Lucent Technolgies Grl Llc, Mumbai vs Ddit (It) 4(1), Mumbai on 16 July, 2018

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IN THE INCOME TAX APPELLATE TRIBUNAL " L" BENCH, MUMBAI

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BEFORE SRI MAHAVIR SINGH, JM AND SRI G MANJUNATHA, AM

Aayakr ApIla saM . / (inaQa- a rNa baYa-	ITA No. 504/Mum/2010 / Assessment Year 2006-07)

The Dy. Director of Income - Tax (international Taxation) - 4(1), Scindia House, Ballard Pier, Mumbai -400 038		Lucent Technologies GRL LLC, C/o, M/s Pricewaterhouse Coopers Pvt. Ltd., P wC House, Plot 18A, Guru Nanak Road (Station Road), Bandra (W), Mumbai-400 050
	Vs.	
(ApIlaaqaI- / Appellant)	..	(p`%yaqaaI- / Respondent)
	. / PAN No. AABCL3902G	

Aayakr ApIla saM . / (inaQa- a rNa baYa-	ITA No. 1934/Mum/2014 / Assessment Year 2010-11)

Lucent Technologies GRL LLC Alcatel Lucent India Limited, 14 t h Floor, Tower C, DLF Cyber Green, DLF City, Phasse-III, Gurgaon-122002	Vs.	The Dy. Director of Income - Tax (international Taxation) -4(1), Scindia House, Ballard Pier, Mumbai-400 038
(ApIlaaqaI- / Appellant)	..	(p`%yaqaaI- / Respondent)

/ Appellant by	:	Shri PJ Pardiwala Shri Madhur Aggarwal, ARs'
¡ / Respondent by	:	Shri Samuel Darse, DR

¡ / Date of hearing: 16-07-2018

¢£ ¡ / Date of pronouncement : 16-07-2018

AadoSa / O R D E R

PER MAHAVIR SINGH, JM:

These cross appeals are arising out of the order of Dispute Resolution Panel-III [in short 'DRP'] in Objection Nos. 171, directions dated 11.12.2013. And also arising out of the order of Commissioner of Income Tax, Mumbai, [in short 'CIT(A)'] in appeal No. CIT(A)-11/IT- 118/Rg.4(1)/08-09/139-L dated 07.10.2009. The Assessments were framed by the Addl. Director of Income Tax (international Taxation)-Range 4(1), Mumbai (in short 'ADIT') for the assessment years 2010-11 & 2006- 07 vide orders dated 28.03.2013 & 30.12.2008 under section 144C(1) read with section 143(3) of the Income Tax Act, 1961(hereinafter 'the Act').

2. The first issue in this appeal of Revenue for AY 2006-07 is as regards to the order of CIT(A) deleting the addition made by AO by holding that the assessee has merely supplied software to Reliance Communication Limited and it is not in the nature of royalty under section 9(1)(vi) of the Act. For this assessee Revenue has raised the following grounds: -

> "1. On the facts and in the circumstances of the case and in law, the Ld CIT (Appeals) has erred in not holding payments received by the assessee for supply of software to Reliance lnfocomm Ltd. (Now known as Reliance Communication Ltd.) are in the nature of Royalty' u/s.9(1)(vi) of the 1.1. Act, 1961.
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> 2. On the facts and in the circumstances of the case and in law. The Ld CIT(A) has erred in not holding that payments received by the assessee for ITA No s . 5 04 / Mu m /2 0 10 & 19 3 4/ Mu m/ 2 01 4 supply of software (i.e. the payments received for the supply of copyrighted article) are in the nature of copyright rights and hence royalty under Article 12 of the India US Tax treaty.

3. On the facts and in the circumstances of the case and in law, the Ld.CIT(A) failed to appreciate the detailed finding made by the Assessing Officer that the payments received for the supply of software is assessable as Royalty. In this regard, reliance is placed on the recent judgment of Karnataka High Court in the case of CIT Vs Samsung Electronics Co. Ltd. (2009) 185 TAXMAN 313 (Kar.) wherein it has been held that income received from the import of software is royalty and is taxable in India."

3. At the outset, the learned Counsel for the assessee stated that CIT(A) has observed in Para 2.25 as under: -

> "2.25 The appellant has merely supplied software to Reliance with the object code and the source code of the software vests with the Appellant. The object code is sufficient to carry out the desired functions on the software i.e. operating the software but this object code does not divulge any technical knowledge or trade secret of the Appellant. The ownership right of the intellectual property or know how or knowledge to produce the software remains with the Appellant. Accordingly, it is

clear that no secret Formula or process or scientific experience is passed on by the appellant to Reliance. Arguments of the AO are therefore not accepted."

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4. Further, the CIT(A) also held that this payment does not amount to royalty within the meaning of section 9(1)(vi) of the Act read with Article 12(13) of the DTAA. For this the CIT(A) observed in Para 2.39 and 2.40 as under: -

"2.39 It is therefore very apparent from several decisions of Hon'ble ITAT that in the case of sale of copyrighted article, namely, a copy of computer programme, payment received is not royalty if there is no transfer of copyright partly or wholly. Facts obtaining in the case of appellant clearly point that no part of the copyright as envisaged by section-14 of the Copyright Act has been transferred by the appellant to Reliance. Therefore, the payment for purchase of software cannot amount to royalty within the meaning of section 9(1)(vi) of the Act and Article- 12(3) of DTAA.

2.40 With the above discussions, it is held that the appellant tinder the Software Contract acquired only a copy of software programme. Under above circumstances, payments received by the appellant from Reliance cannot be said to be payment for the use of or right to use of copyright. Thus, payments received are only for supply of copyrighted article and does not amount to royalty within the meaning of section 9(1)(vi) of the Act or Article-12(3) of the DTAA. It is accordingly held that the AO has wrongly held the payments to be royalty. Addition made by the AO is therefore deleted. Accordingly, appeal on grounds of appeal no. 1 to 6 is allowed."

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5. The learned Counsel for the assessee, before us filed copies of Tribunals order for AY 2003-04 to 2005-06 and 2007-08 in ITA Nos. 7001-7004/Mum/2010 vide order dated 02.05.2018, wherein exactly identical issue has been considered in assessee's own case and this addition was deleted vide Para 4 to 10 as under: -

"4. Subsequently, in these appeals miscellaneous application was filed before the ITAT. The Tribunal vide order dated 09.10.2017 has noted that similar miscellaneous application filed by Reliance Communication Ltd. has been allowed by the Tribunal vide order dated 18.11.2016. The Tribunal has stated that it was brought to the notice of the Bench that the assessee was also party in the order passed by the Tribunal dated 06.09.2013 along with M/s. Reliance Communication Ltd. Accordingly the Tribunal had recalled the order. Subsequently a corrigendum was passed and in the corrigendum dated 07.02.2018 the Tribunal had directed as under: -

3. Only request was to consider Ground No. 2 whereas due to typographical error, the entire order has been recalled.

Now Para 12 may read as under: -

> 12. In view of the above discussion, we recall the ground No. 2 passed by the Tribunal and Registry is directed to fix the appeals for hearing afresh by regular bench.
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> ITA No s . 5 04 / Mu m /2 0 10 & 19 3 4/ Mu m/ 2 01 4
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> 5. Pursuant to the above recall we have heard ground No. 2 raised in this appeals. Ground No. 2 reads as under: -
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> 2. On the facts and in the circumstances of the case and in law the Learned AO and the Dispute Resolution Panel (hereinafter referred to as "the DRP") have erred in holding that the amounts received by the Appellant from supply of software to Reliance Communications Limited (previously known as Reliance Infocomm Limited) (hereinafter referred to as "Reliance") are "Royalty" in nature under the provisions of the Act and under Article 12 of the Double Taxation Avoidance Agreement between India and USA (hereinafter referred to as "DTAA") and thus liable to tax in India.

6. We find that in the case or Reliance Communications Ltd., from whom payment has been received by the assessee company, ITAT has passed an order wherein it has been held that the impugned payment would not qualify as royalty. In the said order dated 02.02.2018 in the case of DDIT vs. Reliance Communications Ltd. in ITA No. 837 & Others the Tribunal had adjudicated the issue as under: -

"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-

ITA No s . 5 04 / Mu m /2 0 10 & 19 3 4/ Mu m/ 2 01 4 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,
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> ii) the software was an integral part of the wireless-equipment, which facilitated running of the said equipment,
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> iii) the subject software had no independent value of its own,
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> iv) copyrights in the software were transferred to the customers,
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> 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 ITA No s . 5 04 / Mu m /2 0 10 & 19 3 4/ Mu m/ 2 01 4 the payments made by an assessees cannot be treated 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 assessees to the suppliers of software for the wireless network can be considered 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 in to 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 ITA No s . 5 04 / Mu m /2 0 10 & 19 3 4/ Mu m/ 2 01 4 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.

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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 assessees 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 assessees. 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., Envilogg AB, Techtronix Inc., Tekelec Inc., Ulticom Inc. and Venturi Wireless Inc. USA.
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> ITA No s . 5 04 / Mu m /2 0 10 & 19 3 4/ Mu m/ 2 01 4 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.
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> 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 ITA No s . 5 04 / Mu m /2 0 10 & 19 3 4/ Mu m/ 2 01 4 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 (80 taxmann.com 64), 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).

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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.
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> Reference may be made to the decision in Sneh Enterprises v.
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> Commissioner of Customs [2006] 7 SCC 714, of this court wherein, inter alia, it was observed as under :
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> "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 ITA No s . 5 04 / Mu m /2 0 10 & 19 3 4/ Mu m/ 2 01 4 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 engineering service. The High Court held that the consideration for engineering service would ITA No s . 5 04 / Mu m /2 0 10 & 19 3 4/ Mu m/ 2 01 4 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.

7. Referring to the above order of the ITAT the learned counsel for the assessee submitted that since the ITAT has considered in detail and held that the payment did not amount to royalty and the payer, M/s. Reliance Communications, has been absolved from the liability of deducting tax there from, this income cannot be taxed in the hands of the assessee as royalty and hence no tax is exigible.

8. Per contra the learned D.R. did not dispute the position that the issue is covered in favour of the assessee by the decision of this Tribunal in the case Reliance Communications (supra). However, the learned D.R. submitted that the assessment in this case have been framed after reopening under Section 127 of the Act. He pleaded that in the reopening assessee cannot make out a new case in its favour. He referred to the submissions of the Department before the Tribunal when the matter was first heard in the order dated 06.09.2013 wherein the Departmental submission was noted as under:-

> ITA No s . 5 04 / Mu m /2 0 10 & 19 3 4/ Mu m/ 2 01 4
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> 56. The ld. Counsel however relied on the orders that the AO as supported by DRP. It was further submitted that assessee chose not to file return after TDS was made and therefore, since proceedings are initiated under section 148 assessee cannot seek any benefit in the proceedings initiated for the benefit of the revenue . He relied on the judgment of Hon'ble Bombay High Court in the case of K. Sudhakar S. Shanbhag Vs ITO (241 ITR 865) for the proposition of "doctrine of election".

Hence the learned D.R. pleaded that no benefit can be granted to the assessee in the reopened assessment.

9. On the other hand learned counsel of the assessee submitted that there is no such ground before us for adjudication. He further submitted that assessee has not at all made out a new case or sought any new benefit. He submitted that it has all along been assessee's claim that the said payment received doesn't amount to royalty and hence not taxable in the hands of the assessee. Hence the assessee was not filing any return of income. It is only when the assessee was visited with the assessment notice that the assessee filed its return of income and made the claim of the income not being in the nature of royalty and hence not taxable.

10. Having heard both the counsel and perused the material on record we note that after noting the submission of the assessee the Tribunal in its order ITA No s . 5 04 / Mu m /2 0 10 & 19 3 4/ Mu m/ 2 01 4 had not adjudicated this limb of Departments argument. The Department had not filed any miscellaneous application before the Tribunal or appealed before the Hon'ble High Court against non adjudication of this aspect/issue. We are seized with ground No.2 only recalled by ITAT. Hence we do not have the jurisdiction to go into this aspect nor it is emanating from the impugned order in appeal before us. Accordingly as discussed above, since it has already been held in the hands of Reliance Communications supra by the elaborate order referred above that the payment made by it was not royalty in the hands of the assessee, these amounts are not taxable as income in the hands of the assessee. Accordingly this ground No. 2 raised by the assessee stands allowed."

6. In view of the above, the learned Counsel for the assessee stated that this issue is squarely covered in favour of assessee and against Revenue. When this common order was confronted to the learned CIT Departmental Representative, he only relied on the assessment order.

7. We have heard the rival contentions and gone through the facts and circumstances of the case. We find that this issue is squarely covered in assessee's own case in ITA Nos. 7001 to 7004/Mum/2010 vide order dates 02.05.2018, wherein exactly identical issue and exactly on same facts, the Tribunal deleted the disallowance by holding that the payment received by assessee was not royalty in the hands of the Reliance Infocom Limited (now Reliance Communication Limited) and this is not taxable as income in the hands of the assessee. Respectfully following the Tribunal's decision in assessee's own case, we confirm the ITA No s . 5 04 / Mu m /2 0 10 & 19 3 4/ Mu m/ 2 01 4 order of CIT(A) in this year also. This issue of Revenue's appeal is dismissed.

8. Coming to ITA No. 1934/Mum/2014 for AY 2010-11 in assessee's appeal, the first issue is as regards to the payments received by assessee from supply of software to Reliance Communication Limited held by AO/ DRP as royalty in the nature under the provision of the Act and also under Article 12 of DTAA between India and USA. For this assessee has raised the following ground No. 3:-

> "3. On the facts and in the circumstances of the case and in law, the AO / DRP erred in holding that the amounts received by the Appellant from supply of software to Reliance Communications Limited (previously known as Reliance Infocomm Limited) (hereinafter referred to as 'Reliance') are 'Royalty' in nature under the provisions of the Income-tax Act ("Act") and also under Article 12 of the Double Taxation Avoidance Agreement between India and the USA ("DTAA") and thus liable to tax in India."

9. At the outset, we mentioned that this issue is exactly identical what we have already dealt with in this order in ITA No. 504/Mum/2010 for AY 2006-07 above. The facts and circumstances are exactly identical, hence, we delete the addition and allow this issue of assessee's appeal.

10. The next issue in this appeal of assessee is as regards to the order of AO/ DRP held that the assessee has a permanent establishment in India being Lucent Technologies Hindustan Pvt. Ltd. For this assessee has raised following ground No. 4 to 14: -

"4. On the facts and in the circumstances of the case and in law, the AO / DRP erred in holding that ITA No s . 5 04 / Mu m /2 0 10 & 19 3 4/ Mu m/ 2 01 4 the Appellant has a permanent establishment ("PE") in India being Lucent Technologies Hindustan Private Limited.

5. On the facts and in the circumstances of the case and in law, the AO / DRP erred in holding that the sale of software is effectively connected to the PE of the Appellant in India.

6. Without prejudice to the grounds 2, 3 and 4 above, on the facts and in the circumstances of the case and in law, the AO / DRP erred in not holding that the payments received by the Appellant are not "Royally" in nature and that there is no PE of the Appellant in India and that accordingly, the receipts of the Appellant are not taxable in India.

7. On the facts and in the circumstances of the case and in law, the AO / DRP erred in holding that the payment received by the Appellant would be taxable as per Article 12(6) read with Article 7(3) of the DTAA, thereby taxing the entire receipts from supply of software under section 44D read with section I 15A(l)(b)(A) of the Act.

8. On the facts and in the circumstances of the case and in law, the AO / DRP while computing the income as per Article 7(3) r.w.s. 115A(I)(b)(A) erred in holding that the entire receipts from supply of software to Reliance are attributable to the PE in India.

9. On the facts and in the circumstances of the case and in law, the AO / DRP erred in holding that ITA No s . 5 04 / Mu m /2 0 10 & 19 3 4/ Mu m/ 2 01 4 the provisions of section 44D and section 115A(I)(b)(A) would be applicable to the Appellant.

10. On the facts and in the circumstances of the case and in law, the AO/DRP erred in taking a without prejudice argument that in the event at any appellate level, provisions of Article 12(6) are not considered to be applicable, then the receipts from supply of software to Reliance are taxable under Article 12 of the DTAA.

11. On the facts and in the circumstances of the case and in law, the AO / DRP erred in holding that if the payment received by the Appellant is not regarded as royalty', then a. the amount would be taxable in India on account of the Appellant having a PE in India; and b. 80% of the receipt by the Appellant is to be apportioned to the PE in India; and c. 40% of the apportioned amount is to be taken as the net profit of the Appellant.

The Appellant submits that the AO / DRP came to the aforesaid conclusion on their own surmises and conjectures without there being any factual basis for the same.

12. Without prejudice to the above, the AO / DRP erred in not appreciating that all critical activities in relation to the sale of software were carried on by the Appellant outside India and all risks resided ITA No s . 5 04 / Mu m /2 0 10 & 19 3 4/ Mu m/ 2 01 4 outside India and that no amount can be held to be attributable to the PE in India.

13. On the facts and in the circumstances of the case and in law, the AO / DRP erred in not considering and in not taking cognizance of the profit attribution study filed by the Appellant to substantiate the profit attribution ratio.

14. On the facts and in the circumstances of the case in law, the AO / DRP erred in not referring the matter to the Transfer Pricing Officer for computing the profits attributable to the PE in India."

11. At the outset, the learned Counsel for the assessee stated that this issue is also covered in favour of assessee in assessee' sown case for AY 2003-04 to 2005-06 and 2007-08 in ITA No. 7001 to 7004/Mum/2014, wherein Tribunal has considered this issue and held that there is no PE to the assessee company in India as there is neither any office in India nor any business communication in India nor any business activity carried out in India. The Tribunal has also observed that the assessee company is standalone independent legal entity and therefore there is no PE in India, so as to attribute any profit. For this Tribunal has discussed the entire issue from Para 51 to 58 as under: -

"51. These appeals pertain to Lucent Technologies, GRL LLC. As briefly stated above, the issue in these appeals is with reference to the taxability of the amounts received from supply of software to Reliance. The AO held the same as royalty in nature and in the alternate, also considered that there is a PE in India and so the business profits are attributable to the PE. Along with the above two ITA No s . 5 04 / Mu m /2 0 10 & 19 3 4/ Mu m/ 2 01 4 issues there are issues on non-granting of TDS credited, levy of interest also.

52. The issue of royalty was considered above in detail and consequent to the findings therein, it is considered that amounts paid by Reliance for supply of software under a licence agreement is to be considered as royalty under the provisions of the Act and also under DTAA and liable to tax in India. Accordingly, the grounds raised by Lucent from Ground No.2 to 5 are rejected.

53. The next issue to be considered is attribution of business profit to the PE. Vide para 4.18 of the order of the AO for the impugned year,, the AO gave a finding that payment made for software would be termed as royalty payments and necessary tax rates have been mentioned in the table. Further, considering the agreements entered by Reliance with Lucent Group the AO was of the opinion that there existed an Agency PE. Vide para 5.8 of the order the AO also considered that in case it is held that assessee's income is not taxable as royalty, the assessee's business profits have to be worked out in view of it having a PE in India. We have already held that payments

made by Reliance have to be considered as royalty and accordingly the same are to be taxable as royalty only. Therefore, there is no need to consider the same as business profits. However, the issue of PE has to be decided, as existence of PE makes business profit taxable in India. Therefore, it is necessary to give a finding on the existence of PE to the assessee Lucent.

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54. The AO invoking provisions of Article-5 of DTAA, was of the opinion that an agency PE is coming into picture as substantive functions of negotiations, entering into contract, stocking of goods or merchandising is being done by India enterprise i.e., LTHPL. He referred to various terms of agreement entered between the parties particularly the Assignment and Assumption Agreement, including the scope of services for maintenance of software entered by LTHPL. The AO was of the opinion that in this case, not only original agreement has been entered into by the Indian Company but services relating to making software operation or warranties or maintenance were also being done by LTHPL only. In addition to that terms of the agreements , the AO also relied on documents found in the course of survey in the premises of Alcatel Lucent International Ltd. (got merged entity of LTHPL) more particularly with respect to letter of agreement dated 06.09.2008 between group concerns with Reliance Communications regarding restructure of payment mile stone. The AO ultimately concluded that there existed an agency PE and accordingly, since assessee has a PE in India, the business profits are taxable and worked out profits at 32% of the total receipts.

55. It was the submission of the assessee that LTHPL was acting independently and assessee has no agency agreement or no business. connection in India except supply of software. It was also further submitted that no service personnel came to India so as to come under Service PE. The ld. Counsel ITA No s . 5 04 / Mu m /2 0 10 & 19 3 4/ Mu m/ 2 01 4 for the assessee also relied on Article-5 of the DTAA and decision of co-ordinate Bench in the case of Western Union Financial Services Inc. vs. ADIT (104 ITD 34)(Del.) to submit that mere use of software for the purpose of business in India need not lead to an agency PE as assessee was not rendering any service in India nor LTHPL is authorized to deal with outsiders on behalf of assessee Lucent. Further, it was submitted that the co-ordinate Bench in the case of Lucent Technologies International Inc. vs. DCIT, Non- resident Circle (28 SOT 98) considered the facts in the case to hold that there is a service PE in that case. It was submitted that mere existence of a PE to a group company does not lead to a finding that the assessee also as a PE in India. It was further submitted that AO's reliance on a document i.e., subsequent restructured agreement for payment by the group companies does not indicate that any one of them is authorized to enter into contract on behalf of the assessee Lucent and further, agreement was dated 06.09.2008 does not pertain to any of the impugned assessment years. Nothing was brought on record by the Revenue that there is a PE except relying on the so called agreement which was

entered on a principle to principle basis.

56. The ld. Counsel however relied on the orders that the AO as supported by DRP. It was further submitted that assessee chose not to file return after TDS was made and therefore, since proceedings are initiated under section 148 assessee can not seek any benefit in the proceedings initiated for the ITA No s . 5 04 / Mu m /2 0 10 & 19 3 4/ Mu m/ 2 01 4 benefit of the revenue . He relied on the judgment of Hon'ble Bombay High Court in the case of K. Sudhakar S. Shanbhag Vs ITO (241 ITR 865) for the proposition of "doctrine of election".

57. We have considered the rival submissions. In the case of Lucent Technologies International Inc. (28 SOT 98) the co-ordinate Bench at Delhi considered the facts and held as under :-

> The agreement entered into between the assessee-company and the Indian Company, Escotel, as also the agreement entered into between Escotel and the Indian subsidiary, LTIL showed that the agreements were for two different purposes. The agreement between Escotel and the assessee was for the supply of the hardware and software; the agreement between Escotel and LTIL was for commissioning, installation and operations. However, both the agreements provided for the turnkey functioning of the project of the GSM network. Therefore, by entering into the contract with both, the assessee and LTIL, Escotel had made both the assessee and LTIL responsible for the turnkey completion of the GSM project, individually and severely. Thus, if either one would break its terms and conditions of the agreement with Escotes, the other would be responsible for its completion. Thus, consortium or partnership had been created between the assessee and its Indian subsidiary, LTIL. With that situation, the next ITA No s . 5 04 / Mu m /2 0 10 & 19 3 4/ Mu m/ 2 01 4 question for consideration arose as to whether either the assessee or its subsidiary, LTIL could complete the contract with Escotel on a turnkey basis without the assistance of the other. Obviously, the assessee was to supply the hardware and the software and LTIL was to do the installation, testing, commissioning and bringing up to operational stage the turnkey project. If the assessee did not provide the hardware and the software, it would be the duty of LTIL to provide the requisite hardware and the software for the completion of the turnkey project. Similarly, if LTIL did not comply with its duties of commissioning, installation, testing and bringing up to operational stage the turnkey project, such responsibility would rest on the shoulders of the assess. There was no dispute in that the assessee had completed part of its contract, i.e., the supply of the hardware and the software. The installation, commissioning, testing and bringing up to operational state of the hardware and the software supplied by the assessee had been undertaken by the Indian Subsidiary, LTIL.

For said purpose, LTIL had also taken the assistance of the employees of the affiliates of the assessee. Thus, the parent company, being the assessee had made personnel available to the LTIL, the subsidiary in form of the employees of the affiliates of the assessee at certain remuneration.

Further, a perusal of the agreement between Escotel ITA No s . 5 04 / Mu m /2 0 10 & 19 3 4/ Mu m/ 2 01 4 and the assessee clearly showed that the warranty provided by the assessee-company was in relation to the defects in the hardware. That warranty clause in identical form was also found in the agreement entered into between Escotel and LTIL. Normally, the warranty for a particular product to be supplied by one person is the responsibility of that person alone, but in the instant case, that burden was also shifted to the subsidiary, being LTIL. Though LTIL had certified that it did not keep any spares on behalf of the assessee for the equipments supplied by the assessee under the contract with Escotel, yet the fact that LTIL had also assumed the responsibilities of the warranty in regard to the hardware supplied by the assess, as also the responsibility to replace the same within the period specified in the support contract between Escotel and LTIL clearly showed that the subsidiary, LTIL was also acting on behalf of the assessee. A perusal of article 5(2)(1) of the DTAA between India and the USA clearly shows that it is not only the employees through whom if services are provided, the PE is to said to come into existence, it also includes other personnel. Obviously, the term 'other personnel' has to be read with reference to the earlier words, as provided in the said article 5(2)(1). The other personnel specified would be the persons over whom the enterprise would be having a control. In the instant case, ITA No s . 5 04 / Mu m /2 0 10 & 19 3 4/ Mu m/ 2 01 4 undisputedly, employees of the affiliates of the assessee had been employed through LTIL for providing the services of installation, commissioning, testing and bringing up to operational stage of the hardware and the software sold by the assessee to Escotel through its contract in regard to GSM project which was to be completed on a turnkey basis. Those employees of the affiliates over whom the assessee had a control would fall within the term 'other personnel' and, consequently, it would have to be held that a PE did exist as per the inclusive term as provided in article 5(2)(1) of the DTAA. A copy of the returns of the aforesaid employees also clearly showed that they had been staying in India for more than 90 days within the 12 month period from April, 1996 to March, 1997. Consequently, the requirements of article 5(2)(1) of the DTAA were fulfilled. In such circumstances, it was to be held that LTIL, in fact, was a service PE of the assessee-company. As a result, the findings of the Commissioner (Appeals) on the aforesaid issues were to be set aside."

58. However, the facts in the present case are different for the above case. Here LTHPL entered into an agreement for supply of hardware, software and also installation and that company is an Indian company. After entering into an agreement supply of software was assigned to the assessee Lucent by way of the Tripartite agreement between Reliance ITA No s . 5 04 / Mu m /2 0 10 & 19 3 4/ Mu m/ 2 01 4 and LTHPL and assessee Lucent. Eventhough, installation was on Indian company there is no evidence of either deputing personnel of assessee Lucent to India nor there is any evidence in the record for invoking Service PE as in other case. Moreover for invoking Agency PE , facts do not support AO's contentions. The agreement entered is an independent agreement, entered on principle to principle basis and nowhere the Indian company has authorized or has undertaken any responsibility of the assessee Lucent. On the facts of the case we are of the opinion that there do not exist any PE, more so of agency PE. It is also not the case of the Revenue that the assessee deputed its personnel to India so as to invoke Service PE as per Indo-US DTAA. In view of the above, we hold that there is no PE to the assessee company in India and as there is neither any office in India nor it has any business connection in India nor carried out any business activities in India. Assessee's company is a standalone legal independent entity. Therefore, assessee's ground nos. 6 to 12 are upheld, as there is no PE in India, so attribution of profits does not arise."

12. The learned CIT Departmental Representative, on the other hand, heavily relied on the assessment order and the order of DRP.

13. We have heard the rival contentions and gone through the facts and circumstances of the case. We find that this issue is squarely covered exactly on identical facts in earlier years Tribunal order in assessee's own case and there is no distinction made by learned CIT Departmental Representative. Hence, respectfully following the Tribunal's ITA No s . 5 04 / Mu m /2 0 10 & 19 3 4/ Mu m/ 2 01 4 order in assessee's own case in earlier year in ITA No. 7001- 7004/Mum/2010 for AY 2003-04 to 2005-06 & 2007-08. We also held that there is no PE of the assessee in India. Accordingly, this issue is decided in favour of assessee. This issue of assessee's appeal is allowed.

14. The next issue in this appeal of assessee is against the order of AO/ DRP is against the assessing the income based communication from reliance communication limited. For this assessee has raised the following ground No. 15: -

"15. On the facts and in the circumstances of the case and in law, the AO / DRP erred in considering the income of the appellant at Rs. 20,62,19,799 based on the communication from Reliance instead of Rs. 10,40,48,956 as provided by the Appellant."

15. At the outset, it is to be stated that once, we have already held that there is no PE of the assessee in India and hence, this ground is become consequential and need no adjudication. This issue of assessee's appeal is allowed.

16. The next issue in this appeal of assessee is against the order of AO/ DRP is as regards to the levy of interest under section 234B of the Act. For this assessee has raised the following ground No.16: -

> "16. On the facts and in the circumstances of the case and in law, the AO / DRP erred in levying interest under section 234B of the Act. The Appellant denies liability to the interest under section 234B."

17. The assessee has also raised the issue of non-granting of TDS credited in this very issue and referred to Tribunal's decision in assessee's own case in ITA No. 7001 to 7004/Mum/2010 for AY 2003-04 ITA No s . 5 04 / Mu m /2 0 10 & 19 3 4/ Mu m/ 2 01 4 to 2005-06 & 2007-08, wherein Tribunal has allowed this issue vide Para 59 as under: -

> "59. Non granting of TDS credit:- AO did not give credit to the TDS claimed by assessee. At the outset it was submitted that this issue is covered by the decision of co-ordinate Bench of the Tribunal in assessee's own case in 45 SOT 311 Lucent technologies GRL LLC vs. DR. director IT (Intl. taxation) Circle-4(1(, Mumbai wherein it was held :-
>
> The assessee-company with fiscal domicile in U.S.A. was engaged in business of supply of copyrighted software in connection with telecommunication project. The assessee received certain amount From 'R' Ltd., towards supply of software out of

which tax was deducted at source by 'R' Ltd. It also issued TDS certificates to the assessee. On the basis of said TDS certificates the assessee claimed, credit for tax deducted at source. In the meantime, 'R' Ltd. claimed that no taxes were deductible from payment made for supply of copyrighted software and, accordingly, application to Assessing Officer requesting permission to make remittance to assessee without any deduction of tax at source but same was rejected by the Assessing Officer. Subsequently, 'R' Ltd. was refunded the amount which it had deducted at source from the payment made to the assessee. Therefore, assessee's claim of credit for TDS was declined by the Assessing ITA No s . 5 04 / Mu m /2 0 10 & 19 3 4/ Mu m/ 2 01 4 Officer on ground that 'R' company had been refunded the amount of TDS, hence, certificate issued by 'R' Ltd. no longer remained valid. On appeal, the Commissioner (Appeals) upheld said order.

on second appeal:

HELD The short question that was required to be answered in the instant case was as to whether lawful implications of a valid tax deduction certificate can be declined on the ground that the person who has issued tax deduction certificates has been refunded the taxes which he had deposited with the Government. [Para 6] There was no dispute that the taxes had been deducted in accordance with the provisions of section 195, the tax deductor had fulfilled his obligations under section 200and that tax deduction certificates had been issued under section 203 - At least to the extent of tax deductions. All these requirements had been duly complied with, and, in all fairness to the Assessing Officer, the compliance in respect of these provisions had not even been questioned. The only reason that had prompted the Assessing Officer to decline the credit in respect of the TDS certificates was that 'R' Ltd. had been refunded taxes which were deducted by 'R' ITA No s . 5 04 / Mu m /2 0 10 & 19 3 4/ Mu m/ 2 01 4 Ltd. and which were deposited with the Government of India. [Para 7] It was also an undisputed position that such a refund to tax deductor, as had been granted in the instant case, was not prescribed under the scheme of the Act but appeared to be an administrative exercise. Department could not point out any provisions of law under which such a refund could be made particularly as TDS certificates were already issued by the tax deductor, and no fault was found in the certificates so issued. [Para 8] The rights were granted to the person, from whose income taxes were so deducted and who is issued the tax deduction certificate in the prescribed manner, by the statute and those rights could not be abridged by an administrative action on the part of the revenue authorities and particularly when the person, whose rights were being sought to be abridged, was not even a party to the administrative exercise or was known of refund being granted to 'R' 'Ltd. Refund granted to 'R' Ltd. By revenue authorities could not have adverse impact on the rights of the assessee. That was a matter between the tax authorities and 'R' Ltd., one was sure that the revenue authorities, while granting the refund, must have safeguarded their interests effectively, and perhaps by now 'R' Ltd. might have even returned the monies, ITA No s . 5 04 / Mu m /2 0 10 & 19 3 4/ Mu m/ 2 01 4 but assessee could

not be expected to get into these aspects of the matter. in the instant appeal, one was confined to the issue that the assessee, from whose payments taxes had been deducted at source and who was also in receipt of the appropriate certificates in accordance with the scheme of the Act, must get credit admissible under section 199 and that such a credit was not declined on the basis of an action which was neirher contemplated by the provisions of the Act, nor even in the control of the assessee. [Para 9] In view of the above discussions, the Assessing Officer was directed to grant due credit to the assessee, on the basis of original tax deduction at source certificates produced by the assessee, in accordance with the law and as long as taxes so deducted had been paid over to the Government and certificates in respect of the same had been issued by the tax deductor uninfluenced by any refunds subsequently granted to the tax deductor. The refund made to the tax deductor, even if wrongful, had no adverse impact on the rights of the assessee.

Therefore, the Assessing Officer was directed to grant credit for tax deducted at source, in accordance with the law." [Para 10]. Respectfully following the coordinate bench decision, we direct AO to give credit to the ITA No s . 5 04 / Mu m /2 0 10 & 19 3 4/ Mu m/ 2 01 4 tax deducted at source. Accordingly ground No.13 is allowed."

18. Respectfully following the same, we direct the AO accordingly. This issue of assessee's appeal is allowed.

19. In the result, the appeal of the Revenue is dismissed and that of the assessee is allowed.

Order pronounced in the open court on 16-07-2018. Aado S a kI Gaao Y aNaa Ku l ao mao idnaM k 16-07-2018 kao kI ga[- .

Sd/-	Sd/-
(. /G MANJUNATHA)	(/MAHAVIR SIN
(/ ACCOUNTANT MEMBER)	(/ JUDICIAL M

Mumbai, Dated: 16-07-2018
Sudip Sarkar /Sr.PS

Copy of the Order forwarded to:
1. The Appellant
2. The Respondent.
3. The CIT (A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

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ITAT,