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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

RESERVED ON: 16.01.2017

% **PRONOUNCED ON: 24.01.2017**

\+ ITA 904/2016,
ITA 905/2016, CM APPL.46510/2016
ITA 906/2016, CM APPL.46511/2016
ITA 907/2016, CM APPL.46512/2016
ITA 908/2016, CM APPL.46513/2016
ITA 909/2016, CM APPL.46515/2016

THE COMMISSIONER OF INCOME TAX, INTERNATIONAL TAXATION-2 ..... Appellant

versus

ZTE CORPORATION ..... Respondent

Appearance: Mr. Ruchir Bhatia, Sr. Standing Counsel with Mr. Puneet Rai, Jr. Standing Counsel, on behalf of Revenue, in all the appeals.
Mr. Deepak Chopra with Mr. Harpreet Singh Ajmani and Mr. Rohan Khare, Advocates for the assessees in all the appeals.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE NAJMI WAZIRI

S.RAVINDRA BHAT, J.

1. In these appeals, the following questions of law arise for consideration: -

(i) Are the ITAT's findings with respect to interpretation of Article 12 (3) of the Indo-China Double Taxation Avoidance Agreement (DTAA), in the light of

Explanations 5 & 6 to Section 9 (1) (vi), erroneous in law.

(ii) Is the impugned order correct in its interpretation of Section 234B of the Income Tax Act, 1961, in the facts and circumstances of the case.

2. Brief facts of the case are that the assessee is a tax resident of the Republic of China and is engaged in the business of supplying telecom equipment. During the financial years, relevant to the subject assessment year, it was engaged in supply of telecom equipment to Indian telecom operators; it also supplied mobile hand-sets to customers in India. It did not file its return of income arguing that it had no Permanent Establishment (PE) in India in terms of the provisions of Article 5 of the Indo-China Double Taxation Avoidance Agreement ("DTAA"). On 6.10.2009 a survey under Section 133A was undertaken at its premises and several documents were seized. Statements of its senior executives were also recorded. On the basis of these documents and statements, the Assessing Officer (AO) formed the opinion that the assessee had a business connection in India and its business had been carried through its PE in India and further income had accrued to it during the relevant year from such business.

3. A notice under Section 148 of the Income Tax Act ("the Act") was issued on 23.10.2009 requiring the assessee to file its return of income; it did so, declaring Nil income. In the notes to the "statement showing computation of income" the assessee stated that since it did not have PE in India, its revenues were not taxable as business profits. It made detailed submissions justifying that it had no fixed place PE, no dependent agency PE in India, no installation PE and no service PE. It also urged that no part

of profits of supplies could be attributed to the independent PE unless it was established by the revenue that the supplies were not at arm's length price.

4. The AO after examining various statements, concluded that the assessee had fixed place PE, installation PE, dependent agency PE in India and, therefore, the revenues from the supply of telecom equipment and mobile hand sets were to be taxed in India as business profits. He, therefore, proceeded to determine the profits attributable to the assessee's PE in India. Before computing the profits he pointed out that the profits to the PE in India have to be computed separately in respect of hardware and software components of the telecom equipment and the mobile handsets.

5. The assessee had contended before the AO that the software embedded in the telecom equipment or provided to the customers separately, or software supplied to the various customers in India should not be treated as royalty under Section 9(1) (vi) of the Act and also under Article 12 (3) of the DTAA. The assessee had argued that:

a) Software is sold in the same manner as telecom equipment,
b) The software is an integral part of the telecom equipment, which facilitates running of the said equipment.
c) The subject software has no independent value of its own.
d) No copyrights in the software are transferred to the customers.
e) No access to the "source codes" in the software is granted to the customer.
f) Payment for software is not related to the productivity, use or number of subscribers.
g) Customers do not have the right to commercially exploit the software.

h) Software supply is in the nature of transfer of copyrighted article and not transfer of "a copyrighted right".

6. The assessee also relied on the definition of *"copyright"* under Section 14 of the Indian Copyright Act, 1957. It also relied on the decision of Delhi Special Bench Tribunal in *Motorola India vs DCIT* (95 ITD 269). It was therefore stated that the receipts from sale of computer software is in the nature of payment for the use of copyrighted article as against payment for use of a copyright in the software and hence such payment shall not constitute royalty under India- China tax treaty.

7. The AO also referred to the decision of the Authority for Advance Ruling in *Worley Parsons Pty. Ltd.(AAR No. 747 of 2007)* for the proposition that the payments for software should be taxed on case basis, since the same were not effectively connected to the PE of the assessee in India. The assessee in its reply distinguished this decision on facts and pointed out that AAR held so since no material evidence was placed by the assessee to demonstrate the role played by the PE under the PMS contract and its relationship with the royalty revenue earned under the BE &P contract. It was pointed out that the applicant before the ruling was not able to demonstrate 'effective connection' between the BE &P revenue and PE under the PMS contract. The AO rejected these contentions.

8. Aggrieved by the AO's order, the assessee appealed to the CIT (A). The appellate commissioner accepted the assessee's contentions and found as follows:

(i) Assessee had fixed place PE and dependent agency PE in India. However, he did not accept the AO's plea as regards installation PE in India.

(ii) On the issue of taxation of software embedded in telecom equipment mobile handsets, CIT(A) held it to be taxable as business profit.

(iii) As regards the computation of profits attributable to PE, the CIT(A) held that 2.5% of total sales made by foreign company in India was to be attributed as business profits of PE (including the value of software).

(iv) The CIT(A) also directed the AO to delete the interest levied under Section 234B.

9. Both the assessee and the revenue appealed to the ITAT. On the question of attribution of profits, the ITAT rendered the following findings:

> *"we find that the level of operations carried out by assessee through its PE in India are considerable enough to conclude that almost entire sales functions including marketing, banking and after sales were carried out by PE in India and, therefore, keeping in view the decision of Hon'ble Supreme Court in the case of ZTE Corporation Ahmedbhai Umarbhai & Co. (supra), the decision of Rolls Royce (supra) and Nortel Networks India International Inc. (supra), we are of the opinion that it would meet the ends of justice if 35% of net global profits as per published accounts out of transactions of assessee with India are attributed to PE in India in respect of both hardware and software supplied by assessee to Indian customers. At this juncture we may point out that while deciding the department's appeal in subsequent part of this order, we have upheld the findings of ld. CIT(A) to tax the income from sale of software as business income and not royalty. We may point out that in AY 2009-10 the AO estimated the operating profits at 7.5% as against the weighted average of net operating profit at 2.53% as per the global accounts.*
>
> *We are not inclined to accept this mode of computation resorted by AO, particularly in view of Rule 10 of the IT Rules, which mandates*

the AO to go by the published accounts of assessee. In the result assessee's ground no. 6 in AY 2009-10 stands allowed. We may further clarify that our decision does not amount to enhancement of income because overall tax effect will be less as compared to tax computed by AO/CIT(A).”

10. On the two surviving issues, i.e., applicability of Section 234-B and whether amounts paid towards software constituted “royalty” the impugned order held in favour of the assessee. The ITAT followed the decisions of this court in *Commissioner of Income Tax v Alcatel Lucent Canada [2015] 372 ITR 475 (Del)* which had in turn relied on *Director of Income Tax v Erricsson AB* (2012) 343 ITR 470. On the issue of interest under Section 234B, reliance was placed on *Director of Income Tax v GE Packaged Power Inc.* 373 ITR 65 and relief was granted to the assessee.

11. Mr. Ruchir Bhatia, learned counsel argues that the ITAT fell into error, in holding that payment for the embedded software, was not royalty. It was submitted that software prices also have separately been mentioned in the contract itself. The following conditions under the contract between the assessee and its vendor were relied on:

“ARTICLE 34 LICENSE 34.1 Subject to this Article, Buyer is hereby granted a limited, non- transferable, perpetual, non-exclusive license to use the Software and Documentation provided pursuant to the Contract ("Software License"). Buyer agrees that the copyright in the Software and Documentation licensed to it by Supplier including any renewals, extensions, or expansions thereof, shall be treated as proprietary of Supplier or its sub-suppliers. 34.2 Buyer shall not make any copies of Software or Documentation, except for archival back up purposes. Buyer shall not translate, reverse engineer, modify, decompile, disassemble or create derivative works from the Software.

34.3. Buyer may assign the right to use the Software License to a third party in India for the purpose of operations and maintenance of the Buyer's Network , provided that any such third party agrees in writing to abide by all of the terms and conditions of this Software License.

34.4. The Software licensed under a Purchase Order may be delivered in. an inseparable package also containing software programs and features other than the Software. Buyer may use such other software programs and features unless expressly provided otherwise in the Purchase Order.

34.5. The obligations of Buyer under this Article, shall survive the termination or expiration of this Contract for any reason."

12. It was submitted that the judgments in *DIT Vs. Nokia Networks OY 58 ITR 259*, *Erricson, and Alcatel Lucent (supra)* are distinguishable, because of the difference in terminology of the DTAAs in those cases. Counsel emphasized that the software has not been sold but licensed to the customers and there is separate consideration for the software. This was the reason why the assessee could submit details of payments received in lieu of supply of software for F.Ys. 2006-07, 2007-08, 2008-09 and 2009-10. Mr. Bhatia urged that the software is sometimes independently supplied to the customer, who is given the right to use the software for the purpose of its business thereby assigning the user the right to commercially exploit the software.

13. It was urged on behalf of the revenue that the term "copyrighted article" is not defined in the Indian Copyright Act. The assessee has assigned the customers *"the right to use the software"*. Such assignment meant that the customers were given the "right to use the copyrighted right in the software." It was urged, furthermore that right and title passed to the

customer in the case of hardware but not in the case of software. In terms of the contract between the assessee and the customers, the buyer has no title or ownership rights. The buyer could neither license nor sell nor alienate or part with its possession. In view of this the said transaction is not a sale under Sale of Goods Act but is a limited right to use the software and hence the payment for the same is a form of royalty. It was stressed that as the agreement specifically provided for licensing of the software, such licensing amounted to transfer of copyright and not merely transfer of copyrighted article as is the contention of the assessee.

14. It was also argued that "royalty" was not effectively connected with the PE in India. The relevant extract of the finding of AO were relied upon. It was also submitted that the ITAT failed to note and appreciate Explanations 5 and 6 inserted to Section 9 (1) (vi) of the Act with retrospective effect by the Finance Act, 2012. In this case, the assessee failed to establish that the rights, property or the contract in respect of which the royalty is payable is effectively connected to the PE of the assessee in India. The further argument is that the AO's finding- that in the present case of the assessee such royalty is not effectively connected with the PE and therefore is not covered under Article 12(5) of the DTAA between India and China is correct. The taxability of the payments characterized as royalty is to be governed under Article 12(2) of the DTAA read with Section 90(2) of the Act.

15. Mr. Bhatia made an alternative submission that even if this court were to uphold the finding that the payments made were not royalty, under Article 12(3), they nevertheless constituted payments for the right to use equipment

under the same provision of the DTAA. It was highlighted that the latter part of the provision did not exist in the Indo-Finland DTAA, interpreted by this court in *Ericcson (supra).*

16. Mr. Deepak Chopra, learned counsel argued that the revenue is foreclosed from arguing that the payments were in the nature of royalty. Once the question of PE was settled in its favour, the issue of the payments, receiving separate treatment as royalty, did not arise, because of Article 12 (5) of the DTAA in question. It was also submitted that the ITAT did not commit any error in its application of the rulings in *Ericson, Nokia and Alcatel Lucent (supra).*

17. It is evident from the above factual narration that the first question argued and which arises for consideration is whether payments made by the assessee's customers to it constituted royalty, in respect of software supplied. The software so supplied is not independent, but necessary for the hardware supplied by it, under the contract. The assessee also provides upgrades for the software. The AO held that the payments made for the right to use the software was royalty as per clause (i), (iii) and (v) to Explanation 2 to section 9(1)(vi) of the Act. According to him, the software is a secret formula or process for the purpose of Explanation 2 (i) and (iii) and was also a copyright in terms of Explanation 2 (v). Further, such payments were also royalty under Article 12(3) of the DTAA between India and China. The assessee's plea that the payments for supply of software along with hardware are in the nature of business profits and not royalty, was rejected and it was held that the revenue was in appeal against the decision of the ITAT in *Motorola (supra).* It was therefore held that payment received

against supply of software was in the nature of royalty under Section9(1)(vi) of the Act and also under Article 12(3) of India-China DTAA.

18. Before proceeding further, it would be necessary to extract the relevant provisions of the DTAA. Article 12, which is pertinent in this context, reads as follows:

> ***"ROYALTIES AND FEES FOR TECHNICAL SERVICES***
>
> *1. Royalties or fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other Contracting State.*
>
> *2. However, such royalties or fees for technical services may also be taxed in the Contracting State in which they arise, and according to the laws of that Contracting State, but if the recipient is the beneficial owner of the royalties or fees for technical services, the tax so charged shall not exceed 10 per cent of the gross amount of the royalties or fees for technical services.*
>
> *3. The term "royalties" as used in this Article means payment 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 and films or tapes for radio or television 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.*
>
> *4. The term "fees for technical services" as used in this Article means any payment for the provision of services of managerial, technical or consultancy nature by a resident of a Contracting State in the other Contracting State, but does not include payment for activities mentioned in paragraph 2(k) of Article 5 and Article 15 of the Agreement.*

5. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the royalties or fees for technical services, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties or fees for technical services arise, through a permanent establishment situated therein, or performs in that other Contracting State independent personal services from a fixed base situated therein, and the right, property or contract in respect of which the royalties or fees for the technical services are paid is effectively connected with such permanent establishment or fixed base. In such case the provisions of Article 7 or Article 14, as the case may be, shall apply."

19. In *Ericson (supra)* this court had to deal with the supply of equipment with software, and interpret the Indo-Sweden DTAA: similar to the facts of this case. The Indo-Sweden DTAA provided, by Article 13, as follows:

"Article 13: ROYALTIES AND FEES FOR TECHNICAL SERVICES

1. Royalties and fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, such royalties and fees for technical services may also be taxed in the Contracting State in which they arise and according to the laws of that State, but if the recipient is the beneficial owner of the royalties or fees for technical services the tax so charged shall not exceed 20 per cent. of the gross amount of the royalties or fees for technical services.

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.

4. The term " fees for technical services " as used in this article means payments of any kind to any person, other than payments to an employee of the person making the payments and to any individual for independent personal services mentioned in article 15, in consideration for services of a managerial, technical or consultancy nature, including the provision of services of technical or other personnel.

5. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the royalties or fees for technical services, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties or fees for technical services arise, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the right or property or contract in respect of which the royalties or fees for technical services are paid is effectively connected with such permanent establishment or fixed base or with business activities referred to under (c) of paragraph 1 of article 7. In such case, the provisions of article 7 or article 15, as the case may be, shall apply."

This court held as follows:

"....We have also held that the supply of equipment in question was in the nature of supply of goods. Therefore, this issue is to be examined keeping in view these findings. Moreover, another finding of fact is recorded by the Tribunal that the Cellular Operator did not acquire any of the copyrights referred to in Section 14(b) of the Copyright Act,1957.

55. Once we proceed on the basis of aforesaid factual findings, it is difficult to hold that payment made to the assessee was in the nature of royalty either under the Income-Tax Act or under the DTAA. We have to keep in mind what was sold by the assessee to the Indian customers was a GSM which consisted both of the hardware as well as the software, therefore, the Tribunal is right in holding that it was not permissible for the Revenue to assess the same under two different articles. The software that was loaded on the hardware did not have any independent existence. The software supply is an integral part of the GSM mobile telephone system and is used by the cellular operator for providing the cellular services to its customers. There could not be any independent use of such software. The software is embodied in the system and the revenue accepts that it could not be used independently. This software merely facilitates the functioning of the equipment and is an integral part thereof. On these facts, it would be useful to refer to the judgment of the Supreme Court in TATA Consultancy Services Vs. State of Andhra Pradesh, 271 ITR 401, wherein the Apex Court held that software which is incorporated on a media would be goods and, therefore, liable to sales tax. Following discussion in this behalf is required to be noted:-

In our view, the term "goods" as used in Article 366(12) of the Constitution of India and as defined under the said Act are very wide and include all types of movable properties, whether those properties be tangible or intangible. We are in complete agreement with the observations made by this Court in Associated Cement Companies Ltd. (supra). A software programme may consist of various commands which enable the computer to perform a designated task. The copyright in that 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 case of painting) or computer discs or cassettes, and marketed would become "goods". We see no difference between a

sale of a software programme on a CD/floppy disc from a sale of music on a cassette/CD or a 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. Thus a transaction sale of computer software is clearly a sale of "goods" within the meaning of the term as defined in the said Act. The term "all materials, articles and commodities" 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.

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In Advent Systems Ltd. v. Unisys Corpn, 925 F. 2d 670 (3rd Cir. 1991), relied on by Mr. Sorabjee, the court was concerned with interpretation of uniform civil code which "applied to transactions in goods". The goods therein were defined as "all things (including specially manufactured goods) which are moveable at the time of the identification for sale". It was held:

Computer programs are the product of an intellectual process, but once implanted in a medium are widely distributed to computer owners. An analogy can be drawn to a compact disc recording of an orchestral rendition. The music is produced by the artistry of musicians and in itself is not a "good," but when transferred to a laser-readable disc becomes a readily merchantable commodity. Similarly, when a professor delivers a lecture, it is not a good, but, when transcribed as a book, it becomes a good.

That a computer program may be copyrightable as intellectual

property does not alter the fact that once in the form of a floppy disc or other medium, the program is tangible, moveable and available in the marketplace. The fact that some programs may be tailored for specific purposes need not alter their status as "goods" because the Code definition includes "specially manufactured goods.

56. A fortiorari when the assessee supplies the software which is incorporated on a CD, it has supplied tangible property and the payment made by the cellular operator for acquiring such property cannot be regarded as a payment by way of royalty.

57. It is also to be borne in mind that the supply contract cannot be separated into two viz. hardware and software. We would like to refer the judgment of Supreme Court in CIT Vs. Sundwiger EMFG Co., 266 ITR 110 wherein it was held:

> *"A plain and cumulative reading of the terms and conditions of the contract entered into between the principal to principal i.e., foreign company and Midhani i.e., preamble of the contract, Part-I and II of the contract and also the separate agreement, as referred to above, would clearly show that it was one and the same transaction. One cannot be read in isolation of the other. The services rendered by the experts and the payments made towards the same was part and parcel of the sale consideration and the same cannot be severed and treated as a business income of the non-resident company for the services rendered by them in erection of the machinery in Midhani unit at Hyderabad. Therefore, the contention of the Revenue that as the amounts reimbursed by Midhani under a separate contract for the technical services rendered by a non-resident company, it must be deemed that there was a "business connection", and it attracts the provisions of Section 9(1)(vii) of the Income Tax Act cannot be accepted and the judgments relied upon by the Revenue are the cases where there was a separate agreement for the purpose of technical services to be rendered by a*

> *foreign company, which is not connected for the fulfillment of the main contract entered into principal to principal. This is not one such case and thus the contention of the Revenue cannot be accepted in the circumstances and nature of the terms of the contract of this case."*

58. No doubt, in an annexure to the Supply Contract the lump sum price is bifurcated in two components, viz., the consideration for the supply of the equipment and for the supply of the software. However, it was argued by the learned counsel for the assessee that this separate specification of the hardware/software supply was necessary because of the differential customs duty payable.

59. Be as it may, in order to qualify as royalty payment, within the meaning of Section 9(1)(vi) and particularly clause (v) of Explanation-II thereto, it is necessary to establish that there is transfer of all or any rights (including the granting of any license) in respect of copy right of a literary, artistic or scientific work. Section 2(o) of the Copyright Act makes it clear that a computer programme is to be regarded as a 'literary work'. Thus, in order to treat the consideration paid by the cellular operator as royalty, it is to be established that the cellular operator, by making such payment, obtains all or any of the copyright rights of such literary work. In the present case, this has not been established. It is not even the case of the Revenue that any right contemplated under Section 14 of the Copyright Act,1957 stood vested in this cellular operator as a consequence of Article 20 of the Supply Contract. Distinction has to be made between the acquisition of a "copyright right" and a "copyrighted article".

This ruling was followed in *Alcatel Lucent Canada (supra).*

20. The misconception that the revenue harbors stems from its flawed appreciation of a copyright license. True, "copyright" is not defined; yet *what works are capable of copyright protection is spelt out in the Copyright*

Act. Sections 13 and 14 of the Copyright Act flesh out the essential ingredients that make copyright a property right. More particularly, Section 14 states as follows:

> *"14. Meaning of copyright- For the purposes of this Act, "copyright" means the exclusive right subject to the provisions of this Act, to do or authorise the doing of any of the following acts in respect of a work or any substantial part thereof, namely :-*
>
> *(a) In the case of a literary, dramatic or musical work not being a computer programme-*
>
> *(i) to reproduce the work in any material form including the storing of it in any medium by electronic means;*
>
> *(ii) to issue copies of the work to the public not being copies already in circulation;*
>
> *(iii) to perform the work in public, or communicate it to the public;*
>
> *(iv) to make any cinematograph film or sound recording in respect of the work;*
>
> *(v) to make any translation of the work;*
>
> *(vi) to make any adaptation of the work;*
>
> *(vii) to do, in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in sub clauses (I) to (vi)*
>
> *(b) In the case of a computer programme,-*
>
> *(i) to do any of the acts specified in clause (a)*
>
> *(ii) to sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer programme:*

Provided that such commercial rental does not apply in respect of computer programmes where the programme itself is not the essential object of the rental.

(c) In the case of an artistic work,-

(i) to reproduce the work in any material form including depiction in three dimensions of a two dimensional work or in two dimensions of a three dimensional work;

(ii) to communicate the work to the public;

(iii) to issue copies of the work to the public not being copies already in circulation;

(iv) to include the work in any cinematograph film;

(v) to make any adaptation of the work;

(vi) to do in relation to an adaptation of the work any of the acts specified in relation to the work in sub clauses (i) to (iv);

(d) In the case of a cinematograph film-

(i) to make a copy of the film, including a photograph of any image forming part thereof;

(ii) to sell or give on hire, or offer for sale or hire, any copy of the film, regardless of whether such copy has been sold or given on hire on earlier occasions;

(iii) to communicate the film to the public

(e) In the case of a sound recording-

(i) to make any other sound recording embodying it;

(ii) to sell or give on hire, or offer for sale or hire, any copy of the sound recording regardless of whether such copy has been sold or given on hire on earlier occasions;

(iii) To communicate the sound recording to the public

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

Thus, Section 14 categorically provides that copyright *"means the exclusive right to do or authorizing the doing of any of the acts mentioned in Section 14 (a) to (e) or any ―substantial part thereof"*. The content of copyright in respect of computer programmes is spelt out in Section 14 (b). A joint reading of the controlling provisions of the earlier part of Section 14 with clause (b) implies that in the case of computer programs, copyright would mean the doing or authorizing the doing- in respect of work (i.e. the programme) or any substantial part thereof –

(b) In the case of a computer programme,-

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

(ii) to sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer programme:

Provided that such commercial rental does not apply in respect of computer programmes where the programme itself is not the essential object of the rental.

21. The reference to clause (a) and (b) means that all the rights which are in literary works i.e.*"(i) to reproduce the work in any material form including the storing of it in any medium by electronic means;(ii) to issue copies of the work to the public not being copies already in circulation;(iii) to perform the work in public, or communicate it to the public;(iv) to make any cinematograph film or sound recording in respect of the work;(v) to make any translation of the work;(vi) to make any adaptation of the*

work;(vii) to do, in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in sub clauses (I) to (vi)" inhere in the owner of copyright of a computer programme. Therefore, the copyright owner's rights are spelt out comprehensively by this provision. In the context of the facts of this case, the assessee is the copyright proprietor; it made available, through one time license fee, the software to its customers; this software *without the hardware which was sold, is useless. Conversely the hardware sold by the assessee to its customers is also valueless and cannot be used without such software.* This analysis is to show that what was conveyed to its customers by the assessee bears a close resemblance to goods- significantly enough, Section 14 (1) talks of sale or rental of a "copy". The question of conveying or parting with copyright in the software itself would mean that the copyright proprietor has to assign it, divesting itself of the title *implying that it has divested itself of all the rights under Section 14.* This would mean an outright sale of the copyright or assignment, under Section 18 of the Act. Section 16 of the Copyright Act enacts that there cannot be any other kind of right termed as "copyright".

22. In the present case, the facts are closely similar to *Ericson.* The supplies made (of the software) enabled the use of the hardware sold. It was not disputed that without the software, hardware use was not possible. The mere fact that separate invoicing was done for purchase and other transactions did not imply that it was royalty payment. In such cases, the nomenclature (of license or some other fee) is indeterminate of the true nature. Nor is the circumstance that updates of the software are routinely given to the assessee's customers. These facts do not detract from the nature

of the transaction, which was supply of software, in the nature of articles or goods. This court is also not persuaded with the submission that the payments, if not royalty, amounted to payments for the use of machinery or equipment. Such a submission was never advanced before any of the lower tax authorities; moreover, even in *Ericson (supra),* a similar provision existed in the DTAA between India and Sweden.

23. As far as the question of interest payments and Section 234B is concerned, the court is of the opinion that the issue is covered by *GE Packaging (supra).* This question of law too is answered against the revenue, and in favour of the assessee.

24. In the light of the foregoing discussion, the two questions framed are answered against the revenue and in favour of the assessee. The revenue's appeals are therefore, dismissed.

S. RAVINDRA BHAT
(JUDGE)

NAJMI WAZIRI
(JUDGE)

JANUARY 24, 2017