

Hughes Escorts Communication Ltd., vs Assessee on 1 November, 2004

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

BEFORE SMT. DIVA SINGH, JUDICIAL MEMBER
AND
SHRI B.C.MEENA, ACCOUNTANT MEMBER

ITA No: 752/Del/2005
A.Y. : N.A.

M/s Hughes Escort Communications Ltd.
B 25, 2nd floor, Qutub Institutional area
New Delhi

vs. DCIT, Circle 2(2)
New Delhi

(Appellant)

(Respondent)

Appellant by : Shri Ajay Vohra/Sh.Neeraj Jain, Adv.
Respondent by : Shri NK Chand, Sr.D.R.

ORDER

PER DIVA SINGH, JUDICIAL MEMBER

This is an appeal filed by the assessee against the order dated 1.11.2004 of CIT(A)-XXIX, New Delhi on the following grounds.

"That the CITT(A) erred on facts and in law in confirming the action of A.O. in directing to deduct tax @ 15% from the payment to be made to Tower Innovative Learning Solutions Inc. USA (eCornell), holding the same to be in the nature of Royalty, in terms of Article 12 of the Double Tax Avoidance Agreement India and USA (DTAA).

2. That the CITT(A) erred on facts and in law in holding the payment proposed to be made was in the nature of Royalty since the same was for the use of trade marks, service marks, logos and other corporate indices.

3. That the CITT(A) erred on facts and in law in not appreciating that the use of the aforesaid marks was for the purpose of advertising for soliciting registration from students, the benefit of which was to accrue to eCornell and, hence, no consideration could be deemed to have been paid for such trade marks, logos etc.

4. That the CITT(A) erred on facts and in law in contending that the appellant was granted limited, non exclusive, non transferable and non sub licensable right in connection with the offering and

distribution of courses by eCornell and, hence, the payment for the same was in the nature of Royalty as per Article 12 of the DTAA between India and USA.

5. That the CIT(A) erred on facts and in law in confirming the action of the AO in not holding that the payment proposed to be made was in the nature of "business profits" and in terms of Article 7 of the DTAA, in absence of a permanent establishment, the same was not taxable in India.

2. The relevant facts of the case are that the assessee made an application u/s 195(1) of the Income Tax Act, 1961 asking for Nil deduction of tax certificate. The payee i.e. the Tower Innovative Learning Solutions Inc. USA (hereinafter referred to as TILS) entered into an agreement with Hughes Escorts Communication Ltd. i.e. the assessee (hereinafter referred to as HECL) to grant the latter a limited, non -

exclusive, non-transferable, non-sublicensable right and license to market, promote and provide certain ancillary services in connection with the offering and distribution of its distance learning courses by eCornell in the territory.

2.1. It was submitted that the process involved the following transactions.

"Step 1 : Student accesses HECL's web site containing promotional material in relation to the courses offered by Cornell. Step 2: Student enters into an arrangement with HECL for obtaining the beneficial fee for the courses offered by Cornell and for using the infrastructure of HECL.

- Infrastructure shall include computers, modems etc. • Access charges are separately payable to the extent of usage of connectivity (telephone connection, gateway, broadband etc.) • Total fee of Rs.1,65,000 is paid by the student to HECL in Indian rupees of which USD 2.100 is to be remitted by Cornell for the course content.

- Step 3: Student is registered by Cornell directly upon confirmation cashiering by HECL.

- Step 4: Student avails facilities provided by HECL's centre.

HECL will provide the following facilities.

- Computers • Modem • Broadband access • Telecom connectivity

2.2. The assessee put forth the following arguments in support of the contention that income earned by TILS is not taxable in India neither under the Income Tax Act, 1961 nor under the act of Indo-US Treaty for the following reasons.

The main contention of the assessee is that the income earned by TILS is for imparting of education online i.e., from the activity of teaching and granting of certificate/degree and hence shall only be in the nature of business income.

Accordingly in the absence of any presence in India in the form of a 'permanent establishment' or 'business connection' the income earned by TILS shall not be taxable in India either under the Income Tax Act, 1961 or under the India US treaty i.e. Article 7 of the treaty.

2.3. Considering the same the A.O. required the assessee to explain as to why the said income should not be treated as Royalty.

2.4. In response to the said query it was the plea of the assessee that HECL is not making any payments for the use of, or the right to use any copy right of literary, artistic, or scientific work and therefore the nature of income in the hands of TILS would not fall within the scope of Royalty. The contention put forth was that HECL was by and large only providing ancillary services to the payee as such HECL would provide infrastructure i.e. computers, broad band access, translation assistance, class room, VSAT connectivity etc. to the students in India to enable them to access the contents of the course on the web site. HECL would also assist the registration process of the students and collect combined fees for the course content and the services/facilities offered by it to the students.

2.5. In the context of these facts it was pleaded that income received by e-Cornell from HECL through imparting of education does not fall in the ambit of Royalty under the DTAA. Elaborating further Clause 3(a) of Article 12 of DTAA between India and the US it was stated could be divided into three parts namely -

- Consideration for use/right to use copy right of literary, artistic or scientific work.
- Consideration for any patents, trade marks, design, model, pan, secret formula or process.
- Consideration for information concerning industrial commercial or scientific experience.

Addressing each of these parts the assessee stated that none of them were applicable.

3. However not convinced with the explanation offered the AO after taking into consideration the copy of the agreement signed between TILS which was doing business as eCornell and HECL held that the payment received by eCornell is in the nature of Royalty and directed the assessee to deduct tax @ 15% as per Article 12 of India US DTAA before remitting money.

3.1. In order to arrive at the above conclusion the said authority namely ADIT , Circle 2(2), International Taxation, New Delhi on considering the petition and the copy of the agreement signed between TILS and HCEL, took note of the fact that the assessee had been granted a limited, non exclusive, non transferable, non sublicenseable right and license to market, promote, and provide

certain ancillary services in connection with the offering and distribution of the courses by eCornell in the territory. Taking into consideration Clause 10 and Clause 11.2 and exhibit "G" of the agreement, it was concluded that payments received by eCornell would be in the nature of Royalty under DTAA between India and the U.S. The relevant portion extracted from the order reads as under:-

The assessee went into each of these parts and ruled them out one by one by arguing that its case does not fall within the ambit of any of these.

However, on going through the copy of agreement signed between the TILS, which was doing business as eCornell and HECL, it is seen that the former had granted the latter a limited, non exclusive, non transferable, non sublicenseable right and license to market, promote, and provide certain ancillary services in connection with the offering and distribution of the courses by eCornell in the territory. Further HECL, at its expense was to register students wishing to enroll in the courses via a web site developed, hosted and maintained by one or behalf of HECL. Moreover, it was agreed upon that the content and functionality of the registration site shall be mutually agreed upon by the parties in writing providing however that the registration site may display eCornell marks in accordance with the terms of the agreement.

Regarding the Clause on fees and payments it was mentioned that eCornell on the 12th of each month would invoice HECL for all course registrations processed via the registration site at the rates for such registrations of the said courses in the agreement. It was also mentioned that eCornell shall only be obligated to complete the registration process and release the material required by students to access the courses upon receipt of full payment from HECL.

Under Clause 10 of the agreement it was stated that eCornell grants to HECL the limited right and license to use the eCornell trade marks, service marks, logos and other corporate indicia for the purposes of advertising and promoting the courses. Further under clause 11.2 it was stated that the courses are subject to the warranty provisions of the N User agreement. eCornell does not warrant that the courses will meet affiliates that is HECL requirements or those of enroll students, or that the operation or views of any of the courses will be uninterrupted or error free.

In exhibit G of the agreement which defines the roles and responsibilities of the two parties it is clearly stated that HECL shall perform and be responsible for the marketing and promotion of the eCornell courses within the defined territory, creation of in country marketing and promotion collateral and sales cashiering of all N users transactions for course registration and for the purpose of course delivery transactions for course registration and for the purpose of course delivery, establishment, maintenance and provisioning of the class rooms that can facilitate course access for student in the territory. On the part of eCornell, it was responsible for providing a cobranded web based registration interface for HECL's use in making

registration requests. It was also supposed to provide approvals to HECL registration requests within 24 hours of receiving payment in full for such requests.

In the field of marketing eCornell was supposed to provide the following:

Registration:

- provide a co-branded web based registration interface for affiliate's use in making registration requests.
- Provide approvals to affiliate registration requests within 24 hours of receiving payment in full for such requests.

Marketing:

- Provide US based sales collateral to be adapted at Affiliate's discretion.
- Provide guidelines for affiliate's use of eCornell's registered marks.
- Provide timely approvals for all Affiliate-developed marketing collateral.

For Course Deliver eCornell was supposed to provide following:

- Provide Internet access to courses and support services to students for which affiliate has paid all course fees.
- Provide letters of completion to all students who complete course requirements in a satisfactory manner.

- Provide certificates or certifications to students who complete successfully all courses making up a certificates or certification program.

From the above facts reflected in the agreement signed between the two parties, it is evident that the payment received by eCornell would be in the nature of royalty. Under the DTAA between India and US, royalty has been defined as follows.

A) payments of any kind received as a consideration for the use of, or the right to use, any copyright or a literary, artistic, or scientific work, including cinematograph films or work on film, 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, including gains derived from the alienation of any such right or property which are contingent on the productivity, use, or disposition thereof; 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 payments derived by an enterprise described in paragraph 1 of Article 8 (Shipping and Air Transport) from activities described in paragraph 2(c) or 3 of Article 8.

Therefore, generally defined Royalty is a payment made to the owners of certain types of rights by those who are permitted by the owners to exercise the rights. The rights concern are literary, musical or artistic copy rights, rights in invention and design, rights in mineral deposits, including

oil and natural gas. Royalty is therefore thus a consideration for the transfer of all or any right (including granting of a license) in respect of copy right, patent, trade mark, design and model, or secret formula etc. The various provisions in the agreement signed between the two parties, has have been quoted above indicate the fact that eCornell had granted a license to HECL and therefore, had permitted the latter to exploit its copy right in the form of distribution of the courses provided by eCornell. Further, eCornell has granted to HECL the limited right and license to use the eCornell trade marks, service marks, logos etc. It can therefore be safely assumed that the payment received by eCornell is in the nature of royalty, as it is in consideration for the use/right to use copy right of literary, artistic, scientific or other work and also for its trade marks.

4. In appeal before the First Appellate authority the CIT(A) summed up the facts in para 2 as under:-

"2. The appellant company had filed an application asking for a nil deduction of tax certificate. The appellant has entered into an agreement with TILS Inc. (eCornell) to market, promote and provide ancillary services in connection with providing distance learning courses offered by eCornell University to the students in India. The appellant stated that the payment made to eCornell is in the nature of business income and it is not liable to be taxed because the recipient does not have any PE in India. After examination of the agreement the A.O. found that eCornell had granted the appellant a limited non exclusive, non transferable, non sub licensable right and license to market, promote and provide certain services in connection with the offering and distribution of courses by eCornell in the territory. It was also noticed by the A.O. that eCornell grants to HECL the right and license to use the eCornell trade marks, service marks, logos and other corporate indicia for the purposes of advertising and promoting the courses. It was also noticed by the A.O. that eCornell was responsible for providing a co-branded web based registration interface for HECL;s use in making registration requests. On the basis of above material and after analyzing the provisions of Article 12 of India USA DTAA, the AO held that the payment made by the assessee was in the nature of Royalty and therefore the assessee was liable to be deducted tax @ 15%.

4.1. The arguments advanced on behalf of the assessee are culled out in para 3 which reads as under:-

"The assessee argued the issue at length and stated that the action of AO is not as per provisions of Article 12. It was submitted that the payment made by the assessee is not in consideration for the use of or the right to use any copy right of literary, artistic or scientific work, including inter lia for any patent, trade mark, design or model or plan. The consideration is for imparting education remitted through the assessee to eCornell, therefore, it could not be regarded as Royalty in terms of Article 12 of DTAA. It was also submitted that the use of eCornell marks is merely incidental to the advertising for soliciting registration from students as benefit of which is to vest namely in eCornell. In such circumstances, there being no consideration paid for use of any trade mark or eCornell marks by the appellant. In absence of any rationale and

also the stipulation as to payment of any Royalty under the agreement between the parties, it would be inconceivable as to how the A.O. could on the basis of his own whims and fancies attribute any part of payment towards use of trade mark. It was further submitted that the payment made by the appellant under the aforesaid agreement would not constitute 'royalties' as defined in Article 12 of DTAA. The aforesaid payment would constitute 'business profits' to which Article 7 would apply. However, in the absence of a PE of eCornell in India, the payment made for acquiring marketing rights, as aforesaid, would not be liable to tax in India and consequently the same would not be subject to tax deduction at source u/s 195 of the Act."

4.2. The assessee's appeal was dismissed by the CIT(A) holding as under:-

"I have examined the submissions of the appellant and facts of the case carefully. I find that A.O. has examined the various clauses of agreement from which it is clear that the eCornell has granted to HECL the right & license to use the eCornell Trade marks, service marks, logos and other corporate indicia. eCornell has also granted limited non exclusive non transferable, non sublicensable right in connection with the offering and distribution of courses by eCornell. The appellant's arguments that there rights to use trade mark etc. are free of charge is neither comprehensible nor it is mentioned in the agreement. As per clause 12 of DTAA any payment for use of the right to use any 'trade mark' or any copy right will be Royalty. Considering the facts mentioned by AO, agreement of the appellant and provisions of Article 12 of DTAA between USA & India. It is clear that the payment made by the appellant is in the nature of Royalty and is liable to be taxed @ 15%. Therefore, AO was justified in directing the appellant to deduct tax at source @ 15%. Therefore, AO was justified in directing the appellant to deduct tax at source @ 15% as per DTAA. Accordingly, ground no.1 to 4 are dismissed.

In the result, the appeal is dismissed."

5. Aggrieved by this the assessee is in appeal before the Tribunal.

6. Ld.A.R. reiterated the submissions advanced before the authorities below. The submissions advanced before the CIT(A) placed at pages 1 to 14 of the paper book were relied upon. Copy of the DTAA agreement between India and US placed at pages 53 to 57 in the paper book wherein at page 56 Article 12 has been reproduced was referred to.

Copy of the agreement entered into between the assessee and TILS placed at pages 24 to 34 of the paper book was also referred to. Specific attention was invited to page 30, Clause 7, Clause 9.3 of the Agreement and Exhibit 'A' at page 35 of the paper book which is a eCornell affiliation agreement containing sample of the course list. It was submitted that the assessee is an affiliate of eCornel and paper book page no.36 would show that the assessee as an affiliate had a specific territory assigned to it; page 37 it was submitted which is exhibit "C" would show that the assessee was required to provide infrastructure of the class room having approved furniture, fixtures, air conditioning, sign

board, personal computers, VSAT with transport capability and adequate back up in terms of UPS with requirements for 10% extra fees loaded with extra software etc. which were described as "Ancillary Services", pages 40 to 44 of the paper book were referred to which is a sample end user agreement to be entered into by the individual students with eCornell.

Attention was invited to page 45 of the paper book which laid down the 'Roles and Responsibilities' which were assigned to were to be discharged by the affiliate i.e. the assessee and e-Cornell under the Agreement. It was stated the Agreement entered into with TILS clearly defines the roles and responsibilities spelling out the fee sharing responsibilities and addresses the obligations cast upon the parties which would clearly show that it is a case of two parties pooling together, their resources and agreeing to share fees received/apportioned in terms of the Agreement and it is not a situation where any transfer of any right to use any copy of right of literary, artistic, scientific work or marketing design, model or plan has been received for which payments are being made.

6.1. It was submitted that the nature of agreement is largely like what is considered in the case of ACIT vs. NIIT Ltd. 112 TTJ 800 copy of which is placed at pages 69 to 73 which was approved by Hon'ble Delhi High Court in CIT vs NIIT Ltd. 318 ITR 281 Delhi. It was submitted that against this judgement the SLP filed by the department has been dismissed. Reliance was also placed upon the order of the Delhi Bench of the Tribunal in the case of Career Launcher Ltd. vs ACIT 304 ITR 295 copy of which is placed in the paper book. It was argued that the assessee has not been given any right whatsoever in lieu of which the payments are being made. Referring to Clause 3 page 24 of the paper book which is affiliation agreement between the assessee and eCornell it was submitted that the affiliate would be solely responsible for promotion, marketing of the courses etc. within its territory and the expenses for the same would be met by the affiliate and the affiliate would provide certain marketing materials used to promote the courses in US which the affiliate can make use of in India or get it translated.

Referring to the same Clause it was submitted that it was decided that the affiliate may refer to itself as "Authorised affiliate of eCornell", as such it was urged that all these terms, conditions and recitals in the Agreement demonstrate the fact that it is a case of pooling of resources by the two parties concerned wherein the responsibilities and roles of each of the parties are clearly set out. Referring to Kamat Hotels 78 ITD 241 and the order of the Delhi Bench of the Tribunal in Sheraton International Inc. vs DCIT (2006) 10 SOT 542 copy of which is placed in the paper book filed, it was submitted that the principles laid down therein would fully apply to assessee's case. This order it was submitted was confirmed by the Hon'ble Delhi High Court and is reported in 313 ITR 267 (Delhi), copy of the same is placed at pages 61 to 68.

7. The Ld.D.R. placed reliance upon the orders of the authorities below. Inviting attention to the facts on record it was submitted that in the case of the assessee a payment of 350 US Dollars has been fixed as registration charges per student and 2100 US Dollars is to be paid for the course material etc. and the assessee is charging Rs.1,65,000/- per student. It was argued that the assessee is able to charge only account of its association with eCornell and the fact that for the same copy righted material of eCornell is being used is a matter of record. Specific attention was invited to Clause 10, 10.1 and 10.2. of the affiliate agreement it was argued that this demonstrates this fact. It

was submitted that and the assessee is free to charge anything over and above 350 US Dollars per student and it is only on account of the use of the brand name of eCornell that the assessee is in a position to enhance the payment to be received from the students. It was his vehement stand that the payment made to eCornell is Royalty as it is only on account of the using of the brand name of the assessee assessee as in this capacity, it can charge a higher amount. Relying on Transmission Corporation of A.P.Ltd. and another vs CIT 239 ITR 587 and GE India Technology Centre P.Ltd. vs CIT, 327 ITR 456 it was his submission that the amount is taxable and the CIT(A) is justified in upholding the action of the A.O.

8. We have heard the rival submissions and perused the material available on record. The case law relied upon by either side has also been taken into consideration. It is seen that the A.O. and the CIT(A) have taken a consistent view considering the provisions in the agreement holding that the payments made to eCornell by the assessee amounts to Royalty in terms of Article 12 of the Indo US DTAA on account of the fact that eCornell has granted to HECL the right and license to use the eCornell trade mark, service mark, logos and other indicia. eCornell has also granted limited non exclusive, non transferable, non sub licensable right in connection with the offering and distribution of courses by eCornell.

8.1. It may not be out of place to refer to the terms recorded in the Affiliate Agreement entered into by the assessee with eCornell.. As per the written submissions titled as "Broad Propositions" filed before the CIT(A) placed at paper book pages 1 to 14 before us, Cornell University has been described as having been founded in 1865 in the New York State, offering courses in humanities, arts, science and social services.

Cornell University offers variety of distance learning courses through Tower Innovative Learning Solutions Inc. (TILS) eCornell has been described as a wholly owned subsidiary company incorporated in USA and engaged in the business of creating, distributing and maintaining distance learning courses and providing related services. eCornell is further described as providing distance learning courses to students across the globe including India through the medium of the Internet.

8.2. Copy of the Affiliate Agreement entered into with eCornell on 1st April,2003 is placed at pages 23 to 45 of the paper book. A perusal of the same shows that Tower Innovative Learning Solutions Inc., (TILSI) is described as doing business as e-Cornell duly organized and validly existing under the laws of the State of New York entered into agreement with Hughes Escorts Communications Ltd. (HECL) i.e. the assessee which is described as an "affiliate" which is stated to be a corporation which is duly organized and validly existing under the Indian Companies Act, 1956. The Affiliate Agreement it is stated includes the terms and conditions entered therein along with Exhibits "A" to "G" attached thereto.

8.3. e-Cornell is described as an e-learning company established and wholly owned by e-Cornell University described as one of the world's leading educational institutions which is stated to desire to distribute on line courses stated in Exhibit "A" to legal residents and foreign nationals domiciled in the territory set forth in Exhibit B. e-Cornell has also been described as having authorized American Higher Education Incorporation, a Corporation duly organized and described to be validly

existing under the laws of State of Delaware to seek affiliation in certain territories and to distribute courses. This eCornell Affiliation Agreement referred to as the agreement by the A.O. and the CIT(A) further describes that the affiliate desires to market, promote and provide certain ancillary services in connection with the offering and distribution of the courses in the territory. Accordingly in terms of the Affiliate Agreement e-Cornell and the affiliate herein meaning the assessee agreed to do the following:-

Now, therefore, eCornell and Affiliate hereby agree as follows:

1. Authorization. Subject to the terms of this Agreement, eCornell grants to Affiliate a limited, non-exclusive, non-transferable, non-

sublicenseable right and license to market, promote, and provide certain ancillary services in connection with the offering and distribution of the Course(s) by eCornell in the Territory.

2. Non-Exclusive. The rights granted to Affiliate by eCornell under this Agreement are non-exclusive. Nothing in this Agreement shall be construed as limiting in any manner eCornell's marketing, promotion, or distribution activities, directly or indirectly, with respect to the Course(s) in the Territory.

3. Promotion. Subject to the terms of this Agreement, Affiliate shall be solely responsible, at its expense, for the marketing and promotion of the Course(s) within the Territory. eCornell will provide Affiliate with certain marketing materials used to promote the Course(s) in the United States, which Affiliate; may use, whether in English or as translated by Affiliate, in order to fulfill its obligations under this Agreement. In connection with its marketing and promotion of the Course(s), Affiliate may refer to itself as an ["authorized affiliate of eCornell,"] or such other designation approved in writing by eCornell. Affiliate shall comply with any eCornell policies and guidelines regarding the type, nature and quality of any marketing or promotional materials regarding the Course(s) and/or displaying an eCornell Mark (as defined below). In the event that eCornell objects to any such marketing or promotional materials, Affiliate shall immediately cease distributing such materials unless and until otherwise notified in writing by eCornell. Affiliate shall market and promote the Course(s) only within the Territory and only to legal residents of and/or foreign nationals domicited in the Territory in accordance with the terms of this Agreement.

4. Registration Processing. Affiliate shall, as its expense, register students wishing to enroll in the Course(s) via a website developed, hosted, and maintained by or on behalf of, Affiliate (the "Registration Site"). Affiliate shall be solely responsible for collecting and processing all tuition fees for the Course(s); provided, however, that Affiliate shall charge a tuition fee of at least \$350US per Course. The content and functionality of the Registration Site shall be mutually agreed upon by the parties in writing; provided, however, that the Registration Site may display eCornell Marks in accordance with the terms of this Agreement. The parties shall work together in good faith to integrate certain functions of the Registration Site with the distance learning platform used by eCornell to distribute the Course(s) so that eCornell receives all necessary enrollment information from the Registration Site regarding students and prospective students. Affiliate will host, or

arrange for the hosting of, the Registration Site in a manner that provides ninety-nine and five-tenths percent (99.5%) Uptime during the Term. ("Uptime" means the absence any interruption greater than sixty (60) seconds in the availability of the Course, other than due to scheduled maintenance, of which Affiliate provides eCornell with reasonable prior written notice.) Notwithstanding anything herein to the contrary, Affiliate acknowledges and agrees that the Course(s) are provided only for use by legal residents of or foreign nationals domiciled in the Territory. Affiliate shall not cause or permit the Course(s) to be distributed or promoted outside of the Territory.

4.1. Sharing Enrollment Information. Subject to applicable laws, rules, and regulations, eCornell may, in its discretion, provide AHed with the name, address, and phone numbers of students that register through the Registration Site.

5. Affiliate Obligations. Affiliate will, at its expense, provide prospective students and students who enroll in the Course(s) with access to facilities capable of providing reasonably acceptable access to the Course(s). Such facilities shall provide: (i) a reasonable number of computers equipped with broadband connections to the Internet; and (ii) a reasonable number of personnel capable of providing enrolled students and prospective students with English-language support to assist such students in enrolling and participating in the Course(s). Affiliate shall promptly report to eCornell any suspected or actual performance issues relating to the Course(s) of which it becomes aware, regardless of whether such performance issue is material or immaterial or whether discovered by Affiliate or a student. Without limiting the foregoing, Affiliate shall also furnish the mutually agreed upon ancillary services set forth in Exhibit C in connection with the Course(s).

5.2 eCornell Obligations. eCornell will provide students and prospective students with support services that are substantially similar in all material respects to the support services provided to students enrolled in other online courses made available by eCornell (except as eCornell's provision of any such services may be affected by any translation assistance that eCornell may require).

6. Fees and Payment.

6.1. Invoice. On the 12th of each month during the Term of this Agreement, eCornell will invoice Affiliate for all Course Registrations processed via the Registration Site, at the rates for such registrations set forth on Exhibit D to this Agreement, which eCornell may modify upon ninety (90) days prior written notice. Affiliate shall pay eCornell the amounts set forth in such invoices, in U.S. funds, within ten (10) business days of its receipt of each such invoice. Notwithstanding anything herein to the contrary, eCornell shall only be obligated to complete the registration process and release the materials required by students to access the Courses upon receipt of full payment from Affiliate. Manner of Payment. Any and all fees, charges or other payments to be made pursuant to the Agreement shall be made in United States dollars and shall be paid by wire transfer of immediately available funds or by such other method acceptable to eCornell in its sole discretion. Interest. Any and all fess, charges and other payments to be made pursuant to this Agreement that are not paid when due, and that remain outstanding for a period of ten (10) business days following Affiliate's receipt of written notice thereof, shall accrue interest at the rate of 1.5% per month, or the

highest rate allowed by law, whichever is less. Non-refundable. Any and all fees, charges and other payments made pursuant to this Agreement to eCornell by Affiliate are non-refundable and shall not be returned or repaid to Affiliate under any circumstances.

8.4. Para 6.5 refers to the responsibilities and obligations.

8.5. Further clauses of the affiliation agreement reads as under.

7. End User Agreement. Affiliate acknowledges and agrees that enrolled students shall be required to enter into an End User Agreement provided by eCornell (the current version of which is attached as Exhibit F). eCornell may modify the terms of the End User Agreement in its discretion at any time upon written notice. Affiliate shall not make any representation or warranty or give any assurance to any third party (including enrolled students and prospective students) that exceeds, expands, or differs from the terms set forth in this Agreement or the End User Agreement.

8. Ownership. Affiliate acknowledges and agrees that, as between the parties, eCornell owns all right, title, and interest in and to: (i) the Course(s) and the eCornell Marks; and (ii) all copyright, patent, trademark, service mark, trade secret, and other intellectual property or proprietary rights relating thereto. Affiliate acknowledges and agrees that, except for the limited rights granted under this Agreement, nothing herein affects any transfer of any right, title or interest in or to the Course(s) or eCornell Marks from eCornell to Affiliate or any third party. Affiliate shall not remove any copyright notice, trademark notice, or other proprietary legend displayed on or in connection with the Course(s) or eCornell Marks. Affiliate shall use best efforts to protect eCornell's rights in and to the Course(s) and eCornell Marks and shall cooperate with eCornell in order to protect such rights. Affiliate shall also promptly report any infringements or potential infringements of the Course(s) and eCornell Marks of which it is aware.

9. Term and Termination.

Term. This Agreement shall be in effect as of the Effective Date and, unless otherwise terminated in accordance with the terms of this Section 9, shall remain in effect for a period of two (2) years thereafter (the "Term"). Each party shall consult with AHed regarding any renewals of this Agreement.

Termination. Either party may terminate this Agreement upon written notice if the other party materially breaches any term or condition herein (except for Affiliate's obligation to timely pay invoices when due) and fails to cure such breach within thirty (30) days after receipt of written notice thereof; provided, however, that eCornell may terminate this Agreement upon written notice if Affiliate fails to pay any invoice when due and such failure continues for a period of ten (10) business days following receipt of written notice thereof.

Responsibilities Upon Termination. Upon the expiration or termination of this Agreement: (i) Affiliate shall immediately cease to process registrations for students wishing to enroll in the Course(s); each party shall follow reasonable instructions from the other party as to the time, place,

and manner for return or destruction of the other party's Confidential Information (as defined below); (iii) all licenses granted pursuant to this Agreement (including the right to promote the Course(s) and to use the eCornell Marks) will immediately terminate and Affiliate shall cease to refer to itself as or use any materials, whether tangible or intangible, in which Affiliate is referred to as an ["authorized affiliate of eCornell,] (or any other designation permitted by this Agreement); (iv) Affiliate shall promptly return to eCornell all marketing and promotional materials, whether tangible or intangible, furnished by eCornell pursuant to this Agreement; and (v) eCornell shall permit students who are then- registered in any Course(s) or any set of Courses that would result in the award of a certificate ("Certificate Program") to complete any such Course or Certificate Program, provided, however, that eCornell has received payment in full for such Courses or Certificate Program.

Survival. The following provisions shall survive any expiration or termination of this Agreement: 6, 8, 9.3, 10.2, 11, 12, 13, and

14."

10 eCornell Marks.

10.1 Certain Permitted Uses. e-Cornell grants to affiliate the limited right and license to use the e-Cornell trade marks, service marks, logos and other corporate indicia (collectively 'e-Cornell Marks') for the purposes of advertising and promoting the courses as set forth in this Agreement and for no other purpose. Affiliate only shall use the eCornell Marks in accordance with e-Cornell's written guidelines and policies relating to the use of such marks which e-Cornell shall provide to affiliate from time to time. Affiliate shall not use any e- Cornell marks in any manner likely to confuse, mislead, or deceive the public, or to be adverse to the interests of e-Cornell. Affiliate will cease using any e-Cornell Mark on any materials, whether tangible, or intangible, immediately upon receipt of written notice from e- Cornell to cease such use.

10.2 Ownership. Affiliate acknowledges that e-Cornell and its licensors are the exclusive owners of the eCornell Marks, any trade mark incorporating all or any part of any eCornell mark, and the trade mark rights created by the use of the eCornell marks. All uses of the validity or ownership of any of the eCornell marks.

10.3. Additional Restrictions. Except as otherwise expressly permitted by this Agreement or with the prior written consent of eCornell in each instance: (i) Affiliate will not use any eCornell Mark, or any mark incorporating all or any part of any eCornell Mark, on any business sign, business card, stationery, or form, or use any eCornell Mark as the name of Affiliate's business or any division thereof; and (ii) Affiliate will not associate its marks, or any third- party marks, with the eCornell Marks or affix the eCornell Marks to any product or service except as otherwise expressly set forth in this Agreement. Except with eCornell's prior written consent in each instance, Affiliate shall not register or attempt to register, whether in the Territory, [insert country of incorporation], or in any other nation, copyright in, or to register as a trademark, service mark, design patent, industrial design, or business designation, any of the eCornell Marks or derivations or adaptations thereof, or

any word, symbol, or design that is similar to any of the eCornell Marks. eCornell shall have the right, but not the obligation, to seek and maintain registration of the eCornell Marks within the Territory and [insert country of incorporation]. Affiliate shall, at eCornell's expense, provide eCornell with any assistance and cooperation that eCornell may deem reasonably necessary to obtain or maintain such registration.

11. Representations and Warranties; Disclaimer; Limitations.

11.1 Affiliate. Affiliate, represents and warrants that:

(a) it is a company duly organized, validly existing, and in good standing under the laws of India and has the power and authority to own its property and carry on its business as owned and carried on as of the Effective Date and as contemplated by this Agreement;

(b) it has all requisite power, authority, and licenses to execute and deliver this Agreement and to perform its obligations hereunder, and the execution, delivery, and performance of this Agreement by it has been duly authorized by all necessary company action;

(c) it will comply with all laws, rules, and regulations applicable to the performance of its obligations hereunder, including the laws of the Territory, [insert country of incorporation], the United States of America, and any applicable international laws or conventions;

(d) it is not a party to any agreement with a third party, the performance of which is reasonably likely to adversely affect the ability of eCornell or Affiliate to fully perform their respective obligations hereunder;

(e) all services furnished by Affiliate pursuant to this Agreement (whether to an enrolled student, a prospective student, or otherwise) will be of high quality conforming to highest level of academic standards for internationally known institutions of higher education;

(f) in its performance of its obligations hereunder, it and its directors: (i) shall comply with all applicable Corrupt Practices Laws;

and (ii) shall conduct its business and operations in compliance with all applicable Corrupt Practices Laws. For purposes of this Agreement "Corrupt Practices Laws" shall mean collectively, the United States Foreign Corrupt Practices Act of 1977 (Pub. L. No. 95- 213, 101-104), as amended, and any other law, rule, regulation, order, decree, or directive having the force of law and relating to bribery, kick backs, or similar business practices; and

(g) it has obtained all consents, authorizations, permits, licenses, order and approvals of (and all filings and registrations with) any governmental authority located in the Territory and [insert country of Incorporation] that are required by law with respect to the execution, delivery, and performance of this Agreement by the parties hereto and the consummation of the transactions contemplated by this Agreement.

11.2. eCornell: The course(s) are subject to the warranty provisions of the End User Agreement. Any other warranty made by Affiliate shall be the sole responsibility of Affiliate and Affilaite agrees to hold eCornell harmless, in accordance with section 12 of this Agreement, from and against any liability or obligation eCornell may incur as a result of any such other warranty. eCornell does not warrant that the course(s) will meet Affiliate's requirements or those of enrolled students, or that the operation or use of any of the course(s) will be uninterrupted or error free. WITHOUT LIMITING THE FOREGOING, ANY IMPLIED WARRANTIES, INCLUDING, WITHOUT LIMITATION, WARRANTEES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, ARE EXPRESSLY EXCLUDED. Affiliate acknowledges and agrees that the modification or alteration of any course(s) and/or eCornell Mark by any entity other than eCornell or its designee will void the warranty for the applicable course(s) and/or eCornell Mark.

11.3.Limitation of Liability. EXCEPT FOR AFFILIATE'S INDEMNIFICATION OBLIGATIONS SET FORTH HEREIN, NEITHER PARTY SHALL BE LIABLE TO THE OTHER FOR INDIRECT, SPECIAL, INCIDENTAL, CONSEQUENTIAL, PUNITIVE, OR EXEMPLARY DAMAGES OR LOSS OF PROFITS ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT OR ANY ACTS OR OMISSIONS ASSOCIATED THEREWITH, WHETHER SUCH CLAIM IS BASED ON BREACH OF WARRANTY, CONTRACT, TORT OR ANY OTHER LEGAL THEORY AND REGARDLESS OF THE CAUSE OF SUCH LOSS OR DAMAGES OR WHETHER ANY OTHER REMEDY PROVIDED HEREIN FAILS.

8.6. Clauses 12 refers to Indemnification and 12.1 and 12.2 refer to the Scope and Process of Indemnity. Clause 13 along with its Sub-

Clauses refers to Confidential Information. Clause 14 is general and refers to Audit Rights, Export controls, choice of law, Arbitration Judgement Currency, language etc. The courses are set out in Exhibit "A". Exhibit "B" refers to the territory of the affiliate which in the facts of the present case is described as India, Sri Lanka, Nepal, Bangladesh.

The ancillary services which the assessee is required to provide under the Affiliate Agreement is set out in Exhibit "C". For ready reference the same is reproduced hereunder:-

Exhibit C : Ancillary Services Classrooms/centers operated by HECL can be owned by HECL or franchised out by HECL. The following terms shall govern the conduct of eCornell programmes using these facilities:

1. Each classroom, as per HECL plans, comprises:

* Common HECL design including furniture, fixtures, lighting, air- conditioning, sign boards, earth pits and power conditioning * Personal computers * 1 very small aperture terminal (VSAT) with receive and transmit capability and any other communication facility, as may be suitable for the learning to take place.

2. Adequate backups shall be put in place so that the registered program participants have a good classroom experience. In particular backups shall be provided as follows:

* Each classroom shall have an UPS of adequate rating to ensure that the PCs and VSAT remain operational even during power cuts, * Spares for the VSAT shall be provisioned locally (either at a HECL office or at the classroom location) so that a minimum VSAT uptime of 98% is maintained.

* At least 10% extra PCs, loaded with required software, shall be provisioned at the classrooms so that registered program participants have easy access to back up machines, should their allocated machines fail.

3. In the event a scheduled session is cancelled for whatever reason, it shall be HECL's responsibility to reschedule the same and communicate the changed schedule to all effected registered programme participants.

4. In case of classrooms which are franchised out by HECL to third parties, the following terms shall additionally apply:

* The franchisee has no rights whatsoever over the brands, material and programmes conducted by eCornell and HECL.

5. eCornell shall have the right to conduct an inspection of the HECL facilities (owned by HECL or franchised) and material provided by HECL to registered program participants for conduct of eCornell programs. Such an inspection can be conducted by eCornell officials ;by giving 2 days written notice to HECL specifying their intention to do so.

8.7. The course rates are described in Exhibit "D" which is 350 US Dollars per course registration and a Course registration is defined as one seat registration for one person participating in a single e-Cornell course.

8.8. Exhibit "E" refers to the signatories to the agreement and Exhibit "F" is a Sample End User agreement for individual students which sets out the privacy policy and the information e-Cornell collects, how it is used and how it protects the information so collected. Net work use policy for eCornell students. The commitments from eCornell coupled with responsibilities of the students for respecting intellectual work and property of others where unauthorized use of software, programme code etc. is described as unacceptable and may be considered as a violation of state and federal

law. It further refers to confidentiality of login ID which is described as a unique identifier which gives students access to information and courses; it also refers to policies regarding privacy, authorized user pass words etc. for the purposes of legal consequences of forging, hiding identity impersonating, Intellectual rights legal and ethical in the context of downloading or posting material (uploading etc.) 8.9. Exhibit "G" sets out the roles and responsibilities of the affiliate and e-Cornell respectively.

Exhibit G : Roles and Responsibilities Affiliate shall perform and be responsible for the following:

Marketing :

- Marketing and promotion of eCornell courses within the defined territory.
- Creation of in-country marketing and promotion collateral.
- Sales and cashiering of all end user student transactions for course registration.

Course Delivery:

- Establishment, maintenance, and provisioning of the classrooms (per ExhibitC) that can facilitate course access for students in the Territory.

eCornell shall perform and be responsible for the following: Registration:

- To provide a co-branded web based registration interface for affiliate's use in making registration requests.
- Provide approvals to affiliate registration requests within 24 hours of receiving payment in full for such requests.

- Marketing:
- Provide US based sales collateral to be adapted at Affiliate's discretion.
- Provide guidelines for affiliate's use of eCornell's registered marks.
- Provide timely approvals for all Affiliate-developed marketing collateral.

Course Delivery:

- Provide Internet access to courses and support services to students for which affiliate has paid all course fees.
- Provide letters of completion to all students who complete course requirements in a satisfactory manner.
- Provide certificates or certifications to students who complete successfully all courses making up a certificates or certification program.

8.10. On a careful perusal of the terms and conditions recorded in the Affiliate Agreement entered into with TILS (e-Cornell) by the assessee, it is eminently clear that Whereas eCornell is to impart education to the students in India through the

medium of internet which involves making available to its students login ID and therefore grant access to course material, respond to queries, conduct exams, grant Certificates etc. for which purposes eCornell enters into a separate agreement (End User Agreement) with the students directly. 8.11. The assessee on the other hand has undertaken/been assigned/has agreed to perform the role of marketing the courses; assist the registration process of students; collect combined fees for the course content and provide infrastructure namely computers, broad band access, VSAT connectivity etc. to the students so registered in order to enable them to access the contents of the course on the web site by using the specific log-in ID numbers which are provided to the duly registered students by e-Cornell. On a careful consideration of the terms and conditions of the clauses of the Affiliation Agreement reproduced above; it is seen that at no point of time this material is available to the assessee. Under the agreement the assessee as per Exhibit 'G' is required to market and promote e-Cornell courses within its defined territory; and sales and cashiering of all End-User students perform functions for course registration. For facilitating course delivery it has been held responsible for providing facilities of establishment, maintenance and providing of class room, computers, broad-band connectivity etc. as per the requirements of Exhibit 'C'. The responsibility of eCornell has also been set out to provide approvals to Affiliate registration requests for marketing, to provide for internet access to courses and support services to students for which affiliate has paid course fee; to provide letter of completion to students who complete course requirements; to provide certificates to students on successful completion of all courses making a Certificate Programme. A perusal of Clause 5.1, clause 5.2 of the Affiliate Agreement which has been reproduced above shows that the obligations of the assessee and the responsibilities of eCornell have been spelt out and would show along with Exhibit 'F' which is the sample End User agreement; along with Clause 8, Clauses 10, 10.1 and 10.2 shows that the assessee and eCornell have collaborated for the purpose of providing distance learning courses run by eCornell to students in India through the medium of internet. The above mentioned clauses in the Affiliate Agreement read with the Exhibits to the said agreement fully set out that eCornell owns the rights, title and interest in and to the courses and the user of eCornell marks and all copy rights, patent, trade mark, service mark, trade secrets and other intellectual property or proprietary rights relating thereto remain vested in eCornell and except for limited rights granted under the agreement to register the students affiliate acknowledges that nothing therein will effect any transfer of any right, title or interest in or to the courses or e-Cornell marks from e-Cornell or to affiliate or of any third party and the affiliate shall not remove any copy right notice, trade mark notice, or other proprietary legend displayed on or in connection with courses or e-Cornell marks. Clause 10 along with 10.1/10.2 and 10.3 refers to e-Cornell marks, certain permitted uses, ownership, additional restrictions whereby the affiliate had been granted limited right and license to use eCornell trade marks, service marks, logos and other indicia (collectively referred to as eCornell) for the purpose of advertising and promoting the courses. Accordingly on a perusal of the Affilaite Agreement along with Exhibits which is the only document which has to be taken into consideration

for deciding the issue it is eminently clear that the assessee solicits enrollment by way of advertising, promoting and marketing the trade marks of eCornell granted to it for the limited use of marketing so as to solicit enrollment to the courses conducted by eCornell registration is granted by eCornell to the students subject to the fulfillment of necessary terms and conditions in regard to fees and Clause 7 of the agreement as discussed which is entered into by eCornell with the students demonstrates the fact that at no point of time assessee was in possession of any copy righted material as it is exclusively to be accessed by the student using the log in ID provided by eCornell the assessee is to provide the infrastructure as per the terms of the agreement which information a student can access from any where else also. A perusal of Exhibit F which is a sample end user agreement shows that there is a privity of contract between the e-Cornell and the students and it is the students who receive right to access the course material provided by eCornell by using their specific log in ID numbers which is the unique identifier which gives students access to unique identification to course contents and at no point of time the course material or content of copy right material is available to the assessee which is specifically addresses in clause 7 of the agreement which stipulates that the affiliate does not receive transfer of any right, title and interest in and to the courses or eCornell marks and of copy right, patent, trade mark, service mark, trade secret and other intellectual property or proprietary rights relating thereto remains with eCornell. The role of the assessee is merely to enroll students, and provide the infrastructure for accessing course material in the class room. The assessee as discussed above as per the Affiliate Agreement is to provide infrastructure by way of computer broad band access VSAT connectivity etc. 8.11. Considering the respective stand of the parties before the Bench in regard to whether the payment is Royalty under Article 12 of the Indo-

US DTAA it is necessary at this juncture to consider the said Article.

For ready reference the same is reproduced hereunder from paper book page nos. 57 to 58 wherein copy of the same is placed by the assessee.

ARTICLE 12:

Royalties and fees for included services -

1. Royalties and fees for included 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 included services may also be taxed in the Contracting State in which they arise and according to the laws of that State; but if the beneficial owner of the royalties or fees for included services is a resident of the other Contracting State, the tax so charged shall not exceed:

(a) in the case of royalties referred to in sub-paragraph (a) of paragraph 3 and fees for included services as defined in this Article [other than services described in sub-paragraph (b) of this paragraph]:

(i) during the first five taxable years for which this Convention has effect,

a) 15 per cent of the gross amount of the royalties or fees for included services as defined in this Article, where the payer of the royalties or fees is the Government of that Contracting State, a political sub-division or a public sector company; and

b) 20 per cent of the gross amount of the royalties or fees for included services in all other cases; and

(ii) during the subsequent years, 15 per cent of the gross amount of royalties or fees for included services; and

b) in the case of royalties referred to in sub-paragraph (b) of paragraph 3 and fees for included services as defined in this Article that are ancillary and subsidiary to the enjoyment of the property for which payment is received under paragraph 3(b) of this Article, 10 per cent of the gross amount of the royalties or fees for included services.

3. The term "royalties" as used in this Article means:

a) payments of any kind received as a consideration for the use of, or the right to use, any copyright or a literary, artistic, or scientific work, including cinematograph films or work on film, 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, including gains derived from the alienation of any such right or property which are contingent on the productivity, use, or disposition thereof; 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 payments derived by an enterprise described in paragraph 1 of Article 8 (Shipping and Air Transport) from activities described in paragraph 2(c) or 3 of Article 8.

4.

5.

6.

8.12. On a careful perusal of the above it is seen that the nature of payment made to eCornell is not 'royalty' as the payment is not for the use or the right to use any copy right or literary work. The fact

that it is not for artistic, scientific work, work on film, tape, radio, television, broadcasting etc. does not arise. It is also not for use or right to use patent, trade mark, design, plan, secret formula or process etc. It is purely and simply a case of pooling of resources by way of an Affiliate Agreement wherein the respective roles and responsibilities have been assigned and the arrangement being of the nature of pooling of resources where fee sharing of the two parties have been set out this is not a case where any payment is being made to eCornell by the assessee for any kind of service as it is purely a case of apportioning of fees attributable to eCornell as per the Affiliate Agreement being remitted to eCornell and the portion of the fees collected for providing enrollment infrastructure in order to access the study material by the students is retained by the assessee as its share. As such on facts the present case does not partake the nature of royalty as contemplated under Clause 3(a) of Article 12 of the Indo-US DTAA.

9. We now propose to discuss the case law which has been referred to by the parties before the Bench for our consideration.

9.1. Transmission Corporation of A.P. Ltd. & another vs CIT 239 ITR587 (S.C.) The said judgement has been relied upon by the Revenue. A perusal of the same shows that it holds that S.195 of the Income Tax Act, 1961 provides for deduction of tax at source subject to regular assessment. It lays down that the purpose of sub-section (vi) of section 195 is to see that on the sum which is chargeable u/s 4 of the Act for levy and collection of Income Tax Act, 1961 the payer should deduct incometax thereon at the rates in force if the amounts is to be paid to a non-resident. The said provision is for tentative deduction of tax thereon subject to regular assessment and by deduction of income tax, the rights of the parties are not, in any manner adversely affected. The said rights of the payer or respondent are fully safeguarded u/s 195(2)/ (3) and 195(7) of the Act. The only thing which is required to be done is to file an application for determination by the A.O. that such sum would not be chargeable to tax in the case of the recipient, or for determination of appropriate proportion of such sum so chargeable, or for grant of certificate authorizing the recipient to receive the amount without deduction of tax, or deduction of income tax at any lower rate. On such determination, tax at the appropriate rate could be deducted at source. If no such application is filed income tax on such sum is to be deducted and it is the statutory obligation for the persons responsible for paying such "sum" to deduct tax before making the payment. On facts it is seen that for considering the nature of remittance whether falling in the category of royalty in terms of Article 12(3)(a) of the Indo-US DTAA it has no applicability as eminently an appropriate application has been made by the assessee which has been rejected by the A.O. 9.2. Revenue has also placed reliance on GE India Technology Centre P.Ltd. vs. CIT 327 ITR 456 (S.C.). A perusal of the said judgement shows that it lays down that duty to deduct does not arise unless remittance contains wholly or partly taxable income. The said judgement lays down the proposition that the expression 'chargeable ' under the provisions of the Act in S.195(1) shows that remittance has got to be of a trading receipt, the whole or part of which is liable to tax in India. If tax is not so assessable, there is no question of tax at source being deducted."

In the facts of the present case considering the Affiliate Agreement, the remittance is not Royalty under Article 12(3)(a) of Indo US DTAA as such the said judgement has no applicability.

9.3. On behalf of the assessee reliance has been placed upon the orders of the Tribunal in ACIT vs. NIIT Ltd. 112 TTJ 800 (Delhi) which order has been approved by the Hon'ble High Court. Copy of the order of the Tribunal is placed at pages 69 to 73 in the paper book. Relying on the same it has been vehemently contended that the said order clinches the issue in favour of the assessee. A perusal of the same shows that the facts considered by the Co-Ordinate Bench were that the assessee was a public limited company engaged in computer education and training. It also provided the student services through its franchisee under a license and were provided with the course content. Infrastructure was to be provided by franchisee who were running the training centre under assessee's brand name. The fees collected was shared between the franchisee and the assessee as per the clauses of the agreement. It was held that the dominant intention of the parties was to conduct business and not mere letting out of the building, furniture and fixtures. It was the composite agreement which was to be seen and the essence of the agreement was to conduct the business of running educational centres jointly. As such the broad objective of the Agreement was to share revenue and not to hire the premises provided by the assessee. In the facts of the said case the administrative control of the education centre was with franchisee who were responsible for marketing the courses admitting the students conducting the classes and perform all other administrative functions relating to the education centre. The assessee in the present proceedings has placed reliance upon the finding in the facts of the said order wherein it has been held that it is the dominant intention of the parties to the agreement which has to be considered and the composite agreement has to be considered so as to arrive at the broad objectives of the parties to the agreement. It has been argued that the various stipulations in the agreement which are entered into to protect business interest should not be read in isolation as they would not change the essence of the agreement and in the facts of that case the finding has been arrived at on the basis of broad objective of the agreements between the parties which has been held to be for the purpose of sharing the revenue and it was not to hire the premises provided by the assessee. In facts of the present case it is stated that the principle laid down in the said order that it is the dominant purpose of the assessee and e-Cornell to pool their resources to earn profit which is to be taken into consideration. It is seen that considering the facts the Co-Ordinate Bench has followed the well settled legal principles namely that an agreement has to be read as a whole to arrive at the dominant object so as to gauge the intention of the parties to the agreement which has to be the sole basis for deciding the facts of a case. The said order it is seen has been confirmed by the Jurisdictional High Court. Copy of the said order in ITA 1167/08, 1176/08 and 1200/08 is placed at pages 74 to 76 of the paper book. The principle laid down therein applies to the case at hand.

9.4. Reliance has also been placed by the assessee upon CIT (International Taxation) and another vs Illinois Institute of Technology of India P.Ltd. 321 ITR 49 (Kar.) A perusal of the same shows the assessee therein entered into an agreement with a foreign company in order to impart distance education in certain facilities. The A.O. under the provisions of S.195 of the Income Tax Act, 1961 treated the assessee as an assessee in default for not deducting tax at source while remitting the fees collected by it on behalf of the foreign company. Accordingly an order was passed u/s 201(1) and (1A) of the Act. This order was confirmed by the Commissioner (Appeals). The Tribunal held that the foreign company had no permanent establishment in India and that the fee collected by the assessee and transferred to the foreign company did not attract deduction of tax at source as required u/s 195 of the Act. On appeal their Lordships in the said judgement dismissed the

departmental appeal. A perusal of the same shows that their Lordships have taken note of M.A.Pai Foundations vs. State of Karnataka (2002) 8 SCC 481 and CIT vs. Mahindra and Mahindra Ltd. (2003) ITR 263 481 (Bombay High Court) and thus held that it is no longer in dispute that imparting education can no longer be treated as a business.

9.5. Reliance also has been placed on the order of the Coordinate Bench in Career Launcher India Ltd. vs ACIT 139 TTJ 48 copy of which is placed before the Bench. A perusal of the same shows that the assessee therein was carrying on the business of running coaching classes for admission of students to professional courses. In the course of this business it had also entered into agreements with various persons desirous of running similar coaching classes on the basis of standardized agreement. The agreement allowed the franchisees were to use the trade name, trade mark and course material belonging to the assessee. However other arrangements such as finding suitable premises, enrolling students, collecting fees etc. were made by the franchisees. The fees collected by the franchisees from the students was credited to a bank account. In lieu of the user of the trade mark, trade name and course material the assessee received an amount equal to 25% of net value earned from the operations. Apart from this, the assessee supplied stationery etc. to the franchisees at the rates fixed in this behalf by it. In the year under consideration the assessee had credited net fees of Rs.27,37,56,334/- to the profit and loss account. Further, the assessee had debited a sum of Rs.6,38,64,018/- under the head 'Franchisee payments' under the head 'Admn. & other exp.' The question was whether the payments are in the nature of payments to contractors or sub-contractors for carrying out any work (including supply of labour for carrying out any work) in pursuance of the contracts. Considering the provisions of S.194C and the agreement entered into by the assessee licensor and the operator of the study centre the licensee the Coordinate Bench held that what is material is the content of the agreement. From a perusal of the same the Coordinate Bench concluded that it emerges that the licensee may not be doing any work for the assessee even within the wider meaning of the term 'work' as understood in common parlance. The Co-ordinate Bench held it to be a case of running study centre and to apportion profits between the assessee and the licensee. Considering the facts of NIIT Ltd. which had been upheld by the Hon'ble Delhi High Court the action of the Tribunal in holding that the fees shared by the assessee with the franchisee which has been placed under different nomenclatures namely marketing claim infrastructure claim etc. has to be read as a whole and a composite agreement like this could not be broken into various components as contended by the Revenue, the Co-ordinate Bench held that the model of sharing receipts in the case of NIIT is somewhat different, however in this case also the agreement has to be read as a whole.

9.6. Similarly in the other cases relied upon by the assessee it is again and again the same principle which has been applied namely that the intention of the parties can be gathered only from the agreement which has to be read as a whole. The said issue is not in dispute. On a careful consideration of the Affiliate Agreement along with Exhibits, we are of the view that the remittances made to eCornell (TILS) do not fall in the category of Royalty as considered in Clause 3(a) of Article 12 of the Indo- US DTAA.

9.7. Accordingly for the detailed reasons given hereinabove on facts and law in the earlier part of this order the grounds of the assessee are allowed.

9.8. In the result the appeal filed by the assessee is allowed.

Order pronounced in the open court on 9th March, 2012.

Sd/-
(B.C.MEENA)
ACCOUNTNAT MEMBER

Sd/-
(DIVA SINGH)
JUDICIAL MEMBER

Dated: 9th March, 2012

*manga

Copy of the Order forwarded to:

1. Appellant; 2.Respondent; 3.CIT; 4.CIT(A); 5.DR

6.Guard File By Order Dy. Registrar