ld. DR has referred to the findings of the AO and the DRP and submitted that the AO has given a finding that even as per the OECD Model Tax Convention and Guidelines, the payment in question falls under the purview of royalty. The ld. DR has submitted that the decision of Mumbai Bench of the Tribunal in the case of *GECF Asia Ltd. (supra)* would not help the case of the assessee as the Tribunal has set aside

the issue for examination at the level of the AO, for want of necessary details and information, whereas in the case of the assessee, the AO has already examined the facts and arrived at a conclusion that payment is a royalty. The ld. DR has then referred to confidential clause of the agreement and submitted that it specifies the criteria as provided under the definition of 'royalty', when the services provided by the assessee are in the nature of undivulged information of industrial, commercial or scientific nature arising from the previous experience, which is practical application in the operations of TNT India and from the disclosure of which an economic benefit can be derived by the recipient of such information. Thus, the ld. DR has submitted that when the knowledge or information provided by the assessee is not publicly available and it is confidential and secret, this is certainly a case of imparting knowledge or information to TNT India, which would fall under the purview of royalty. He has relied on the order of the authorities below and submitted that the economic benefit derived from the said information was the sole purpose and therefore experience and knowledge of the assessee was parted with TNT India.

12. In the rebuttal, ld. AR has submitted that no secret formula or knowhow was imparted by the assessee to TNT India and the work provided was only a service of commercial nature.

13. We have considered the rival submissions as well as relevant material on record. The AO has given his finding by holding that assessee supplied information to TNT India which has to be used by TNT India for its own account. The AO further noted that commercial information being provided by the assessee to TNT India arises from previous experience which definitely has practical application in the operations of the enterprise and from which an economic benefit can be derived. Thus, the AO held that the services which are being provided by the assessee are in fact in the nature of supply of commercial information concerning commercial experience. In the concluding para, the AO has also observed as under:-

"Looking into the contract it is possible to suggest that some information being provided like sales support, liaison with professional advisors lobbying activities and co-ordination with trade associations may not strictly speaking be in the nature of supply of 'know-how'. But details regarding them were not provided. The assessee was asked to give a break up of payments received from each of the various services / information rendered by it. The A.R. of the assessee Mr. C. Narayan submitted that no break up is available and that it is a composite contract. Information was also not provided about the cost incurred by the assessee in rendering these services."

14. Thus, it is clear that the assessee was asked to give the break-up of payments received from each of the various services/information rendered by it. However, the assessee did not furnish such information on the ground that no break-up is available as it is a composite contract. No information was provided about the cost incurred by assessee in rendering these services. Even before us, the assessee has not provided the break-up of the payments received for various services/information provided to TNT India. We further note that Schedule-4 of the MAS agreement is also not filed along with copy of agreement in the Paperbook-I. Therefore, we have no privilege to examine the details of the payments against the various services/information and further as per clause 3.5 of the agreement, the amounts as set out in Schedule-4 are also not made available, as the assessee has not annexed Schedule-4 along with the agreement. Since the assessee chose not to furnish the relevant information, despite the lower authorities making a specific observation regarding non-furnishing of the information and details, therefore, we are constrained to adjudicate the issue on the basis of material available before us.

15. The services are rendered by the assessee to TNT India as per the MAS agreement. The relevant clauses of the agreement are reproduced as under:-

"1. Definitions.

1.1 In this Agreement the following expressions have the following meaning :

Cost	*Means the direct and indirect costs incurred in Relation to the provision of services.*
Providing Party	*Means a Designated Head Office Company providing one or more of the services.*

3. Compensation.

3.1 In consideration for the provision of the services each Receiving Party shall compensate the relevant providing party with an amount as set out in Schedule 3 as amended form time to time by agreement of the Parties.

3.2 The relevant Providing Party or a nominee Group Company shall calculate periodically in accordance with Schedule 3 the payments in respect of Services due from each of the Group companies. The relevant Providing Party shall then send the appropriate invoices or arrange for them to be sent and will facilitate Treasury Arrangements with the relevant Group Company to accommodate the transfer of all required payments. Invoices may be prepared on a provisional basis according to budgeted projected estimated or actual information provided always that periodically an adjustment to actual costs is made within the next following financial year.

3.3 The providing party shall directly or through TNT Finance BV, a private limited li8ability company with its headquarters at Amsterdam raise invoices in monthly arrears and the invoices shall generally be rendered in Euro but values referred to in any invoice may also be expressed in an appropriate or agreed currency subject to the Treasury Agreements.

3.4 Settlement of invoices will be made on or before 30 days after the end of the month in which the invoice was issued or in accordance with such other Treasury Arrangements as may be agreed from time to time.

Unsettled balances will attract interest according to the Treasury Agreements.

3.5 The amounts set out in Schedule 4 are exclusive of VAT and it is the responsibility of both the relevant Providing Party and the Receiving Party to ensure that the correct VAT treatment is applied to any charge in respect of any Service provided.

6. Confidentiality

6.1 Each Party shall take all reasonable steps to keep secret and maintain in confidence all confidential information disclosed to such party by any other party during the term of this Agreement and thereafter save that this obligation of secrecy and confidentiality shall not apply to information :

6.1.1 which at the time of disclosure to such party is in the public domain as evidenced by printed publication or otherwise; or

6.1.2 which after disclosure to such party falls into the public domain through no fault of a Party; or

6.1.3 which such Party has received permission in writing form the other Party to disclose; or

6.1.4 which such Party is required to disclose pursuant to applicable law or regulation."

16. Clause 1.1 of the agreement stipulates that cost means direct and indirect costs and clause 3.1 provides consideration for provision of the services with an amount as set out in Schedule-3 as under:-

"Schedule 3
The Allocation of the Fee

1. Direct Charges

Direct charges shall be made on the basis of the direct and indirect costws or budgeted costs of providing the services together with a reasonable profit element where appropriate.

2. Indirect Charges.

Where a direct charge is not made for the Services then an indirect charge shall be made. The indirect charge shall be based on gross revenues."

Thus, as per the agreement, the receiving party shall compensate the relevant service providing party with an amount which may include direct charges as well as indirect charges. The direct chares as per Schedule-3 shall be made on the basis of direct and indirect costs or budgeted cost of providing services together with reasonable profit element where appropriate. In case where a direct charge is not made for services, then an indirect charge shall be made based on gross revenue. Thus, as per the agreement, the services provided by the assessee are broadly of two types; one on which the assessee may incur direct costs, and the other where there is no direct cost for providing the services and the compensation and consideration of providing such services is charged based on gross revenue. It is clear that the services fall under the second category are definitely not specifically developed or designed for the purpose of providing services to TNT India, but the same may be already in existence. The list of services as provided under Schedule-2 contains as many as 23 kinds of services. By nomenclature of these services itself, it cannot be ascertained whether the provision of these services are in the nature of imparting knowledge, experience, information concerning

industrial, commercial or scientific experience or skill. The term 'royalty' has been defined in Explanation 2 to 6 of section 9(1)(vi) as well as under Article 13 of the Indo-UK DTAA. For ready reference, we quote Explanation 2 to 6 to section 9(1)(vi) of the Act as well as Article 13(3) of Indo-UK tax treaty as under:-

"9. Income deemed to accrue or arise in India.

(1) The following incomes shall be deemed to accrue or arise in India—

(vi) income by way of royalty payable by—

Explanation 1 : ……

Explanation 2 : For the purposes of this clause, "royalty" means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head "Capital gains") for—

(i) the transfer of all or any rights (including the granting of a licence) in respect of a patent, invention, model, design, secret formula or process or trade-mark or similar property;

(ii) the imparting of any information concerning the working of or the use of, a patent, invention, model, design, secret formula or process or trade-mark or similar property;

(iii) the use of any patent, invention, model, design, secret formula or process or trade-mark or similar property;

(iv) the imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill;

(iva) the use or right to use any industrial, commercial or scientific equipment but not including the amounts referred to in section 44BB;

(v) the transfer of all or any rights (including the granting of a licence) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, but not including consideration for the sale, distribution or exhibition of cinematographic films; or

(vi) the rendering of any services in connection with the activities referred to in [sub-clauses (i) to (iv), (iva) and (v)].

Explanation 3 : For the purposes of this clause, "computer software" means any computer programme recorded on any disc, tape, perforated media or other information storage device and includes any such programme or any customized electronic data;
Explanation 4.—For the removal of doubts, it is hereby clarified that the transfer of all or any rights in respect of any right, property or information includes and has always included transfer of all or any right for use or right to use a computer software (including granting of a licence) irrespective of the medium through which such right is transferred.
Explanation 5.—For the removal of doubts, it is hereby clarified that the royalty includes and has always included consideration in respect of any right, property or information, whether or not—

(a) the possession or control of such right, property or information is with the payer;

(b) such right, property or information is used directly by the payer;

(c) the location of such right, property or information is in India.

Explanation 6.—For the removal of doubts, it is hereby clarified that the expression "process" includes and shall be deemed to have always included transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal), cable, optic fibre or by any other similar technology, whether or not such process is secret;]"

" Article 13

ROYALTIES AND FEES FOR TECHNICAL SERVICES

1……
2…….
3 For the purpose of this Article, the term "royalties" means :
(a) Payments of any kind received as a consideration for the use of, or the right to use, any copyright of a literary, artistic or scientific work, including cinematography films or work on films, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience; and
(b) *Payments of any kind received as consideration for the use of, or the right to use, any industrial, commercial or scientific equipment, other than income derived by an enterprise of a Contracting State from the operation of ships or aircraft in international traffic."*

17. As it is clear from a plain reading of the definition of the term 'royalty' as provided under the Act as well as under the DTAA, except for some further clarification and meaning of certain terms of the said

definition, broadly there is no other difference in the meaning of 'royalty' provided under the Act as well as in the treaty. The meaning of the term 'royalty' as provided under Article 13(3) of Indo-UK treaty reveals that payment of any kind received is a consideration for use or the right to use any copyright, any patent, trademark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience and the payment of any kind received as consideration for use of, or right to use, any industrial, commercial or scientific equipment.

18. In the case in hand, it is not the case of Revenue that the payment received by the assessee is a consideration for use or right to use for any copyright, patent, trademark, design, etc. Even otherwise, from the description of services as provided in Schedule-2 of the agreement, it was not for use or right to use any copyright, patent, trademark, design or model, plan, secret formula or process. Thus, the case of assessee has to be examined in the context of the last part of the definition to say a consideration for use or right to use for information, concerning industrial, commercial or scientific

experience. To bring the case in the definition of royalty, imparting of experience, information by the assessee to TNT India is necessary. The AO has also observed in the assessment order that it is possible to suggest that some information being provide like sales support, liasoning with professional advisors, lobbying activities and coordination with trade associations may not be in the nature of supply of know-how. However, the remaining services where R&D nature of imparting knowledge, information or expertise, which is already in possession and in existence with the assessee, can be ascertained only from the details of the actual nature of the services provided under various categories and the basis of the compensation received by the assessee for providing such services, whether the assessee charged the Indian entity on the basis of Cost Plus or on the basis of gross revenue. If the compensation is charged by the assessee based on the gross revenue, then it implies that assessee did not incur any cost in providing such services as these are the kind of information, knowledge or expertise as well as experience already in existence and in the possession of assessee. There is no quarrel that using the experience and expertise by the assessee itself for providing

the services in the form of report or design developed specifically for Indian entity which was not already in existence, then providing such report, plan or design by using the expertise would not constitute imparting of such expertise, information or experience and therefore would not fall under the purview of royalty, as held by the Hon'ble Bombay High Court in the case of *Diamond Services International (P) Ltd. v. UOI (supra)* as under:-

" 9. The question that remains to be answered is whether there is imparting of specific experience by GIA to the person. Impart in Webster's Encyclopaedic Unabridged Dictionary has been defined "to give, to bestow; communicate; to grant a part or share of". In Oxford English Reference Dictionary it is prescribed as "give a share of (a thing)". A plain reading, therefore, of the meaning of the word "impart" implies that it means to give, to bestow, communicate, to grant a part or share of or give a share of a thing. Considering that the term royalty envisages grant or share of industrial or commercial experience. In other words there should be a transfer of "industrial or commercial experience" from assignor to the assignee for a consideration. Therefore, to fall within the meaning of the term royalty under art. 12 of the DTAA it must envisage the person who is the owner of any intellectual property right, designs, or model, plan, secret formula or process, etc. to retain the property in them and permit the use or allow the right to use such patents, designs or models, plans, secret formula, etc. to another person. Where there is no transfer of the right to use, payment made cannot be treated as royalty. To be considered as royalty normally the following factors should be present in the transaction :

"(a) there should be a consideration for use or transfer of right to use;

(b) the payment shall be towards grant or share for acquiring inter alia information concerning industrial, commercial or scientific experience, including gains derived from the alienation of any such right, property or information;

(c) such use or right to use of such property or information shall be for the stipulated period in accordance with the terms of the contract."

10. Article 12(3)(a) of the DTAA is a tax liability and as per has to be interpreted on the said principles of interpretation of taxation provisions as explained in A.V. Fernandez vs. State of Kerala AIR 1957 SC 657 :

"(a) tax can be charged only if the activity sought to be taxed falls squarely within the taxing entry;

(b) a tax cannot be imposed by presumption, inference or conjecture, but must be imposed only as per the specific language of the taxing entry.

(c) each word used in a taxing provision must be given effect to."

Learned counsel for both parties had submitted some orders of the Tribunal for the purpose of advancing their contention that the issuance of the grading certificate can be considered as parting of commercial or technical information. None of the judgments cited are in respect of the DTAA between India and Singapore.

11. From the impugned order of the authorities what emerges is that GIA by using its experience, does the work of diamond grading. In other words parts in favour of the person seeking its specialised knowledge as to the particular diamond in the form of grading certificate. It is on account of this activity that in the order of 13th June, 2007 or for that matter in the order dt. 13th Nov., 2006 it is set out that there is a transfer of commercial experience in the (shape) of diamond grading report. As discussed earlier it is true that GIA may have the experience of grading. However, does it impart its experience to its client ? In our opinion there is no imparting of its experience in favour of the client. What the client receives is the report where the GIA uses its commercial or technical knowledge to give a report to the client. Illustrative example would be a lawyer giving advise to his client, a doctor giving his medical opinion, a laboratory submitting blood analysis report and the like. These cannot be said to be imparting of information by the person who possesses such information. What such person does is uses his experience and technical know-how for a consideration without parting with that information. In our opinion, therefore, considering the definition of royalty under art. 12 of DTAA there is no parting or rendering of technical services either of managerial, technical or consultancy nature or industrial, commercial or scientific experience. Once the consideration/fees received do not fall within the expression "royalty" the action of the respondents in refusing the certificate under s. 195 of the IT Act was clearly without jurisdiction and consequently the impugned orders are set aside with a further direction to the respondent No. 2 to issue the certificate as applied for by the petitioners."

19. It is not the nomenclature of the agreement, but the substance and contents and terms and conditions of the agreement which are material to ascertain the real intention of the parties and the nature

of mutual obligations of the parties. As it is manifest from the list of services as provided under Schedule-2 that some of the services are clearly for new process information including specification and application, evaluation of new opportunities, management information and other automatic system services, which may be the assessee's own expertise and experience and acquired during due course of time. Therefore, these services *prima facie* appear to be in existence and being provided in the form of information, which are definitely related to the commercial and business activity of the Indian entity. It is not the case of the assessee that all these services provided to the Indian entity is available in the public domain, rather, there is a confidential clause in the agreement which prohibits the parties to reveal the information exchanged between the parties to a third party or to public. The commentary on OECD Model Tax Convention is a relevant guidance for deciding the issue of nature of payment, whether it is royalty or business income. The relevant extracts of the OECD Model Tax Convention in paragraphs 10.2 to 11.6 are as under:-

"10.2 A payment cannot be said to be "for the use of, or the right to use" a design, model or plan if the payment is for the development of a design, model or plan that does not

already exist. In such a case, the payment is made in consideration for the services that will result in the development of that design, model or plan and would thus fall under Article 7. This will be the case even if the designer of the design, model or plan (e.g. an architect) retains all rights, including the copyright, in that design, model or plan. Where, however, the owner of the copyright in previously developed plans merely grants someone the right to modify or reproduce these plans without actually performing any additional work, the payment received by that owner in consideration for granting the right to such use of the plans would constitute royalties.

11. In classifying as royalties payments received as consideration for information concerning industrial, commercial or scientific experience, paragraph 2 is referring to the concept of "know-how". Various specialist bodies and authors have formulated definitions of know-how. The words "payments… for information concerning industrial, commercial or scientific experience" are used in the context of the transfer of certain information that has not been patented and does not generally fall within other categories of intellectual property rights. It generally corresponds to undivulged information of an industrial, commercial or scientific nature arising from previous experience, which has practical application in the operation of an enterprise and from the disclosure of which an economic benefit can be derived . since the definition relates to information concerning previous experience, the Article does not apply to payments for new information obtained as a result of performing services at the request of the payer.

11.1 In the know-how contract, one of the parties agrees to impart to the other, so that he can use them for his own account, his special knowledge and experience which remain unrevealed to the public. It is recognized that the grantor is not required to play any part himself in the application of the formulas granted to the licensee and that he does not guarantee the result thereof.

11.2 This type of contract thus differs from contracts for the provision of services, in which one of the parties undertakes to use the customary skills of his calling to execute work himself for the other party. Payments made under the latter contracts generally fall under Article 7.

11.3 The need to distinguish these two types of payments, i.e. payments for the supply of know-how and payments for the provision of services, sometimes gives rise to practical difficulties. The following criteria are relevant for the purpose of making that distinction :

-- Contracts for the supply of know-how concern information of the kind described in paragraph 11 that already exists or concern the supply of that type of information after its development or creation and include specific provisions concerning the confidentiality of that information.

-- In the case of contracts for the provision of services, the supplier undertakes to perform services which may require the use, by that supplier, of special knowledge, skill and expertise but not the transfer of such special knowledge, skill or expertise to the other party.

-- In most cases involving the supply of know-how, there would generally be very little more which needs to be done by the supplier under the contract other than to supply existing information or reproduce existing material. On the other hand, a contract for the performance of services would, in the majority of cases, involve a very much greater level of expenditure by the supplier in order to perform his contractual obligations. ;for instance, the supplier, depending on the nature of the services to be rendered, may have to incur salaries and wages for employees engaged in researching, designing, testing, drawing and other associated activities or payments to sub-contractors for the performance of similar services.

11.4 Examples of payments which should therefore not be considered to be received as consideration for the provision of know-how but, rather, for the provision of services, include :

-- payments obtained as consideration for after sales service,

-- payments for services rendered by a seller to the purchaser under a warranty,

-- payments for pure technical assistance,

-- payments for a list of potential customers, when such a list is developed specifically for the payer out of generally available information (a payment for the confidential list of customers to which the payee has provided a particular product or service would, however, constitute a payment for know-how as it would relate to the commercial experience of the payee in dealing with these customers),
-- payments for an opinion given by an engineer, an advocate or an accountant, and
-- payments for advice provided electronically, for electronic communications with technicians or for accessing, through computer networks, a trouble shooting database such as a database that provides users of software with non-confidential information in response to frequently asked questions or common problems that arise frequently.
11.5 In the particular case of a contract involving the provision, by the supplier, of information concerning computer programming, as a general rule the payment will only be considered to be made in consideration for the provision of such information so as to constitute know-how where it is made to acquire information constituting ideas and principles underlying the program, such as logic, algorithms or programming languages or techniques, where this information is provided under the condition that the customer not disclose it without authorisation and where it is subject to any available trade secret protection.
11.6 In business practice, contracts are encountered which cover both know-how and the provision of technical assistance. One example, amongst others, of contracts of this kind is that of franchising, where the franchisor imparts his knowledge and experience to the franchisee and, in addition, provides him with varied technical assistance, which, in certain cases, is backed up with financial assistance and the supply of goods. The appropriate course to take with a mixed contract is, in principle, to break down, on the basis of the information contained in the contract or by means of a reasonable apportionment, the whole amount of the stipulated consideration according to the various parts of what is being provided under the contract, and then to apply to each part of it so determined the taxation treatment proper thereto. If, however, one part of what is being provided constitutes by far the principal purpose of the contract and the other parts stipulated therein are only of an ancillary and largely unimportant character, then the treatment applicable to the principal part should generally be applied to the whole amount of the consideration."

20. Para 10.2 reiterates the concept of imparting the knowledge, however, if the payment is received for development of a design, model or plan that does not already exist, then the development of such design, model or plan by using its own experience or experience, skill, know-how, would not constitute as imparting the knowledge, experience or know-how, but the payment is simply for execution of work and therefore cannot be said to be royalty. On the contrary, if the payment is received to supply the existing information or

reproduce the existing material, then it will constitute imparting of information so as to fall under the purview of royalty.

The Mumbai Bench of the Tribunal in the case of *GECF Asia Ltd. v. DDIT, 34 ITR (Trib) 303 (Mum)* has taken the view on this issue in paras 9 to 11 as under:-

" 9. The Revenue's case is that the services rendered by the assessee are in the nature "of information concerning industrial, commercial or scientific experience". The OECD commentary on model convention on Article–12, has explained the term "industrial, commercial or scientific" experience in the following manner:–

"11. In classifying as royalties payments received as consideration for information concerning industrial, commercial or scientific experience, paragraph 2 alludes to the concept of "know-how". Various specialist bodies and authors have formulated definitions of know-how which do not differ intrinsically. One such definition, given by the "Association des Bureaux pour la Protection de la Propriete Industrielle" (ANBPPI), states that "know-how is all the undivulged technical information, whether capable of being patented or not, that is necessary for the industrial reproduction of a product or process, directly and under the same conditions; inasmuch as it is derived from experience, knowhow represents what a manufacturer cannot know from mere examination of the product and mere knowledge of the progress of technique".

11.1 In the know-how contract, one of the parties agrees to impart to the other, so that he can use them for his own account, his special knowledge and experience which remain unrevealed to the public. It is recognised that the grantor is not required to play any part himself in the application of the formulas granted to the licensee and that he does not guarantee the result thereof.

11.2 This type of contract thus differs from contracts for the provision of services, in which one of the parties undertakes to use the customary skills of his calling to execute work himself for the other party. Payments made under the latter contracts generally fall under Article 7.

11.3 The need to distinguish these two types of payments, i.e. payments for the supply of know-how and payments for the provision of services, sometimes gives rise to practical difficulties. The following criteria are relevant for the purpose of making that distinction:

Contracts for the supply of know-how concern information of the kind described in paragraph 11 that already exists or concern the supply of that type of information after its development or creation and include specific provisions concerning the confidentiality of that information.

In the case of contracts for the provision of services, the supplier undertakes to perform services which may require the use, by that supplier, of special knowledge, skill and

expertise but not the transfer of such special knowledge skill or expertise to the other party.

In most cases involving the supply of know-how, there would generally be very little more which needs to be done by the supplier under the contract other than to supply existing information or reproduce existing material. On the other hand, a contract for the performance of services would, in the majority of cases, involve a very much greater level of expenditure by the supplier in order to perform his contractual obligations. For instance, the supplier, depending on the nature of the services to be rendered, may have to incur salaries and wages for employees engaged in researching, designing, testing, drawing and other associated activities or payments to sub-contractors for the performance of similar services.

11.4 Examples of payments which should therefore not be considered to be received as consideration for the provision of know-how but, rather, for the provision of services, include:

----- payments obtained as consideration for after-sales service

— payments for services rendered by a seller to the purchaser— under a guarantee, payments for pure technical assistance,

-----payments for an opinion given by an engineer, an advocate—or an accountant, and

-----payments for advice provided electronically, for electronic— communications with technicians or for accessing, through computer networks, a trouble-shooting database such as a database that provides users of software with non-confidential information in response t frequently asked questions or common problems that arise frequently. "emphasis supplied".

10. From the above, it can be gathered that the royalty payment received as consideration for information concerning industrial, commercial, scientific experience alludes to the concept of knowhow. There is an element of imparting of knowhow to the other, so that the other person can use or has right to use such knowhow. In case of industrial, commercial and scientific experience, if services are being rendered simply as an advisory or consultancy, then it cannot be termed as "royalty", because the advisor or consultant is not imparting his skill or experience to other, but rendering his services from his own knowhow and experience. All that he imparts is a conclusion or solution that draws from his own experience. The eminent author Klaus Vogel in his book "Klaus Vogel On Double Tax Convention" has reiterated this view on difference between royalty and rendering of services in the following manner:–

"Imparting of experience: Whenever the term "royalties" relates to payments in respect of experience (knowhow) the condition for applying art.12 is that the remuneration is being paid for "imparting" such knowhow…. In contrast, the criterion used to distinguish the provisions of know–how from rendering advisory services is the concept of imparting. An advisor or consultant, rather than imparting this experience, uses it himself (BFH BStBI.II 235 (1971); Minister des Relations exterieures, Reponses a M. Bockel, 36 Dr. Fisc. Commn. 1956 (1984). All that he imparts is a conclusion that he draws inter–alia from his own experience. His obligation to observe secrets, or even his own interest in retaining his "means of production' will already prevent a consultant from imparting his experience. In contrast to a person using his own know=–how in providing advisory services, a grantor of know–how has nothing to do with the use, the recipient makes of it."

11. The thin line distinction which is to be taken into consideration while rendering the services on account of information concerning industrial, commercial and scientific experience is, whether there is any imparting of knowhow or not. If there is no "alienation" or the "use of" or the "right to use of" any knowhow i.e., there is no imparting or transfer of any knowledge, experience or skill or knowhow, then it cannot be termed as "royalty". The services may have been rendered by a person from own knowledge and experience but such a knowledge and experience has not been imparted to the other person as the person retains the experience and knowledge or knowhow with himself, which are required to perform the services to its clients. Hence, in such a case, it cannot be held that such services are in nature of "royalty". Thus, in principle we hold that if the services have been rendered de– hors the imparting of knowhow or transfer of any knowledge, experience or skill, then such services will not fall within the ambit of Article–12. Since neither the Assessing Officer nor the DRP has examined the nature of service rendered by the assessee from this angle therefore, we are of the opinion that the matter should be restored back to the file of the Assessing Officer to examine the nature of services in line of the principles discussed above. If such services do not involve imparting of knowhow or transfer of any knowledge, experience or skill, then it cannot be held to be taxable as royalty. Since the issue of FTS is not the subject matter of dispute after the direction of the DRP, hence, we are not expressing any opinion on FTS. Thus, ground no.1 and 2, are treated as partly allowed for statistical purposes."

21. In the case of the assessee, it appears to be a composite agreement for providing various services, some of which are purely business/commercial practice and contract services and others are in the nature of imparting the knowledge, experience and experience, which concern the commercial or business experience. In such a scenario, when the assessee is unable to provide bifurcation of the payment relating to each kind of services, then as per para 11.6 of the OECD Model Tax Convention, where a reasonable apportionment is not possible, then the other part of the services could also be given the tax treatment as given to one part of the services provided, which constitute the principal purpose of the contract and falling under the

purview of royalty. In view of the above facts and circumstances of the case, where the assessee has failed to produce the relevant information, details and record to support its case and which is also necessary to segregate such part of the payment which may not be falling under the purview of royalty, we do not find any error or illegality in the impugned orders of authorities below in treating the entire consideration received by the assessee as royalty.

22. In the result, the appeal by the assessee is dismissed.

Pronounced in the open court on this 29th day of April, 2016.

Sd/-	Sd/-
(**ABRAHAM P. GEORGE**)	(**VIJAY PAL RAO**)
Accountant Member	Judicial Member

*Reddygp

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar,
ITAT, Bangalore.