Teoco Ltd, Mumbai vs Asst Dit (It) 2(2), Mumbai on 15 October, 2018

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IN THE INCOME-TAX APPELLATE TRIBUNAL "L" BENCH MUMBAI
        BEFORE SHRI G.S. PANNU, ACCOUNTANT MEMBER
           AND SHRI PAWAN SINGH JUDICIAL MEMBER
            ITA No. 103/Mum/2017 (Assessment Year 2011-12)
    Teoco Limited (Formerly known         DCIT (IT) - 2(2)
    as M/s TTI Team Telecom               Room No. 1712, 17th Floor,
    International Ltd.) C/o Sudit K.    Vs. Air India Building, Nariman
    Parekh & Co. Ballard House,           Point, Mumbai-400021.
    Adi Marzban Path, Ballard Pier,
    Fort, Mumbai-400001
    PAN: AACCT5300M
                Appellant                     Respondent


               Appellant by                  : Shri Vijay Mehta with
                                               Anuj Kisnadwala (AR)
               Respondent by                 : Shri Himanshu Sharma (Sr. DR)

               Date of Hearing               : 02.08.2018
               Date of Pronouncement         : 15.10.2018

        ORDERUNDER SECTION 254(1)OF INCOME TAX ACT

PER PAWAN SINGH, JUDICIAL MEMBER;
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1. This appeal by assessee under Section 253 of Income-tax Act is directed against the order of ld. CIT(A)-58, Mumbai dated 29.09.2016, which in turn arises from the assessment order passed under section 143(3) r.w.s.

144C(1) dated 07.02.2014 for Assessment Year 2011-12. The assessee has raised the following grounds of appeal:

> I. Ground No. I - Indian subsidiary Considered As Permanent Establishment (PE) of the Appellant 1.1 On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in holding that TTI Team Telecom Software Pvt. Ltd.

(hereinafter referred to as 'TTI India') is a Dependent Agent PE of the appellant company in India and assessed an amount of INR 39,84,177 as business income without appreciating the fact that the condition prescribed ITA No. 103 Mum 2017-Teoco Limited under Article 5(5) of India - Israel Double Taxation Avoidance Agreement (DTAA) are not satisfied.

1.2 On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in disregarding the fact that TTI India has independently entered into an agreement with Reliance Communication Limited and held TTI India as a representative of the appellant in India and accordingly PE of appellant.

1.3 The Appellant contends that on facts the learned CIT(A) has erred in wrongly interpreting the facts and clauses of agreements.

1.4 Without prejudice to the above, the appellant contends that even if the income earned is taxable as Business Profits, then the executive and general administrative expenses incurred in earning this income is to be allowed as a deduction in arriving at the taxable income.

1.5 Without prejudice to the above, the learned CIT(A) has erred in not allowing deduction of salary expenses amounting to INR 39,84,177 from the business profits as per the provisions of Article 7 read with Article 5 of DTAA.

II. Ground No. II - Reimbursement of expenses considered as Fees for Technical Services (FTS) taxable as Business Profits consequent to holding that Indian Subsidiary is a PE of the Appellant.

2.1 On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in holding reimbursement of expenses as Fees for Technical Services (FTS) in the case where TTI India is not considered as PE of the appellant.

2.2 Without prejudice to the above, the Appellant contends that even if the reimbursements are treated as FTS under Income Tax Act, 1961 (Act), the same cannot be treated as FTS within the meaning of Article 13 of the DTAA read with Protocol to the DTAA and Article 12 of India-Canada DTAA, since the services neither make available technical knowledge, experience, skill, etc nor consist of the development and transfer of a technical plan or a technical design.

2.3 On the facts and the circumstances of the case and in law, learned CIT(A) has erred in disregarding the order of Honorable Income Tax Appellate Tribunal in Appellant's own case for AY 2006-07 and AY 2007-08.

2. Brief facts of the case are that the assessee is a tax resident of Israel and 100% subsidiary of TTI Telecom International Pvt Ltd (India). The assessee is engaged in supply of software. The assessee filed its return of income for Assessment Year 2011-12 on 30.11.2011 declaring Nil ITA No. 103 Mum 2017-Teoco Limited income. During the year under consideration, the assessee had agreement (dated 28.05.2003) with Reliance Infocom Limited (RIL) and some other parties for supply of software through separate agreement entered with these parties. The Agreement includes installation and maintenance of software through long term contract with reference to development process of software envisaging continuous improvement and up-gradation of software. The assessee earned Rs. 39,84,177/-. The assessee claimed that the aforesaid amount is not taxable in India as it is not in the nature of Royalty. The assessment was completed under section 143(3) r.w.s.

144C(3) on 03.04.2014. The Assessing Officer while passing the assessment order treated the receipt of Rs. 39,84,177/- as Business Income holding that the condition prescribed under Article5(5) of India-

Israel Double Taxation Avoidance Agreement (DTAA) are not satisfied.

The Assessing Officer while treating the receipt as a Business Income followed the view taken by Assessing Officer in earlier Assessment Years.

On appeal before the ld. CIT(A), the action of Assessing Officer/TPO was sustained. Therefore, further aggrieved, the assessee has filed the present appeal before us.

3. We have heard the ld. Authorized Representative (AR) of the assessee and ld. Departmental Representative (DR) for the Revenue and perused the material available on record. The ld. AR of the assessee submits that the identical issue has been decided in favour of assessee by the Tribunal in ITA No. 103 Mum 2017-Teoco Limited assessee's appeal for Assessment Years 2006-07, 2008-09, 2009-10 & 2010-11. It was further submitted that by following the decision of earlier year, the Tribunal in appeal for Assessment Year 2012-13 followed the earlier year's decision. Thus, the Ground No. 1.1 of the appeal is completely covered in favour of assessee. Ground No.1.2 to 1.5 are in support of Ground No. 1.1.

4. On the other hand, the ld. DR for the Revenue supported the order of authorities below. It was further submitted that in appeal for Assessment Year 2006-07, the issue of Permanent Establishment (PE) was not considered. It was further submitted that in appeal for Assessment Year 2008-09, the finding of Tribunal in paragraph no. 5.3 are wrong that there is no PE in India.

5. We have considered the rival submission of the parties and have gone through the orders of authorities below. We have noted that similar addition for payment of supply of software was made against the assessee in Assessment Year 2008-09 & 2009-10 and again in Assessment Year 2010-11. On appeal before the ld. CIT(A), the addition was deleted holding that the amount received by assessee are not in the nature of Royalty as per Article 12 of the India-Israel DTAA is not taxable as such in India.

6. We have further noted that while following the decision of Assessment Year 2008-09 & 2009-10 the Tribunal on similar ground followed the ITA No. 103 Mum 2017-Teoco Limited decision in Assessment Year 2008-09 & 2009-10. The Co-ordinate Bench of Tribunal passed the following order:

> "6. The learned Departmental Representative agreed with the aforesaid submissions of the learned Authorised Representative.
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> 7. We have considered rival submissions and perused materials on record. As could be seen from material on record, similar nature of payment for supply of software was made by the assessee to Reliance Communication ltd. in assessment years 2008-09 and 2009-10 and 2010-11 and to Indus Towers ltd.
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> in assessment years 2009-10 and 2010-11. While completing the assessments for these assessment years the assessing officer treated such payments as royalty and

brought them to tax. Learned DRP also confirmed the view of the assessing officer. However, the Tribunal while deciding the issue in the appeals filed by the assessee, took note of the orders passed by it in assessee's own case for earlier assessment years and held as under:-

"4.13. We have gone through the orders passed by the lower authorities as well as submissions made before us by both the sides and also judgment of the Tribunal passed in assessee's own case in the earlier years. The Only issue to be decided by us is whether amount received by the assessee on account of supply of software to M/s. Reliance Infocom Ltd.(subsequently name changed to Reliance Communication Ltd.) constituted payment of 'royalty' within the meaning of section 9(1)(vi) of the Act and Article 12 of DTAA between India and Israel. It is noted by us that as discussed in detail above, the impugned amounts have been received in pursuance to an agreement between the assessee and Reliance dated 27th September, 2002 (entered into the period relevant to A.Y. 2003-04). The AO has contended in the order that an amendment has been made in the said agreement vide supplementary agreement dated 17th September 2007, which has brought out a material change and that is why decision given by the Tribunal in earlier orders needs to be deviated. We have analysed this contention very carefully. It is noted by us that agreement dated 27th September 2002 has been analysed by the Tribunal twice in two separate orders i.e. for A.Y. 2003-04 and A.Y. 2006-07 and detailed orders were passed wherein it was observed, after analyzing various clauses of the agreement and position of law, that the impugned amount did not constitute 'royalty' in the hands of the assessee. Under these circumstances, we shall not repeat the exercise ITA No. 103 Mum 2017-Teoco Limited done by the coordinate bench in assessee's own case, nor shall we like to modify the conclusion drawn by the coordinate bench as far as analysis of the original agreement is concerned. We shall therefore analyse the nature and scope of amendment agreement dated 17th September 2007 in the light of some of the relevant clauses of the original agreement dated 27th September 2002, which are reproduced hereunder:

"License Grant.

a) TTI hereby grants to Reliance and its affiliates (and to any third party to whom Reliance or its Affiliates have contracted to operate the Wireless Reliance Network on their behalf within the territory of India and only for that purpose (and to the extent of the same under a limited Lincense as defined herein) a perpetual irrevocable, nonexclusive, royalty free, worldwide license to install, use and operate and copy the software and the documentation licensed under any approved Purchase order in accordance with the terms and conditions contained in Wireless Reliance network within India. Agreement solely for the implementation operation, management and maintenance of the license does not give Reliance title to the software, or to any trademark or copyright in them (TTI will be the owner or the license of the intellectual property Rights in the Software). Reliance may only use the software in machine readable form.

Reliance shall not (i) reverse engineer, decompile or disassemble any part of the Software without the express prior written consent of TTI; (ii) Reliance shall not remover, obscure or deface any proprietary legend relating to the software without TTIs prior written consent, and further, shall not delete any and all such proprietary legends for such copies as are made. The software is to be locate and used at the designated site/s specified in the purchase order only.

(b) The aforementioned licenses set forth above are hereinafter be referred to as the "Software Licenses". Such software Licenses shall not be sold transferred, assigned, sublicensed by or used by outsourcees of Reliance without TTIs prior written consent except with respect to (i) the sale of the wireless Reliance network (or any relevant component thereof) (ii) the financing of the wireless Reliance Network (or any component thereof) or

(iii) The outsourcing by Reliance of any operating or maintenance functions related to the wireless Reliance Network, under the terms and conditions of the limited license as specified herein; or (iv) the transfer or assignment by Reliance of the Software Licenses to a Reliance Affiliate (or vice versa) in conjunction with a transfer of a portion of the wireless Reliance network to be operated in the territory of India only, provided that in each such case specified in (i)-(iv) above, such transferee, assignee, or outsourcee agrees in writing to abide by all the terms and conditions set forth in the software Licenses and the TTI is informed of the same in writing by Reliance and provided further that the rights transferred, assigned or granted to outsources, as the case may be shall be those reasonably necessary, to fulfill the commercial purposes of such transaction.

ITA No. 103 Mum 2017-Teoco Limited

(c) Notwithstanding any statement in this Agreement to the contrary, Reliance may permit use under the limited license of the Software (or any part thereof) under the terms of any agreement between reliance and any third party (Contractor Agreement) including without limitation, consultant programmers, system integrators, system maintainers, outsourcing or disaster recovery or other service suppliers (Authorized Subcontractors) (Reliance shall be entitled to grant such Authorized subcontractors a limited sub license to use the software solely to provide services to Reliance under such contractor agreement in respect of the software (the limited License). The limited License expressly excludes any right for the Authorized Sub- contractors. Such limited License shall terminate on termination of the contractor Agreement (or if later, on termination of any obligation to provide services consequent upon termination of such contractor agreement provided that (i) such authorized Subcontractor executes a non disclosure agreement in between itself Reliance and TTI; and (iii) Reliance agrees to be responsible for any breach of the non disclosure agreement by such Authorized Subcontractor."

4.14. Perusal of the aforesaid clauses clearly reveals that the assessee would continue to remain owner of the intellectual property rights embedded in the software and Reliance would be able to use software only in machine readable form. Reliance was not permitted to reverse engineer, alter, software programme or tinker with proprietary legends of the said software. The software was permitted to be located and used only at the sites designated in the purchase order issued by Reliance. Further, such software was not permitted to be freely sold by Reliance except for strict usages for Wireless Reliance Network only, as permitted in the agreement. The AO noted that in the said agreement, there were certain clauses with regard to transfer of source code by the assessee to Reliance. It is noted by us that section 11 of the said agreement deals with escrow of source code which is reproduced hereunder for ready reference and further discussion:

> "Section 11: Escrow of Source Code 11.1. Escrow, concurrent with the execution or this Agreement, the parties will duly execute and deliver the Escrow Agreement, and TTI, upon Acceptance of the software, will deliver to the Escrow Agent a complete master, reproducible copy of all source code relating to the software. TTI promptly will update the source code in escrow to reflect all revisions, modifications and enhancements to the software that are provided to Reliance hereunder. In the event that the Escrow Agreement has not been executed and the source code delivered to Escrow Agent within thirty (30) days after acceptance of the Software, then until such events have occurred Reliance shall be entitle to terminative this agreement by written notice provided that Reliance has given written notice and details of such breach to TTI and has advised TTI of its intention to terminate and TTI has failed to deliver the Source Code to the Escrow Agent within thirty (30) days from Reliance's notice thereof no payment obligation with respect to such software or nay support services (and if Reliance has previously paid any sums in respect thereof, TTI will promptly refund all such sums to Reliance).
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> ITA No. 103 Mum 2017-Teoco Limited 11.2. Release of Source Code. Upon occurrence of the conditions described in the Escrow Agreement (each, a "Release condition") the Source Code placed in escrow will be delivered to Reliance for us, copying in connection with Reliance's use, maintenance and support of the software in accordance with its rights under this Agreement.
>
> 11.3 License; Ownership. TTI hereby grants and agrees to grant to Reliance a perpetual, non-exclusive, worldwide license to use, copy, and create derivative works the purposes specified in Section 11.2 (the Derivative Works"). Reliance will be the exclusive owner of any modifications to or Derivative Works of the Source Code created by or for Reliance under this terms and circumstances Section 11."

4.15. It was contended by the Ld. Counsel that the lower authorities mislead themselves by making incomplete reading of the said clause with regard to source code. It was contended by Ld. Counsel that there was no absolute transfer of source code of the assessee to Reliance. In fact, source code was meant to be provided for the limited purpose of enabling Reliance for maintenance support of the software in accordance with its rights granted under the said agreement. Thus, source code was not intended to be transferred so as to transfer full-fledged right embedded in the software by the assessee to Reliance. It has been further brought to our notice that in any case, no Escrow Agreement has been entered into between the assessee and Reliance and therefore there was no question of providing the source code by the assessee to Reliance. It was further submitted that in any case, aforesaid agreement has been discussed and analysed in detail by the Tribunal in the order passed for A.Y. 2003-04 and 2006-07 and thereafter only decision has been taken which should be followed by us. We agree with the argument of Ld. Counsel that as far as this agreement is concerned, we are bound to respectfully follow the order of the Tribunal on this issue.

4.16. With regard to supplementary amendment agreement dated 17th September 2007, it is noted by us with the assistance of the parties that this agreement was entered into by the parties mainly for the purpose of widening the scope of Wireless Reliance Network for which software was provided by the assessee to Reliance. The original agreement permitted usages of software for the Wireless Reliance network for the mobiles phones using CDMA technology. But, subsequently mobile phones based on GSM technology were also included under the aforesaid amendment agreement. Thus, in brief, main objective of the aforesaid amendment agreement was to include mobile phones using new technology.

4.17. Thus, this supplementary agreement has been entered into in continuation with the earlier agreement dated 27th September 2002 for purchase of additional software by Reliance from the assessee to be used in technologically updated Wireless Reliance Network (i.e. CDMA or GSM etc.).

ITA No. 103 Mum 2017-Teoco Limited Thus, vide this supplementary agreement, though scope of usages of the software for relatively wider range of products has been increased, but all other terms and conditions remained same. We do not find any change much less any material change in the terms and conditions of the original agreement which may have any bearing on the decision which has been taken by the Tribunal in earlier years. One of the main objections which had been prominently discussed by the lower authorities is with respect to transfer of source code by the assessee to Reliance. It is noted by us that firstly, as discussed above, the source code was intended to be provided by the assessee to Reliance only for the limited purpose of enabling it maintenance and support of software in accordance with its rights under the said agreement. Secondly, in any case, it has been informed that the aforesaid Escrow Agreement was never entered into and therefore, there was no question of providing any source code by the assessee to Reliance in this regard. The assessee had submitted on record a copy of declaration which reads as under:

> "Declaration To whomsoever it may concern
>
> 1. Exhibit C of the Original Software Supply and License Agreement (SSLA) dated 27th September 2002 executed between TTI Team Telecom International Ltd. (TTI) and Reliance Infocomm Ltd. (now known as Reliance Communications Ltd. (RCL) has never been executed.
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> 2. The original SSLA dated 27th September, 2002 between TTI and RCL contained a clause for the transfer of source code to RCL in an escrow account. However, TTI and RCL did not enter any Escrow Agreement and the source code of TTI's software was never deposited at RCL or with an escrow for the benefit of RCL. For TTI Team Telecom International Limited Eitan Naor CEO"

4.18. These facts have not been disputed before us. Under these circumstances, the issue of source code becomes academic. Under these circumstances, we find that there is no change in facts which could have permitted or compelled us to deviate from decision of the Tribunal rendered in earlier years. Thus, under these circumstances, we are bound to respectfully follow orders of the Tribunal passed in earlier years. It is noted by us that the Tribunal has in its order for A.Y. 2006-07 in assessee's own case vide order dated 26.08.2011 in ITA No.3939/Mum/2010 analysed all the facts in detail and decided this issue in favour of the assessee, after analyzing provisions of the Act as well as provisions of Treaty at great length. Relevant part of the order is reproduced hereunder:

> "13. In view of the above discussions, as long as the assessee cannot be subjected to tax on the impugned receipts in terms of the provisions of Indo- Israel tax treaty, the assessee will not have tax liability in India. The provisions of the IT Act, 1961, cannot be put into service in such a situation, because, as we have noticed earlier, these provisions can apply only when ITA No. 103 Mum 2017-Teoco Limited they are more beneficial to the assessee vis-a-vis the provisions of the applicable tax treaty.
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> 14. It is an admitted position that the assessee did not have any PE in India in terms of the provisions of art. 5 of the tax treaty, and, accordingly, the assessee cannot be held liable to be taxed in respect of business profits, under article 7, on supply of software in question. The case of the Revenue really rests on taxability under art. 12 which provides as follows:
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> "Royalties
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> 1. Royalties arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.
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> 2. However, such royalties may also be taxed in the Contracting State in which they arise, and according to the laws of that State, but if the recipient is the beneficial owner of the royalties, the tax so charged shall not exceed 10 per cent of the gross amount of the royalties.
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> 3. The term royalties as used in this article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, any patent, trademark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience.
>
> 4. The provisions of paras 1 and 2 shall not apply if the beneficial owner of the royalties, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties arise, through a PE situated therein, or perform in that other State independent personal services from a fixed base situated therein, and the right or property in respect of which the royalties are paid is effectively connected with such PE or fixed base. In such case, the provisions of art. 7

or art. 15, as the case may be, shall apply.

5. Royalties shall be deemed to arise in a Contracting State when the payer is that State itself, a political subdivision, a local authority or a resident of that State. Where, however, the person paying the royalties, whether he is a resident of a Contracting State or not, has in a Contracting State a PE or a fixed base in connection with which the liability to pay the royalties was incurred, and such royalties are borne by such PE or fixed base, then such royalties shall be deemed to arise in the State in which the PE or fixed base is situated.

6. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the royalties, having regard to the use, right or information for which they are paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this article shall apply only to the last mentioned amount. In such case, the excess part of the payments shall ITA No. 103 Mum 2017-Teoco Limited remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Convention."

15. In terms of the provisions of art. 12(3) of the Indo-Israel tax treaty, royalty is defined, for the purposes of this tax treaty, as "payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, any patent, trademark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience". The question then arises whether a payment for computer software cannot be a payment for use of or right to use of 'a copyright of literary, artistic or scientific work, including cinema photographic film', and, while examining this question, it is important to bear in mind the fact that there is a specific mention about the use "of" copyright. The only other clause in which payment for software could possibly fall is "consideration for use of, or right to use of, a "process". Let us examine these two aspects of the definition of 'royalty' under the India-Israel tax treaty.

16. As regards the question whether the payment for software could be treated as payment for "use of, or the right to use, any copyright of literary, artistic or scientific work", we find that this issue directly came up for consideration of a Special Bench of this Tribunal in the case of Motorola Inc. (supra). That was a case in which the Special Bench had an occasion to decide whether payment for software amounts to 'royalty', for the purposes of India Sweden tax treaty [(1998) 229 ITR (St) 11] which incidentally is the same as in Indo-Israel tax treaty and which also defines royalty as "payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, any patent, trademark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience". The Special Bench, after a very erudite discussion on various facets of the issue before them, concluded that "we hold that the software supplied was a copyrighted article and not a copyright right, and the payment received by the assessee in respect of the software cannot, therefore, be considered as royalty either under the IT Act or the DTAA". Right now we are only

concerned with the provisions of the tax treaty, and we have noticed that the provisions of tax treaty as before the Special Bench are exactly the same as before us in this case. The issue, therefore, as to whether payment for supply of software can be viewed as a payment for copyright or not is no longer res integra. The Special Bench has decided this issue in favour of the assessee, and the views so expressed by the Special Bench, being from a higher forum than this Division Bench, are binding on us. In any case, as the provisions of art. 12(3) specifically provide, what is liable to be treated as royalty is payment for "use of, or the right to use, any copyright of literary, artistic or scientific work", and the connotations of "use of copyright" of a work are distinct from the use of a copyrighted article. The meaning of "use of copyright of a work" cannot be treated as extending to "use of a copyrighted work" as well, as it would amount to doing clear violence to the words employed by the treaty. Copyright is one thing, and copyrighted article is quite another thing. To ITA No. 103 Mum 2017-Teoco Limited give a simple example, when a person is using a music compact disc, that person is using the copyrighted article, i.e. the product itself, and not the copyright in that product. As held by the Special Bench in Motorola's case (supra), the four rights which, if acquired by the transferee, constitute him the owner of a copyright right, and these rights are :

> (i) The right to make copies of the computer programme for purposes of distribution to the public by sale or other transfer of ownership, or by rental, lease, or lending.
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> (ii) The right to prepare derivative computer programmes based upon the copyrighted computer programme.
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> (iii) The right to make a public performance of the computer programme.
>
> (iv) The right to publicly display the computer programme.

17. It is not even Revenue's case that any of these rights have been transferred by the assessee, on the facts of this case, and, for this reason, the payment for software cannot be treated as payment for use of copyright in the software. As we hold so, we may mention that in the case of Gracemac (supra), a contrary view has been taken but that conclusion is arrived at in the light of the provisions of cl. (v) in Expln. 2 to s. 9(1)(vi) which also covers consideration for "transfer of all or any rights (including the granting of a licence) in respect of any copyright, literary, artistic or scientific work" a provision which is clearly larger in scope than the provision of art. 12(3) of the Indo-Israel tax treaty. The word "of" between 'copyright' and 'literary, artistic or scientific work" is also missing in the statutory provision. The treaty provision that we are dealing with are thus certainly not in pari materia with this statutory provision, and, by the virtue of s. 90(2) of the Act, the provisions of India Israel tax treaty clearly override this statutory provision. In Gracemac decision (supra), the Co-ordinate Bench was of the view that the provisions of the applicable tax treaty and the IT Act are "identical"--a position which does not prevail in the situation before us. We, therefore, see no reasons to be guided by Gracemac decision (supra). The next issue that we need to consider is whether a payment for software can be said to be a payment for "process" as a computer program is nothing but a set of instruction lying in the passive state and this execution of instructions is 'a process' or 'a series of processes'. No doubt, in terms of the provisions of s. 2(ffc) of the Indian

Copyright Act, 1957, a computer program, i.e. software, has been defined as "a set of instructions expressed in words, codes, schemes or in any other form, including a machine readable medium, capable of causing a computer to perform a particular task or achieve a particular result", but the moot question is as to what is that a customer pays for when he buys, or to put it in technical terms 'obtains licence to use' the software--for the process of executing the instructions in the software, or for the results achieved on account of use of the software. To draw an analogy, it is akin to a situation in which a person hires a vehicle, and the question could be as to what does he pay for--for the use of the technical know-how on the basis of which ITA No. 103 Mum 2017-Teoco Limited vehicle operates, or for the use of a product which carries passengers or goods from one place to another. The answer is obvious. When you pay for use of vehicle, you actually pay for a product which carries the passengers or goods from one place to another and not the technical know-how on the basis of which such a product operates. Same is the case with the software, when someone pays for the software, he actually pays for a product which gives certain results, and not the process of execution of instructions embedded therein. As a matter of fact, under standard terms and conditions for sale of software, the buyer of software is not even allowed to tinker with the process on the basis of which such software runs or to even work around the technical limitations of the software. In Asia Satellite Telecommunications Co. Ltd. vs. Dy. CIT (2003) 78 TTJ (Del) 489, a Co-ordinate Bench of this Tribunal did take the view that when an assessee pays for transponder hire, he actually pays for the process inasmuch as transponder amplifies and shifts the frequency of each signal, and, therefore, payment for use of transponder is in fact a payment for process liable to be treated as 'royalty' within meaning of that expression under Expln. 2 to s. 9(1)(vi) of the IT Act. However, when this decision came up for scrutiny of Hon'ble Delhi High Court, in the case reported as Asia Satellite Telecommunications Co. Ltd. vs. Director of IT (2011) 238 CTR (Del) 233 : (2011) 51 DTR (Del) 1 : (2011) 332 ITR 340 (Del), their Lordships, after a very erudite and detailed discussion, concluded that "we are unable to subscribe to the view taken by the Tribunal in the impugned judgment on the interpretation of s. 9(1)(vi) of the Act". It cannot, therefore, be open to us to approve the stand of the Revenue to the effect that the payment for software is de facto a payment for process. That is a hyper- technical approach totally divorced from the ground business realities. It is also important to bear in mind the fact that the expression 'process' appears immediately after, and in the company of, expressions "any patent, trademark, design or model, plan, secret formula or process". We find that these expressions are used together in the treaty and as it is well-settled, as noted by Maxwell in Interpretation of Statutes and while elaborating on the principle of noscitur a sociis, that when two or more words which are susceptible to analogous meaning are used together they are deemed to be used in their cognate sense. They take, as it were, their colours from each other, the meaning of more general being restricted to a sense analogous to that of less general. This principle of interpretation of statutes, in our considered view, holds equally good for interpretation of a treaty provision. Explaining this principle in more general terms, a very distinguished former colleague of ours Hon'ble Shri M.K. Chaturvedi, had, in an article 'Interpretation of Taxing Statutes' (AIFTP Journal: Vol. 4 No. 7, July, 2002, at p. 7), put it in his inimitable words as follows :

> "Law is not a brooding omnipotence in the sky. It is a pragmatic tool of the social order. The tenets of law being enacted on the basis of pragmatism. Similarly, the rules relating to interpretation are also based on commonsense approach. Suppose a man tells his wife to go out and buy bread, milk or anything else she needs, he will

> not normally be understood to include in the terms 'anything else she needs' a new car or an item of jewellery. The dictum of ejusdem generis refers to similar situation. It means ITA No. 103 Mum 2017-Teoco Limited of the same kind, class or nature. The rule is that when general words follow particular and specific words of the same nature, the general words must be confined to the things of same kind as specified. Noscitur a sociis is a broader version of the maxim ejusdem generis. A man may be known by the company he keeps and a word may be interpreted with reference to the accompanying words. Words derive colour from the surrounding words."

18. Viewed in this perspective, and taking note of lowest common factors in all the items covered by definition of the expression 'royalty' in art. 12(3), the 'process' has to be in the nature of know-how and not a product. In this view of the matter, and in view of Hon'ble Delhi High Court's declining to uphold the Co-ordinate Bench's decision in the case of Asia Satellite Telecommunication Co Ltd. (supra), we are of the considered view that the payment for software, by no stretch of logic, can be treated as a payment for "a process" liable to be taxed as royalty. This is precisely what was held by a Co-ordinate Bench of this Tribunal in the case of Sonata Information Technology (supra), though for different reasons.

19. On this aspect of the matter also, Gracemac decision (supra) has come to a different conclusion by opining that payment for software is in fact a payment for a process, but the view so expressed, being contrary to earlier decisions of the other Co-ordinate Benches and in accordance with the law laid down by Hon'ble Andhra Pradesh High Court in the case of CIT vs. B.R. Constructions (1993) 113 CTR (AP) 1 : (1993) 202 ITR 2(22)(e) (AP) does not constitute a binding judicial precedent. In our considered view, even a Co-ordinate Bench decision, which is admittedly contrary to earlier precedents on that issue from other Co-ordinate Benches, does not bind the subsequent Co-ordinate Benches. We have all the respect and admiration for the Co-ordinate Bench decision, but, in our considered view, this decision does not constitute a binding judicial precedent, and we leave it at that. The other aspect of the matter is that the issue of taxability of software, as a copyrighted article, is directly covered by a Special Bench of this Tribunal and the said decision, coming from a Bench of larger strength, prevails over the Division Bench decision. As laid down by the apex Court in the case of Ambika Prasad Mishra vs. State of UP AIR 1980 SC 1762 (p. 1764 of AIR 1980 SC) "every new discovery nor argumentative novelty cannot undo or compel reconsideration of a binding precedent. A decision does not lose its authority merely because it was badly argued, inadequately considered or fallaciously reasoned....". Therefore, whatever be the points, right or wrong, which can be put against the Special Bench decisions, the Special Bench decision continues to have a binding force on this Division Bench. In our humble understanding, the Special Bench decision in Motorola's case (supra) binds us and we have to respectfully follow the same. Respectfully following this Special Bench decision, as also a series of other Division Bench decisions on the same lines, we must approve the conclusions arrived at by the CIT(A).

20. In view of the above discussions, respectfully following Special Bench decision in Motorola's case (supra) as also a large number of Division Bench decisions on the issue, including in assessee's own case for one of the ITA No. 103 Mum 2017-Teoco Limited preceding assessment years, we approve the conclusions arrived at by the CIT(A) and decline to interfere in the matter.

21. In the result, the appeal is dismissed."

4.19. Thus, in view of the judgment of Hon'ble Supreme Court in the case of Radhasoami Satsang (supra), we respectfully follow the order of the Tribunal for A.Ys. 2003-04 & 2006-07 and hold that the payment received by the assessee on account of supply of software by the assessee to Reliance in pursuance to agreements made between both the parties dated 27th September, 2002 read with supplementary agreement 17th September, 2007 is not in the nature of 'Royalty' within the meaning of Article 12 of DTAA between India and Israel and therefore not liable to tax as such, but assessable as business income of the assessee subject to other provisions of the Act and DTAA. Thus, Ground No. 1.1 is decided in favour of the assessee.

xxxxxx

8. With respect to appeal for A.Yrs. 2009-10 and A.Y. 2010-11, it was jointly stated by both the parties that grounds raised therein are identical and facts and circumstances of the case as well as legal position remains the same. Under these circumstances, the A.O. is directed to follow our order with respect to each ground in accordance with our directions given in our order for A.Y. 2008-09, which shall be applicable mutatis mutandis."

2. There being no difference in facts brought to our notice by learned Departmental Representative, respectfully following the aforesaid decision of the Tribunal in assessee's own case as referred to above, we hold that the amount received by the assessee not being in the nature of royalty as per Article-12 of the India-Israel DTAA is not taxable as such in India, but, has to be treated as business profit of the assessee. "

> 7. We have seen that there is no variance in the fact for the year under consideration. Therefore, respectfully following the decision of Co-
>
> ordinate Bench in assessee's own case for assessment year 2008-09, 2009- 10 and 2012-13, the income earned by assessee is not taxable in India. In the result, Ground No. 1.1 of the appeal is allowed.
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> 8. Ground No. 1.2 to 1.5 is in support of Ground No. 1.1, which we have allowed, therefore, the discussion on these grounds become academic.
>
> ITA No. 103 Mum 2017-Teoco Limited
>
> 9. Ground No.2 relates to reimbursement of expenses considered as Fees for Technical Services. The ld. AR of the assessee further submits that this Ground of appeal is also covered by the decision of Tribunal in assessee's own case for Assessment Year 2006-07 which was followed in Assessment Year 2008-09 and further followed in appeal for Assessment Year 2012-13. On the other hand, the ld. DR for the Revenue supported the order of authorities below.

10. We have considered the submission of the parties and perused the material available on record. We have noted that the Co-ordinate Bench in appeal for Assessment Year 2012-13 by following the decision of Tribunal for Assessment Year 2008-09 passed the following order:

13. We have considered rival submissions and perused materials on record. As could be seen from the facts on record, in the preceding assessment years also the Assessing Officer has treated TTI India as a dependent agent PE of the assessee. However, while deciding the issue in dispute, the Tribunal in the order referred to above, have held in the following manner:-

"5.3. We have gone through the orders passed by the lower authorities.

It is noted by us that it is sixth year of the transactions; which have always been accepted by the Revenue in all the earlier years. It is further noted that the Tribunal in assessee's own case in A.Y. 2006-07 clearly held that assessee had no permanent establishment in India. It is further noted that TTI India has entered into the agreement on independent basis. No facts have been discussed by the Ld. CIT(A) to show that how the judgment of Rolls Royce PLC was applicable in the preference of the decisions of the Tribunal rendered in assessee's own case. Under these circumstances, we do not find any reason to deviate from the order of the Tribunal of the earlier years. Thus, respectfully following the order of the Tribunal for A.Y. 2006-07, we decide this issue in favour of the assessee. Thus, ground no.2 is allowed."

14. Consistent with the aforesaid view of the Co-ordinate Bench in assessee's own case, we hold that TTI India cannot be treated as assessee's dependent agent PE in India, hence, the amount of Rs. 2,26,51,706 is not taxable at the hands of the assessee. The grounds are allowed.

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11. Considering the fact that consistent view has taken by Co-ordinate Bench in assessee's own case for assessment year 2006-07, which was followed in 2008-09 & 200910 and again 2012-13, wherein it was held that TTI India cannot be treated as assessee's dependent agent PE in India.

Therefore, this ground of appeal is also allowed in favour of assessee.

12. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 15/10/2018.

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             Sd/-                                      Sd/-
         G.S. PANNU                                PAWAN SINGH
       ACCOUNTANT MEMBER                         JUDICIAL MEMBER
     Mumbai, Date:15.10.2018
     SK
     Copy of the Order forwarded to :
     1. Assessee                                2. Respondent
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3. The concerned CIT(A)
4. The concerned CIT
5. DR "L" Bench, ITAT, Mumbai
6. Guard File

BY ORDER,
Dy./Asst. Registrar
ITAT, Mumbai