

Ddit (It)-2(1), Mumbai vs M/S. Reliance Infocomm Ltd., Mumbai on 2 February, 2018

, " " Income-tax Appellate Tribunal "L" Bench Mumbai
, Before S/Sh. Rajendra, Accountant Member &
Ravish Sood, Judicial Member ./I.T.A.s/837/Mum/2007;

3431/Mum/2008; 3432/Mum/2008; 3433/Mum/2008; 3434/Mum/2008; 3435/Mum/2008;
3436/Mum/2008; 3437/Mum/2008; 3440/Mum/2008; 3441/Mum/2008; 3442/Mum/2008;
3443/Mum/2008; 3444/Mum/2008;

4245/Mum/2008; 4247/Mum/2008; 4249/Mum/2008; 4250/Mum/2008; 4251/Mum/2008; 42
52/Mum/2008; 4253/Mum/2008; 4261/Mum/2008; 4278/Mum/2008; 4279/Mum/2008;
4284/Mum/2008; ; 4285/Mum/2008; 4286/Mum/2008; 4287/Mum/2008; 4305/Mum/2008;
4306/Mum/2008; 4308/Mum/2008;

4673/Mum/2007; 4674/Mum/2007; 4676/Mum/2007; 4677/Mum/2007;
4873/Mum/2007; 4875/Mum/2007; 4876/Mum/2007; ; 4900/Mum/2007; ;
4903/Mum/2007; 4907/Mum/2007; 4917/Mum/2007; 4918/Mum/2007; 4920/Mum/2007; 4921/
Mum/2007; 4922/Mum/2007; 4923/Mum/2007;

5074/Mum/2008; 5075/Mum/2008; 5076/Mum/08; 5082/Mum/2008; 5085/Mum/2008; 5088/
Mum/2008; 5089/Mum/2008; 5090/Mum/2008;

5373/Mum/2007;

5407/Mum/2008; 5470/Mum/2008; 5475/Mum/2008;

DDIT
Room No.120, 1st Floor, Scindia House,
Ballard Estate, N.M. Road (IT)

Mumbai-400 038.

(/Appellant)

Reliance Communication Ltd.(RM)
(Formerly known as M/s. Reliance
Infocomm Limited, H Block

Vs.

1st Floor, Dhirubhai Ambani Knowledge
City, Navi Mumbai-400 710.
PAN:AACCR 4472 J

(/Respondent)

Revenue by: S/Shri Parag Vyas- DR

Assessee by: S/Shri J.D. Mistry/Deepak Jain

/ Date of Hearing: 10/01/2018

i / Date of Pronouncement: 02/02/2018

, 1961 254(1) ¢

Order u/s.254(1) of the Income-tax Act, 1961 (Act)

/ PER RAJENDRA, AM-

Challenging the orders of the CIT(A)-XXXI, Mumbai, of various dates, the Assessing Officers (AO.s) have filed above mentioned appeals. Issue involved in all the appeals is identical-relief granted by the First Appellate Authority (FAA) to the assesseees for the alleged violation of the provisions of section 40(a)(i) of the Act. The AO.s were of the opinion that there was failure on part of the assesseees of not deducting tax at source for the payments made by them to the non-resident-entities. Considering the commonness of the issue, we are adjudicating these appeals together.

Assessee-company are part of Reliance (ADAG) Group. The group consists many an entities, including Reliance Communication Ltd. (RCL), Reliance Telecom Ltd., Reliance BPO Ltd. and Reliance Communication Infrastructure Ltd. RCL is engaged in business of telecommunication. Other three entities were also connected with wireless telecommunication network in India. For that purpose, they entered into various contracts with non-resident-entities and made certain payments for purchase of software. The assesseees made applications u/s. 195 of the Act, requesting the AO.s to allow them to make payments to non residents without deducting tax at source. However, the AO.s held that payments made by them to the non residents were taxable in India, that they should deduct tax at source before making such payments. Accordingly, the assesseees deducted the taxes.

2. Aggrieved by the orders of the AO.s, passed u/s. 195(2) of the Act, the assesseees preferred appeals before the First Appellate Authority (FAA) and made elaborate submissions. Consider

-ing various clauses of the Contracts entered into by the assessee with the suppliers, he held that the assesseees did not own any rights for transferring the software licenses, that they were not having the power to decode the machine code of the software nor did they had the power to make copies of software (except for back-up), that they had obtained only the right to use the software for their business purpose and obtained no other rights in the Software, that the assessee had acquired the hardware and software simultaneously, that they did not acquire any right of duplication of software except for its own use. He also deliberated upon the provisions of the Indian Copyright Act, 1957 (ICA) and held that payment made by them for acquiring copy of the software did not amount to royalty within the definition under Article 12(3) of the DTAA.s. He referred to various clauses of the agreements entered into between the assesseees and the vendors. Finally, he allowed the appeals filed by them holding that there was no obligation on part of the assesseees to deduct tax at source for the payments made to the non-resident entities.

3. Before us, the (DR) submitted that software was a Process/an Invention/an Equipment/ transfer of all or any rights in respect of the software, that the consideration received for the use or the right to use the software constituted royalty, that in the decision of Solid Works (42 SOT 13) Tribunal had not considered the arguments of Software being a Process/an Invention /an Equipment. He referred to websites and dictionaries and contended that Software was a Process as defined in Expl. 2 to section 9(l)(vi) of the Act. He also relied on the definition of the term Invention given under the Oxford Dictionary and Black Laws Dictionary to hold that Software is an invention. Referring to the term 'Equipment' from Wikipedia website and relying on the decision of the Poompuhar Shipping Corporation Ltd. (360 ITR 257), he submitted that payment made by the assessee for purchase of

software fell under the head 'equipment-royalty'. He also relied on the definition of the royalty as per DTAA and stated that definition of the royalty was same in all DTAA.s, that some of the DTAA.s did not include equipment-royalty under the definition of royalty, that after amendment in the Act, the definition of royalty had become very vast and the same was also applicable to the tax treaties.

He further relied on section 14 of the ICA and submitted that to reproduce the work in any material form including the storing of it in any medium by electronic means covered under the definition of computer programme, that the assessee had stored or reproduced the software in equipment and therefore payment made by it for purchase of software fall under the definition of royalty, that as per section 30 of the ICA the assessee had received interest / rights to use the software and therefore the same fell under royalty, that there were no decisions which had considered section 30 of the ICA, that as per section 51 of the ICA copyright in a work would be deemed to be infringed when any person, without a licence granted by the Owner of the copyright did anything. He relied on the judgments of Synopsis International Old Ltd. (212 Taxman 454), Samsung Electronics Co. Ltd. (345 ITR 494) of Hon'ble Karnataka High and argued that payment made by the assessee for purchase of software was royalty payment, that it was liable to deduct TDS for the said payments, that the Hon'ble Karnataka High Court had considered the provisions of the ICA and had rightly held that payment made for use of software was copyright, that Hon'ble Court had also held that it was not necessary that there should be a transfer of exclusive right in copyright and where consideration paid was for rights in respect of copyright and for user of confidential information embedded in software/computer programme it would fall within mischief of Expl. (2) of section 9(1)(vi) of the Act and there would be a liability to pay tax, that facts of Ericsson's case were different from the judgments of Samsung and Synopsis, that the facts of the case under appeal were similar to the facts of Samsung (supra) and Synopsis (supra), that there were no contradictory decisions to those facts. He further argued that supply of hardware and software were of two different articles and relied on the decision of the Hon'ble Supreme Court in the case of M/s. PSI Data System Ltd. (Civil Appeal 491 of 1989, dated 17.12. 1996) and stated that for the purpose of custom and excise duties both the items i.e.- Hardware & software were separate, that for the purpose of income tax also, purchase of software was a separate item regardless of whether it was purchased standalone or was bought along with hardware.

The DR relied on the cases of Elkem Technology (250 ITR 164) Sunray Computers (P.) Ltd. & Lucent Technologies Hindustan Ltd. (348 ITR 196) Mahyco Monsanto Biotech (India) (P.) Ltd. (74 taxmann.com 92/58 GST 339), Citrix Systems Asia Pacific Pty Ltd. (343 ITR 1), Millennium IT Software (338 ITR 391), IMT Labs (India) (P.) Ltd. (287 ITR 450), Synopsis International (212 Taxman 454), Rishiroop Chemicals Pvt. Ltd. (36 ITD 35) and contended that payment made by the assessee for purchase of software was covered by the definition of royalty, that it was liable to deduct TDS on the said payments.

3.1. The (AR) referred to four contracts entered in to on dated 31/07/ 2002, with Lucent Techno

-logies, Hindustan Private Limited (LTHPL), namely, Wireless Equipment Contract (Pg. 1-55, Vol. 44); Wireless Software Contract (Pg. 56-73, Vol. 44); Wireless Service Contract (Pg. 74-101, Vol. 44); Wireless Network General Terms and Conditions ('GTC Contract'-Pg. 102-289, Vol.

44).He also referred to Wireless Software Assignment and Assumption Agreement,dated 5/08/2002 entered in to with Lucent Technology GRL LLC(Lucent)wherein LTHPL assigned the Software Contract to Lucent (Pg.290-294,Vol. 44).He contended that payment made to Lucent/other vendors for the purchase of software in pursuance of the aforementioned Contracts did not constitute royalty,as per the definition given under the Act and the DTAA.s.

3.2.He referred to the definition of 'royalty' given under the India-USA DTAA and argued that as per the definition,the term royalties included any payment towards the use or right to use any copyright,that royalties as a subject-matter of a copyright connoted only the payments for the use i.e.exploitation of such copyright in the software,that it was different from the use of the copyrighted article i.e. the software itself,that the acquisition of a product (software)-in which the subject matter of copyright was embedded-did not amount to use of or right to use the copyright of such product(software),that to constitute royalty, a person must be entitled to utilise the copyright in a manner which was otherwise protected by the relevant copyright law in favour of the Owner of such copyright,that the use of or the right to use the software was not the same as use of or the right to use the copyright of the software,that the assessee merely had the domain over the copyrighted article and used such copyrighted article for its business purpose(internal use),that it had neither used nor did it had the right to use the copyright in software,that the payments made by the assessee to Lucent and other vendors did not constitute royalty.

3.3.Referring to the various clauses of Contracts entered in to with LTHPL and Lucent,the AR stated that the nature of purchase made by the assessee and the rights and terms and conditions in respect of the use of the software proved that payment made by the assessee was not royalty,that the Equipment Contract was to support the Software Contract and vice versa,that the two contracts would be rendered unworkable in absence of either of the Contracts,that the Service Contract dealt with services in respect of the installation,commissi

-oning,operation,management and maintenance of all the Wireless Reliance Network, that the GTC Contract dealt with the background of the Contract,that all the agreements were not identical,that the FAA had,after examining the relevant clauses in respect of each of the Agreements,decided that the payment made by the assessee was for acquiring copy of software programme,that he had also held that the assessee did not acquire any copyright over such software,that the DR did not challenge the aforesaid finding of the FAA.He referred to the case of Ericsson A.B.(343 ITR 470) He relied upon the cases of Ericsson A.B.(supra),Infrasoft Ltd. (220 Taxman 273), ZTE Corporation(392 ITR80),National Stock Exchange of India Ltd. (ITA/7735/Mum. /20U),OECD Commentary on Article 12 and stated that the facts of the assessee's cases were similar to that of Ericsson's case,that the payment made by the assessee to Lucent and other vendors for supply of software was not royalty within the meaning of the Act or the DTAA,that Ericsson A.B. was also one of the vendors/deductees to whom the assessee had made payments for purchase of software,that treating the payment of software to Ericsson A.B. as royalty in the hands of the assessee/deductors was not correct,that payments made to other suppliers was not royalty as the Hon'ble Delhi High Court had-based on similar agreement-held that the said payment was not royalty,that payment made for purchase of software was for the use of copyrighted article which was distinct from the copyright,that the same did not constitute royalty under the provisions of the Act as well as DTAA.

3.4.Regarding software being a process /an Invention/an Equipment,he submitted that after the order of the Solid Works(supra)the Tribunals and/or High Courts had considered the arguments advanced by the DR,that they had deliberated upon the arguments of Software being a Process/an Invention,an Equipment, that the judicial forums had decided the issue in favour of the assessee after considering all the arguments advanced by the Department,that the case of Poompuhar was of no help ,that in that matter the Hon'ble Madras High Court had held that ship was an equipment,that the same is therefore not relevant to decide the issue raised in the present case, Referring to the provisions of the ICA,the AR stated that same were already considered in the various decisions by the Hon'ble High Court as well as Benches of Tribunal including Juris - dictional Tribunal.In that regard he relied upon the cases of ZTE Corporation (392 ITR 80), Reliance Industries Ltd.(69 taxmann.com 311),Baan Global BV(71 taxmann.com 213),Shell Information Technology International BV(80 taxmann.com 64),Qad Europe BV(77 taxmann. com 267);Solid Works Corpn.(supra)I.T.C. Ltd.(79 taxmann.com 206)Black Duck Software Inc.(86taxmann.com 62).He contended that the DR was factually incorrect in ascertaining that section 30 of the ICA was not been considered in any of the decisions,that in the matter of Dassault Systems K.K.(188Taxman223)section 30 of the ICA was considered,that above order was deliberated upon in the cases of Ericsson AB (supra) Solid Works Corpn.(supra). He also referred to Visteon Technical & Services Centre (P.) Ltd.(81 taxmann.com 390); Financial Software & Systems(P.)Ltd.(47 taxmann.com 410);HITT Holland Institute of Traffic Technology B.V. (78 taxmann.com 101).

About the matter of Mahyco Monsanto Biotech (India) (P.) Ltd (supra),relied upon by the DR,the AR argued that in that matter the question before the Hon'ble Bombay High Court was whether provision of proprietary technology for protection of particular seeds was taxable as 'sale' or 'service',that the Hon'ble High Court had held the transaction was a 'transa

-ction of sale,as against 'service' as claimed by the Petitioners,that after considering the aforesaid decision in Mahyco Monsanto's case (supra),the Tribunal in the case of Qad Europe B.V.(77 taxmann.com 267)had held that absence of transfer of rights to authorise doing of certain acts,mentioned in sections 2, 13 and 14 of the ICA,it could not be said that there was a transfer of copyright.The AR also referred to the matter of Synopsis International (supra)and stated that after considering the decision of Karnataka High Court in the case of Synopsis(supra)in the cases of Alcatel Lucent USA Inc.(ITA/1131,7299&7300/Mum/ 2010) Reliance Industries Ltd.(supra)and National Stock Exchange of India Ltd.(supra),it was held by the Tribunal that payment made for use of software did not constitute royalty. Referrring to the case of Samsung,he stated that it was considered in many a matters by the Tribunal.He also stated that the facts of the case of Synopsis(supra)were totally different from the facts of the present case.Referring to the case of Citrix Systems Asia Pacific Pvt Ltd.(supra).the AR stated that the Hon'ble Delhi High Court in the case of M Tech India (P.) Ltd. (381 ITR 31) had considered the decision of the AAR in Citrix Systems Asia and had held that payment made for purchase of software as a product would be treated as a payment for purchase of software rather than payment for use or right to use software.

About Millenium IT Software (338 ITR 391)and IMT Labs (India) (P.) Ltd.the AR submitted that both the AARs were considered in Citrix Systems (supra) which in turn had been considered by the

Delhi Tribunal as well as the Delhi High Court in Halliburton and M. Tech's case, that the AARs were only applicable to the assessee who applied for and not to other assessee.

Referring to the matter of Rishiroop Chemicals Pvt. Ltd. (supra), the AR submitted that the Tribunal in that case had held that in case of conflicting decisions of the High Court other than jurisdictional High Court, the view which appeared better had to be adopted or under certain circumstances, the view which was favourable to the tax payer would prevail, that in the case of Vegetable Products Ltd. (88 ITR 192) the Hon'ble Apex court had held that in case of difference in view, the view favourable to the assessee ought to be taken, that Rishroop had no application in the present case. About M/s. PSI Data System Ltd. Vs. Collector of Central Excise (Civil Appeal 491 of 19891-order dated 17.12.1996), the AR contended that the question before the Hon'ble Supreme Court was whether the value of software implanted into the computer had to be taken into account for the purpose of valuation to compute the excise duty, that the decision had no applicability in the present case. The AR further stated that the issue in the present appeals were not subject matter of the case of Elkem Technology (250 ITR 164)

4. We have heard the rival submissions and perused the material before us. We find that the assessee group companies were engaged in the business of providing telecommunication services, that for build-up of Wireless Telecommunication Network they had entered into various contracts with non-resident-vendors for supply of software, that the contracts can broadly be categorised as Equipment Contract, Software Contract, Service Contract, GTC Contract and Assignment Agreement. For the better understanding of the facts all the contracts/agreements will have to be considered cumulatively. The basic issue to be decided is as to whether the payments, made by the group entities to the non-resident vendors for supplying them software for installing wireless network, can be treated as royalty or not.

Term 'royalty', used in commercial and business world frequently, is understood to be a comp

-ensation/consideration/feed paid to an Owner for the use of his intellectual property like patents, copyrighted-works, franchises or natural resources. A royalty payment is made by those who wish to make use of it for the purposes of generating revenue or other such desirable activities. In most cases, royalty is designed to compensate the Owner for the asset's use and they are legally binding. The terms under which royalties are based on is called a license agreement. The license agreement defines the limits and restrictions of the royalties, such as its limitations pertaining to geographic territory, how long the agreement will last or the type of products with particular royalty cuts. License agreements are regulated specially if the resource Owner is the government or if the license agreement is a private contract. We would like to refer to the case of Ahmedabad Manufacturing and Calico Printing Mills (139 ITR 806), wherein the word royalty has been defined as follows:

"In the case of secret processes, patents, special inventions, when right of exploitation is given by the Owner of the inventions, patents, etc., to a third party instead of outright sale, then for the right to exploit these inventions, secret processes, some amount may be paid and the amount paid may be correlated to the extent of the

exploitation. It is in this sense that licence agreements for the exploitation of patents, inventions, etc., are being entered into in modern commercial world and as part of such agreements, even knowledge derived from his own experience and technical know-how for the most economical and efficient user of the patents, inventions, etc., are parted with by the Licensor to the licensee. Payments of this kind are known as royalties. This is also evident from several double taxation avoidance agreements between the Govt. of India and foreign countries such as Sweden in which the term "Royalty" has been defined. That such payments are royalties is also evident from the definition of the word "Royalty" in s. 9(1)(vi), Explanation 2, which was subsequently introduced by the Finance Act, 1976, with effect from June 1, 1976."

The Hon'ble Madras High Court has in the matter of Neyveli Lignite Corporation Ltd.(243 ITR 459)defined the term royalty as under:

"The term "royalty" normally connotes the payment made by a person who has exclusive right over a thing for allowing another to make use of that thing which may be either physical or intellectual property or thing. The exclusivity of the right in relation to the thing for which royalty is paid should be with the grantor of that right. Mere passing of information concerning the design of a machine which is tailor-made to meet the requirement of a buyer does not by itself amount to transfer of any right of exclusive user, so as to render the payment made therefor being regarded as "royalty".

In the case of Asia Satellite Telecommunications Co.Ltd.(332 ITR 340)the term royalty was explained in following manner:

"Clause (vi) of section 9(1) of the Act,makes income by way of royalty payable by certain persons chargeable to tax. The term "royalty" is assigned a specific meaning in Explanation 2 to clause (vi) of section 9(1) of the Act. Sub-clause (i) of the Explanation deals with a situation where rights in intellectual property are transferred including "the granting of a licence". What sub-clause (i) envisages is the transfer of "rights in respect of property" and not transfer of "right in the property". In the first category, the rights are purchased which enable use of those rights, while in the second category, no purchase is involved, only a right to use has been granted. Thus, the definition of the term "royalty" in respect of the copyright, literary, artistic or scientific work, patent, invention, process, etc. does not extend to the outright purchase of the right to use an asset. In the case of royalty, the Ownership on the property or right remains with the Owner and the transferee is permitted to use the right in respect of such property. According to sub-clause (iii) of the Explanation, even consideration paid for use of intellectual property would qualify as "royalty". Clause (vi) makes payments made for services rendered in connection with activities referred to in sub-clauses (i) to (iv), (iva) and (v) "royalty" for the purpose of section 9 . Explanation 2 has to be read as part and parcel of section 9(1)(vi) of the Act."

4.1. For taxation purposes the term royalty has to be understood in the manner it has been defined by the Act/tax treaties. Section 9(1) of the Act reads as under:

The following incomes shall be deemed to accrue or arise in India--

(i) all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situate in India :

XXXX

(vi) income by way of royalty payable by--

(a) the Government ; or

(b) a person who is a resident, except where the royalty is payable in respect of any right, property or information used or services utilised for the purposes of a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India ; or

(c) a person who is a non-resident, where the royalty is payable in respect of any right, property or information used or services utilised for the purposes of a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India :

Provided that nothing contained in this clause shall apply in relation to so much of the income by way of royalty as consists of lump sum consideration for the transfer outside India of, or the imparting of information outside India in respect of, any data, documentation, drawing or specification relating to any patent, invention, model, design, secret formula or process or trade mark or similar property, if such income is payable in pursuance of an agreement made before the 1st day of April, 1976, and the agreement is approved by the Central Government :

Provided further that nothing contained in this clause shall apply in relation to so much of the income by way of royalty as consists of lump sum payment made by a person, who is a resident, for the transfer of all or any rights (including the granting of a licence) in respect of computer software supplied by a non-resident manufacturer along with a computer or computer-based equipment under any scheme approved under the Policy on Computer Software Export, Software Development and Training, 1986, of the Government of India : Explanation 1.-- For the purposes of the first proviso, an agreement made on or after the 1st day of April, 1976, shall be deemed to have been made before that date if the agreement is made in accordance with proposals approved by the Central Government before that date ; so,

however, that, where the recipient of the income by way of royalty is a foreign company, the agreement shall not be deemed to have been made before that date unless, before the expiry of the time allowed under sub-section (1) or sub-section (2) of section 139 (whether fixed originally or on extension) for furnishing the return of income for the assessment year commencing on the 1st day of April, 1977, or the assessment year in respect of which such income first becomes chargeable to tax under this Act, whichever assessment year is later, the company exercises an option by furnishing a declaration in writing to the Assessing Officer (such option being final for that assessment year and for every subsequent assessment year) that the agreement may be regarded as an agreement made before the 1st day of April, 1976. Explanation 2.-- For the purposes of this clause, "royalty" means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head "Capital gains") for--

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

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

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

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

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

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

(vi) the rendering of any services in connection with the activities referred to in sub-clauses

(i) to (iv), (iva) and (v).

Explanation 3.-- For the purposes of this clause, "computer software" means any computer programme recorded on any disc, tape, perforated media or other information storage device and

includes any such programme or any customized electronic data. Explanation 4.-- For the removal of doubts, it is hereby clarified that the transfer of all or any rights in respect of any right, property or information includes and has always included transfer of all or any right for use or right to use a computer software (including granting of a licence) irrespective of the medium through which such right is transferred. Explanation 5.-- For the removal of doubts, it is hereby clarified that the royalty includes and has always included consideration in respect of any right, property or information, whether or not--

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

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

(c) the location of such right, property or information is in India. Explanation 5.-- For the removal of doubts, it is hereby clarified that the expression "process" includes and shall be deemed to have always included transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal), cable, optic fibre or by any other similar technology, whether or not such process is secret ; In the tax treaties, entered in to with above mentioned five countries, the term royalty has been also been dealt with. We are reproducing the relevant portion of the DTAA.s. Article 12 of Australia India DTAA contains following provisions about Royalty:

(3) The term "royalties" in this article means payments or credits, whether periodical or not, and, however described or computed, to the extent to which they are made as consideration for :

(a) the use of, or the right to use, any copyright, patent, design or model, plan, secret formula or process, trade mark, or other like property or right ;

(b) the use of, or the right to use, any industrial, commercial or scientific equipment ;

(c) the supply of scientific, technical, industrial or commercial knowledge or information ;

(d) the rendering of any technical or consultancy services (including those of technical or other personnel) which are ancillary and subsidiary to the application or enjoyment of any such property or right as is mentioned in sub-paragraph (a), any such equipment as is mentioned in sub-paragraph(b) or any such knowledge or information as is mentioned in sub-

paragraph(c) ;

Royalty provision, as per the India-Israel tax treaty (Article 12), can be summarised as under:

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, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience.

Article 13 of the India-Sweden Double Taxation Avoidance Agreement provides as follows ;

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, films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for the use of, or the right to use, industrial, commercial, or scientific equipment, or for information concerning industrial, commercial or scientific experience.

Following are the provisions of royalty (Article 12) in the India Singapore DTAA:

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:

(a) any copyright of a literary, artistic or scientific work, including cinematograph film or films or tapes used for 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, property or information ;

(b) any industrial, commercial or scientific equipment, other than payments derived by an enterprise from activities described in paragraph 4(b) or 4(c) of Article 8.

Now, we would refer to Article 12 of the Indo-USA tax treaty and it reads as under:

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

"(a) payments of any kind received as consideration for the use for the right TO use, any copyright of 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, trademark, 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 were contingent on the productivity, use of disposition thereof;

A comparison of the provisions of DTAA.s and the section 9 of the Act clearly reveal that term royalty does not connote the same meaning even if both are casually glanced at. In the DTAA.s royalty 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. But, the Act has expanded the meaning of Royalty by adding explanations to the section. The canvass of term royalty is broader in the Act, as compared to the above referred tax treaties. While making amendments to the Act, the Parliament has not amended the DTAA.s with the above mentioned five countries. So, the treaties, as they are, will be applicable and will govern the tax incidence of the transactions covered by them, if an assessee opts out for them. It has to be remembered that while dealing with taxation of non-resident-entities provisions of tax treaties have to be considered and that domestic law will not have preference over the DTAA.s.

5. In the appeals before us, the issue has arisen with regard to entities that are located in 5 countries. About 20 vendors have supplied software to the assessee. We are tabulating the vendors as per the ITA.s and Countries:

SN.	ITA	Country	Vendor's Name
1.	5089	Australia	Clarity International
2.	5074	Australia	e-Serv Global Limited
3.	5088	Australia	e-Serv Global Limited
4.	5090	Ireland	Atrica Ireland Limited
5.	5475	Israel	Comverse Limited
6.	4250	Israel	Comverse Ltd.
7.	4253	Israel	Comverse Ltd.
8.	4308	Israel	Comverse Ltd.
9.	4673	Israel	Comverse Ltd.
10.	4873	Israel	ECI Telecom-NGTS Ltd.
11.	5076	Israel	Septier Communication Ltd.
12.	4918	Israel	Verint Systems Ltd.
13.	4676	Israel	Verint Systems Ltd.
14.	4677	Israel	Verint Systems Ltd.
15.	4876	Israel	Verint Systems Ltd.
16.	4900	Israel	Verint Systems Ltd.
17.	4907	Israel	Verint Systems Ltd.
18.	4261	Israel	Verint Systems Ltd...
19.	4875	Singapore	3 Com Asia Pacific Rim Pte Ld
20.	4674	Singapore	3 Com Asia Pacific Rim Pte.Ltd.
21.	4922	Singapore	Actix Pte.Ltd.

22. 4903 Singapore Agilent technologies Singapore (Sales) Pte.Ltd.

23. 4923 Singapore Hewlett Packard Singapore Pte (sales) Ltd

24. 4287 Singapore Hewlett Packard Singapore Pte (sales) Ltd.

25. 5085 Singapore Infovista (Asia Pacific) Pte.Ltd. Singapore.

26. 5373 Singapore Nortel Network Singapore Pte.Ltd
27. 4278 Singapore Nortel Network Singapore Pte.Ltd.
28. 4279 Singapore Nortel Network Singapore Pte.Ltd.
29. 4284 Singapore Nortel Network Singapore Pte.Ltd.
30. 5467 Singapore Sun Microsystem Pte.Ltd.
31. 5470 Singapore Sun Microsystem Pte.Ltd.
32. 4920 Singapore Sun Microsystems Pte.Ltd.
33. 4305 Sweden Envilogg AB
34. 4245 Sweden Envilogg AB
35. 4249 Sweden Envilogg AB
36. 4251 USA Ericson Communication Wireless Inc.
37. 4285 USA Ericson Wireless Communication Inc.
38. 4286 USA Ericson Wireless Communication Inc.
39. 3431 USA Lucent Technologies GRL LLC
40. 3432 USA Lucent Technologies GRL LLC
41. 3433 USA Lucent Technologies GRL LLC
42. 3434 USA Lucent Technologies GRL LLC
43. 3435 USA Lucent Technologies GRL LLC
44. 3436 USA Lucent Technologies GRL LLC
45. 3437 USA Lucent Technologies GRL LLC
46. 3440 USA Lucent Technologies GRL LLC 47 837 USA Lucent Technologies GRL LLC
48. 3441 USA Lucent Technologies GRL LLC

49. 3442 USA Lucent Technologies GRL LLC

50. 3443 USA Lucent Technologies GRL LLC

51. 3444 USA Lucent Technologies GRL LLC

52. 4921 USA Techtronix Inc.

53. 4252 USA Tekelec Inc.

54. 4917 USA Tekelec Inc.

55. 4247 USA Ulticom Inc

56. 4306 USA Ulticom Inc.

57. 5075 USA Venturi Wireless Inc. USA

58. 5082 USA Venturi Wireless Inc. USA 5.1. In the case of Tata Consultancy Service (271 ITR 401), the Hon'ble Apex Court has dealt with the issue of sale of software. That matter is of great help to decide the appeals before us. So, we are reproducing the relevant portion of the judgment and it reads as under:

"The term 'goods', for the purposes of sales tax, cannot be given a narrow meaning. Properties which are capable of being abstracted, consumed and used and/or transmitted, transferred, delivered, stored or possessed, etc., are 'goods' for the purpose of sales tax. The test to ascertain whether a property is 'goods' for the purposes of sales tax is not whether the property is tangible or intangible or incorporeal. The test is whether the concerned item is capable of abstraction, consumption and use and whether it can be transmitted, transferred, delivered, stored, possessed, etc. In the case of software, both canned and uncanned, all of these are possible. Intellectual property when it is put on a media becomes goods. A software programme may consist of various commands which enable the computer to perform a designated task. The copyright in the programme may remain with the originator of the programme. But the moment copies are made and marketed, it becomes goods which are susceptible to sales tax. Even intellectual property, once it is put on to a media, whether it be in the form of books or canvas (in the case of painting) or computer discs or cassettes, and marketed would become 'goods'. There is no difference between sale of a software programme on a CD/floppy disc and sale of music on a cassette/CD or sale of a film on a video cassette/CD. In all such cases, the intellectual property has been incorporated on a media for purposes of transfer. Sale is not just of the media which by itself has very little value. The software and the media cannot be split up. What the buyer purchases and pays for is not the disc or the CD. As in the case of paintings or books or music or films the buyer is purchasing the

intellectual property and not the media, i.e., the paper or cassette or disc or CD.

A transaction of sale of computer software package off the shelf is clearly a sale of "goods"

within the meaning of that term in section 2(n) of the Andhra Pradesh General Sales Tax Act, 1957. The term "all materials, articles and commodities" in section 2(h) of the Act includes both tangible and intangible/incorporeal property which is capable of abstraction, consumption and use and which can be transmitted, transferred, delivered, stored, possessed, etc. The software programmes have all these attributes.

The theory of 'copyrighted article' and 'copyright itself', as propounded by the Hon'ble Apex Court, has worked as a lighthouse for tax litigation related to copyright issues. Following the above judgment, Hon'ble High Courts of Delhi and Madras have held that the provisions of section 9(1)(vi) of the Act, cannot be applied to a situation of outright purchase and sale of a product. In the case of Vinzas Solutions India Pvt. Ltd. (392 ITR 155), the Hon'ble Madras High Court has dealt the issue. Facts of the matter were that the assessee was a dealer in computer software purchased from various companies. The AO disallowed the deduction u/s. 40(a)(ia) of the Act on the ground that the consideration for the purchase by the assessee was in the nature of royalty and tax ought to have been deducted at source in accordance with the provisions of section 194J. The FAA confirmed the order of the AO and held that the consideration paid by the assessee fell within the ambit of the definition of royalty under Explanations 4 and 5 of section 9(1)(vi). The Tribunal reversed the orders of the lower authority.

-ties. Dismissing the appeal of the Department, the Hon'ble High Court held as under:

".....the provisions of section 9(1)(vi) of the Act, dealing with and defining "royalty" could not be made applicable to a situation of outright purchase and sale of a product. It was an admitted fact that the assessee was engaged in buying and selling software in the open market. The transaction in question was thus one of purchase and sale of a product and nothing more. Courts had consistently noted the difference between a transaction of sale of a "copyrighted article" and one of "copyright" itself. The provisions of section 9(1)(vi) would stand attracted in the case of the latter and not the former. Explanations 4 and 7 to section 9(1)(vi) relied on by the authorities had to be read and understood only in that context and could not be expanded to bring within their fold, transaction beyond the realm of the provision. The Appellate Tribunal was justified in deleting the disallowance."

6. In addition to concept of royalty, theory of 'copyrighted article' and 'copyright itself', the agreements entered into between the assesseees and the non residents, are also very crucial to decide the issue raised before us. We have gone through all the 20 agreements inked by the non resident suppliers of software with the assesseees. First of all, we would like to reproduce the salient clauses of the agreements entered into by the assesseees with one of their suppliers of the USA i.e. Lucent Technologies GRL LLC (Lucent).

The Equipment Contract (Page 1-55 of the PB, Vol. 44) Clause 1. Background Reliance desires to obtain certain Equipment to support the Wireless Reliance Network. The Vendor shall perform all specific Vendor responsibilities set forth in this Wireless Equipment Contract, including applicable Purchase Orders and the Specifications. Notwithstanding the foregoing sentence, Vendor shall be responsible for providing the Equipment under this Wireless Equipment Contract in accordance with the Documents. This Wireless Equipment Contract is subject to the terms and conditions set forth in the Wireless Network General Terms and Conditions executed by the parties as of the date hereof ("the General Terms").

1.2 Objectives Reliance requires equipment that fully supports: (a) the Initial Wireless Reliance Network and the Wireless Reliance Network as specified in the relevant Document. The Vendor represents, warrants and covenants that the Equipment shall be fully compatible with and fully supports the Objectives, as shall be demonstrated to Reliance, in part, in the Acceptance Tests.

3.1.1 The Vendor shall provide to Reliance the Equipment set forth in the Specifications as amended from time to time. Vendor's obligations hereunder shall include, but not be limited to the obligations to manufacture, supply (including inspection and expediting) and deliver the Equipment on FCA basis (read with Documents), to agreed international airport in the country of the export to be put on ship/airport in accordance with the Documents.,

The Software Contract (Pg. Nos. 56-73 of the PB, Vol. 44):

1.1 Background Reliance desires to obtain certain Software to support the Wireless Reliance Network. The Vendor shall perform all specific Vendor responsibilities set forth in this Wireless Software Contract, including applicable Purchase Orders and the Specifications.

Notwithstanding the foregoing sentence, Vendor shall be responsible for providing the Equipment under this Wireless Software Contract in accordance with the Documents. This Wireless Software Contract is subject to the terms and conditions set forth in the Wireless Network General Terms and Conditions executed by the parties as of the date hereof ("the General Terms").

1.2 Objectives Reliance requires software that fully supports: (a) the Initial Wireless Reliance Network and the Wireless Reliance Network as specified in the relevant Documents and (b) Interoperability as specified in the documents. The Vendor represents, warrants and covenants that the software shall be fully compatible with and fully supports the objectives, as shall be demonstrated to Reliance in part, in the Acceptance Tests.

3.1.1. The Vendor shall provide to Reliance the software set forth in the specifications as amended from time to time. Vendor's obligations hereunder shall include, but not be limited to the obligations to manufacture, supply (including inspection and expediting) and deliver the Equipment on FCA basis (read with Documents), to agreed international airport in the country of the export to be put on ship/airport in accordance with the Documents... ..

3. 1.4 The Software supplied under this Wireless Software Contract is standard software that Vendor would supply to any other Person seeking to establish wireless technology networks similar to the Wireless Reliance network.

The GTC Contract (Pg. Nos. 102-289 of Vol. 44):

Clause 1 of the GTC Contract (Pg. 108 of Vol. 44) deals with the background of the Contract. Relevant extract of the same is as under:

1.1.1 Reliance desires to construct a telecommunications network in the Republic of India and to provide advanced optical, wireless and wireline voice, video and data services across the Republic of India and throughout other parts of the world, either directly to its end customers or through services resold by other telecommunication carriers. Reliance and its Affiliates had been providing GSM mobile wireless services in seven (7) telecommunications circles and basic telecommunications services in one (1) telecommunication circle..... "

XXXX 15.1.1 Subject to the terms of this Section 15, upon delivery of Software, Vendor hereby grants to Reliance or its Affiliates (and to third parties whom Reliance or its Affiliates had contracted to operate the Wireless Reliance Network on their behalf (and to the extent of the same) upon payment (of, or agreement to pay, the relevant license fees by Reliance and/ or its Affiliates, a perpetual, irrevocable, non-exclusive, unrestricted {within the Wireless Reliance Network), unlimited (where specifically so identified in the relevant Documents), royalty-free license, to use such Software for the benefit of Reliance in connection with the Ownership operation and maintenance of the Wireless Reliance Network in the Territory and the provision of relevant services in the Territory to Reliance's customers. The Software shall be used in accordance with the relevant Documents 15.1.4 Except as otherwise expressly set forth in the Documents, Reliance shall use such Software only for the operation of the Wireless Reliance Network, or in the case where the Software is purchased by or on behalf of Reliance Affiliates, for the operations of such Reliance Affiliates in the Wireless Reliance Network. The Software Licenses grant Reliance or Reliance Affiliates no right to and Reliance or Reliance Affiliates will not, sublicense such Software or modify, decompile, reverse engineer, or disassemble, or in any other manner decode Software furnished as object code for any reason. Reliance and Reliance Affiliates shall not copy the Software including firmware except for the purposes of making a limited number of archival copies (for backup use in operating and maintaining the Wireless Reliance Network) in accordance with the Documentation and/ or the relevant Agreement, or as otherwise authorized in writing by the Vendor or as otherwise set out in the relevant Documentation. Except as provided below, no license is granted to Reliance to use the Software outside of the Territory. For the avoidance of doubt, the changing by Reliance or Reliance Affiliates of the values in the Software, modification by Reliance and/ or its Affiliates of the Software by using the tools provided in or with the Software or any modification,

in accordance with and pursuant to the relevant Documentation, shall not constitute 'modification' of the Software provided always that Reliance ma\ only change, amend or modify Software which is designed for 'customer access' and to be so modified.

15.2.1 Except as otherwise expressly agreed by the Parties in writing, all Custom Work Product shall be the sole and exclusive property of the Vendor, including, without limitation, all copyrights, trademarks, patents, trade secrets, and any other proprietary rights inherent therein and appurtenant thereto, and the vendor hereby grants Reliance a perpetual, irrevocable, exclusive, fully paid up, unrestricted license, without any additional charges, to use copy, sublicense and transfer such Custom Work Product within the Wireless Reliance Network. With respect to Custom Work Product that Vendor had developed or created at the direction of Reliance that is not based on existing Vendor software, and that is not intended for use in Equipment supplied by the Vendor, Vendor hereby grants Reliance a perpetual, irrevocable, exclusive, fully paid up, unrestricted license, without any additional charges, to use, copy, make Derivative Works from, modify, sublicense and transfer such Custom Work Product within the Wireless Reliance Network. Prior to the development of any Custom Work Product, Reliance and the Vendor shall agree in writing with respect to exploitation rights.

15.2.2 All intellectual property rights with respect to the Software (other than the Intellectual Property Rights) were and shall remain the sole and exclusive property of Vendor or its suppliers, including without limitation, all copyrights, trademarks, patents, trade secrets, any other proprietary rights inherent therein and appurtenant thereto. All intellectual property rights with respect to the Reliance Software were and shall remain the sole and exclusive property of Reliance, including, without limitation, all copyrights, trademarks, patents, trade secrets and any other proprietary rights inherent therein and appurtenant thereto. In the appeals before us, in more than one case the assessee had made payments to Lucent only. In all those appeals the terms and conditions are similar. The agreements of other 7 suppliers also are on the similar lines.

6.1. Now, we would like to refer to the terms and conditions of the agreement entered into with one of the companies of Israel, namely, Comverse Ltd. GTC entered into between the assessee and the supplier of the software is about Software Licences. Clause 42.1 stipulates that upon delivery of software, the Licensor (i.e. non resident supplier) shall grant to Owner (assessee) or its Affiliates to 'operate the Owner's network. The assessee was granted a perpetual, irrevocable, non-exclusive, unrestricted unlimited with respect to the number of subscribers, non transferable, 'royalty free license', for the use of such Software in object code form and the Documentation, inter alia, for storing, loading, Installing, executing, displaying, analysis, configuration, training, implementation, interfacing and/or integration purposes for the benefit of Owner in connection with the Ownership, operation and maintenance of the Software together with Licensor supplied equipment and hardware on Owner's network. Remaining clauses of the Agreement reads as follows:

42.3 The aforementioned licenses set forth above are hereinafter be referred to as the 'software license'. Such Software License shall not be transferred assigned sublicensed by or used by outsources of Owner without Licensor's express written consent....

42.4 The rights and obligations of Owner the Software Licenses shall survive the termination of all or any portion of the Order. In the event that Owner to pay applicable and undisputed for the Software, Licensor may terminate owner's right to use the Software to which such charges apply...

42.5 Owner shall have the right to translate, abridge and / or make as many numbers of copies of the Documentation as reasonably required for Owner's internal business purpose .

Further, Owner shall have the right to make as many copies of the Software as are necessary for the use of the Software in accordance with this agreement. Owner shall reproduce all copyright notices as provided in the original Software and Documentation on all copies thereof, translations and abridgements thereof. Owner shall not remove nor alter, nor permit the removal or alteration of, any trademarks, copyright notices, tags, labels or other identifying markings placed on any software-

42.6 Owner shall not translate, reverse engineer, modify, decompile, disassemble or create derivative works from the Software except as expressly provided under applicable law. However, tailoring of the Software by use of the utilities provided In the Software shall not be construed as modification of the Software 42.7 Owner shall not use the Software for (i) commercial time-sharing with non-affiliate third parties (ii) rental, lease, and sub-licensing to non-affiliate third parties; and (iii) service- bureau purposes."

Clause 43.0 of GTC deals with Intellectual Property/Warranties and it reads as under:

Licensor represents, warrants and covenants that:

(i) Licensor is the Owner, valid licensee or authorized user of the SOFTWARE, Documentation and the Licensor's internal use tools:

(ii) the SOFTWARE and Owner'S proposed use thereof does not and shall not infringe the patent, copyright, trade secret or other intellectual property right of any third party:

(iii) the SOFTWARE complies with Applicable Law:

(iv) Licensor has and shall have full and sufficient right to license the Intellectual Property Rights (as defined below), including without limitation to sublicense the SOFTWARE and any intellectual property related thereto, hereunder to Owner for the purposes contemplated by this Agreement:

(v) the Intellectual Property Rights are, or prior to Acceptance of any SOFTWARE will be, sufficient for such items to perform in accordance with the relevant Specification and Owner'S business objectives as and to the extent expressed herein:

(vi) the SOFTWARE do not and shall not infringe any patents, copyrights, trademarks, or other intellectual property rights (including trade secrets) or similar rights of any third party, nor has any claim of such infringement been threatened or asserted, nor is such a claim pending against Licensor

(vii) Licensor has no obligations to any third party that in any way limits or restrict its ability to perform this Agreements and;

(viii) Licensor shall not disclose to Owner, nor make use in the performance of this Agreements, any trade secrets or other proprietary information of any third party, unless Licensor may do so without Licensor or Owner incurring any obligation (past pr future) to such third party for such disclosure or work or any future application thereof, except the obligations of "Non disclosure" as required by Section 21 of this Agreements."

6.2.Main clauses(Clause 42)of the agreements with Hewlett Packard Singapore (Sales)Pte Ltd.,a non resident entity from Singapore read as under:

42.1.Upon delivery of software, the SELLER shall grant to Owner or its Affiliates (and to third Parties whom Owner or its Affiliates have contracted to operate the Owner's network on their behalf (and to the extent of the same) by OWNER and/or its Affiliates, a perpetual, irrevocable, nonexclusive, royalty free license, for the use of such Software in object code form and the Documentation, inter alia, for storing, loading, Installing, executing, displaying, analysis, configuration, training, implementation, interfacing and/or integration purposes for the benefit of Owner in connection with the Ownership, operation and maintenance of the Software in the Owner'S Data Centre.

42.2.The aforementioned licenses set forth above are hereinafter be referred to as the 'software license'. Such Software License shall not be transferred assigned sublicensed by or used by outsources of Owner without SELLER'S consent except with respect to (i) the sale of the Owner'S net work (or any component thereof); (ii) the financing of the Owner'S Data Centre (or any component thereof; or (iii) the outsourcing by Owner of any operating or maintenance functions related to the Owner'S data centre; or (iv) the transfer, assignment or sublicense by Owner Affiliate (or vice versa) or between Owner Affiliates, in conjunction with a transfer of a portion of the Owner'S network, provided that in each such case, such transferee, assignee or sublicense agrees in writing to abide by all the terms and conditions set forth in the Software Licenses and the SELLER is informed of the same in writing by Owner and provided further that the rights transferred, assigned sublicensed or granted to outsources, as the case may be, shall be only those reasonably to fulfill.

42.3.The rights and obligations of Owner under the Software Licenses shall survive the termination of all or any portion of the Purchase Order. In the event that Owner

fails to pay applicable and undisputed charges for the Software, seller may terminate Owner'S right to use the Software to which such charges apply: provided that SELLER has given written notice and details of such breach to Owner and has advised Owner of its intention to terminate and Owner has failed to make such payment within (30) days from Sellers notice thereof. Such terminated rights shall be immediately reinstated upon payment of all applicable license fees.

In no event other than as set forth in this Section 42 may SELLER terminate Owner'S right to use the Software. Notwithstanding any other provision of the Purchase order, if there is a dispute hereunder, pending final resolution of such dispute, all the Owner'S right under the Purchase Order shall continue in full force and effect, and SELLER will not terminate the; Software Licenses, and so long as Owner continues to pay SELLER applicable fees, SELLER will not terminate, suspend, interrupt or delay maintenance and support of the Software.

42.4. The Owner shall make copies or adaptations of the Software for archival purposes or when copying or adaptation is an essential step for the authorised use of the software.

42.5. Owner shall not translate, reverse engineer, modify, decompile, disassemble or create derivative works from the Software except as expressly provided under applicable law. However, tailoring of the Software by use of the utilities provided In the Software shall not be construed as modification of the Software.

42.6. Owner shall not use the Software for (i) commercial time-sharing with non-affiliate third parties; (ii) rental, lease, and sub-licensing to non-affiliate third parties; and (iii) service- bureau purposes."

42.7. SELLER shall obtain and keep valid (either perpetually or till replacement) all consents, authorizations, licenses, permissions or approvals, including but not limited to rights of access to and use the third party software, systems or other material required to validly and effectively provide and license the Software to Owner and its Affiliates Licensee (" Required Consent"), at no additional cost or expenses to Owner, SELLER shall pay all fees and cost or expenses to Owner, SELLER shall pay all fees and cost (such as transfer, re-licensing or upgrade fees, termination or underutilization costs) associated with the Required Consents. Failure to obtain any Required Consent shall not relieve SELLEER of its obligations under this Agreement and SELLER shall pay any additional costs incurred by Owner as a result of such failure in addition to any other remedies available to Owner hereunder.

42.8. SELLER hereby covenants that the Software is free from any encumbrance, charge, lien or security interest. Further, in the event of such encumbrance, charge or lien the SELLER shall (i) notify the party in whose favour such encumbrance, charge or lien is created, of Owner'S rights under this Agreement; and (ii) obtain such party's consent (and intimate such consent to Owner within seven (7) days of obtaining thereof) and in no case later than 30 days from the date its supplying such Software to Owner. Further, seller shall not, at anytime, undertake any act or omission that shall limit, regress or abrogate either the licenses granted to Owner and Affiliates

hereby or any rights accruing to Owner and Affiliates hereunder."

6.3. Agreement with, Clarity International, a supplier of software from Australia, contains following main clauses:

2.1 Grant of License in consideration of the License Fee, Vendor hereby grants unto Reliance and its Affiliates' nonexclusive irrevocable, worldwide, and unlimited, royalty free and perpetual license for Use of the Software and all Upgrades and the Documentation. Reliance shall be entitled to Use the Software, Documentation, and all related documentation, in the course of its business operation. Vendor acknowledges that delivery of the Documentation is a material obligation of the Vendor and hereby agrees to provide, simultaneous with the delivery of the Software. I (one) complete, unabridged copy of the Documentation in printed format and / or machine-readable form as it exists at that point in time. The Vendor further agrees to provide updated copies of the documentation as and when they become available during this Agreement 2.2 Ownership Reliance hereby acknowledges that Vendor is and shall remain the sole and exclusive Owner of the rights, title and property in Software and the Source Code to the Software, save and except on the occurrence of any of the release events set out in Clause 10.1 [Source Code Escrow].

2.3 Copies Reliance and its Affiliates shall have the unlimited right to translate, abridge and/or make : as many copies of the Software and/or Documentation as are reasonably necessary for Use of the Software. Reliance agrees that the rights & title in such copies shall at all times remain vested in the Vendor and agrees to reproduce on all such copies, all , copyright notices as provided on the original Software.

2.4 Restrictions on Use The grant of license under Clause 2.1 above shall be subject to the following restrictions:

Reliance shall not reverse engineer, decompile and disassemble the Software;

Reliance shall not use the Software or Documentation copies of either, except provided under applicable and in accordance with the of this Agreement.

Reliance shall not use Software for (ii) commercial sharing with non-Affiliate parties; and

(iii) rental, sub-licensing to non-Affiliate third parties.

Reliance shall not to the extent reasonably possible allow any non-Affiliate third party use of or access to the Software or the Documentation .

2.5. Catalyst Vendor hereby agrees to grant to Reliance, the Source Code of "Catalyst" and a non-exclusive, perpetual, ' worldwide, royalty-free, unlimited right to use the Intellectual Property' rights

in Catalyst, save and except the right to sell re - sell. distribute, redistribute, or otherwise transfer such license. Notwithstanding the above, it is clarified that Vendor shall not directly or indirectly sell, transfer such, license, sublicense, distribute; enhance, upgrade, customize, or assign or in any other confer any rights or interest in Catalyst to any third party in the territory of India. A detailed description of Catalyst is attached to this Agreement under Annex C. 6.4. Erricsson AB Sweden, a Swedish company had also entered in to agreements with the assessee group companies for supplying software for installing wireless network. Clause 20 of the Supply Contract provides for the Software Licenses and it stipulates transfer of a non-exclusive, non-transferrable, irrevocable 'restricted License' to use the Software for 'Buyer 's own operation and maintenance of the system and its extensions.' Sub-clause 2 and 4 state as under:

"Notwithstanding anything in this Contract to the contrary it is understood that Buyer receives no title or Ownership software or Document such right shall remain with Supplier or its suppliers. However, buyer receives the right to use software and the documentation as provided in this Article"

20.4. In pursuance of the foregoing Buyer Shall:

- a) not provide or make the Software or Documentation or any portions or aspects thereof available to any person except to its employees and legal advisors on a "need to know" basis;
- b) not make any copies of Software or Documentation or Parts thereof, except for archival backup purposes:
- c) When making permitted copies as aforesaid transfer to the copy/ copies any copyright or other marking on the Software or Documentation.
- d) Not de-compile, disassemble or reverse engineer the Software; and
- e) Not remove any trademark, trade-name, proprietary, copyrights, trade secret or warning legend from the Software, Documentation or copies thereof : and
- f) Not translate, adapt, arrange or error correct or make any other alteration of the Software or documentation ; and
- g) Not use the Software or Documentation for any other purpose than permitted in this Article 20, License or sell or in any manner alienate or part with its possession.
- h) Not use or transfer the Software or Documentation outside India without the written consent of Supplier and after having received necessary export or reexport permits from relevant authorities.

7. After considering the various clauses of the above mentioned agreements, we are of the opinion that below mentioned factors can be very helpful to solve the knotty problem of taxation of royalty payments to the non-residents. In such matters, what has to be seen is that as to whether:

- i) the software was sold in the same manner as wireless network equipment,
- ii) the software was an integral part of the wireless-equipment, which facilitated running of the said equipment,
- iii) the subject software had no independent value of its own,
- iv) copyrights in the software were transferred to the customers,
- v) access to the "source codes" in the software was granted to the assessee,
- vi) the payment for software was not related to the productivity, use or number of subscribers,
- vii) the customers did not have the right to commercially exploit the software,
- viii) the software supply was in the nature of transfer of copyrighted article and not transfer of "a copyrighted right."

If replies to questions no. iv) and v) are negative and replies to remaining questions are in positive, then it can be safely held that the payments made by an assessee cannot be treated as royalty. We can summarise the above discussion by holding that the terms and conditions of the agreements will decide as to whether the payments made by the assessee to the suppliers of software for the wireless network can be considered as royalty. In other words, rights of the Owner of the IPR.s on one hand and the rights and duties of purchasers/users on the other hand are the decisive factors. If the Owner retains absolute rights of the IPR.s with itself then the payments made by the user will not be royalty. But, if the Owner transfers the rights of the property against periodical or onetime payment to the user it will be a case of payment of royalty. Thus, it is the degree of transfer of the rights of IPR.s that is very crucial.

7.1. We do not have even slightest doubt in our mind that the answers to questions number four and five, at paragraph 7, are plain and simple NO, if the agreements entered into by the assessee with the non-resident suppliers of softwares are analysed. Similarly, remaining question will have positive answers. In the earlier paragraphs, we have summarised the main characteristics of the agreements. All the agreements stipulate that the assessee would be using the software for 'operation of its wireless network only'. Thus, it is clear that it was prevented from utilising the software for commercial uses. Had the ultimate authority been with the assessee, it could have used the software in the manner it wanted. It could make copies of Software or the documentation or parts thereof for archival purposes only. Restriction on copying the software clearly establishes that the suppliers of the softwares were the sole and exclusive owner of the rights, title and property in Software and the

Source Codes. Software. Agreements forbid the assessee from transferring, assigning, sub-licensing, using by outsourcing, decompiling, reverse-engineering, disassembling/decoding the software. None of the agreement talks of transferring of copyright to the assessee by the suppliers- rather it is clearly mentioned in the agreements that copyright would remain with them. Agreements provide returning of the copies of the software to the vendors upon termination or cancellation of the agreements. So, we hold that the consideration paid by the assessee to the suppliers for acquiring copy of software was not for the 'use of copyright or transfer of right to use of copyright' the payment was made for the 'copyrighted article' and that the payments made by the assessee to the vendors of software cannot be taxed as royalty.

8. While deciding the appeals, filed by the 19 recipients, who are not part of the present appeals, the Tribunal or the Hon'ble High Courts have held that sums-received by them from the assessee for supply of software for wireless- network- were not taxable in their hands and that the payments could not be termed as royalty. Those suppliers are Nortel Networks India International Inc. USA, Team Telecom International Ltd., Israel, Motorola Inc USA, Alcatel USA International Marketing Inc USA, ZTE Corporation China and Ericsson AB Sweden. All the above mentioned vendors had received payment for supply of softwares. Only on this count, we could have dismissed the appeals filed by the AO.s in respect of those assessee. But, we are not adjudicating the issue before us, only on that basis. We have considered the individual agreements of the following suppliers:

e-Serv Global Limited., ECI Telecom-NGTS Ltd., Septier Communication Ltd., Verint Systems Ltd.(I), 3 Com Asia Pacific Rim Pte.Ltd., Actix Pte.Ltd., Agilent technologies Singapore (Sales) Pte.Ltd., Infovista (Asia Pacific) Pte.Ltd. Singapore, Agilent technologies Singapore (Sales) Pte.Ltd., Nortel Network Singapore Pte.Ltd., Sun Microsystem Pte.Ltd., Envilog AB, Techtronix Inc., Tekelec Inc., Ulticom Inc. and Venturi Wireless Inc. USA. From the perusal of the agreements one thing is clear that there was no transfer of copyright of the software in any manner. As mentioned earlier, a copyright is different from the work in respect of which copyright subsists. The assessee had only got a copy of software without any part of the copyright of the software. All the arguments advanced by the DR about ICA, including the section 30, in our opinion are of no help. At the cost of repletion, we are holding that in the cases under consideration payments made by the assessee was for copyrighted articles. So, we are of the opinion that payments made by it to various suppliers of six countries did not amount to royalty within the definition of Article 12/13(3) of the DTAA.s and it was not obliged to deduct tax at source.

8.1. Submissions of the DR in respect of software being Process/, Invention/Equipment were considered in the matter of ZTE Corporation (supra). The Tribunal, in the case of Baan Global BY(71 taxmann.com 213), held that receipts from sale of shrink-wrapped software cannot be considered as royalty within the meaning of DTAA as the same is consideration for the copyrighted product and not for the use of copyright. In the said case, the assessee was engaged in the business of development and sale of software and other services related to software products. While deciding the issue, the Tribunal observed that the sale of software cannot be held to be covered

within the expression 'use or process'. Further, in the cases of Shell Information Technology International BV(80taxmann.com64), National Stock Exchange of India Ltd (supra), First Advantage(P.)Ltd.(163 ITD 165) Datamine International Ltd.(68 taxmann.com97); Black Duck Software Inc. (86 taxmann.com 62); I.T.C. Ltd.(79 taxmann.

com 206), the Tribunal has considered the term 'process' while deciding the issue of software is not royalty. We also find that in the case of AVEVA Information Technology India (P.) Ltd.(85taxmann.com 14), the Tribunal had considered the argument that software was Invention/Patent, etc. and had held that payment made for procuring and distributing copy - righted software was not royalty. Judgment of Samsung was considered in the cases of Solid Works Corpn. (supra); Shell Information Technology International BV(80taxmann.com 64); Shinhan Bank(76 taxmann.com 42); Baan Global BV (71 taxmann.com 213); Alcatel Lucent USA Inc.(ITA.s/1131,7299 &7300/Mum/2010), National Stock Exchange of India Ltd. (supra), Lucent Technologies Hindustan Ltd.(348 ITR 196), Halliburton Export Inc(152 ITD

803), Halliburton Export Inc.(ITA 477 of 2014 of the Hon'ble Delhi High court).

9. We are aware that the Hon'ble Karnataka High Court has held that the payment for supply of software is royalty. Thus, we have two diagonally opposite views on the same issue. In such a situation the Hon'ble Supreme Court has, in the matter of Pradip J. Mehta (300 ITR

231), held that when two views were possible, then 'invariably, the court would adopt the interpretation which is favour of the taxpayer'. The Hon'ble Court held as under:

"29. It is well-settled that when two interpretations are possible, then invariably, the court would adopt the interpretation which is in favour of the taxpayer and against the Revenue. Reference may be made to the decision in Sneh Enterprises v. Commissioner of Customs [2006] 7 SCC 714, of this court wherein, inter alia, it was observed as under :

" While dealing with a taxing provision, the principle of ' strict interpretation' should be applied. The court shall not interpret the statutory provision in such a manner which would create an additional fiscal burden on a person. It would never be done by invoking the provisions of another Act, which are not attracted. It is also trite that while two interpretations are possible, the court ordinarily would interpret the provisions in favour of a taxpayer and against the Revenue."

Considering the above, we would like to follow the judgments of Hon'ble Madras and Delhi High Courts rather than judgment of Hon'ble Karnataka High Court.

10. We would also like to deal with other arguments advanced by the DR and the cases relied upon by him. In the case of M/s. PSI Data System Ltd., we find that the Hon'ble Supreme High Court has held as under:

"We make it clear at the outset that when we shall speak of software, we shall be referring to the tangible software of the nature of discs, floppies and CD rom and not to the intellectual property, also called software, that is recorded or stored thereon. "

Therefore, we hold that the aforesaid case is not applicable to the facts of the present case. In Elkem Technology (supra), the question raised before the Hon'ble Andhra Pradesh High Court was dealing with composite contract involving supply of equipment and providing of engineer

-ing service. The High Court held that the consideration for engineering service would be independent of consideration for the supply of equipments. We are of the opinion, that the judgment is of no help to decide the issue before us.

Considering the above and confirming the orders of the FAA, we decide the effective grounds of appeals against the AO.s, as, in our opinion, same does not suffer from any factual or legal infirmities.

As a result, all the appeals, filed by the AO.s, stand dismissed.

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Order pronounced in the open court on 2nd February, 2018.

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Sd/-

(/Ravish Sood)
/ JUDICIAL MEMBER

Mumbai; /Dated : 02.02.2018.

Jv. Sr. PS.

Sd/-

(/ RAJENDRA)
/ ACCOUNTANT MEMBER

i /Copy of the Order forwarded to :

1. Appellant /
2. Respondent /
3. The concerned CIT(A) /
4. The concerned CIT /

5. DR "L" Bench, ITAT, Mumbai / § ¢ , . .

6. Guard File/¢ ¥ //True Copy// / BY ORDER, ✕ / □
Dy./Asst. Registrar , /ITAT, Mumbai.