आयकर अपीलीय अधिकरण "आई" न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
"I" BENCH, MUMBAI

श्री शक्तिजीत दे,न्यायिक सदस्य **एवं**
श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।
BEFORE SHRI SAKTIJIT DEY, JM AND
SHRI MANOJ KUMAR AGGARWAL, AM

आकरअपील सं./ I.T.A. No.783/Mum/2017
(**निर्धारण वर्ष /** Assessment Year: 2012-13)

Netcracker Technology Solutions LLC (Formerly known as Convergys Information Management Group Inc.) C/o. Pricewater House Coopers Pvt. Ltd., PWC House, Plot 18/A Guru Nanak Road, (Station Road) Bandra (W), Mumbai-400 050	**बनाम**/ Vs.	**DCIT- Circle-3(3)(1)** International Taxation Mumbai.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. AACCC-8990-N		
(अपीलार्थी/**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थीकीओरसे/ **Appellant by**	:	Ms. Hirali Desai-Ld.AR
प्रत्यर्थीकीओरसे/**Respondent by**	:	Shri Samuel Darse-Ld. CIT-DR

सुनवाईकीतारीख/ **Date of Hearing**	:	01/10/2019
घोषणाकीतारीख / **Date of Pronouncement**	:	14/10/2019

आदेश / O R D E R

Manoj Kumar Aggarwal (Accountant Member): -

1. Aforesaid appeal by assessee for Assessment Year [in short referred to as 'AY'] 2012-13 contest the final assessment order dated 28/11/2016 passed by Dy. Commissioner of Income Tax(I.T.)-3(3)(1), Mumbai [AO] u/s.

143(3) r.w.s. 144C(13) & 92CA of the Income Tax Act pursuant to the directions of Dispute Resolution Panel-2, Mumbai, [in short referred to as DRP] u/s 144C(5) dated 29/09/2016. The grounds raised by assessee read as under: -

1. That in the facts and circumstances of the case & in law, the Ld. AO/ DRP erred in assessing the income of the Appellant at Rs. 7,52,34,100 against the returned income of Rs. 44,11,290.
2. That in the facts and circumstances of the case & in law, the Ld. DRP/ AO erred in making an addition of Rs.1,42,77,485 received on account of International Private Leased Circuit CIPLC) charges by stating that link charges constitute as Fee for Technical/ Included Services ('FTS/ FIS') as well as Royalty under section 9 the provisions of the Act read with the provisions of Article 12 of the India-USA Double Taxation Avoidance Agreement ('the DTAA').
3. That the Ld. DRP/ AO grossly erred on facts and in law in making an addition to the returned income in respect of support and maintenance fees, amounting to Rs. 2,20,77,105, by stating that the receipts on account of support and maintenance fees being ancillary and subsidiary to the enjoyment of right to use the software are taxable as FIS under para 4(3) of Article 12 of the DTAA.
4. That the Ld. DRP/ AO grossly erred on facts and in law in making an addition to the returned income in respect of service fees, amounting to Rs. 3,44,68,220, by stating that the receipts on account of service fees being ancillary and subsidiary to the enjoyment of right to use the software are taxable as FIS under para 4(3) of Article 12 of the DTAA.
5. That the Ld. AO erred in levying interest under section 234B of the Act.
6. That on the facts and circumstances of the case & in law, the Ld. AO erred in proposing to initiate the penalty proceedings under section 271(1)(c) of the Act."

As evident from grounds of appeal, the assessee is primarily contesting the action of lower authorities in making additions by treating certain receipts as Fees for Technical Services / Fees for included services within the meaning of Article 12 of India-USA Double Taxation Avoidance Treaty (DTAA). Ground No. 1 is general in nature whereas Ground No. 6, assailing penalty u/s 271(1)(c) is premature at this stage.

2. The Ld. Authorized Representative for Assessee, at the outset, submitted that the issues under appeal stood squarely covered by the decision of this Tribunal in assessee's own case for AYs 2009-10 to 2011-12, ITA Nos. 1701/M/2014, 1439/M/15, 1995/M/16 common order dated 30/08/2019, a copy of which has been placed on record. The Ld.CIT-DR could not point out any distinguishing features in this AY. Nothing is on record to suggest that aforesaid ruling is not applicable to the facts of this AY also.

3. In the above background, the assessee before us is a non-resident corporate assessee. The assessment was framed on 28/11/2016 wherein the income was determined at Rs.752.34 Lacs after certain additions as against *Nil* return filed by the assessee on 27/03/2014. During assessment proceedings, it transpired that the assessee received aggregate amount of Rs.752.34 Lacs which *inter-alia* comprised-off of data access / link charges of Rs.142.77 Lacs, supply of off-the-shelf shrink-wrapped software for Rs.220.77 Lacs & Supply of Services for Rs.344.68 Lacs. The three amounts were claimed to be not taxable in terms of India-USA Double Taxation Avoidance Treaty (DTAA). In defense, the assessee submitted that it provides communication links known as International Private Leased Circuits (IPLC) which is a point-to-point private line used by the organization for communication. This link could be used for internet access, business data exchange, video conferencing or any other form of telecommunication. These links were stated to be procured by the assessee from third party service provider which were charged to customers in India. However, the

said service would not qualify as Fees for included services since no technical knowledge is made available and the same would not constitute royalty also since the services would not constitute use or right to use any process. However, disregarding the same, Ld. AO opined that the said services would constitute Fees for included services as well as royalty under Article 12 of DTAA read with Section 9(1)(vi) as held in AYs 2007-08 to 2010-11. The other two receipts were also held to be taxable as Fees for Technical Services under para 4(a) of Article 12 of the Treaty, as held in earlier years.

4. The Ld. DRP following directions given in AYs 2009-10 to 2011-12 upheld the taxability of all the three items. Consequently, final assessment order was passed on 28/11/2016 assessing total income at Rs.752.34 Lacs. Aggrieved, the assessee is under further appeal before us.

5. As noted in the opening paragraphs, we find that all the issues have been dealt with by the co-ordinate bench of this Tribunal for AYs 2009-10 to 2011-12 common order dated 30/08/2019. The relevant portion of the order, for ease of reference, could be extracted in the following manner: -

> 19. We have further noted that DRP has also relied upon the decision of Raymond Ltd. (supra) held that section 9(1)(vii) stops with the "rendering" of technical services, the DTA goes further and qualifies such rendering of services with words to the effect that the services should also make available technical knowledge, experience, skills etc. to the person utilising the services. These words are "which make available". The meaning ascribed by Mr. Kapila for the Department is that these words merely mean "to allow somebody to make use of, whether actually made use of or not", but in our opinion and with respect, this meaning does not take due note of the addition of such words to the "rendering of any technical or consultancy services". The meaning suggested by Mr. Kapila is embedded in the "rendering" of the services itself. When somebody "renders" services, it presupposes that somebody else is "making use" of the same. But the "making use of" should be contrasted with the "making available". The "making

available", in our opinion, refers to the stage subsequent to the "making use of" stage. The qualifying word is "which" the use of this relative pronoun as a conjunction is to denote some additional function the "rendering of services" must fulfil. And that is that it should also "make available" technical knowledge, experience, skill etc. In our view the conclusion arrived by the Tribunal does not support the view taken by the lower authorities.

20. Further, the co-ordinate bench of Delhi Tribunal in Geo Connect vs. DCIT (supra) while examining the taxability of IPLC charges paid to AT & T also held that agreement was only for the provision of services and not for “use” or “right to use” any industrial, commercial or scientific equipment or process between the non-resident and assessee for use of dedicated private bandwidth in underwater sea cable and therefore, consideration paid to AT & T would not constitute ‘Royalty’. The Tribunal further held that payment to ICLC charge does not constitute FTS either under the Act or the Treaty. The relevant part of decision is extracted below:

> “10.13 In the case of instant assessee, the control of equipment was with the non-resident parties and they have not leased the equipment, i.e. the undersea cable etc. to the assessee. The equipment were owned and used by the non-resident parties only and therefore it cannot be said that the consideration paid was for use of equipment by the assessee. Similarly the non-resident parties have not provided use of any process to the assessee, which are of patentable nature having exclusive ownership rights. The assessee was not concerned with any of the process involved in transmission or connectivity of call data. The only concern of the assessee was transmission of call data beyond the boundaries of India to the person in USA to whom call was made.
>
> -------
>
> 10.15 Further the assessee in support of the proposition that amendment under section 9(1)(vi) of the Act by finance Act 2012 has no bearing on the provisions of DTAA has relied on the decision of the Hon'ble Delhi High Court in the case of New Sky Satellite BV, (supra) in ITA 473/2012. In the instant case also the assessment year involved is 2002-2003, and thus the Explanation-5 and 6 and Memorandum of Explanation cannot be brought into action as there has not been any corresponding change in the definition of the term royalty in the DTAA between India and the USA. Accordingly, we are of the opinion that under the DTAA, the restricted meaning of the royalty shall continue to operate despite the amendment in law.
>
> ----------
>
> 10.16 As far as the assessee is concerned, in case of difference between provisions of the Act and an agreement under section 90 i.e. (DTAA), the provisions of the agreement shall prevail over the provisions of the Act.
>
> 10.17 In view of our discussion above, we hold that the payments made by the assessee are not in the nature of royalty either under the domestic law or relevant DTAA .....
>
> 19. Further in para- 40 of the decision in the case of Bharti Airtel Ltd. (supra), the Tribunal has held that where make available clause is found in the treaty and there is no imparting as contemplated in the treaties, the payment cannot be treated as Fee for Technical Services (FTS) under the DTAA. The relevant paragraph of the decision is reproduced as under:
>
> '40. The second aspect of the issue are before us, is without prejudice to the finding under the Domestic Law, whether the payment to FTOs for "IUC" is fee for technical services under the DTAA, wherever 'make available clause' is found in these agreements. In view of our finding that the payment is not fee for
>
> technical services under the Act, it would be an academic exercise to examine whether the payment in question would be fee for technical services under DTAA's. Suffice to say wherever treaties contain "making available" clause, then in terms of the judgment of the Hon'ble Karnataka High Court in the case of CIT & Ors. v. De Beers India Minerals (P.) Ltd. [2012] 346 ITR 0467; the

payment cannot be treated as FTS under the DTAA as ITA Nos. 3593 TO 3596/Del/2012 [Bharti Airtel Ltd. v. ITO(TDS)] & ITA Nos. 4076 TO 4079/Del/2012 [ITO(TDS) v. Bharti Airtel Ltd.] there is no imparting as contemplated in the Treaties. Similar are the propositions on the issue of "make available" in the decisions in the case of Mahindra & Mahindra Ltd. v. DCIT 313 ITR 263; Raymond Ltd. v. DCIT 86 ITD 791; Cable and Wireless Networks India P. Ltd. [2009] 315 ITR 72.'

20. We find that in the DTAA between India and the USA the make available clause is in existence. The article 12(4) of the treaty is reproduced as under:

'For purposes of this Article, "fees for included services" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services:

(a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received ; or

(b) make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design.'

21. Since in the call connectivity and transmission from end of the Indian Territory at Mumbai to the termination of call in USA, no technical knowledge has been made available to the assessee, respectfully following the decision of the Tribunal in the case of Bharti Airtel Ltd. (supra), we hold that payment for the services of call transmission through dedicated bandwidth provided by the non-resident parties to the assessee, cannot be termed as Fee for Technical services under the treaty also, in the hands of the recipients."

21. The Mumbai Tribunal in Interroute Communication Ltd. vs. DDIT (supra) held as under:

9. Essentially, the role played by the interroute facility is connecting the call to the end operator, and, in that sense, it works like a clearing house. Similarly, in the case of incoming calls, calls originating from Europe and USA, which are to end in India, are routed to the respective operators. In the present fact situation, the payment made by the Indian entities can be held to be royalty only when it is payment for scientific work, any patent, trademark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience. It is not for a payment for a scientific work nor there is any patent, trademark, design, plan or secret formula or process for which the payment is made. There can hardly be any dispute that the payment is made for a service, which is rendered with the help of certain scientific equipment and technology, rendered by the assessee. The service is connectivity to the telecom operators in the call end jurisdiction. The facility is a standard facility which is used by other telecom companies as well. As for the dedicated ports, these things only provide a certain level of capacity in access but the payment is for the service nevertheless. Merely because the payment involves a fixed as also a variable payment does not alter the character of service. Dealing with such a type of consideration, a coordinate bench of this Tribunal, in the case Kotak Mahindra Primus Ltd. v. Dy. DIT[2007] 11 SOT 578 (Bom.), had held that "This type of pricing of a service, by segregating the fixed and variable price, is not unusual". That does not, however, alter the character of arrangement. The payment continues to be for service alone. The assessee may charge a fixed amount to cover its costs in employing enhanced capacity so as not to incur losses when this capacity is not used, but what the customer is paying for is a service and not the use of equipment involved in additional capacity, nor, as we have seen above, for any scientific work, any patent, trademark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience. It cannot, therefore, be taxed as royalty under article 13 of the Indo-UK tax treaty. The payment for a service can be brought to tax under article 13 only when it makes available the technology in the sense that recipient of service is enabled to perform the same service without recourse to the service provider. As held by this Tribunal, in the case of C.E.S.C. Ltd. v. Dy. CIT[2003] 87 ITD 653 (Kol.) (TM), "....in order to be covered by the provisions of Art. 13(4)(c) of the India-UK DTAA, not only the services should be of technical in nature but such as to result in making the technology available to the person receiving the technical services. We also agree that merely because the provision of the service may require technical input by the person providing the service, it cannot be said that technical

knowledge, skills, etc. are made available to the person purchasing the service. As to what are the connotations of 'making the technology available to the recipient of technical services', as is appropriately summed up in protocol to Indo-US DTAA, "generally speaking, technology will be considered 'made available' when the person acquiring the service is enabled to apply the technology." In the case before us, no services are made available in the sense that the recipient of service is enabled to apply the technology, and do the same work without recourse to the service provider. There is no transfer of technology here, and in that sense technical services are not made available. Undoubtedly, the services rendered by the assessee requires technical inputs, but that alone, as we have seen above, does not bring it in the ambit of fees for technical services taxable under article 13 of India-UK tax treaty.

22. In view of the above factual and legal discussions, we are of the view payment made by the assessee is only in respect of standard services provided by AT&T and Spinet, which cannot be held to be 'Royalty'. Only those payment, when it made for scientific work, any patent, trademark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience, which is absolutely missing in the present case. The payment in the present case is not for a payment for a scientific work nor there any patent, trademark, design, plan or secret formula or process for which the payment made. The service is connectivity to the telecom operators in the call end jurisdiction. The facility is a standard facility which is used by other telecom companies as well. Therefore, the action of the assessing officer, which was upheld by ld. DRP, in treating the receipt as fee for FIS/ FTS or for the Royalty is not justified. In the result the ground No. 2 of the appeal is allowed.

23. Ground No. 3 relates to taxability of income from sale of shrink- wrapped software as 'Royalty'. The ld AR for the assessee submits that the assessee sold certain off-the self /shrink wrapped software to TCS for an amount of Rs. 4,05,24,300/-. The main features of contract for sale of shrink wrapped software by assessee to TCS were viz, (i) the assessee granted a personal, non-transferable and non-exclusive license to TCS, (ii) the assessee is the owner of the patents, copyright, trade secret, trademark and any other intellectual property right which subsist in the software, (iii) the title of the software shall remain with the assessee, (iv) the TCS was not allowed to make copy or print out of the software except for reasonable number of copies but only for its own internal back-up, archival, development, training and testing purpose, (v) TCS was not allowed to reverse engineer, decompile or dissemble the software,(vi) TCS was not allowed to sell, assigned, licensing lease, rent, lend, transmit network or otherwise distribute, transfer or make available the software in any manner to the third party, (vi) the Software was to be used for internal purpose only and was not allowed to use the software to provide services through a service bureau or other arrangements,(vii) TCS was expressly prohibited from adapting, modifying merging, revising, improving, translating, upgrading, enhancing and creating derivative works of the software for any purpose, including error correction or any other type of maintenance.

24. In the return of income the assessee claimed that income arising from the sale of software was not taxable in India as the same was not covered within the definition of 'Royalty'. The assessing officer treated the said consideration for the right to use the copyright of software and accordingly proposed to tax the income from sale of software as 'Royalty', under the Income tax Act and India USA tax treaty. On objections before DRP, the action of the assessing officer was upheld.

25. The learned AR of the assessee submits that the assessing officer treated the sale of software as 'Royalty', by taking view by virtue of retrospective amendment introduced in Explanation 4 in the definition of 'Royalty' under section 9 (1)(vi) of Income tax Act by virtue of Finance Act 2012. The assessing officer failed to appreciate that there was no corresponding change introduced in the definition in the term 'Royalty' under the India USA tax treaty. The assessee being tax resident of USA, is eligible for beneficial provision of India USA tax treaty in term of section 90(2) of the Act. Therefore, even if the consideration for sale of software is covered within the definition of 'Royalty' under the Act, it cannot be taxed as such unless it falls within the definition of "Royalty" as defined in India USA tax treaty, therefore the assessee is entitled for availing beneficial provision of India USA tax treaty. To support their contention that payment received from TCS for sale of product is not liable to tax in India as 'Royalty' income. Article 12(3) of India US tax treaty defined the Royalty payment made for the use of right to use of copyright of a literary, artistic or scientific work. Accordingly, in order to qualify as 'Royalty payment as income, provided in Article 12 of India USA tax treaty, the income of the appellant should have been generated by use of or right to use of any copyright of a literary, artistic or scientific work. TCS should have acquired all or any right in the copyright which the copyright holder has. A distinction has to be made between 'copyright' and a 'copyrighted article'. A copyright is an intangible right independent of copyrighted article. The assessee has transferred to copyrighted article and there is no transfer of any copyright. A right to use copyright is distinguishable from the sale consideration paid for copyrighted article. The licensing agreement between the assessee and the TCS shows that license is non-exclusive non-transferable and that software is to be used in accordance with the agreement, only one copy of software is supplied by the assessee to TCS.

26. To strengthen his submission the learned AR for the assessee also relied upon the decision of Delhi High Court in DIT Versus Infrasoft Ltd (264 CTR 329), PCIT Vs M. Tech India P. Ltd (2016) 382 ITR 31 (Delhi), Mumbai Tribunal in Tata Communications Ltd. (ITA No. 1473 /Mumbai/2009 and Delhi Tribunal in assessee's group case in Converges Customer Management Group Inc Versus ADIT (ITA No. 1443/Delhi/2012 and 5 to 43/Delhi/2011).

27. On the other hand the learned AR for the revenue supported the order of lower authorities. The ld. DR for the revenue further submits that the software supplied by the assessee is not a copyrighted article. On the point of the issue of amendment in section 9(1)(vi) the ld DR submits that the amendment is clarificatory in nature. In support of his submission the learned DR of the revenue relied upon the decision of honourable Karnataka High Court in case of Samsung Electronics Co Ltd (2009) (185 Taxman 313).

28. We have considered the rival submission of the parties and perused the material available on record. The In the return of income, the assessee has shown a receipt of Rs. 4.05 crore on account of supply of software to TCS. The assessee claimed that said software is the nature of Shrink Wrapped Software and no use or right to use any copyright or intellectual copy right in the software was granted to the TCS. The TCS was provided a copyrighted article; the said arising of said software is not taxable in India as the same is not covered by the definition of Royalty under India-US Tax Treaty.

The Assessing Officer treated the said receipt for the use of copyright and proposed to tax in the form of sale of software as Royalty under India-US Tax Treaty. The DRP upheld the action of Assessing Officer. We have gone through the licence agreement wherein the assessee granted licence to TCS in accordance with the term and condition of the agreement. The term and condition of the licence is provided under clause 2.1. Further, in clause 4 of the agreement, the assessee has put a restriction on licence. The perusal of licensing agreement further shows that licence is non-exclusive, non-transferable and that the software is to be used strictly in accordance with agreement, and only one copy of software is supplied to the TCS. The TCS is only permitted to make one copy of software for internal back and archival purposes. Further, software is to be used by TCS only for its own business and cannot be rented, sold sub-licence or transfer to any third party as the TCS is restricted from making copies, decompile disassemble or reverse engineer the software. The title and ownership of the software is with the assessee. We have noted that Article 12(3) of the India-US Tax Treaty define the Royalty as a payment made for use of a copyright of a literary, artistic or scientific work. Therefore, for taxing Royalty Income covered by Article 12 of India-US Tax Treaty. The income should have been generated by the 'use of' or 'right to use of' any copyright. In our view, the payment received by assessee is for the sale of software, which cannot be treated as consideration for transfer of any copyright and cannot be treated as Royalty under Article 12 of the India US Tax Treaty. The Delhi Tribunal in Converges Customer Management Group Inc. (supra) held that the consideration received for sale of Shrink Wrapped Software does not constitute Royalty as the same is for the sale of copyrighted article and not for the use of copyright. Further, Mumbai Tribunal in case Tata Communication Ltd. (supra) also held that payment made for copyrighted article and not copyright per se and hence, the same is not taxable in India.

29. The Hon'ble Delhi High Court in DIT vs. Infrasoft Ltd. (supra) also held that when they right transfer is not the right to use the copyright but it is limited to right to use the copyrighted material and the same does not give rise to Royalty Income and would be business income. It was also held that consideration received by assessee on grant of licence for use of software is not Royalty within the meaning of Article 12(13) of India-US Tax Treaty. The decision relied by ld. DR in Samsung Electronics (supra) has been distinguished by Hon'ble Delhi High Court in DIT vs. Infrasoft Ltd. (supra). The relevant part of decision of Hon'ble Delhi Court is extracted below:

> "98. We are not in agreement with the decision of the Karnataka High Court in the case of Samsung Electronics Co. Ltd (supra) that right to make a copy of the software and storing the same in the hard disk of the designated computer and taking backup copy would amount to copyright work under section 14(1) of the Copyright Act and the payment made for the grant of the licence for the said purpose would constitute royalty. The license granted to the licensee permitting him to download the computer programme and storing it in the computer for his own use was only incidental to the facility extended to the licensee to make use of the copyrighted product for his internal business purpose. The said process was necessary to make the programme functional and to have access to it and is qualitatively different from the right contemplated by the said provision because it is only integral to the use of copyrighted product. The right to make a backup copy purely as a temporary protection against loss, destruction or

damage has been held by the Delhi High Court in Nokia Networks OY (supra) as not amounting to acquiring a copyright in the software."

30. In view of aforesaid discussion, we are of the view that the receipt on account of sale of copyrighted/Shrink Wrapped Software is not taxable as per Article 12(14) of India-US Tax Treaty. Further, the receipt is also not taxable under the provisions of Income-tax Act as the assessee is eligible for beneficial provision of India-US Tax Treaty in term of section 90(2) of Income-tax Act. Moreover, after the amendment introduced in Explanation (4) in definition of Royalty under section 9(1)(6) by Finance Act, 2012, there is no corresponding change made in definition in term of Royalty under India-US Tax Treaty. Therefore, in view of the aforesaid discussion, the ground no.3 of the appeal is allowed in favour of assessee.

31. Ground No. 4 relates to taxability of support and maintenance services as FIS. The learned AR of the assessee submits that during the year under consideration the assessee received Rs. 2,29,63,770/- from TCS and TCL in relation to support and maintenance services rendered in connection with the software supplied by the assessee. Under the contract with TCS, the assessee was to render the support and maintenance services in the form of version updates, bucks fixing, call support etc, in connection with the software supplied to TCS. The support and maintenance services were rendered remotely from outside India. The main feature of the contract consists of viz, (i) to addresses standard software code product defect, bug, issue or technical query,(ii) the problem include but is not limited to new standard software problem, related problem, re- occurrence of all problems, duplicate problems or problems that we are similarities to issue which have been previously raised, and any technical quarries on standard core software, (iii) the problem was to be reported either by way of telephone or by email. The agreement specifically mentioned that assessee shall not be under no obligation to provide support and maintenance service in respect viz,(a) problem resulting from any modification of customisation if the software is not made by the assessee list of any software other than software supplied by assessee, (b) any software other than the software supplied by the assessee, (c) incorrect or unauthorised use of the software supplied by the assessee or operation is not in accordance with the documentation, (d) any fault in the equipment on which software is installed, (e) any programme used in conjunction with software supplied, (f) use of element of the software supplied in any combination other than those specified in the documentation, (g) use of software supplied with computed hardware, operating stem or other supporting software other than those specified in the documentation. Accordingly the support and maintenance services rendered by assessee work only in connection with the software supplied and ancillary and subsidiary as well as inextricably and essentially linked to software supplied.

32. In the return of income the assessee claimed that said receipt were not taxable in India under India US tax treaty. The assessing officer in the draft assessment held that support and maintenance fees were ancillary and subsidiary to enjoyment of 'right to use' of the software for which royalties being paid and hence proposed to tax the amount as FIS in term of Article 12(4)(a) of India US tax treaty. The learned DRP rejected the objection of assessee and confirm the view taken by assessing officer.

33. The learned AR of the assessee submits that assessee, being tax resident of USA is eligible for beneficial provisions of India USA tax treaty which contains more restrictive definition of FTS as compared to the Act. Accordingly, the subject receipt cannot be taxable as FTS unless it is covered by the definition of FTS in the India US tax treaty, even if discovered by the definition of FTS under the Act. The learned AR of the assessee again reiterated the provision of Article 12 of India USA taxability wherein definition of royalty and 'fees for included' services is defined.

34. The learned AR further submit that it is an undisputed fact that the support and maintenance services are ancillary and subsidiary, as well as inextricably and essentially linked, to the software supplied, therefore, the services would be dependent on the taxability of software supplied. The services can be considered as FTS under clause- (a) of paragraph 4 of Article 12, only if the software is taxable as Royalty under paragraph 3 of Article 12 of the tax treaty. It was argued that in case ground No. 2 is allowed in favour of assessee, support and maintenance services cannot be taxable under Article 12(4) of Tax Treaty.

35. The learned AR in alternative submission submit that the receipt on account of support and maintenance service are not taxable under article 12(4)(b) of tax treaty as the service do not make available technical knowledge, experience, skill for no or process. The learned AR also relied upon the MOU to the India US tax treaty. In support of his submission the learned AR of the assessee also relied upon the decision of Karnataka High Court in case of CIT v/s De Beers India minerals Ltd 2012 346 ITR 467(Karnataka), decision of Pune Tribunal in Sandvik Australia Pty Ltd Vs DDIT (ITA No. 93/Pune/2011), Bharti AXA General Insurance Co. Ltd (2010) 326 ITR 477 (AAR). The assessee has also placed on record the copy of software licence agreement dated 15.11.2007 with TCS (page no.126 to 137 of PB).

36. On the other hand the learned AR for the revenue supported the order of assessing officer and the direction of the DRP. The ld. DR for the revenue further submits that this ground of appeal is linked to the Ground No.3.

37. We have considered the submission of both the parties produce the orders of authorities below. We have also deliberated on various case laws relied by lower authorities and the learned AR of the assessee. We have noted that the assessee provided support and maintenance services linked with the software supplied. Accordingly, the taxability of such services is dependent on the taxability of software supplied. As we have held that the receipt earned on sale of software is not taxable under Article 12 of India-US Tax Treaty, therefore, the services the receipt from support and maintenance services are also not taxable under 12(4)(b) of India US Tax Treaty. In the result, this ground of appeal is allowed.

38. Ground No. 5 relates to taxability of service fee as FTS. During the year under consideration, the assessee rendered certain services to TCS. The services comprised of in Geneva health check for retail instances (Geneva billing system performance tuning) and other professional and consultancy services. These services were claimed to have been subcontracted by assessee to Indian entity CIM on a principal to principal basis. In the return of income the assessee claimed that the said receipt are not taxable in India under the India US tax treaty. However the assessing officer in the assessment

order held that services are ancillary and subsidiary to the enjoyment to use the software for which royalties being paid and hence proposed to tax the amount as FIS. On objection before DRP the action of assessing officer was upheld. The learned AR of the assessee submits that the services rendered by assessee are neither ancillary and subsidiary to the application or enjoyment of the right, property or information for which a royalty payment is described in Article 12(3) of Tax Treaty is received nor do they make available technical knowledge, experience, skill, know-how or process or consist of the development of transfer of technical plan or technical design. The learned AR further submits that unless, the services satisfy a make available test, the same could not be taxed as FIS income. The learned AR retreated the contents of MOU to the India US tax treaty.

39. On the other hand learned AR for the revenue supported the order of lower authorities.

40. We have considered the rival submission of the parties and perused the order of lower authorities. During the relevant period for A.Y. under consideration, the assessee rendered certain services to TCS. Those services were sub-contracted by assessee to Indian Entity CIM on Principle to Principle Basis in the return of income, the assessee claimed said receipt are not taxable in India. The Assessing Officer treated the said receipt as subsidiary and ancillary to the right to use of software which is Royalty and proposed to tax as FIS under Article 12(4)(a). The objection of assessee was rejected by DRP. The DRP concluded that payment have been received for providing specialized technical input services rendered by assessee and will be covered by the definition of FIS/FTS.

41. The Fees for included services is defined in Article 12(4) of India-US Tax Treaty, wherein 'Fees for included services' means payment of any kind to any person in consideration for rendering of any technical or consultancy services (including through the provision of services of technical or other personnel' if services are ancillary and subsidiary to the application or enjoyment or right, property or information for which payment is received or make available technical knowledge, experience, skill no-how or process or consist of development and transfer of a technical plan or technical design. We have noted that the assessee has claimed that services rendered are ancillary and subsidiary and inextricably essentially linked with the software supplied. In our view, unless the services satisfy the make available test, the same cannot be taxed as FIS. Further, mere fact that provision of service may require technical input by the person providing services does not per se mean the technical knowledge. In our view, the receipt on account of support and maintenance services are not taxable under Article 12 as the services do not make available technical knowledge, experience, skill, know-how or process or consist of any development and transfer of any design. In the result, ground no.5 of the appeal is allowed.

Since facts are stated to be pari-materia the same in this AY, applying the aforesaid decision of the Tribunal, we delete impugned three additions made by Ld. AO. Ground Nos. 2 to 4 of the appeal stands allowed.

6. In ground No.5, the assessee is contesting the levy of interest u/s 234B by relying upon the decision of Hon'ble Bombay High Court rendered in **DIT V/s NGC Network Asia LLC (313 ITR 187).** We find that similar issue, in the aforesaid decision of the Tribunal has also been dealt with in the following manner: -

> 42. Ground No. 6 relates to levy of interest under section 234B of the Act. The learned AR of the assessee submits that in the assessment order, the assessing officer levied interest under section 234B of the act amounting to ₹ 37,58,522/-on account of shortfall in payment of advance tax and self-assessment tax. The learned AR submitted that the assessee being tax resident of India and is foreign company under the income tax laws, accordingly, as per section 195 of the act taxes deductible at the source on all its received. Therefore there can be no liability to pay advance tax under section 208 of the act in absence of any liability to pay advance tax. The provision of section 234B of the act cannot be involved. In support of his submission the learned AR of the assessee relied upon the decision of honourable Bombay High Court in case of DIT versus NGC Network Asia LLC (313 ITR 187)
> 43. On the other hand the learned AR for the revenue submits that suitable direction may be given to the assessing officer to recompute the interest as per law.
> 44. We have considered the rival submission of the parties and find that assessee is a foreign company and tax resident of USA and as per section 195 of the act taxes deductible at source on all its received and accordingly the assessee was not liable to pay advance tax. Therefore we direct the assessing officer to recompute the tax by following the decision of the jurisdictional High Court in case of NGC network Asia LLC (supra).

The issue being similar, we direct Ld.AO to follow the decision of Hon'ble Bombay High Court rendered in **DIT V/s NGC Network Asia LLC (313 ITR 187).** This ground stand allowed for statistical purposes.

7. Resultantly, the appeal stands partly allowed.

Order pronounced in the open court on 14th October, 2019.

Sd/-	**Sd/-**
(Saktijit Dey)	**(Manoj Kumar Aggarwal)**
न्यायिक सदस्य / **Judicial Member**	लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांकDated : 14/10/2019
Sr.PS:-Jaisy Varghese

आदेश की प्रतिलिपि ग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / **ITAT, Mumbai.**