Datamine International Ltd., India ... vs Assessee on 14 March, 2016

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           IN THE INCOME TAX APPELLATE TRIBUNAL
               DELHI BENCHES : B : NEW DELHI

        BEFORE SHRI R.S. SYAL, AM & SHRI A.T. VARKEY, JM

                         ITA No.5651/Del/2010
                        Assessment Year : 2007-08

      Datamine International Ltd.,       Vs.       Addl. DIT,
      India Branch Office,                         Range-1,
      C-484, Sarita Vihar,                         International Taxation,
      New Delhi.                                   New Delhi.
      PAN: AAACD7600A
        (Appellant)                                    (Respondent)


               Assessee By        :    Shri V.K. Aggarwal, AR
               Department By      :    Shri Anuj Arora, CIT, DR

            Date of Hearing                 :   10.03.2016
            Date of Pronouncement           :    14.03.2016

                                   ORDER
      PER R.S. SYAL, AM:
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This appeal by the assessee is directed against the final assessment order passed by the Assessing Officer (AO) u/s 143(3) read with section 144C(1) of the Income-tax Act, 1961 (hereinafter also called `the Act') on 7.10.2010 in relation to the assessment year 2007-08.

2. The first ground is against treating `Business receipts' of Rs.1,04,18,783/- towards sale of software as `Royalty'.

3. Briefly stated, the facts of the case are that the assessee, Datamine International Ltd., UK, having an Indian branch, called Datamine International Ltd., India Branch Office, is a subsidiary of Datamine Corporate Ltd., UK (hereinafter also called `Corporate'). The Indian branch is engaged in the activity of providing specialized mining software solutions, developed by its Group, to mining industry in India. The assessee, inter alia, declared 'Software sales' of Rs.1,04,18,783/- in its Profit & Loss Account as business receipts. During the course of assessment proceedings, the assessee was asked to submit various Agreements including the license agreement under which software were claimed to have been sold to end-users. After going through these Agreements, the AO rejected the assessee's claim of having sold copyrighted articles instead of copyright itself. In reaching this conclusion, he noticed that the software licensed for use by the assessee to the end-consumers were specialized software having special purpose usage in mining activity covering full scope of mining from the exploration, drill hole extending up to shipping. In addition, he also held that the software

sold by the assessee were making available a 'process' to the customer who 'use' the process while carrying out their business. In the backdrop of this factual matrix, the AO held that the consideration for software license falls within the definition of `Royalty' under section 9(1)(vi), clauses (i), (iii) and (v) of Explanation 2 of the Act and also Article 13(3)(a) of Indo-UK Double Taxation Avoidance Agreement (hereinafter called `the DTAA'). The assessee failed to convince the Dispute Resolution Panel (DRP) on its line of reasoning, which countenanced the action of the AO in the draft order. In the final order, the AO treated `Software sales' amounting to Rs.1.04 crore as `Royalty' which was subjected to tax accordingly. The assessee is aggrieved against such treatment.

4. We have heard the rival submissions and perused the relevant material on record. The assessee is a tax resident of UK having a permanent establishment in the shape of branch office in India. It has been taxed as a foreign company in respect of income from its branch office in India. The short controversy before us is to decide the nature of receipts amounting to Rs.1.04 crore which the assessee claims as `Business receipts' from sale of software, whereas the Revenue has held it to be `Royalty'. Chain of transaction of sale of mining solutions is that the Indian branch receives orders of software from end users; such orders are then placed by the Indian Branch to its head office; the Head office, in turn, purchases such software from Datamine Corporate Ltd., which are then supplied by the India branch to the end users. In this entire sequence, there are two types of Agreements, viz., the Distributor's Agreement between Corporate and Datamine International Ltd., including its Indian branch office for purchasing software from Corporate; and the End user Agreement between Corporate and the end users, who eventually purchase Datamine Software Products from the assessee. First, we proceed to examine the Distributor's Agreement, a copy of which has been placed at page 125 onwards of the paper book. As per this Agreement, the Distributor (the assessee, Datamine International Ltd., including its Indian branch office) purchase licenses of defined Software Products from Datamine Corporate for reselling or renting to End Users and for the supply of maintenance and related services to the Products. It has been categorically mentioned that: 'This Agreement is not Royalty Agreement; it confers no rights upon the Distributor to use or incorporate in any way any of the ideas or technology contained within the Products.... Datamine Corporate warrants that it has the authority to offer the Products for sale and rental to the Distributor'. Next para of the Agreement provides that Corporate grants Distributor the non-exclusive `right to resell' and rent licenses for the Products in the specified territories. Clause 3 of the Agreement contains obligations of Datamine Corporate. It provides that the Corporate shall make available to the Distributor a reasonable number of Not-For-Resale copies of the Products to allow the Distributor to market the Products. It has specifically been provided that: 'the Distributor may not copy the software except for reasonable back-up purposes, nor shall the Distributor sell or pass on these Not for sale copies to any other organization'. Clause 4 of the Agreement contains `Obligations of Distributor', whose relevant part obliges : "4.1. The Distributor ... to install the Products on the customer's computer and to carry out training courses in the use of the Products." A perusal of this clause divulges that the Distributor is obliged `to install the Products on the customers' computer'. Clause 8 of the Agreement has been captioned as 'Confidentiality and Intellectual Property Rights.' Para 1 of this clause indicates that the : ` Intellectual Property and other rights to the Products remain at all times with Datamine Corporate ... and do not pass in any way to the Distributor'. It further provides that the Distributor agrees that the Products are proprietary information and trade secrets of Datamine Corporate for which the distributor shall

maintain the confidentiality. Para 8.2, which is quite relevant for our purpose, provides that the : `Distributor shall not attempt to register any Trade Mark, logos, company name, ... that may be identical to or confused with those already owned or registered by Datamine Corporate'. The above clauses of the Distributors' Agreement amply manifest that the Distributor, namely, the assessee acquires simply Software Products from Datamine Corporate for reselling to the end customers. The Product is nothing, but, CD which has to be simply installed by the assessee in the computers of end customers. All the intellectual property rights to the Products remain with Datamine Corporate and the assessee cannot use it or pass it over to anyone except by way of sale of Software Products.

5. Now, we espouse the `End user Agreement' between Datamine Corporate Ltd. and the end-user of the software products, who purchases such software through the assessee, a distributor of the software product. A copy of this Agreement is placed at page 122 onwards of the paper book. Clause 'Usage rights' clearly states that Datamine Corporate Ltd. (DCL) grants to the end user: 'the perpetual right to use the number of seats of the software products.' It further provides that: 'the perpetual right to use the software refers only to the version of the product that was available when the purchase was made and does not entitle you to receive further updates or enhancements to the software.....'. A significant clause of the Agreement states that:

> 'This agreement does not transfer the intellectual property rights to the products to you.' Then, there have been specified certain dos and do nots, which are as under:-
>
> "Under this agreement you may:
>
> a. Install the software on any number of computers over which you have control; b. make copies of the software in machine readable form for backup purposes; c. make copies of any documentation for your use only; and d. execute as many simultaneous copies of the software products as you have purchased seats.
>
> You may not:
>
> a. Contrive for the software to be executed by more than the number of simultaneous users for which you have purchased seats; b. modify, translate, reverse engineer, decompile, disassemble or create similar or derivative software programs based on software products you have purchased; or c. assign, rent or lease any rights in the software or accompanying documentation in any form to any third party without the prior written consent of DCL or its authorized channels which, if given, is subject to the third party's consent to the terms and conditions of this agreement."

6. This clause fairly indicates that the end user can install the software on any number of computers, make copies for back up purposes for his own use only but with the qualification that he cannot operate/execute simultaneous copies of the software product more than the purchased seats. For example, if three copies of a product are purchased, these three software can be installed in any number of computers, but, at a time the usage cannot by of more than three seats. If only one copy is purchased, that can be installed by the end customer on any number of computers, but, at a time

only one can be used. Then, there is a warranty clause in this Agreement which provides that the warranty duration varies from product to product and during such warranty period, the Datamine group will repair any programme error that may have been found. A perusal of the above clauses of the End user Agreement divulges that the end user acquires perpetual right to use the software and the number of permissible seats to the user is equal to the number of copies purchased. It further shows that intellectual property rights vest in Corporate alone and the end user has simply a right to use the product, which is albeit perpetual.

7. Under such circumstances, the question arises as to whether the sale of software can be treated as `Royalty' as held by the authorities or `Business receipts' as canvassed by the assessee. The ld. AR was fair enough to concede that Explanation 4 to section 9(1)(vi) inserted by the Finance Act, 2012 with retrospective effect from 1.6.1976 brings consideration for right to use a computer software within the ambit of `Royalty'. It was, however, submitted that the DTAA has not been correspondingly amended in line with the section 9(1)(vi) of the Act, so as to bring payment for right to use a computer software within the purview of Article 13 of the DTAA. This argument was vehemently countered by the ld. DR, who submitted that insertion of Explanation 4 to section 9(1)(vi) should also be read into the DTAA and thus going by the language of Article 13 of the DTAA as so amended, the case of the assessee falls within the same.

8. 1. We first take up the contention of the ld. DR that the retrospective amendment to the provisions of the Act should be considered for determining the taxability of the amount even under the DTAA. This contention, in our considered opinion, is partly correct. Any amendment carried out to the provisions of the Act with retrospective effect shall no doubt have the effect of altering the provisions of the Act but can not per se have the effect of automatically altering the analogous provision of the Treaty. There are certain provisions in some Treaties which directly recognize the provisions of the domestic law. For example, Article 7 in certain Conventions provides that the deductibility of expenses of the permanent establishment shall be subject to the provisions of the domestic law. In such a case, if any retrospective amendment is made to the provisions of the Act governing the deductibility of the expenses, the same shall apply under the Treaty as well.

8.2. Article 3(3) of the DTAA provides that any term not defined in the Convention shall, unless the context otherwise requires, have the meaning which it has under the laws of that State concerning tax to which the Convention applies. The nitty-gritty of Article 3(3) in the present context is that if a particular term has not been defined in the Treaty but the same has been defined in the Act and further there is a retrospective amendment to that term under the Act, then it is this amended definition of the term as per the Act, which shall apply in the Treaty as well. If however a particular term has been specifically defined in the Treaty, the amendment to the definition of such term under the Act would have no bearing on the definition of such term in the context of the Convention, unless the DTAA is also correspondingly amended. A country which is party to a Treaty cannot unilaterally alter its provisions. An amendment to a Treaty can be made bilaterally after entertaining deliberations from both the countries who signed it. If there is no amendment to the provision of the Treaty but there is some amendment adverse to the assessee in the Act, which provision has been specifically defined in the Treaty or there is no reference in the Treaty to the adoption of such provision from the Act, then such amendment will have no effect on the DTAA.

8.3. Reverting to the facts of the extant case, we observe that the term "Royalties" has been defined in the DTAA as per Article 13(3). Such definition of the term "royalties" as per this Article is exhaustive. Pursuant to the insertion of Explanation (4) by the Finance Act, 2012, with retrospective effect, no corresponding amendment has been made in the DTAA to bring the definition of `Royalties' at par with that provided under the Act. Subject matter of the Explanation 4 is otherwise not a part of the definition of `Royalties' as per Article 13 of the DTAA. As such, it becomes vivid that the contention of the learned Departmental Representative that the retrospective insertion of Explanation 4 to section 9(1)(vi) should be read into the DTAA also, cannot be accepted.

9. Now we proceed to evaluate the contention of the ld. AR that the provisions of the DTAA do not permit taxability of receipt from sale of software as `Royalties', defined as per Article 13, whose relevant part reads as under : -

> ARTICLE 13 Royalties and fees for technical services
>
> 1. Royalties and fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.
>
> 2. However, such royalties and fees for technical services may also be taxed in the Contracting State in which they arise and according to the law of that State; but if the beneficial owner of the royalties or fees for technical services is a resident of the other Contracting State, the tax so charged shall not exceed :......

(3) For the purposes 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 cinematograph films or work on films, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trademark, 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.

10. Para 1 of this Article provides that `Royalties' arising in India and paid to a resident of UK may be taxed in UK. Para 2 provides that such royalties may also be taxed in India. As the assessee is a resident of UK, income from royalties arising in India, is otherwise chargeable to tax in India at the stipulated rate of tax. But in order to tax any amount under this Article, it is sine qua non that the receipt must fall within the scope of `Royalties' as defined in para 3 of the Article 13. The AO has enclosed the case of the assessee within sub-para (a) of para 3. It is apparent that sub-para (b) of para 3 of Article 13, dealing with consideration for the use of any industrial, commercial or scientific

equipment etc., has absolutely no relevance in the present context as no equipment has been transferred by the assessee to the end users, which is simply a software. Now coming to sub-para (a) of para 3 of the Article, we find that the term `royalties' has been defined to mean a consideration for the use of, or the right to use, any copyright of a literary, artistic or scientific work, including cinematograph films or work on films, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trademark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience.

11. The Department has covered the case with in the four corners of this Article on two counts. First is that the consideration from the alleged sale of software is nothing, but, for `use' of 'process'. In our considered opinion, this approach is not correct because the assessee has not allowed end users to use any `process'. Obviously, a `computer software' cannot be treated as a `process' because the end users by using the software do not have any access to the source codes. What is available for their use is software product as such and not the processes embedded in it. To cite an example, when we purchase a refrigerator and place vegetables etc. into if for cooling, what we use for cooling is refrigerator and not its in-built processes or technology which facilitated in the manufacturing of a refrigerator. In the same manner, several processes may be involved in making a computer software, but the customer uses the software as such and not the processes involved into it. We, therefore, refuse to accept the view point of the Revenue that the assessee received consideration from end users for the use of or the right to use any `process'.

12.1. As regards second count, the ld. DR accentuated on the language of para 3(a) of the Article 13 to canvass a view that the assessee received the amount for allowing use of copyright in the mining software. A bare perusal of this para deciphers that the term 'royalties' has been defined to mean a consideration for the use of or the right to use any `copyright of literary, artistic or scientific work ..., patent, trademark and design etc.' This contention raised on behalf of the Revenue needs to be dealt in two segments. Firstly, we find that there is no specific mention of `computer software' in para 3(a) of the Article 13 along with literary, artistic or scientific work, patent, trademark etc. Such language of the DTAA is in sharp contrast to the specific use of the term `computer software' or `computer software programme' together with literary, artistic or scientific work, patent, trademark etc. in many DTAAs. To illustrate, Article 12 of the DTAA between India and Malaysia defines 'Royalties' to mean `payments of any kind received as consideration for the use of or right to use any copyright of a literary, artistic or scientific work........... plan, know how, computer software programme, secret formula or process.....' Similarly, the DTAA between India and Kazakhstan defines the term 'royalties' in Article 12(3)(a) to mean :

> '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 software, cinematograph films...'. Similarly, the DTAA with Turkmenistan also defines `Royalties' in Article 12 to mean : 'payments of any kind received as consideration for the use of or the right to use any copyright of literary, artistic or scientific work, ... computer software, any patent, trade mark...'. It is thus clear that wherever the Government of India intended to include consideration for the use of software as 'Royalties', it explicitly provided so in the DTAA with the concerned country. Since Article 13(3)(a) of the DTAA with UK

does not contain any consideration for the use of or the right to use any `computer software', the same cannot be imported in to it. 12.2. The second segment, which is quite pertinent, is that Article 13(3)(a) encompasses consideration for the use of or the right to use any copyright of literary, artistic or scientific work etc. as `Royalties'. Even if we presume for a moment, with which we do not agree, that a computer software is covered with in any of the terms specifically mentioned in the Article, such as `information concerning commercial experience etc.', then also the instant sale consideration cannot be brought within the purview of Article 13. This is for the reason that in order to be covered with in the scope of this Article, it is necessary that user should get a copyright of `information concerning commercial experience' etc. and not the output or products of `literary work', or `information concerning commercial experience etc. There is a marked distinction between the use of any copyright of a literary work etc. and use of a literary work etc. as such. Whereas the use of copyright of literary or artistic work, etc., enables the user to take copies of such literary or artistic work etc. for its purpose, the simplicitor user of such literary or artistic work, etc., does not confer in the user any such right to copy.

12.3. At this juncture, it becomes relevant to see as to whether the end customers have been given a copyright of the software or the software as such. The ld. DR harped on the relevant parts of the assessment order to put forth that it has been specifically mentioned in the End user Agreement that the customer gets simply the right to use the product under the license, which is non-transferrable. It was argued that there are several restrictions placed as per the terms of the license which prevent the customer from using it as per its own sweet will.

12.4. This contention of the ld. DR can be better appreciated after having a look at the relevant sections of The Copyright Act. Section 14 of this Act defines `Copyright' to mean : `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 form including the storing of it in any medium by electronic means, ii. to issue copies of the work to the public not being copies already in circulation, iii. to perform the work in public, or communicate it to the public, iv. to make 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 clauses (I) to (vi) b. in the case of a computer programme-

(i). to do any of the acts specified in clause (a)

(ii) to sell or 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 computer programmes where the programme itself is not the essential object of the rental.

....

Explanation - For the purposes of this section, a copy which has been sold once shall be deemed to be a copy already in circulation."

12.5. When we consider the relevant parts of the End user Agreement, it clearly emerges that the customers have not been assigned any of the things which have been mentioned in section 14 of the Copyright Act, so as to constitute an assignment of a copyright of the computer software to the end user. Insofar as the view point of the ld. DR about the taking of copies of the Software by the end customer is concerned, we find that the same is for self use and thus covered by section 52 of the Copyright Act, which enumerates certain acts that do not amount to infringement of copyright. The relevant part of this provision is as under : -

"(1) The following acts shall not constitute an infringement of copyright namely-

aa. The making of copies or adaptation of a computer programme by the lawful possessor of a copy of such computer programme, from such copy-

i. in order to utilize the computer programme for the purposes for which it was supplied, or ii. to make back up copies purely as a temporary protection against loss, destruction or damage in order only to utilize the computer programme for the purpose for which it was supplied;"

12.6. We have discussed supra the relevant clauses of the End user Agreement and seen what has been precisely transferred to the end users of the software. It clearly emerges that none of the elements of `Copyright' as mentioned in section 14 of the Copyright have been transferred to the end user inasmuch as he cannot do any of the things as set out in clauses (a) (i) to (vi) of section 14, to the extent applicable, nor can he sell or give on commercial rental any copy of the computer program. On the other hand, what has been permitted to him is all that is permissible under section 52 of the Copyright Act, to the extent applicable, which simply facilitates him to use the software without infringing copyright. This conclusively demonstrates that the end users have paid consideration for the use of a computer software and not copyright of a computer software. As the DTAA treats consideration for the use of copyright of a literary or artistic work, etc. as royalties, there can be no question of including consideration for the use of a literary or artistic work, etc. within the ambit of `Royalties' as per Article 13(3)(a) of the DTAA.

12.7. There is another dimension of this issue. While going through the Distributors Agreement, we have noted that the assessee has simply purchased shrink-wrapped software or off-the-shelf software from the Corporate. The assessee was not allowed to use the copyright of such software, which obviously vest in the Corporate. Since the assessee itself has not acquired any copyright in the mining software, it cannot resell or transfer anything more than what it has acquired. We, therefore, hold that the consideration received by the assessee for sale of shrink wrapped software cannot be considered as `Royalties' within the meaning of Article 13 of the DTAA as the same is a consideration for sale of a copyrighted product and not use of any copyright. 13.1. Now we take up the contention of the ld. DR that provisions of section 9(1)(vi) should be applied to determine the taxability of the amount. It was contended that as the ld. AR has admitted the amount of sale of software covered under Explanation 4 to section 9(1)(vi), the same should be taxed as such.

13.2. In this regard, we find that sub-section (1) of section 90 of the Act provides that the Central Government may enter into an agreement with the Government of any other country for the granting of relief of tax in respect of income on which tax has been paid in two different tax jurisdictions. Sub-section (2) of section 90 unequivocally provides that where the Central Government has entered into an agreement with the Government of any country outside India under sub-section (1) for granting relief of tax or for avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, ' the provisions of this Act shall apply to the extent they are more beneficial to that assessee'. The crux of sub-section (2) is that where a DTAA has been entered into with another country, then the provisions of the Act shall apply only if they are more beneficial to the assessee. In simple words, if there is a conflict between the provisions under the Act and the DTAA, the assessee will be subjected to the more beneficial provision out of the two. If the provision of the Act on a particular issue is more beneficial to the assessee vis-a-vis that in the DTAA, then such provision of the Act shall apply and vice versa. The Hon'ble Supreme Court in the case of CIT v. P.V.A.L. Kulandagan Chettiar (2004) 267 ITR 654 (SC) has held that the provisions of sections 4 and 5 are subject to the contrary provision, if any, in DTAA. Such provisions of a DTAA shall prevail over the Act and work as an exception to or modification of sections 4 and 5. Similar view has been taken by the Hon'ble Bombay High Court in CIT v. Siemens Aktiongesellschaft (2009) 310 ITR 320 (Bom.). In the light of the above discussion, it becomes vivid that if the provisions of the Treaty are more beneficial to the assessee vis-a-vis its counterpart in the Act, then the assessee shall be entitled to be ruled by the provisions of the Treaty. We have held above that amount from sale of software falls under Article 7 (Business profits) and not under Article 13 (Royalties). Since the position as per the DTAA is more beneficial to the assessee in comparison with that under the Act, in which the receipts admittedly fall under section 9(1)(vi), we hold that the assessee is entitled to exercise option in his favour by choosing to be governed by the DTAA.

14.1. Be that as it may, we find that there is another aspect of the matter. This is without prejudice to our finding that consideration for sale of software does not fall within the scope of the term `Royalties'. Even if the view point of the AO is accepted for a moment, with which we do not really agree, that such amount falls under para 3(a) of Article 13, in our considered opinion, even then the amount cannot be taxed as `Royalties' because of the operation of para 6 of Article 13, which reads as under : -

> "6. The provisions of paragraphs 1 and 2 of this Article shall not apply if the beneficial owner of the royalties or fees for technical services, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties or fees for technical services arise through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the right, property or contract in respect of which the royalties or fees for technical services are paid is effectively connected with such permanent establishment or fixed base. In such case, the provision of Article 7 (Business profits) or Article 15 (Independent personal services) of this Convention, as the case may be, shall apply."

14.2. Para 6 of Article 13, to the extent applicable, states that the provisions of paragraphs 1 and 2 of this Article shall not apply if the beneficial owner of the royalties or fees for technical services, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties or fees for technical services arise through a permanent establishment situated therein. In simple terms, this means that the amount falling under para 3 of Article 13 cannot be taxed as Royalties under paras 1 and 2, if the beneficial owner of the royalties, being a resident of a Contracting State (UK), carries on business in the other Contracting State (India) in which the royalties arises through a permanent establishment situated therein (India). Once these conditions are satisfied, then the later part of para 6 comes into play, as per which the provision of Article 7 (Business profits) of this Convention shall apply. In other words, on the fulfillment of the conditions in the first part of para 6, the amount shall not be considered as `royalties' under paras 1 and 2 of Article 13, but shall fall for consideration under Article 7 of the DTAA, being, `Business profits'. There is no dispute on the fact that the assessee is a UK company having its branch office in India (which is its permanent establishment) and the transactions in question are sale of computer software made by such permanent establishment to certain parties in India. This shows that all the requisite conditions for the applicability of first part of para 6 of Article 13 are fully satisfied. On such fulfillment, the amount of `royalties' is liable to be considered under Article 7 (Business profits). As the assessee has declared such receipts under Article 7, the view taken by the authorities in this regard, shifting such amount from Article 7 (business profits) to Article 13 (royalties), being contrary to the mandate of the DTAA, is liable to be and is hereby set aside.

15. In the final analysis, we approve the assessee's stand on the sale of computer software as business profits, by jettisoning the Revenue's viewpoint of royalty. This ground is allowed.

16.1. The next item in dispute is receipt of Rs.36,69,021/- towards Annual maintenance contract. The assessee declared such amount as business receipts and offered it accordingly. The AO treated this amount also as `Royalties'. The assessee was unsuccessful before the DRP and that is how this issue has come up before us.

16.2. We find from page 29 of the assessment order that the AO has discussed the nature of this receipt as annual maintenance contract primarily relating to providing updates and new versions of the software. He noticed that: 'this activity is simply an extension of original process and its characterization will be same as that of the original software.' He, therefore, held this amount to be falling under clause (vi) of Explanation 2 below section 9(1)(vi) of the Act. In the next para, he again held this amount as `royalties' under the DTAA. Thereafter, he discussed the relevance of para 4 of Article 13 of the DTAA, being 'Fees for technical services.' He also held such receipts as falling within the description of 'Fees for technical services' within the meaning of Article 13(4)(a) of the Indo-UK DTAA. In the ultimate analysis, he held such receipts on page 31 as royalty and clubbed it with software sales of Rs.1.04 crore to make `Income as Royalty' totaling Rs.1,40,87,804. It is thus discernible that the AO finally treated receipts from annual maintenance contract as part of Royalty covered under section 9(1)(vi) of Article 13(3), as having the same character as that of the original software. While discussing receipts from sale of software amounting to Rs.1.04 crore, we have held that the same is in the nature of business receipts covered under Article 7 and not Article 13 of the DTAA. Going by the AO's own version of receipts from annual maintenance contract having the same character as that of software sales, we consequently hold such receipts also falling under Article 7 of 'Business profits'. 16.3. Before parting with this issue, we want to clarify that we have not independently examined the character of receipt from annual maintenance contract as `Royalties' or 'Fees for technical services'. It is so because of the AO himself finally holding it to be of the same character as the sale of software, and thus royalty covered under Article 13(3) read with section 9(1)(vi) and not Fees for technical services covered under Article 13(4) read with section 9(1)(vii). 17.1. Ground no. 3 is against treating the receipts from training fees amounting to Rs.9,62,372/- as 'Fees for technical services' covered under Article 13(4) of the DTAA. There is no discussion in the assessment order about the nature of training receipts except one line written on page 31 of the assessment order treating training fees of Rs.9.62 lac as 'Fees for technical services' under Article 13 of DTAA. The assessee is aggrieved against this treatment given by the authorities as against its claim of business receipt covered under Article 7 of the DTAA.

17.2. We have heard the rival submissions and perused the relevant material on record. Primary question in this regard is to consider if Article 13(4) is attracted on receipts for imparting training to the employees of end users of the software sold by the assessee. In this regard, it will be apposite to consider the relevant parts of paras 4 and 5 of Article 13, which are as under : -

> "4. For the purposes of paragraph 2 of this Article, and subject to paragraph 5, of this Article, the term "fees for technical services"

means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including the provision of services of technical or other personnel) which :

> (a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3(a) of this Article is received; or
>
> (b) are ancillary and subsidiary to the enjoyment of the property for which a payment described in paragraph 3(b) of this article is received;

or

(c) make available technical knowledge, experience, skill, know-how or processes, or consist of the development and transfer of a technical plan or technical design.

5. The definitions of fees for technical services in paragraph 4 of this article shall not include amounts paid :

> (a) for services that are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of property, other than property described in paragraph 3(a) of this Article;
>
> (b) to (e) ....."

17.3. Para 5 excludes receipts from the ambit of `fees for technical services'. It is noticeable that provisions of para 4 are subject to paragraph 5. It means that if a payment falls under para 5, then it shall be removed from para 4, even if it is covered within that. When we read para 4 in juxtaposition to para 5 of the Article 13, the position which follows is that whereas Article 13(4) defines the term "fees for technical services" to mean payments, inter alia, for rendering of any technical or consultancy services that are ancillary and subsidiary to the application or enjoyment of the right, property or information described in paragraph 3(a) of this Article, para 5 provides that `fees for technical services' in paragraph 4 shall not include amounts paid, inter alia, for services that are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of property, other than property described in paragraph 3(a) of this Article. This shows that in so far as consideration for services that are ancillary, subsidiary, and inextricably linked to the sale of property described in paragraph 3(a) of the Article 13 is concerned, the provisions of para 4 apply. If however, consideration is for services that are ancillary, subsidiary, and inextricably linked to the sale of property other than that described in paragraph 3(a) of the Article 13, then it falls in para 5 and thus cease to be `fee for technical services' as per para 4 of Article 13. While discussing the nature of receipts from sale of software above, we have held in principle that such consideration does not fall within the definition of royalties given in para 3(a) of Article 13. Since the training of personnel of end users for which this consideration has been received is ancillary and subsidiary to the sale of software, the same, being covered under para 5, cannot be treated as 'Fees for technical services' as per para 4 of Article 13 of the DTAA. Ex consequenti, we allow this ground by approving the assessee's stand of including such receipts under Article 7 of the DTAA.

18.1. Last ground of the appeal is against the estimation of income from business at Rs.15,585/-, at the rate of 18% on Consultancy receipts and Miscellaneous income. The facts apropos this ground are that the assessee declared Consultancy receipts of Rs.25,000/- and Miscellaneous income of Rs.61,584/-. The AO worked out net profit rate of 18% from the assessee's Profit & Loss Account. The same profit rate was applied to these two receipts to determine business income of Rs.15,585/-. The assessee is aggrieved against this addition. 18.2. Having heard the rival submissions and perused the relevant material on record, we find that the AO has estimated income at the rate of 18% on Consultancy receipts and Miscellaneous income without pointing out any mistake in or rejecting books of account maintained by the assessee. It is trite law that unless the books are rejected after pointing out certain deficiencies, the declared profit of the assessee cannot be disturbed. In the absence of an iota of evidence justifying rejection of books of account, we overturn the impugned order on this issue and order for the deletion of addition. It is accordingly held these two amounts be included in the income of the assessee as originally declared.

19. In the result, the appeal is allowed.

The order pronounced in the open court on 14.03.2016.

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              Sd/-                                          Sd/-

        [A.T. VARKEY]                                   [R.S. SYAL]
      JUDICIAL MEMBER                                ACCOUNTANT MEMBER


      Dated, 14 March, 2016.
      dk
      Copy forwarded to:
           1.   Appellant
           2.   Respondent
           3.   CIT
           4.   CIT (A)
           5.   DR, ITAT

                                                      AR, ITAT, NEW DELHI.
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                                                                Date
          1.   Draft dictated on                            10.3.2016
          2.   Draft placed before the author               11.3.2016
          3.   Draft placed before the other Member
          4.   Approved Draft comes to the Sr.PS/PS
          5.   File sent to the Bench Clerk
          6.   Date on which file goes to the Head
               Clerk.
          7.   Date on which file goes to the AR
          8.   Date of dispatch of Order.
      *
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