IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES: "E" NEW DELHI
BEFORE SHRI J.SUDHAKAR REDDY, ACCOUNTANT MEMBER
AND SHRI CM GARG, JUDICIAL MEMBER

ITA Nos: 3696-3697-3698-3699 and 3700/Del/2009
A.Ys. : - 2000-2001 to 2004-05

M/s Qualcomm Incorporated C/o S.R.Batliboi & Co. 401, 4th floor, Ashoka Bhopal Chambers S.P road, Secunderabad	vs.	ADIT, Circle 2(1) International Taxation Drum shaped bldg, Room No.414 New Delhi
(Appellant)		**(Respondent)**

Appellant by : Shri S.E.Dastur, Sr.Counsel with S/Shri Nishant Thakkar, **,** Shri.Rajan Vora , Shri.Jayesh Sanghvi, Shri Naveen Agarwal, Ms.Divya Santhanam &Shri. Manoneet Dalal

Respondent by : Shri G.C. Srivastava, Spl.Counsel with Ms.Preeti Bhardwaj & Shri.Sourabh Srivastava

O R D E R

PER J.SUDHAKAR REDDY, ACCOUNTANT MEMBER

All these five appeals are filed by M/s.Qualcomm Incorporated and are directed against a common order passed by the CIT(A)-XXIX, New Delhi dt. 26-06-2009 for the A.Y. 2000-2001 to A.Y. 2004-2005. All these appeals arise from the assessments framed by the Assessing Officer ('AO') under section 143(3) read with section 147 of the Income tax Act 1961('the Act'). Since the issues in all these appeals have arisen from common facts and circumstances, the appeals were heard together and are being disposed of by this consolidated order for the sake of convenience.

2. The Appellant has raised various common grounds. The grounds of appeals are many and pertain to different limbs and contentions in support of Five main issues that require our adjudication. These issues that arise in the present appeals are summarized as under:

a) Whether on the facts and circumstances of the case, the ld. CIT(A) was justified in upholding the validity of reassessment proceedings initiated under S. 148/ 147 of the Act;

b) Whether on the facts and circumstances of the case, the CIT(A) was justified in exercising jurisdiction under section 251 of the Act to enhance the income of the Appellant in respect of royalty income earned by the Appellant from the OEMs on network equipment; and

c) Whether on the facts and circumstances of the case, the CIT(A) was justified in upholding the taxability of royalty income earned by Qualcomm Incorporated, from the Original Equipment Manufacturers ('OEMs') of CDMA mobile handsets and network equipment, who are located outside India, under S. 9(1)(vi) (c) of the Income Tax Act;

d) Whether on the facts and circumstances of the case, the CIT(A) was justified in upholding the taxability of royalty income earned by Qualcomm Incorporated, from the Original Equipment Manufacturers ('OEMs) of mobile handsets and network equipment, who are located outside India, under Article 12(7)(b) of the India –USA tax treaty ('DTAA');

e) Whether on facts and circumstances of the case, the CIT(A) was justified in confirming the levy of interest under section 234A & B of the Act.

We will address the above issues in seriatim.

3. We extract the following additional detailed grounds raised by the Appellant as we feel the same is necessary for the sake of completeness.

"*That the CIT (A) was factually wrong in holding that,*

a) The Indian Carriers constitute a source of income for the OEMs in India;

b) The source of revenue derived by the Appellant is from utilization /exploitation of the patents by users in India, completely disregarding the fact that licensing transaction between the Appellant and the OEMs is completely independent of the supply transaction between the OEMs and the Indian telecom operators;

c) the real intent of licensing the patented technology to the OEMs is to make available the products to Indian Carriers for commercially exploiting the CDMA technology in India;

d) the OEMs customize the products for use in India based on the specific orders placed by the Indian Carriers on the OEMs to manufacture products that are compatible to the CDMA network in India, and the products manufactured by the OEMs for sale to Indian Carriers cannot be sold / used in any other geography outside India;

e) the Appellant provides technology to Indian Carriers and has licensed rights to the patented technology to the Indian Carriers through independent agreements entered into with the Indian Carriers; completely disregarding the fact that the Technical

Services Agreements ('TSAs') entered into between the Appellant and the Indian Carriers are entirely independent of the patent license agreements between OEMs and the Appellant;

f) *the Indian Carriers have made payments to the Appellant for the use or the right to use the patented technology;*

g) *the payment made by the Indian Carriers for the CDMA network infrastructure equipment includes payment for the right to use technology;*

h) *the deployment of CDMA network and use of handsets by the Indian Carriers in India gives the Indian Carriers a license to receive the services from the Appellant;*

i) *the Appellant has licensed software to the OEMs for manufacture of handsets;*

j) *the OEMs acquire a license in the software from the Appellant that enable the base station to communicate with the handsets;*

k) *the Appellant may have received royalty from Indian Carriers or from others providing the infrastructure and embedded technology to Indian Carriers;*

l) *the Appellant receives royalty with respect to the CDMA network being installed in India;*

m) *the right to use the patented technology is given in India.*

4. The brief facts of the case as brought by the AO in his assessment order for the A.Y.2000-2001 dt. 31-12-2007 and the CIT (A) in his order dt. 29.06.2007 is extracted below:-

"Qualcomm Incorporated ('Qualcomm' or 'the Appellant') is a publicly

traded company on the NASDAQ under the symbol: QCOM . Qualcomm was incorporated under the General Corporation Law of the State of Delaware in the United states of America on August 15, 1991. Qualcomm engages in the design, development, manufacture, marketing and licensing of digital wireless telecommunication products and services based on Code Division Multiple Access (CDMA) technology. Worldwide, Qualcomm's extensive portfolio has more than 6200 US patents and patent applications for CDMA and other technologies.

The four principal business units of Qualcomm are as follows:-

i. Qualcomm CDMA Technologies ('QCT')- QCT develops and supplies CDMA based integrated circuits and system software for wireless voice and data communications, multimedia functions and global positioning system products.

ii. Qualcomm Technologies Licensing ('QTL') – QTL grants licenses to manufa*cture of wireless products for the right to use portions of Qualcomm's intellectual property portfolio, which includes certain patent rights essential to and/or useful in the manufacture and sale of certain wireless products.*

iii. Qualcomm Wireless & Internet ('QWI') – QWI is comprised of:

** Qualcomm Internet Services ('QIS') – QIS provides technology to support and accelerate the convergence of the wireless data market including BREW, QChat and QPoint Products and services;*

** Qualcomm Government Technologies ('QGOV') – QGOV provides development, hardware and analytical expertise to United States government agencies involving wireless communications technologies; and*

** Qualcomm Wireless Business Solutions ('QWBS') – QWBS provides* *satellite and terrestrial based two way data messaging, position reporting and wireless application services to transportation companies, private fleets, construction equipment fleets and other enterprise companies.*

iv. Qualcomm Strategies Initiatives ('QST') – QST manages the company's strategic investment activities, and make strategic investments to promote the worldwide adoptions of CDMA based products and services.

The following entities are relevant to Qualcomm's investment in India:

a. *Qualcomm India Private Ltd. ('QIPL');*

b. *Qualcomm Bangalore Design Centre Private Limited ('QBDC') and*

c. *Spike Technologies Private Limited ('Spike').*

QIPL is an ultimate subsidiary of Qualcomm and was incorporated in India on March 08, 1996. QBDC and Spike were acquired in the FY 2004-05. QBDC and Spike have been merged with QIPL effective from April 1, 2005. QIPL is a part of the QCT operating segment of Qualcomm.

The main business of QIPL is to provide R&D services to Qualcomm Global Trading Inc. ('QGT') its indirect parent.

The Appellant has developed key patents to Code Division Multiple Access (CDMA), a method for transmitting simultaneous signals over a shared spectrum, most commonly applied to digital wireless technology. The Appellant has also granted a nonexclusive and nontransferable worldwide license of its patents developed on CDMA technology (the Patented Technology') to unrelated wireless Original Equipment Manufacturers ('the OEMs') to make (and have made), import, use and sell CDMA handsets and wireless equipment (the 'Products') in consideration for a royalty.

The Appellant's business model in relation to grant of license of its patents is as under:-

a) The Appellant licenses its Patents to OEMs who are situated outside India are not residents of India;

b) The OEMs use the patents to manufacture the Products outside of India;

c) The OEMs sold the Products to wireless carriers worldwide;

d) Royalty is payable by the OEMs to the Appellant for use of patented technology in the manufacture of products and is determined with reference to the net selling price of the product sold to unrelated wireless carriers worldwide. The OEMs typically pay a lump sum royalty on one or more installments and ongoing royalties based on their sale of products

e) The OEMs sold products manufactured using the patented technology, among other purchasers, to Tata Teleservices and Reliance Communications, both of whom are wireless carriers located in India (collectively, referred to as the 'Indian Carriers').

f) The products manufactured by the OEMs outside India were purchased by the Indian Carriers from the OEMs. The Indian Carriers, in turn, sold the products to end users in India. The products are used by customers of the Indian Carriers in India."

5. The CIT (A) in his order observed as under.

"*The appellant has further provided a diagrammatic depiction of the transaction between the appellant and the OEMs situated outside India. The perusal of the diagram submitted by the appellant, however, does not indicate complete picture. The diagram is only in respect of licenses* *of patented CDMA technology to handset manufacturer outside India. Second part of the diagram shows sale of equipment (handsets) manufactured to Indian carriers. What has not been indicated is that the appellant also provides CDMA technology of Indian carriers viz., Tata Tele Services (Tata Mobile) and Reliance Infocom (Reliance Mobile) who are able to utilize the handsets by the consumers through their mobile net work for communication which again uses CDMA technology. Therefore, the licensing by the appellant has two arms, -)i) licensing to the OEMs for the handsets, and(ii) licensing of the CDMA technology to net work manufacturers who supply these net works equipment to the Indian carriers where the patented technology is used in India. The net work is installed by the manufacturer either directly or through some other agency but invariably carries the CDMA compatible software for which license is granted by the appellant. For this licensing of software as well as patented technology, royalty would be receivable by the appellant from either the net work instrument supplier or any other agency who had authorized the use of this CDMA patented technology and software in India".*

6. Further, the AO in his order recorded that, the assesses had income from two important streams i.e., (a) from Qualcomm CDMA Technologies ('QCT') which develops and supplies CDMA based integrated circuits and Systems software for wireless voice and data communication, multi-media functions and global positioning system(GPS), products and (b) Qualcomm technology licensing ('QTL') which grants licenses to manufacturer of wireless products for the right to use portions of Qualcomm's intellectual property portfolios which include certain patent rights essential to/ or useful in the manufacture and sale of certain wireless products.

7. On facts the Appellant submitted to the revenue authorities that,

a) Qualcomm did not license CDMA technology to any network equipment manufactures in India during the subject assessment years.

b) Qualcomm does not have any role in determining the cost of handsets purchased by Reliance, etc from third parties (ie OEMs).

c) royalty is payable by the OEM`s for the use of patents for manufacturing CDMA handsets/ equipments and the royalties is quantified and becomes payable on sale. It was clarified that royalty does not accrue on sale of handsets but only on manufacture of handsets/ equipments.

d) It was contended that the patented technology as licensed to the OEM`s is for "use in manufacturing" CDMA standard network equipment and CDMA standard handsets and the OEM`s pay the royalty upon the sale of the licensed product, which is not limited to sale in India. No OEM is limited in India and none of them are located in India.

e) The royalty received by Qualcomm for the OEM`s is independent of whether the network equipment/handsets are sold into India or not.

f) Qualcomm is not involved in the sale of handsets between the OEM`s and the carriers operating in India (i.e., Reliance/Tata).

8. The Appellant did not furnish copies of the licensing agreements between the Appellant and the OEM`s before the AO, on the ground that the agreement with the OEM`s are not restricted to India.

9. The AO reopened the assessment for all the above AYs based on reasons recorded by him, which would be dealt by us later in this order. The AO came to conclusion that the royalty paid by the OEMs to Qualcomm for licensing of patents to manufacture CDMA handsets is taxable in India u/s 9(1)(vi) (c) of the Act and under Article 12(7)(b) of the DTAA.

The AO did not agree with the submissions of the Appellant for the following reasons:-

Under the Income Tax Act 1961,

"Under the provisions of S.9(1)(vi)(c) of the Income Tax Act, income by way of Royalty payable by a person who is a Non-Resident will be taxable in India if, where the royalty is payable in respect of any right, property or information used or services utilized for the purposes of a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India.

*In this case, we are concerned only with the royalty payable by the OEMs to Qualcomm based on the net work equipment/hand sets sold by them to parties in India. **It is not our case to tax the royalty arising out of the global contract between OEMs and Qualcomm but only so much of the royalty which pertains to sales made in India. The source of income of the OEMs is sales made to parties in India based on which royalties are paid to Qualcomm. Thus in terms of S.9(1)(vi)(c) of the Income Tax Act, 1961 royalties payable to Qualcomm are deemed to accrue and arise in India.***

Under the Indo-U S A DTAA,

"In terms of Article 12(7)(b) of the DTAA between India and USA, the royalty arising to Qualcomm is clearly taxable in India. The relevant article is reproduced as under:-

"(b) Where under sub-paragraph (a) royalties or fees for included services

do not arise in one of the Contracting States, and the royalties relate to the use of, or the right to use, the right or property, or the fees for included services relate to services performed, in one of the Contracting States, the royalties or fees for included services shall be deemed to arise in that Contracting State."

With reference to the above article the assessee has submitted that "the technology is used for manufacturing the net work equipment/ hand sets (i.e. products) before they are shift to India or elsewhere. Under the license agreement entered into with OEMs the obligation to pay royalties to Qualcomm arises before the products reach Indian carriers. The license agreement between Qualcomm and OEMs does not require the OEMs to enter into a licensing agreement between the OEMs and carriers for selling the products manufactured by the OEMs. Further more, since the royalty is paid by OEMs for manufacturing the equipment/ hand sets which is done outside India the 'use' is outside India."

The assessee's submission regarding the point at which royalty becomes payable based on the contract between the OEMs and Qualcomm cannot be relied upon since the assessee has failed to submit copy of the contracts between the OEMs and Qualcomm. Despite repeated opportunities the assessee has only stated that no contracts have been entered into with Indian OEMs and has not given a copy of any of the global contracts entered into with Indian OEMs and has not given a copy of any of the global contracts entered into by it. Therefore, no reliance can be placed on the assessee's submission that the OEMs have a contractual obligation to pay the royalty to Qualcomm even if the OEMs does not get paid by the carrier.

In fact as per the assessee's submissions it is apparent that the payment of royalty is based upon the sale of the licensed products and not merely on its manufacturing. It is not a case, where the royalty has *been paid lump sum for the use of CDMA technology but is an ongoing payment dependent on the volume of sales. It has been stated that the definition of sale could mean invoiced, shipped etc. and sale would occur upon the first such occurrence. The fact that sale means invoiced shipped etc. by itself implies that a party has been recognized to which the goods are invoiced or shipped. In this case, unless the OEM has raised a bill/ shipped the goods to a party in India i.e. Reliance or Tata no royalty would be payable to Qualcomm. The assessee's submission that the royalty received by Qualcomm is independent of whether the network equipment/ handsets are sold into India is therefore, incorrect and royalty clearly arises at the time of goods are sold to a particular customer, in this case customers in India".*

Thus he concluded that royalties arising to Qualcomm on the sale of handsets to customers in India is taxable as per S.9(1)(vi)(c) of the Act and in terms of Article 12(7)(b)of the DTAA. Thereafter he quantified the total income.

10. The Appellant aggrieved by the order of the AO carried the matter in appeal before the First Appellate Authority. Before the CIT(A), it challenged the reopening of the assessment u/s 147 of the Act. On merits it disputed the assessment order on the ground that royalty in question cannot be taxed in India u/s.9(1)(vi)(c) of the Act and under Article.12(7)(b) of the DTAA . The quantification was also disputed. The first appellate authority not only rejected the contentions of the assessee but also enhanced the assessment.

11. The Appellant had filed additional evidence before the CIT(A) u/s 250 of the Act read with Rule 46A of the Income Tax rules 1962. The additional evidence consisted of redacted copies of 16 global licensing agreements between the Appellant and OEM`s situated outside India.

At para 7.1 pg.16 of the CIT(A)`s order it is stated as follows:-

"7.1. *It was submitted by the appellant that the licensing agreements contained certain commercially sensitive information and the same was redacted from the agreements to protect the competitiveness of the appellant/OEM business. The redactions were duly supported by the key to redactions and were notarized by a Notary Public – California, San Diego County and also by an affidavit by the Vice President of Tax and Trade of the Appellant that was enclosed with each of the 16 agreements submitted by the appellant. The affidavit reiterates the appellant's position on the redactions that it was essential to protect the commercially sensitive information which could inhibit the appellant's or the OEMs ability to compete effectively. The appellant has also affirmed that no information having an effect on the principle of taxability of the appellant in India has been redacted."*

The CIT(A) admitted the additional evidences for the reasons given at para 7.4.1 of his order, after obtaining a remand report from the AO and also considering the cross objections filed by the Appellant .

Further, to corroborate its position that nothing impinging upon the taxability in India has been redacted from the agreements, the Appellant before this tribunal, produced the original (unredacted) 16 license agreement entered by the Appellant with the OEMs for verification of the revenue authorities and the special counsel and return. We had directed the Appellant to produce the same before the Revenue for verification.

12. Regarding enhancement, the First Appellate Authority came to a conclusion that the AO failed to bring to tax royalty income earned by the Appellant on CDMA network equipments, in addition to handsets. The observations of the CIT (A) at para 7.4.3 of the order is as follows:-

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"*The Assessing Officer has brought to tax the royalty received by the appellant on sale of handsets to Indian Carriers on the ground that the royalty arises in India in view of the fact that the hand sets are sold to Indian Carriers and royalty accrues to the appellant on sale of the handset. However, it is to be appreciated that the handsets would not be of any use in the absence of CDMA net work infrastructure which is built using the CDMA net work equipments and made compatible with the software provided on the handsets being manufactured by the Korean Licensee. It is undisputed that the net work equipments used by the Indian Carriers are also manufactured using the CDMA technology owned by the "Appellant. It is likely that some third party might have been licensed by the appellant to provide network and associated software to Indian Mobile Operator who use CDMA technology like Tata Telecom or Reliance Mobile in India. This network equipment is utilized by the CDMA subscribers for communicating using the CDMA handsets. Therefore, what requires evaluation first is whether the royalty received by the Appellant from the licensing of patented technology for use in India in the mobile network can be deemed to accrue or arise in India. The taxability of the CDMA handsets would also depend upon whether the royalty on the CDMA network equipment is taxable in India. The appellant has raised an objection that its licensing in Korea has no nexus in India. When seen in the above backdrop it shall be observed that the software license to the Korean entity is for manufacture the handset which been made compatible with the software provided to Indian Telecom operators for their network. If the handsets are not made compatible with the Indian network, these shall not be usable in India. It can also be seen that these handsets are sold by the Indian Telecom operator as they have in built compatibility with their network.*"

He issued a show cause notice proposing enhancement of the assessment to bring to tax the royalty income received by the Appellant from licensing of CDMA patents to manufacture network equipment. For various reasons given in his order, the First Appellate Authority concluded that the royalty in question falls within the key provisions of S. 9(1)(vi)(c) of the Act and is also covered under Article 12 (7)(b) of the DTAA. Aggrieved by the order of the First Appellate Authority, the Appellant is in appeal in before us.

13. Shri Soli Dastur, Ld.Sr.Counsel along with Shri Nishant Thakkar appeared for the Appellant. Shri G.C. Srivastava, Special Counsel along with Ms.Preethi Bharadwaj appeared on behalf of the Revenue.

14**. Assesses submissions on reopening**:

1. Mr.Dastur opened his arguments by presenting the facts of the case as per the Appellant. He drew the attention of the Bench to the additional grounds of appeal filed by the Appellant for all these AYs which pertained to the issue of reopening of the assessment under S.148 of the Act. We extract the additional grounds below:

2. *Each of the grounds given below is independent and without prejudice to the other grounds of appeal preferred by the appellant.*

1. On the facts and in the circumstances of the case, the Ld.CIT(A) XXIX, Delhi erred in confirming the initiation of proceedings under Section 148 of the Income Tax Act, 1961 on facts and in law and therefore the assessment made thereon is bad in law and must be quashed.

2. On the facts and in the circumstances of the case, the reassessment proceedings are barred by limitation in as much as the reasons for reopening have been supplied to the appellant after the expiry of six years from the end of the relevant Assessment Year which is beyond the *period prescribed under Section 149(1)(b) of the Income Tax Act, 1961.*

3. On the facts and in the circumstances of the case, the reassessment proceedings are bad in law in as much as the sanction under Section 151 is obtained from the ADIT(International Tax) Range 2, New Delhi and not from the JCIT as prescribed under Section 151(2)of the Income Tax Act, 1961.

4. On the facts and in the circumstances of the case, the formula prescribed by the Ld.CIT(A) for arriving at the royalty income from infrastructure equipment is based on surmise and conjectures as is evidenced from the results reached by the Ld.AO by application thereof.

5. On the facts and in the circumstances of the case, the Ld.CIT(A) being aware of the actual information relating to purchases of CDMA infrastructure equipment by the Indian Carriers ought to have directed the Ld.AO to compute the royalty income of the appellant from infrastructure equipment on the same basis as accepted both by the Ld.AO and the appellant for the Assessment Year 2006-07."

Of the above grounds, Ground No.2 is applicable only for AY 2000-01, Ground No.3 is applicable only for AY 2000-01 and AY 2001-02.

3. On the issue of reopening, the Ld.Sr.Counsel, at the outset, referred to the reasons recorded by the AO for initiating the reassessment proceedings under S.147 of the Act and submitted that the reasons are identical for AY 2000-2001 to 2004-05. He summarized the reasons recorded by the AO for AY 2004-05 (pages 1 to 6 of the Appellant's paper book) as under:-

"i. Press release dt. March 23, 1999 issued by appellant in the USA shows that appellant has several patents registered in its favour. These patents are then used to earn royalties worldwide including India.

ii. News paper article dt. June 28,2006 shows that appellant has research centres located in India. These locations constitute business connection as well as permanent establishment of appellant in India.

iii. News paper article dt. June 15, 2006 and July 29, 2006 shows that appellant negotiates with the customers of CDMA technologies like Reliance and TATA the price of royalties to be embedded in the cost of the cell phone. This shows that the royalty payments are for handsets operational in India and the royalty is only routed through the manufacturers.

iv. Appellant is earning fees from Included Services (FIS) from Reliance Communications Infrastructure Ltd. (Reliance) and Tata Teleservices Ltd. (Tata).”

4. Based on the reasons recorded by the AO, Mr. Dastur put forth the following arguments on the validity of reopening of the assessments:-

a. The entire assessments are reopened based on the news paper reports. Newspaper articles can not constitute information/evidence as contemplated under the Act. News paper reports at the highest show the correspondent’s presumption of the position. Therefore, he submitted that the jurisdiction under section 147 read with section 148 of the Act cannot be assumed on the basis of such articles. In this regard, he drew our attention to the decision of the Jurisdictional High Court in the case Namit Verma vs. UOI (247 ITR 049) and the decision of the Sikkim High Court in the case of Sikkim Subba Associates vs. UOI & Ors (276 ITR 456) wherein in the context of PIL and search operations u/s.132 of the Act it was held that Newspaper reports do not constitute evidence and they are at best second hand secondary evidence.

b. The reasons recorded for reopening are pretence. Merely because the Appellant has patents registered in its name and earns royalty from licensing of the patents, it cannot be regarded as royalty is earned from India as none of the OEMs have manufacturing base in India. The inference sought to be drawn by the AO from the press release dt. 23rd March, 1999 is without any basis.

c. It is factually incorrect to say that the Appellant has R&D centre in India. QIPL an indirect subsidiary does the R&D activities in India for Qualcomm Global Trading Inc, BVI. Besides, the first ever R&D center of QIPL was set up in Hyderabad only on 19.04.2004 (relevant to AY 2005-06). In support of its submission, the Appellant had furnished the audited financial of QIPL for the financial year ended 31.03.2003 and 31.03.2004 and drew the attention of this bench to Clause I under point 7 of the auditor's report where it was reported that "no internal audit was carried out during the year, as there were no operations".

d. The newspaper article dt. 28th June, 2006 merely records that the Appellant's CEO expressed his inclination to promote CDMA technology in India by setting up hand set manufacturing base in India and by increasing R&D activities. A forward looking statement made in 2006 cannot form the basis for the AO to have a reason to believe that income escaped assessment for all the above AYs.

e. The newspaper article dt. 15th June, 2006 regarding a meeting between the CEO of the Appellant and the Chairman of Reliance was nothing but a report of a public relation exercise and cannot be a basis for arriving at a conclusion that royalty rates were directly negotiated by the Appellant with the Indian telephone providers. The meeting took place in the year 2006 has no relevance for earlier AYs.

f. The inference drawn by the AO viz., that the royalty rates are being negotiated by the assessee with Telecom service providers is nothing but a surmise. Mr. Dastur vehemently contended that the proceedings under section 147 of the Act cannot be based on conjectures. In this connection, he referred to the decision of the Bombay High Court in the case of German Remedies vs. DCIT (285 ITR 26) and the decision of the Gujarat High Court in the case of A.Raman & Co vs. ITO which was latter affirmed by the Apex Court in 67 ITR 11 where in the High Courts have held that reopening of the assessment based on suspicion, presumption, conjectures and surmises is not permissible in law.

g. That the Appellant has not earned any fee from included services from any persons in India during the AY 2000-01, 2001-02 and AY 2004-05. Thus, the reason is factually incorrect. Further, in respect of AYs 2002-03 and AY 2003-04, it was submitted that there was no escapement of income as the payment was subject to tax at source.

h. He submitted that the formation of belief is either factually incorrect or is based on surmise and conjectures. Hence, the reason is nothing but pretence and that, jurisdiction under section 147 read with section 148 of the Act cannot be assumed on the basis of reasons which are pretence. In this connection, he referred to the judgment of the Hon'ble Supreme Court in the case of ITO v. Lakhmani Mewal Das (103 ITR 437) where in the Hon'ble Supreme Court held that reason must be held in good faith and it cannot be merely pretence. Reliance was also placed on the decision of the jurisdictional High Court in the case of Sarthak Securities (P) Ltd vs. ITO (329 ITR 110).,

i. Proceedings u/s 147 cannot be based on conjectures and that reopening must be based on some tangible material, something that can be regarded as having a live link/close nexus with the circumstances relied upon for formation of belief. The material relied by the AO viz newspaper articles are nothing but conjectures and surmises and cannot be regarded as tangible material. Further, the newspaper articles are published in 2006 and hence cannot be regarded as live link/ close nexus with the year ended March 31, 2000 through March 31, 2004. He referred to the decision of the Hon'ble Supreme Court in the case of CIT vs. Kelvinator of India Ltd. (320ITR 561) wherein it was held that there should be a tangible material to come to the conclusion that there is escapement of income from assessment and the reasons must have a live link with the formation of the belief. Reliance was placed on the decision of the Hon'ble Supreme Court in the case of ITO vs. Lakhmani Mewal Das (Supra).

j. He contended that the reason to believe cannot be a reason to suspect or even a bare subjective satisfaction or an opinion. For this preposition, he relied on the decision of the Hon'ble Supreme Court in the case of Ganga Saran and Sons (P) Ltd vs. ITO (130 ITR 1). Reliance was also placed on Circular No.549 dated October 31, 1989.

k. The reasons recorded must relate to the year for which notice was issued. There is nothing in the reasons as recorded to show that any income was earned by the Appellant during the financial year ended March 31, 2000 to March 31, 2004 had escaped assessment. The reasons must relate to the year for which the notice was issued. Reliance was placed on the decision of the Calcutta High Court in the case of Grindlays Bank Ltd vs. ITO (116 ITR 710), the decision of the Jurisdictional High Court in the case of CIT vs. Mesco Laboratories Ltd (288 ITR 219) and the decision of the Apex court in the case of ITO vs. Lakhmani Mewal Das (103 ITR 437).

l. That if there are multiple reasons, some relevant and other irrelevant or incorrect thus reopening must be quashed since it is unclear as to which reason the officer relied upon. Reliance was placed on the decision of the Gujarat High Court in the case of Sagar Enterprises vs. ACIT (257 ITR 335). In the facts of Appellant's case, four reasons were recorded by the AO, of the four reasons, two reasons are undisputedly incorrect or wrong. Thus it was argued that the reopening must be quashed since it is unclear as to which reasons the AO relied upon.

m. In the reasons recorded for reopening, jurisdiction to reopen was assumed on the footing that the Appellant has a permanent establishment/business connection in India. However the assessment, was concluded by taxing the royalty earned from Non-resident OEMs on a gross basis under Article 12 of the Indo-US DTAA(Treaty) and not under Article 12(7)(a) of the Treaty. Hence it is argued that such an assessment results in vitiating the entire proceedings since the basis on which jurisdiction was assumed was itself found unsustainable. Reliance was placed on the decision of the Bombay High Court in the case of CIT vs. Jet Airways (I) Ltd (331 ITR 236) and the decision of the jurisdictional High Court in the case of Ranbaxy Laboratories Ltd vs. CIT (ITA No.148 of 2008) where in the court has concurred with the decision of the Bombay High Court in the case of Jet Airways (I) Ltd.

n. The first CDMA mobile services was launched in India by Reliance Infocomm on 15.01.2003. Hence, no royalty income can deem to accrue or arise to the Appellant for the AY 2000-01 and AY 2001-02. Therefore, the notice issued under section 148 of the Act for the AY 2000-01 and AY 2001-02 is invalid and must be quashed as none of the reasons stated by the AO for reopening stand to test. In support of this contention, Mr. Dastur had furnished a copy of the press release dated 14.01.2003 downloaded from the website of Reliance Communications on the launch date of CDMA services in India.

o. For A.Y. 2000-2001 an additional ground has been taken that since the reasons have been furnished after the expiry of 6 years from AY 2000-2001 reassessment proceedings are barred by limitation.

p. Further additional ground was taken for the AY 2000-2001 and 2001-02 that sanction u/s 151(2) was not obtained from the Joint Commissioner of Income tax ('JCIT') for reopening of the assessment and hence bad in law.

q. It was argued that sanction in the present case has been accorded by the Addl .Director of Income Tax ('Addl.DIT'), who is different from the prescribed authority i.e. JCIT defined u/s 2(28C) of the Act. It was submitted that the office of the JCIT is distinct and separate from that of an Addl.DIT and when a section vest the power to a specific authority, such powers cannot be exercised by any other authority albeit higher in rank. It was submitted that the notice under section 148 of the Act having been issued without obtaining proper sanction is void abinitio and deserves to be quashed. Reliance is placed on the decision of the Delhi Bench in the case of ITO vs. Mrs. Naveen Khanna (12 DTR 222 (Del). It was further submitted that the revenue's appeal against the above decision has been dismissed by the Jurisdictional high court

r. That the sanction accorded by the Addl.DIT is mechanical and without application of mind and hence the reassessment is bad in law. The reasons recorded suppress a material fact that the newspaper articles relied upon the by the AO to assume jurisdiction to issue notice under S.148 for the A.Y. 2000-01 were published in the year 2006. In view of this suppression, the Addl.DIT could not have applied her mind to whether reasons recorded have a live link with the year sought to reopened, viz A.Y. 2000-01 and A.Y. 2001-02. In absence of application of mind to the aforementioned fact, the sanction ought to be regarded as mechanical and invalid in the eyes of law. That the sanction accorded by the Addl. DIT is mechanical, is further evident from the fact that the AO had forwarded the sheet recording reasons along with the following text just below the reasons recorded:

"*on the reasons recorded by the AO , I am satisfied that it is a fit case for issuance of notice under section 148. The issuance of notice is approved. The AO shall ensure that the notice served is within the time limit as provided by the statue*".

The above shows that the Addl. DIT has merely signed on the dotted line, as it were. Even the injunction upon himself to serve the notice in time set out by the AO himself in the sheet recording the reasons. Further, the above text does not demonstrate any application of mind and is equivalent to a simple “yes”. Accordingly, he submitted that the sanction granted is without application of mind and is mechanical. Therefore, the notice issued under section 148 is invalid. In support of his content, he relied on the decision of the Hon’ble Supreme Court in the case of Chhugmal Rajpal vs. SP Chaliah (79 ITR 603) wherein it was held that sanction granted in a mechanical manner without proper application of mind is bad in law. He also placed reliance on the decision of the Delhi High Court in the case The Central India Electric Supply Co. Ltd vs. ITO (333 ITR 237) and CIT vs. Mesco Laboratories Limited (288 ITR 219),

15. Revenues submissions on reopening:

The Ld.Special Counsel for the Revenue Mr.G.C Srivastav strongly refuted the submissions made by Mr.Dastur. His submissions on the validity of reopening are as follows:-

a. That it is a settled proposition of law that the validity of reopening of an assessment u/s 147 of the Act has to be judged only on the basis of the reasons recorded by the AO and not on the basis of subsequent developments or based on final conclusions arrived at the time of assessment or in the appellate proceedings;

b. The satisfaction of the AO is a subjective satisfaction and has to be tested on the basis whether a rational person on a given material, would come to the said satisfaction.

c. In the present case, no returns of income were filed by the Appellant for all these years and no assessments were framed prior to the reopening of the assessments. The AO reopened the assessments and notice u/s 148 dt. 29.3.2007 was issued.

Thus the reopening of assessments for AY 2000-2001and 2001-02 fell within the limitation of 6 years and for the later years fall within the limitation of 4 years.

d. The word ‘reason to believe’ appearing in S.147 of the Act does not mean to suggest that the AO. should have made final enquiries with regard to facts and come to a final conclusion about escapement of income. The sufficiency or correctness of the material is not a thing to be considered at this stage. It is sufficient if prima facie some material on the basis of which the department could reopen the case. In support of his contention, he relied on the decisions of the Hon’ble Supreme Court in the case of ACIT vs. Rajesh Jhaveri Stock Brokers Pvt. Ltd. (291 ITR 500) where in it was held that the word "reason" in the phrase "reason to believe" would mean cause or justification. If the Assessing Officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion.

   Reliance was also placed on the decision of the Hon’ble Supreme Court in the case of Raymond Woolen Mills (236 ITR 034) and on the decision of the Delhi High Court in the case of Bawa Abhay Singh vs.DCIT (253 ITR 83).

The Appellate authorities can look as to whether the assumption of jurisdiction is arbitrary or malafide or whether the satisfaction recorded is such that lacks application of mind. On these broad propositions, Mr.Srivastava further submitted that:

The facts before the Assessing Officer were:-

a. Qualcomm is the owner of CDMA technology which is used in India by Indian Wireless net work providers;

b. Reliance and Tata acquired handsets from the OEMs for the price which has an element of royalty embedded in it;

c. One of the Indian operators sought to negotiate with Qualcomm for the reduction of the royalty component of the prices of the hand set, so as to bring down the final cost;

d. the Central Government is also supporting this and held discussions with Qualcomm;

e. Qualcomm is running a R&D Centre which they have promised to extend by increasing the head counts;

As per the law, royalty paid by a resident and as well as by a Non-resident under certain circumstances is taxable in India and this is before the Assessing Officer;

The Assessing Officer in the reasons recorded arrived at three conclusions, for which he had adequate material:-

a. The Press release dt. 23.3.99 indicates that the assessee owns several patent and IPRs in connection with CDMA technology. The Press release notes that 60 major manufacturers of telephonic equipment have taken royalty bearing licenses from the Appellant. The said press release, the authenticity whereof is not disputed, demonstrates unequivocally that the Appellant owns the intellectual property rights in relation to CDMA technology.

b. News item dt. 28.6.2006 indicated that there has been interaction of the Appellant with the Central government with regard to the issue of making available handsets at cheaper rates by reducing the royalty based on the statement of Dr.Jacob representing Qualcomm that the Appellant company was not manufacturing handsets yet it was giving licenses to the companies like LG and Samsung to produce handsets. Based on this information, the AO came to the conclusion that the Appellant company is earning royalty from licensing of CDMA technology. The press report dt. 15.6.2006 refers to the meeting between the Appellant with the central government and also with Reliance which supports the conclusions of the AO. Reference was also made to the difference in the rate of royalty for operators in China and those in India. Report dt. 29.6.2006 refers to the efforts of Qualcomm in negotiating the price with equipment manufacturers for the benefit of Indian operators.

c. From these reports the veracity of which is not in dispute, the AO concluded that the Appellant company is earning royalties in respect of handsets operational in India and further that the price of royalty component for the use of CDMA technology is directly negotiated and licensed by the Appellant and the Indian Telecom operators in India. The AO held that the royalties to the Appellant not only arise in India but are also paid by the Indian concern indirectly.

The above information was adequate to come to the belief that there was a prima facie case for the chargeability of royalty income under Section 9(1)(vi)(c) of the Act and such conclusion by the AO cannot be said to be irrational or perverse.

d. Even if on merits at some stage, if it is found that S. 9(1)(vi)(c)of the Act is not applicable, then also, it would not lead to an inference that the belief formed by the Assessing Officer was not based on proper material or was as such could not be drawn by a rational person.

e. The Appellant had entered into a technical service agreement with Reliance and during the course of arguments, the Ld.Sr.Councel conceded that income chargeable by way of fee for included services was disclosed in the returns filed in pursuance to notice under S. 148 of the Act for A.Y. 2003-04 and 2004-05. That the argument that there was no escapement of income since tax was deducted at source is untenable.

f. The copy of the technical service agreement, which could demonstrate the period during which services were rendered was placed before the AO only in the course of assessment proceedings and earlier to this event, the AO had no material to come to a different conclusion.

g. The conclusion of the AO with regard to business connection in India is based on the information that the Appellant was having full fledged R&D centre in India and it was only at a later date that it was clarified that the R&D centres are owned by Subsidiary company from F.Y. 2005-06.

h. Though QIPL, the indirect subsidiary was incorporated in the year 1996 and it became functional only in the year 2005-06. However subsequent discovery of facts or further investigation in the matter may go to establish that income did not arise in the given year or that it was not chargeable to tax thus by itself would not render the belief formed by the Assessing Officer as invalid.

i. On the issue as to whether, non- existent of one of the facts which lead to certain inferences would vitiate the entire proceedings, it was submitted that the AO has drawn a conclusion with regard to three different streams of the income. It is submitted that if reasons recorded by him for in all these 3 streams of income, which are independent of each other survive, then the reopening would be valid. For each stream of income the conclusion was based on a set of information which is independent of the other stream.

j. The findings of the CIT(A) that there is no business action or PE in India is of no consequence as the reasons recorded by the AO are based on relevant material.

k. Though the press report relates to the year 2006 and not to the earlier years, once it has come to the knowledge of the AO that CDMA technology is being used in India, the satisfaction with regard to escapement of income would relate back to the point of time when technology came/used for the first time in India unless there are contrary or distinguished in facts to indicate that despite the technology being in use, there is no escapement of income in such earlier years.

l. As regards sanction under S. 151, Shri.G.C.Srivastava had furnished the following documents in support of their contentions that the sanctioning authority Ms. Sumedha Verma Ojha, the Addl.DIT was authorized to sanction under S.151 (2) of the Act:

i. Notification dt.14.09.2001 defining the territorial jurisdiction of the Directors and Commissioner of Income tax;

ii. Order No 37 of 2003 dt. 26.03.2003 showing that Ms. Sumedha Verma Ojha was promoted on and from the date of the order to the grade of JCIT/ Jt.DIT; and

iii. Notification dt.11.101.2007 defining the territorial jurisdiction of the Additional directors / Joint Directors of Income tax.

m. it is submitted that S.117 gives power to the Central Government to appoint such persons as it thinks fit to be Income tax authorities which are enumerated in S.116 of the Act and that Clause (cc) thereof puts Additional Commissioners and Additional Directors in the same Clause. A notification is placed before the Tribunal authorizing the Jt.Directors to perform the functions of a Jt.Commissioner. Thus it is submitted that when an Additional Director issues sanction under Section 151 he/she is performing the function of a Jt.Commissioner irrespective of the nomenclature of his/her post. It is within the competence of Central Government to authorize one party to perform statutory function in capacity of the other party and the validity of the sanction could be challenged only if the person giving the sanction was not authorized to do so.

16. Rejoinder of the Assessee on the reassessment :

The Ld. Senior Counsel in his rejoinder to the Revenue's contention submitted that the reasons in the present case are based on mere conjectures and surmises. Therefore cannot be regarded as establishing even a prima facie. Further, he submitted that decisions relied by the Revenue in this regard are distinguishable on facts. While submitting so, he had stated his detailed reasons in respect of each of the case laws relied by the Revenue.

Insofar as the documents furnished by the Revenue in support of their submission that the sanctioning authority viz. Ms.Sumedha Verma Ojha (Addl. DIT) was authorized to grant sanction u/s 151(2) of the Act. The Ld. Sr.Counsel for the Appellant submitted that the Revenue relies on the notification dt. 14.09.2001 and 11.10.2007 to submit that a Director of Income-tax is same as a Commissioner of Income-tax and is called so merely because he exercises jurisdiction over non-resident assessee's and foreign companies. Mr. Dastur submitted that a Director's office is recognized as a separate office under the Act and drew the attention of the Bench to section 2(1D), 2(7A), 2(28C), 2(28D), 132A (1),132(1), 133 and proviso to Section 133 (6) of the Act to confirm that the statue regards a Joint Director to be separate from a Joint Commissioner or a Director to be separate from a Commissioner.

17. Admission of additional evidence:- The Ld. Special Counsel for the revenue Mr Srivastava filed an application for admission of additional evidence in the form of two agreements, the first being agreement entered into between Tata Tele Services Ltd. and Motorola Inc. for purchase of equipment dt. 8.12. 2007 and agreement between Tata Tele Services Ltd. and ZTE Corporation dt. 19.02.2007 which is also an equipment purchase agreement. The Ld. Special Counsel submitted that these two agreements are neither before the AO nor the CIT (A) and these should be admitted for the reason that, it would help in understanding and demonstrating the business model followed in these cases. He emphasized that the relevance of these agreements are limited to demonstrate the business models.

The Ld. Sr. Counsel for the Appellant Mr Dastur strongly objected to the admission of additional evidence on various grounds. He submitted that these agreements are not the basis for making the assessment and that they have no relevance to the case. However, later when the bench wanted to adjudicate this issue separately, before proceeding with the merits of the case, the Ld.Sr.Counsel agreed for the admission of these two documents for enabling expeditious disposal of the appeal, with a caveat that reliance should not be placed on these evidences, when there is no relevance to the case on hand and agreements in question, as these agreements have been entered into in financial years relevant to AY 2008-09 and AY 2007-08 and as these are not connected in any manner to the issue on hand.

In view of the rival submissions, we admit these additional evidences though the case of the A.O. or the C.I.T(A) are not based on these documents and it is well settled that the revenue cannot plead an entirely new case before the tribunal .

18. Submissions of the Assessee on Merits:

On merits Mr.Dastur, the Ld.Sr.Counsel started with the facts of the case and on the basis of the facts, he formulated two basic propositions which in his view are fundamental to the resolution of the case. The first question being a) whether the royalty income earned by QCOM from the OEMs situated outside India can be brought to tax: a) under S. 9(1)(vi)(C) of the Act and b) Article 12(7)(b) of the DTAA between India and the Unites States.

19. Arguments on applicability of S. 9(1)(vi)(C) of the Act:

Mr.Dastur pointed out that royalty is payable by the OEMs, who are situated outside India, to Qualcomm for exploitation of patents held by Qualcomm, for manufacturing handsets and equipment outside India.

Referring to S.9(1)(vi) of the Act, Mr. Dastur read out sub clause (b) and submitted that in respect of a person who is a Resident, royalty payable is taxable, except in certain circumstances. When an assessee claims that it is covered by the Exceptions to the Rule, the burden is on the assessee to prove that it falls within those exceptions. He contrasted the same with sub clause C of S.9(1)(vi) of the Act and submitted that in case of a Non-Resident, the burden is on the Revenue to prove that the royalty is payable in respect of any right, property or information used or services utilized for the purpose of a business or profession carried on by such person in India or for the purpose of making or earning any income from any source in India. He argued that when Revenue claims that a charge is attracted, the burden lies on the Revenue to prove the same and when the assessee claims that it falls within the Exceptions, the burden is on the assessee to prove that it falls within the Exception. Reliance was placed on the following decisions:

– Parimisetti Seetharamamma Vs. CIT, [57 ITR 532 (SC)];

– CIT Vs. Rajesh Pilot, [219 CTR 403, (Delhi HC)]; and

– Decca Survey Overseas Ltd., UK ,[ITA No.8506/Bom/1990].

Posing a question, the Ld.Sr. Counsel submitted that it is to be seen whether the Non Resident was paid royalty in respect of right, property or information used or services utilized <u>'for the purpose of business' carried on by such person in India or 'for the purpose of making or</u>

earning any income from any source in India.'

He submitted that CDMA patents were used for manufacturing CDMA products outside India and that sale is a subsequent event. He pointed out that the agreements are not India's specific and the OEMs manufactured the hand sets and equipments using the patents of Qualcomm and could sell the product anywhere in the world and it is not specific to an Indian Carrier. He emphasized that technology for manufacturing products is different from product which is manufactured from the use of the technology.

On the meaning of '*making or earning any income from any source in India'* he submitted that ultimate use of a product manufactured by the OEMs using the patents licensed by Qualcomm, in India, cannot be said to be a source in India. Giving example he submitted that source is an overall activity carried out and a part of an activity cannot constitute a source. Giving an example he submitted that if a retailer sells 100 pens to 100 different persons, each person to whom a pen is sold is not a source.

He referred to the 16 agreements entered into by the Appellant with the manufacturers of hand sets and submitted that as redacted copies were filed by the assessee, originals are now furnished for verification and that an Affidavit was filed in support of the statement that no material omissions relatable to taxability of royalty were made in the redacted copies. The Ld. Special Counsel for the Revenue had no objection to furnishing of the affidavit and to placing reliance on the redacted license agreements.

He highlighted various Clauses of the agreements to emphasize the fact that the agreements were entered long before India came into the picture i.e. in 1993, which is much before to 2001 and the royalty payment is dependent on time factor and not on the realization of the sale proceeds by the manufacturers.

He referred to various clauses of a second type of agreement which deals with manufacture of handsets as well as net work equipment and submitted that only change is the provision for payment of a lump sum fee.

He emphasized the fact that Qualcomm's role ends with license of the intellectual property for manufacturing handsets and net work equipments and claimed that in such situation Qualcomm has no source in India.

20. He further submitted that:-

a. The source for Qualcomm is the agreement with the licensee alone and that this agreement has no reference to India; Source is the activity that raises income. In the present case, the right property or information licensed to the OEMs relates to manufacture of the products and hence the source is the activity of manufacturing. Thus, there is no activity in India. Reliance was placed on the decision of the Privy Council in the case of Rhodesia Metals Limited vs. CIT (9 ITR (Suppl) 45 and the Jurisdictional High Court in the case of Havells India Limited (ITA No.55/2012, ITA 57/ 2012).

b. General agreements do not come within the ambit of S.9(1)(vi)(c) and for this section to be attracted, the use of the right, property or information or utilization of the services, is to be within the knowledge of the licensee;

c. When the agreements have worldwide operation, S.9(1)(vi)(c) does not apply.

d. The OEMs sell the products i.e. the handsets on shipment outside India.

21. In view of the above, Mr.Dastur wondered how the Appellant could be said to have a 'source of income in India' when none of the OEMs were held as having 'source of income in India' and when no assessment is ought to be made of any of the OEMs.

22. He relied on the decision of Hon'ble Supreme Court in the case of Ishikawajima Harima Heavy Industries Limited vs.DIT(288 ITR 408 (S.C.) and the decision in the case of DIT vs. Ericson AB (246 CTR 433, Delhi) for the proposition that, if the property in the goods passes abroad, no part of the sale proceeds can be taxed in India. He submitted that the source of the OEMs, is sale and it would be a contradiction to say that the OEMs such as LG etc. have no source of income in India and to hold otherwise in the case of Qualcomm.

23. On the evidences relied by the Revenue Mr Dastur arguments on each of these documents are as follows:

A. **Memorandum of understanding between Qualcomm and Reliance Communications Private Limited dated 26.03.2001.**

Without prejudice to his contention that these documents have no relevance, the Ld. Sr. Counsel submitted that this document was relied by the Revenue to contend that Qualcomm is actively interested in the utilization of the CDMA technology in India. However, he argued that the Memorandum in no way demonstrates that the OEMs carry on business in India or that they have a source of income in India, much less that the patents to manufacture the products licensed by Qualcomm have been used by the OEMs in a business carried on by them in India or for the purposes of making or earning any income from any source in India and hence is irrelevant for the purposes of bringing to tax the royalty earned by Qualcomm under S. 9(1)(vi)(c) of the Act.

That the proposal by Qualcomm to invest in the equity capital of Reliance was called off and this information is available in the public knowledge. The recitals and the clauses of the Memorandum to that extent represent mere statements of intent and therefore do not survive and are irrelevant for the purposes of any proceedings. Pursuant to this Memorandum, a technical service agreement was entered into by QCOM and Reliance on 16.10.2001 and there after the Memorandum has no relevance.

Further, it was submitted that S. 9(1)(vi)(c) of the Act itself draws a distinction between the terms "use" and "utilized". Insofar as royalty for right to use the property or information is concerned the word used in the statute is "used" and not "utilized". The allegation that CDMA technology is utilized in India is incorrect; what is utilized in India is the product of that technology. This distinction is on par with the distinction between the use of a copyright and the use of a copyrighted article as brought out by the Delhi High Court in Ericsson's case (at paragraph 59 and 60, page 24).

B. **Technical services agreement between Qualcomm and Reliance Communications Private Limited dated 16.10.2001**

It was submitted that the above document was relied by the Ld. Special Counsel for the Department to demonstrate that Qualcomm has participated with Reliance in various activities regarding setting up of the CDMA system in India.

Mr. Dastur submitted that the Qualcomm has been remunerated for the services under this agreement and the entire amount received for technical services was offered to tax in India during the AY 2002-03 and AY 2003-04 under S. 9(1)(vii)(b) of the Act and under Article 12 of the DTAA. Further it was submitted that no intellectual property/ patents has been licensed to Reliance under this agreement. Thus the agreement in no way demonstrates that the OEMs carry on business in India or that they have a source of income in India.

C. **Technical services agreement between Qualcomm and Tata Teleservices Limited dated 02.03.2004.**

In addition to the arguments raised in the case of agreement with Reliance (SUPRA), it was submitted that the technical services agreement with Tata was entered on 02.03.2004 and therefore has no relevance to the years under consideration.

D. **Subscriber unit license agreement between Qualcomm and Asia Telco (OEM) dated 18.04.2008.**

Mr. Dastur submitted that the above agreement was filed by the Appellant during the course of the assessment proceedings for the AY 2009-10. This agreement was relied by the Ld. Special Counsel to demonstrate that the agreement between Qualcomm and OEM are India specific since Qualcomm charges a different amount of fixed royalty with respect to sales made to Indian customers. However, Mr. Dastur submitted that the agreement has no relevance to the years under consideration. Further no adverse inference had been drawn either by AO or by the DRP with regard to this agreement even in the year to which it relates. Therefore the agreement cannot be relied upon.

Further it was submitted that the 16 license agreements which are relevant for the years under appeal have been filed before the CIT (A) and none of the 16 agreements have any royalty date different for India, as compared to the rest of the World. The grant under this agreement insofar as manufacture of handsets or network equipment, are concerned it is non exclusive, transferrable and worldwide. This is identical with the 16 license agreements that are relevant for the AYs under appeal. Except for having different rate of upfront royalty payable in respect of handsets sold to Indian customers, there is no other India specific restriction in the agreement. Hence, the license granted cannot be regarded as India specific.

Further, the agreement in no way demonstrates that the patents to manufacture the products licensed by Qualcomm have been used by the OEMs to carry on business in India or for the purpose of making or earning any income from any source in India. Hence, it is irrelevant for the purposes of bringing to tax the royalty earned by Qualcomm under S. 9(1)(vi)(c) of the Act.

E. **Equipment purchase agreement between Tata Teleservices Limited and Motorola Inc (Motorola or the OEM) dated 08.12.2007.**

This agreement was filed as additional evidence by the Revenue to demonstrate that

- The OEMs carry out installation activities in India which amounts to business carried on in India.
- The sale of the equipment is concluded in India since the equipment is to be delivered by the OEM to an Indian airport / sea port .
- The OEMs license software to India carriers and hence have a source of income in India.

At the outset, Mr. Dastur submitted that the this agreement has no relevance to the years under consideration since it has been entered into in the financial year 2007-08 relevant to AY 2008-09. Further no adverse inference had been drawn either by AO or by the DRP with regard to this agreement even in the year to which it relates. Therefore the agreement cannot be relied upon.

On the installation activities, it was submitted that the contention of the Revenue that the OEM (i.e. Motorola) carries on installation work for Tata and hence there is some business operations carried on by the OEM in India is belied by clause 5.7.8/ page 8 of the agreement itself which provides that installation activities are to be carried out by a third party appointed by the Indian Carrier (i.e. Tata).Even on a demurrer that the OEM (i.e. Motorola) carries on installation activities in India, this agreement nowhere shows that the OEM (i.e. Motorola) uses the right property or information licensed by Qualcomm to Motorola, in carrying out such installation activity. In fact Qualcomm has no right property or information with respect to installation activity and hence the question of granting a license thereof or user thereof by the OEM does not arise.

Apart therefrom, there is no consideration for carrying out installation activities under the contract referred to by the Revenue, and since the installations are incidental to the sale, no attribution can be made in view of the decision of the Andhra Pradesh High Court in the case of CIT vs. Hindustan Shipyard Ltd. (109 ITR 158), which has been concurred with by the jurisdictional High Court in the case of DIT Vs. Ericisson A.B., [246 CTR 422 @ paragraph 48, page 20 (Del HC)]**.**

On the contention that the sale concludes in India, Mr. Dastur argued that the Revenue has once again relied on the agreement between the OEM (i.e. Motorola) and Tata dated 8.12.2007 to say that since the OEM is to bear the cost of packing/loading/unloading, transportation, carriage, freight, unloading charges, insurance and any other cost or any nature at any time prior to delivery, therefore the sale concludes in India. Placing reliance on the Supreme Court decision on Ishikawajima Harima Heavy Industries Ltd Vs. DIT [288 ITR 408 @

paragraph 73 (SC)] and in the case of DIT Vs. Ericisson A.B.,[246 CTR 422 @ paragraph 37, (Del HC)] it was submitted that it is now a settled law that if the property in goods passes abroad no part of the sales proceeds can be taxed in India, albeit sold to an Indian party or the delivery is effected in India.

Clause 14.1 of the agreement between Tata & Motorola clearly provides that the title in goods passes to the Indian Carrier at the "port of shipment" and not the "port of destination". Hence, the obligation on the OEM to bear the cost of delivery up to the port of destination is irrelevant to decide where the title passes. This is merely a contractual term between the parties to clarify who is to bear cost of transshipment.

Apart therefrom, he also submitted that the agreement states that delivery of goods by the OEM to Tata will take place at the port of shipment albeit as per CIP Incoterms 2000, which only means that the cost of carriage till the port of destination in India will be borne by the OEM. CIP Incoterms 2000 provide that the delivery from the seller to the buyer concludes at the port of shipment upon delivery to the carrier. Indeed in the case of Erricson AB, the terms were: The title to hardware, spare parts and test equipment shall pass to JTM when delivered to the carrier at the port of shipment in Sweden, i.e. identical and the jurisdictional High Court has held that the property passes outside India. In fact, section 20 of the Sale of Goods Act, 1930 provides that property in goods which are in deliverable state passes upon delivery, which in the contract relied upon by the Revenue means at the port of shipment.

On the contention that software is licensed by OEMs to Indian Carriers, it was submitted that the software licensed to Indian Carriers by the OEM, belongs to the OEM. It may be OEM generated software or OEM procured software. No software is provided as part of the licensing of Qualcomm's patents. Further, no amount of the royalty

assessed by the revenue in the hands of Qualcomm is for the licensing of software. The royalty that is assessed by the revenue pertains to patents licensed by Qualcomm and therefore, the reference to software licensed by OEMs to Indian Carriers is irrelevant and out of context.
Qualcomm's patent license has no connection with the software, which relates to the functionality aspect of the product and not with the products capability to provide CDMA connectivity.
Further, it was submitted that the software licensed is an integral part of the hardware and hence cannot be treated independent / separately from the hardware. Therefore, it must be regarded as sale in composite manner as sale of goods. It was also submitted that the OEM receives no separate consideration for the licensing of the software which establishes that the software is meant only to be used with the hardware and not independently. For this preposition, reliance was placed on the decision of the Delhi High Court in the case DIT Vs. Ericsson A.B.,[246 CTR 422 at paragraph 56, 57 and 60 (Del HC).

F. **Equipment purchase agreement between Tata Teleservices Limited and ZTE Corporation ('ZTE' or the 'OEM') dated 19.02.2007.**

24. It was submitted that no separate arguments were advanced by the Revenue Counsel and the import of this agreement was same that of Motorola. He placed reliance on the arguments made in the context of Motorola (SUPRA).

25. The Ld. Special Counsel for the Revenue **Mr.G.C Srivastava** on the other hand opposed to the contentions of Mr.Dastur and submitted that the chargeability of royalty income in the hands of the Appellant in India, has to be examined with reference to the provisions of section 9(1)(vi)(c) read with section 5(2) of the Income Tax Act, 1961.

26. He agreed that section 9(1)(vi)(c) raises a deeming fiction to bring to charge any income by way of royalty if such royalty is payable by a Non resident in respect of any right, property or information used either a) for the purpose of business carried on; by such non- resident person in India; b) for the purpose of making or earning any income from any source in India.

27. He submitted that section .9(1)(vi)(c) and section .9(1)(vii)(c) of the Act are payment based taxations. He emphasized the language employed in section 9(1)(vi) is *"used for the purpose of"* in contra distinction to *"utilized in the business*" as appearing in section 9(1)(vii)(c). He submitted that the property maybe used anywhere i.e. in or outside India, but the use should be for the purpose of business or profession carried on in India and for the purpose of earning income from a source in India. He emphasized that the situs of the use of the property is not material what is material is the purpose of the use of the property, whether it is for business carried on in India or for a source in India.

28. He contended that If the OEMs (the payers of royalty) are found to have used the property either for carrying on business in India or for earning income from a source in India, the income shall be deemed to have arisen in India and would be chargeable to tax and that nothing further needs to be established for the chargeability under the domestic law. He further submitted that the two limbs of S.9(1)(vi)(c) carrying on business in India and having the source of income in India are not inter dependent on each other and may operate independent of each other.

29. On the issue as to whether OEMs carrying on business in India, he submitted that:-

a. Business as defined in section 2(13) of the Act, is admittedly an expression of wide import. The business is not only manufacturing or trading but encompasses many other activities which together constitute a business. Example of MNCs was cited to prove the point that different activity of a composite business are carried out in different locations e.g. manufacturing in one jurisdiction and sales in another jurisdiction and that it cannot be said that business is done in one of the jurisdictions only.

b. That handsets or equipments although manufactured outside India are not off shell products or standard product which can be sold to anyone in any location and that the sale by OEMs is India's specific.

c. The entire supply of handsets/ equipments by the OEMs is India Specific. This is evident from the stipulations in the agreements that OEMs will manufacture the handsets/ equipments as per the design made by the OEMs and approved by a particular operator, at the technical standards and specifications and for an agreed price.

d. That hand sets are manufactured with codes which are programmed to be specific to net work provider. These codes are not of the kind which can be put to the handsets after these are received in India.

30. Reliance was placed in the case of Syed Asifuddin and another (AP) 200 L CRILJ 4314 for the proposition that handsets provided by LG and Samsung to Reliance prior to 2005 was specifically designed and programmed for Reliance. Further, it was submitted that the following findings of the fact by the High Court leave no room for any doubt in this regard.

i. Hand sets are proprietary to Reliance;

ii. there is an agreement between Reliance and manufacturer of hand sets'

iii. the hand sets are to be exclusively used by Reliance;

iv. MIN of Reliance phone is irreversibly integrated with ESN;

v. Samsung and N191 and LG 2030 handsets are exclusively franchised to Reliance;

vi. that handsets are computer program (software) with source code within the meaning of Indian Copy Right Act and Indian Information technology Act.

e. The test is to determine whether the property has been used by OEMs "for the purpose of carrying on business in India" in terms of section 9(1)(vi)(c) and that it is not necessary to look at the arrangements between QCOM and OEMs. The use of technology by the OEMs for the purpose of carrying on business in India is sufficient nexus for the purpose of section 9(1)(vi)(c) of the Act. The use of technology by QCOM in India or use of technology by OEMs in various other jurisdictions has no relevance or consequence for the purpose of applicability of section 9(1)(vi)(c) of the Act.

f. That when handsets and equipments are manufactured for use of a specified service provider, then the OEMs have used the technology for the purpose of carrying on business in India.

g. The license for use of technology embedded in a hand set/equipment is also granted to specific operators in India under the agreement, and hence it is used by the OEMs for manufacturing India specific supplies.

h. On the Appellant's argument that sale to different jurisdictions cannot be considered as a source i.e. each party to whom a product is sold by the manufacturer cannot be regarded as a source, it was submitted that this is of no consequence for the reason that products manufactured by the OEMs are not standard products which are sold anywhere and everywhere. Besides, one may have different source of income lying in different jurisdictions if the supplies differ in technical specifications, customization and are location specific.

31. On the issue whether the title passes in India or outside India, he submitted that:-

a. Section 19(1) of the Sale of Goods Act provides in a contract for the sale of goods, the property is transferred to a buyer at such time as the parties to the contract intend it to be transferred. However section 19(2) of the Act provides that for the purpose of ascertaining the intention of the parties, regard shall be had to:
   i. the terms of the contract;
   ii. the conduct of the parties; and
   iii. the circumstances of the case

b. The contract has to be read as a whole to ascertain the intention of the parties. In the Motorola agreement, Clause 14.1 provides that the title and the risk shall pass upon delivery in accordance with the CIP Incoterms 2000 port of shipment. The word delivery has been defined on page 44 of the agreement to mean "physical delivery by the supplier of the equipment ordered by TTSL on CIP terms at airports/ seaports mutually designated by the parties". CIP has been defined on the page 43 of the agreement to mean "cost, insurance paid to airport / seaport in India" as defined in Incoterms 2000.

c. The definition of these terms clearly indicates that the entire risk is borne by the supplier and carriage and insurance charges paid till their delivery at airport/ seaport in India. The repeated reference by the Appellant to Incoterms 2000 does not alter the situation because the expression by its very definition in the agreement means the obligation to bear the carriage and insurance charges upto airport/ seaport in India. It would be illogical to read that the parties particularly Tata in India, can agree to the delivery at any airport/ seaport outside India. This becomes further evident from the definition of "Site" on page 47 of the agreement which reads to mean "the land building and/ or any other place where the equipment is to be delivered". It is obvious that the reference to the "sites" is to the place where the network is to be installed and commissioned.

d. Clause 4.15 of the agreement further provides that the supplier shall ensure that the equipment is "as per agreed scope of the purchase order". Clause 7.5 gives the right to buyer to change the location at which the equipment is originally required to be delivered. It further provides that the purchase order given by the buyer does always mention the location of the delivery of the equipment.

e. Referring to all above clauses, it was submitted that if the agreement is read as a whole the intent of the parties is clear that the title to the equipment passes in India at the site where the deliveries are made or in a worst scenario at the airports/ seaports in India.

f. Regarding the agreement between Tata and ZTE, he submitted that Clause 14.1 on page 33 states that the "*title shall pass in high seas before arrival in India and the risk of loss shall pass upon provisional acceptance*". Under normal circumstances, the risk and title would go together. In the present case, the terms of the agreement read as whole and the conduct of the parties go to indicate that the terms indicated in clause 14.1 do not demonstrate the true intent of the parties. The fourth preamble to the agreement on page 2 of the agreement provides that buyer has asked the supplier to supply/deliver the "equipment in full and guaranteed working condition to the full satisfaction of TTSL". This condition of the supply cannot be met if the goods are delivered on High seas. The "full satisfaction" can be reached only in India after the provisional acceptance. Clause 2.8 of the agreement on page 3 defines the scope of the supplies and includes various task including, network planning and RF optimization. The provisional acceptance is referred to in clause 4.1 of page 16 to define the supplier's obligation and clause goes on to provide that the supplier shall manufacture, supply, deliver, all the equipment "to achieve provisional acceptance and final acceptance of the equipment in accordance with schedule A". This clause further indicates that supplies and delivery of equipments is subject to achieving provisional acceptance. One cannot pick up one part of supply obligation and contend that the title has passed with the discharge of that obligation.

g. The definition of "delivery" on page 5 of the agreement stipulates "physical delivery by the supplier of the equipment ordered by TTSL on DDU terms at the site". DDU is defined on the same page to mean "site or sites in India" as defined in Incoterms 2000. The clause goes on further to state that it means the supplier fulfils his obligation "when goods had been made available at the named sites <u>in the country of importation</u>." The word "site" has been defined on page 9 of the agreement to mean "the land, building and/or any other places where the equipment is to be delivered. Carrying out of the deliveries as directed by TTSL in writing". It is obvious that the reference is to the "sites" in India and delivery obligation is on the supplier for delivering the goods to a site in India. It is needless to repeat that Incoterms 2000 only refer to the terms of the agreement generally acceptable between the contracting parties with regard to obligation to bear the cost of transportation, insurance till the point of delivery. Thus, if the agreement is viewed as a whole, it demonstrates that the supplier has the obligation to deliver the goods at the relevant sites in India and the declaration in clause 14.1 that the title passes in High seas does not reflect the actual mode and delivery of the supply nor the true intent of the parties.

h. Section 19(2) of Sales of Goods Act provides for the factors to determine the intent of the parties and if despite the declaration to the contrary under the section 19(1), if it is found as a matter of fact that the deliveries had been made in India it would be open to Revenue to assert that title to the goods had passed in India.

i. Section 21 of the Sales of Goods Act provides that where there is contract for sale of specific goods and seller is bound to do something to goods for the purpose of putting them in a deliverable state the property does not pass until such thing is done and the buyer has notice thereof. In the present case, the sale is not of standard goods but of components of a wireless network. Unless the compatibility of the handsets and equipments is established with CDMA network setup in India, these supplies would be worthless. These handsets and equipment reached the deliverable state only when their compatibility with existing network is established through the provisional or final testing. The supplier has definite obligation to achieve this milestone and unless this is done the property cannot pass. Unlike other kinds of overseas supplies where the supplier has no other obligation beyond the point of shipment, in the present case, the obligation of the supplier extends to the geographical limits of India where he has to put the supply into a deliverable state. In CDMA technology, handsets and equipment are integral part of the wholesome technology and these cannot be viewed independently.

j. In view of the above, he submitted that there is no room for any doubt that the title to the goods has passed in India despite the declaration in clause 14.1 to the contrary. In this scenario, it is not open to argue that OEMs do not carry out business in India. If one leg of the business operations is in India and other is in Korea, it cannot be said that OEMS carry business only in Korea and not in India.

k. It is evident that the OEMs have used the property for the purpose of carrying out business in India and the first limb of 9(1)(vi) (c) of the Act stands satisfied.

On the issue whether OEMs have source of income in India**,** Mr.Srivastava submitted that:-

a. The agreement between the OEMs and the Indian operators demonstrate in no uncertain terms that what is sold by them is the hardware and the not the software embedded therein.

b. OEMs are not only supplying the equipments but they are licensing the software, the ownership of which is not transferred to the operators in India. The software is licensed for the use of the operators. Thus, the intellectual property for which the payment is made by OEMs to Qualcomm is licensed for use in India which yields income and becomes a source of income for the OEMs.

c. The two agreements which Indian operators entered with Motorola and ZTE make a categorical difference between the sale of the equipment and licensing of the software embedded in the firmware. The Indian operator has also agreed to purchase the equipment and license to use the software separately (Clause 2.1 of Motorola agreement). Clause 2.2 of the agreement with ZTE also clearly states that the supplier has agreed to "sell and license" and the Indian operators have agreed to purchase the equipment and take license for the software. Both OEMs and Indian operators treat the software embedded in the handset/equipments as distinct from hardware.

d. It is also incorrect to say that software which is licensed for use is not the software belonging to Qualcomm. The end user license agreement contained in clause 33.8.1 (Page 64) of ZTE agreement clearly records undertaking from Tata that they will use CDMA system, software and technology for their own use. It is not the software of OEM for which undertaking is being given. It is for CDMA technology and software which is the property of Qualcomm.

e. Clause 19.5 (page 43) of ZTE agreement further records that all licensed material are the property of "the supplier or its suppliers". The supplier of OEMs is Qualcomm which has supplied the intellectual property to be used under a license for manufacturing of handsets/equipments.

f. The agreement between Qualcomm and OEM (Page 230 of appellant's PB) states in the preamble itself that OEM desires to obtain a license of Qualcomm's intellectual property to manufacture and sell subscriber units. The "chipsets" is defined on page 232 to mean base band analogue, ASIC... purchased by licensee from Qualcomm. From the reading of this definition of chipsets and other definition of "CDMA ASIC" appearing on page 231 clearly shows that OEMs have been given license to use chipset/ASIC purchased from Qualcomm in manufacturing equipments/handsets. The CDMA technology belonging to

Qualcomm is embedded in chipsets which are used by OEMs and licensed to Indian customers for further use by them.

g. There is absolutely no material to, suggest that Qualcomm has not licensed its technology/software to OEMs. If software is not licensed then what is licensed by Qualcomm to OEMs. Clause 5.1 states that Qualcomm has guaranteed worldwide licenses under Qualcomm intellectual property to make, import, use, sell, or lease or otherwise dispose of subscriber units and (b) to make components and use and sell such components. This clause does not make any reference to what kind of intellectual property is being licensed. OEMs do not need any license to manufacture handsets/equipments unless there is an intellectual property belonging to Qualcomm which is going to be used by OEMs. This intellectual property cannot be anything other than chipsets or some other software going to be embedded in the handsets/equipments.

h. If this basic proposition is under dispute and suggestion is made that software licensed by OEMs is not the property of Qualcomm then, the matter needs a more critical examination by someone who understands CDMA technology with all its technicalities. Reliance was placed on the decision of the Hon'ble Supreme Court in the case C.I.T., Delhi vs M/S.Bharti Cellular Ltd (330 ITR 239 (SC). He urged that if the Hon'ble bench finds itself in agreement with the appellant that the license given to Indian operators is not with regard to the software of Qualcomm embedded in the handsets/equipments, then, matter may be remanded back to AO for obtaining the expert evidence to find out:

   i. What is the nature of technology licensed by Qualcomm to OEMs?

ii. What is the nature of software licensed by OEMs to Indian operators; and

iii. Whether it contains the technology made available by Qualcomm to OEMs under a license.

i. In common understanding, Qualcomm has made available to OEMs its patented technology of CDMA in the form of chipsets/ASIC. OEMs have incorporated these chipsets/ASIC in the handsets/equipments manufactured by them and have in turn licensed these to Indian operators. Therefore, it is not only OEMs who are using the intellectual property of Qualcomm in manufacturing the equipments/handsets, the Indian operators are also using the software embedded in the hardware under a license from OEMs.

j. The finance Act of 2012 has introduced explanation 4 to section 9(1)(vi) to clarify for removal of doubts that transfer of any right in an intellectual property includes transfer of any right for use of a computer software irrespective of the medium through which such right is transferred. The amendment comes into operation with retrospective effect from 1.6.1976. In view of this clarificatory amendment it is immaterial that the properties or rights are embedded in handsets/equipments. The entire argument to the effect that OEMs sell copyrighted article and do not give any right in the copyright is of no consequence post this amendment.

k. Qualcomm is in not giving license to OEMs for manufacturing some engineering or mechanical products. Qualcomm is having its patents for wireless technology which has to have software and computer programs to transmit or receive data/signals and provide connectivity and make the network functional. This activity is possible only through the use of software which are in other words only computer programs. Handsets are dumb equipments unless software providing connectivity to the network is embedded in it so is the case with equipments.

l. Therefore, when OEMs license the intellectual property for a consideration (forming part of the overall consideration) to Indian operators, they definitely have a source of income in India.

m. Reliance was placed on the decision of the Privy Council in the case of Rhodesia Metals Limited reported 9 ITR 45 (Sup) where the Privy Council held the view that the source does not mean a legal concept but something which a practical man would regard as a real source of income. It is not in doubt that in commercial parlance, OEMs definitely have a source of income in India in the given facts and circumstances and all technical argument about the nature of use etc. is really of no consequence.

32. Further, on the applicability of the Jurisdiction High Court decision in the case of Ericsson A.B. [246 CTR 422 (Del)], he submitted that the same is totally inapplicable to the facts of the present case . That in the case of Ericsson, the issues under consideration were :

i) Whether Foreign Company has any business connection in India or-not?
ii) Whether Foreign Company has PE in India or not?
iii) Whether the income from the supply contract can be treated as 'royalty' under section 9(1)(vi)?

In this case it was held that the Foreign co. has no business connection in India and it was also held that if the assessee did not have any business connection in India, it is not necessary to go into the issue whether the assesse had any Permanent Establishment in India or not during the relevant period.

However, in the present case, we are not into determination of taxability of "OEMs" but the taxability of "Qualcomm Incorporated" which is to determined having regard to section 9(1)(vi)(c). It has nothing to do with the taxability of "OEMs". The provisions of section 9(1)(i) on which the decision was rendered by the High Court is totally out of context in the present case.

Further, if a non resident (OEM) is paying royalty to another non resident (Qualcomm) in respect of any right, property or information used or services utilized for the purpose of a business carried on by such non resident (OEM) in India or earning any income from any source in India would not necessarily give rise to taxable income in the hands of such non resident (OEM) since the taxability would depend upon other factors also such as whether such non -resident has PE in India or not and whether there is any exclusion in the respective treaty etc. Source of income is distinct from the place of accrual of Income.

In the case of Ericsson, the other issue before the Hon'ble Delhi High court was whether the income from the supply contract can be treated as 'royalty' under section 9(1)(vi) read with Explanation 2 of the Act. But in the present case the nature of payment is not in dispute. The royalty is paid by a non resident to another non- resident, which would be taxable under clause (c) of section 9(1)(vi) and not under clause (b) of S. 9(1)(vi) of the Act.

Further, he also submitted that in the case of Ericsson, the fact that the title of the goods passed outside India was not in dispute whereas in the present case it is under serious dispute.

In the case of Ericsson, it was an admitted position that installation and commissioning of the equipment was done by two separate corporate entities where as in the present case it is still in dark who did the installation and commissioning of the equipments. The mere fact that the agreement does not cast obligation for installation and commissioning on the OEMs does not throw adequate light as to who else was competent to install and commission such highly technical equipment

33. In his rejoinder, Mr.Dastur refuted the aforesaid contentions and

submitted as under:

a. Section 9(1)(vi)(c) of the Act has two limbs, i.e. it provides that the royalty paid by a non-resident shall be taxable in India if such royalty is paid in respect of:

   i. "right property or information used for the purposes of a business or profession carried on by such person in India"; or

   ii. "right property or information used for the purposes of making or earning any income from any source in India"

   He pointed that it is undisputed that limb ii. covers cases where royalty is paid for use of right information or property for the purposes of making or earning any "income from any source in India". He questioned that if the phrase "income from any source in India" is very wide and must include income from a business carried on in India then why then have **limb i.**? That **Limb i**. must necessarily mean something more than merely covering cases where royalty is paid for use if right property or business carried on in India, or else **limb i**. will be rendered otiose.

   It was submitted that **Limb i.** covers cases where the right property or information has been used by the non-resident payer (OEM) itself and is so used in a business carried on by OEM's in India. **Limb ii.** covers a case where the right property or information has not been used by the non-resident payer (OEM) itself in the business carried on by it, but the right property or information has been dealt with in such a manner as would result in earning or making income from a source in India, for e.g. the non-resident payer does not use the right property or information but sub-licenses the right property or information to a person in India for use in India by such person and earns royalty therefrom.

b. The distinction between **limb i**. and **limb ii.,** as contented by the Revenue, is that **limb i.** covers royalty earned from use of the right or property in business in India and **limb ii.** covers royalty earned from use of the right or property other than from a business in India. If the Revenue's contention is accepted, it would tantamount to holding that a business carried on in India would not be a source of income in India. This is ex facie unsustainable. Clearly a business carried on in India is a source in India and that being so royalty earned from a business carried on in India would be covered in **limb ii**. itself, why then have **limb i**.? It is submitted that the interpretation as suggested by the revenue renders **limb** i. otiose. That any interpretation, other than as contended the Appellant, will render **limb i.** redundant.

c. To apply the above interpretation to the facts of the case at hand, the following position emerges:

Limb i. will apply in the present case since the right property or information has been used by the OEM itself in their business of manufacturing and is excluded therefrom since they do not carry on such manufacturing in India.

Limb ii. has no application inasmuch as it is undisputed that the right property or information has been used by the OEM itself in the case at hand outside India.

Summing up, he submitted that the case of Qualcomm does not fall within the provisions of S. 9(1)(vi)(c) of the Act since the right property or information licensed by Qualcomm to OEM has been used by the

OEM itself in its business of manufacturing which is undisputedly carried on outside India.

d. Regarding the contention of the Department that the OEMs carry on business in India, Mr. Dastur submitted that the Department's case is that the handset and equipment although manufactured outside India, are not off the shelf products or standard products. The entire supply of the products is India specific. It has been admitted by the Ld. Counsel for the Department during the course of the hearing that handsets embody two technologies- (a) technology with respect to the functionality of the handset and (b) technology with respect to CDMA connectivity.

All the customization such as inclusion of Hindi language in the handset, default ringtones in the handsets, etc. is customization concerning the functionality of the handset and has nothing to do with the CDMA connectivity. In other words a CDMA handset will carry across conversation in Hindi as well as it carries conversation in English. There is no customization of handset qua the CDMA connectivity. A handset operational on 800 MHz frequency operates anywhere in the world where CDMA is operated on 800 MHz. In fact there are 60 other countries in the world where CDMA technology works on 800MHz frequency band. In support of his contention, he had submitted the list of countries where CDMA technology operates at 800 MHz.

Further he also submitted that the locking of handsets to a particular network operator is a requirement of the network operator and does not affect the ability of the handset to operate on any CDMA telecom network, which is evident from the fact that once the network lock is broken the handset can operate on any network. Network locks are requested by network operators since the handsets sold by them to the eventual subscribers at concessional rates in order to keep the subscribers with them for an extended period. That a locked handset is capable of working anywhere in the world is also clear from the fact that all telecom operators permit international roaming. Though handsets that may have been purchased under certain terms are locked with a particular network service provider, the handset is capable of working in any country of the world with which that particular network service provider has the commercial understanding which clearly demonstrates that the CDMA connectivity of the phone is in no manner connected with the locking of the phone with a network service provider. In support of his argument, Mr. Dastur produced the scheme on international roaming using CDMA handsets downloaded from the website of Reliance Communications to demonstrate that the handset can be used in any other country outside India and submitted that quite rightly, no allegation of the network equipment being India specific has been made.

e. On the decision of the Andhra Pradesh High Court in the case of Syed Asifuddin and another relied by the Department, Mr. Dastur submitted that that the judgement is concerned with a lock in scheme floated by Reliance, under which a handset otherwise costing Rs 10,500 was made available to a subscriber for at Rs.3,350 but with the obligation that the subscriber continued with Reliance for a period of 3 years (Para 2, 1st column, Pg.4315 of the judgement). He further explained that even during this lock-in period, the subscriber is not barred from exiting the lock-in and exiting Reliance network provided he pays cost of handset to Reliance.(Para 4, 2nd column, Pg.4316 of the

Judgement). At the time Reliance had this lock-in offer, it was also making available to its subscribers phones without a lock-in at full price. The judgment was passed in proceedings filed for quashing FIRs where the court was required to consider whether there was any prima facie case made out by the police that rewriting the ESN numbers of the phone by certain persons would amount to a violation of the Copyright Laws and the Information Technology Laws. Therefore, he submitted that the judgment is of no assistance to the issue/controversy involved in the present case.

f. On the contention of the Department that the sale of the products is concluded in India, Mr.Dastur submitted that this fact has been established to be incorrect on a reading of the very agreements relied upon by the Department. Having submitted so, Mr. Dastur drew the attention of this Bench to clause no 14.1 of the agreement between Tata and the OEMs (ie ZTE and Motorola) and submitted that the fact that the risk to the equipment shall pass on provisional acceptance is not relevant for determining where the title in the equipment passes, which in this case is clearly outside India. In support of his argument, Mr. Dastur relied on the decision of the Delhi High Court in the case of Ericsson AB and explained that on identical facts, the Hon'ble Delhi High Court held that acceptance test is not a material event for passing of the title and risk in the equipment supplied.

g. He referred to the relevant provisions of the Sale of Goods Act 1930 and submitted that the intention of the parties should govern as to when the title and the risk passed in goods. The time and the place when the title and the risk in goods pass can be inferred from the terms of the contract , conduct of the parties and surrounding circumstances as per section 19 (2) of the sale of goods Act. However, in the present case, there was no necessity for such an inference as the agreement itself was very specific as to when the title and the risk where to pass.

h. In the context of Motorola agreement, he drew the attention of this Bench to relevant definitions from CIP Incoterms 2000 to show that as per the CIP Incoterms 2000 the delivery from the seller (ie Motorola) to the buyer (i.e. Tata) concludes at the port of shipment upon delivery to the carrier not to the buyer. Accordingly, he submitted that in the instant case the title to the equipment as well as the risk therein passed to Tata at the port of shipment upon delivery to the carrier. The obligation on Motorola to bear the cost of delivery up to the port of destination (i.e. India) is irrelevant to decide where the title passes. In support of his submission, he placed reliance on the Ericsson ruling (SUPRA) where in the shipment was on CIP terms to agreed port in India.

i. His alternate submissions was that even assuming whilst denying the title in the products sold did pass in India, how does that in any manner show that the OEMs carry on business in India? For royalty earned by Qualcomm to be taxable in India it must be shown that the non-resident payer has used the right/property for the purposes of its business "carried on by such person in India". If at all anything, the passing of title in India can, under the Act, result in some portion of the sale proceeds accruing in India but that in no manner establishes that a business is carried on by the OEMs in India. Unless the revenue demonstrates that the OEMs have continuous operations in India the mere passing of title in goods imported into India cannot be said to result to an inference that the OEMs carry on business in India. Reliance was placed on the decision of the Privy Council in the case of Rhodesia Metals Limited Vs. CIT, 9 ITR (Suppl) 45 and the jurisdictional High Court in the case of CIT Vs. Havells India Limited [ITA No.55/2012, ITA 57/2012] he submitted that the source is the activity that raises the income. In the present case, the right property or information licensed to OEMs relates to the manufacture of the products and hence the source of royalty is the activity of manufacturing. Though cited by the Revenue, Rhodesia entirely supports the Appellant's case.

j. Alternatively, he also submitted that assuming whilst totally denying, that the sale is concluded in India, even then since the source of royalty, as explained above, is manufacturing of handsets/network equipment, and such manufacturing activity is undisputedly outside India, the source is outside India. Placing reliance on the decision of the Bombay High Court in the case of Kusumben. D. Mahdevia vs CIT (47 ITR 214), he submitted that the place of source of income and the place of accrual of income can be different. Therefore, the submission of the Revenue is devoid of any merits.

k. On the contentions of the Department that the OEMs have a source in India since the OEM has licensed software to Indian carriers, he submitted as under:

   i. Neither of the agreements entered into by Tata are relevant to decide the issue with respect to the year under consideration. It would be far-fetched to presume that Reliance (who was the only Indian company engaged in providing CDMA mobile services in India in the years under consideration) had entered into agreements with OEMs containing similar clauses and then proceed to decide the taxability in the hands of Qualcomm on the basis of such conjectures and surmises.

ii. OEMs receive no income from such licensing hence to refer to this act of licensing to say that OEMs have a source of income in India is a contradiction in terms. In any event sale of the products coupled with the software will not result in any amount from such sale becoming taxable in India as held by the jurisdictional High Court in the case of Ericsson at paragraph 61, page 24.

iii. Software is sold along with the chipsets, which is a part of the QCT Division of the Appellant's business. Income from the QCT business has rightly not been subjected to tax inasmuch as the software is an integral part of the chipset and the chipsets are sold outside India and income therefore cannot be taxed in India. The decision of the jurisdictional High Court in Ericsson's case has set to naught any controversy, if there was any, in this regard. In fact, the assessments have been reopened on the basis that Qualcomm exploits patents and the entire assessment order proceeds on the basis of Qualcomm earns income on the basis of exploitation of patents. It has never been AO's case that Qualcomm has earned any royalty from exploitation of any copyright in software, the CIT(A) proceeds on "wholesome approach theory" & not that Qualcomm earns from licensing of software, indeed even the CIT(A), despite enhancement does not bring to tax any amount from the QCT business. This argument would also be contrary to the decision in Ericsson's case noted above.

iv. Under the 16 license agreements, what is licensed is right to manufacture "subscriber units" which is defined to mean "Complete CDMA Telephone". Chipset is only one part of the Complete CDMA phone.

v. The revenue had challenged the submissions of the Appellant that there is no licensing of software involved to earn royalty under the 16 agreements and had contended that if the Appellant is disputing this very basic fact then the matter should be remanded back to the assessing officer to be examined by a technical expert since it is not possible for the handset and network equipment to connect with each other without there being some software involved.

vi. The prayer of the Revenue is based on a misunderstanding of the Appellant's case. The very basis on which the remand is sought is factually misplaced, it is not the Appellant's case the there is no software involved in the working of the CDMA network. All that has been submitted is that there is no licensing of software under the 16 patent license agreements, which is evident from the fact that these 16 patent license agreements deal with licensing of patents and not copyright. It is income under the said 16 patents license agreements which are the subject matter of assessment and the present controversy before the Bench. There is software involved and Qualcomm does develop software; but the software developed is it part of the chipsets installed in the products, which chipsets are sold to the OEM. The developing of software and the selling of chipsets is a part of a separate business carried on by Qualcomm known as the QCT Division. That this is in fact the position that has been recognized by the AO in page 1, last paragraph of page 2 and first paragraph of page 5 of the assessment order passed for the years under appeal. As submitted earlier, the income earned by Qualcomm from its QCT division is not the subject matter of assessment and what has been brought to tax and is the subject matter of dispute, is only the royalty earned from the licensing of patents to the OEMs. Hence to ask for a remand under the guise of determining whether there is any software involved in the operation of CDMA network is only with the view to enable the revenue to reinvent its case against the Appellant, which is not permissible.

vii. The request for remand must be considered bearing in mind that more than 12 years have lapsed from the end of the first financial year under consideration. It must further be borne in mind that even after filing additional evidence/ documents mentioned above by the Revenue, no reliance has been placed and no adverse inference has been drawn by the Revenue authorities, by relying on these agreements in the year to which it relates.

viii. In the circumstances explained above, the decision of the Apex Court in the case of CIT vs. Bharati Cellular Limited (330 ITR 239) is of no relevance. It would tantamount to making out a case contrary to the case in the assessment order.

33. Arguments on taxability of the royalty income under Article 12 (7)(b) of the DTAA

On the DTAA between India and USA, Mr. Dastur drew our attention to Article 12 which deals with royalty income and took us through 12 (7)(b) of the DTAA which is relevant for the issue under this appeal.

34. He explained that for the royalty income to be taxed in India, it should relate to the use of or right to use the right or the property in India, the agreement between Qualcomm and the OEM should either (a) be confined to India or (b) India should be one of the countries where the right or property must be specified as being used in India. Neither of the aforementioned conditions is satisfied in the facts of the instant case. Further, it is an admitted position that the patents of Qualcomm are used to manufacture the handsets/ equipments outside India. Therefore, the royalty income cannot be regarded to have deemed to arise / accrue under the DTAA.

35. Referring to the assessment order, he submitted that except making an averment, Revenue has not discharged its primary burden as to how the royalty income is taxable under Article 12 (7)(b) of the DTAA. Referring to the order of the CIT(A) he submitted that the Hon'ble Delhi High Court has reversed the decision of the Delhi Tribunal in the case of Asia Satellite (238 CTR Delhi 233).

That the tests applicable are different under the Act and under the DTAA. For attracting S.9(1)(vi)(C), what is required is *utilization of the license patented by the OEMs in India* and were as under Artcile.12(7)(b) there should be *use of or the right to use of the patent in India*. He disputed the finding of the CIT(A) that there is transfer of technology as incorrect. He submitted that the CIT (A) in his order on wrong premises held that technology is embedded in this case.

36. The Ld. Counsel for the revenue Mr.G.C.Srivastava submitted that under the DTAA with the United States of America , Article 12 para 1 gives the primary right of taxation to the resident state. However para 2 provided that such royalties may also be taxed in the source state in which they arise according to the Laws of that state. Further, Para 7(b) of the Article provides that where royalties do not arise in one of the contracting states in terms of Para 7(a) and the

royalties relate to the use or the right to use the right or property in one of the contracting states, the royalties shall be deemed to arise in that contracting state. On analysis, he submitted that the following conditions need to be fulfilled for the applicability of Article 12 (7) (b) :-

– Royalty do not arise in the contracting state in terms of sub para (a) of 7
– Royalty relates to the use of the right to use the property in the contracting state.

37. He also referred to para 2 of Article 3 of DTAA and submitted that any term not defined in the DTAA shall have the meaning which it has under the laws of the contracting state. The treaty does not define the meaning of the expression 'use' or 'right to use'. It also does not define "computer software" or "copy right". Hence, in terms of Article 3(2), the meanings of these terms will have to be derived as per domestic law.

38. He also submitted that in the facts of the present case, it is not in dispute that the royalties do not arise in India in terms of Para 7(a). The only question that requires examination is whether the royalties earned by Qualcomm relate to the use of the property in India. The stipulation in Article 12(7)(b) is that for the royalties to arise in India, there must be a certain degree of relationship between the royalty and the use of property in India.

39. The word "use" cannot and does not have a restrictive meaning to only mean manufacturing of a product. The technology can be used in different ways depending upon what the technology is about. When OEMs make available the technology to Reliance and Tata under the license, they use this technology to provide net work for the wireless communication and to make the net work operational. The Indian operators are definitely using the technology for their business. For the purpose of para 7 (b) one has to look to the use of the property owned

by Qualcomm. There is nothing in the DTAA to suggest that the "use" of property would only mean manufacturing of a product by the use of such property as suggested by the Appellant. The word "use", not having been defined even under the domestic law, has to be given its normal connotation.

40. For the purposes of para 7(b) one has to look to the use of the property owned by Qualcomm. To understand the extent of use of CDMA technology in India one has to look to the entirety of the arrangements by which the technology is transferred to India which includes the arrangement between Reliance/ Tata and Qualcomm, Qualcomm and OEMs, OEMs and Reliance/Tata. The MOU entered into between Reliance and Qualcomm states in the preamble that Reliance and Qualcomm propose to enter into "an strategic alliance to promote the utilization of CDMA technology for provision of basic wireless services in India". Clause 1 of the MOU uses several expressions like "through the use of CDMA technology" and "utilization and penetration of CDMA technology", "CDMA technology based wireless technology in India". On page 2 of MOU it is stated that both parties agree that price competitiveness of CDMA handsets is a critical requirement to increase the penetration of CDMA technology telecommunication services in India. Exhibit A to the MOU lists various services which Qualcomm would render to Reliance for setting up CDMA based networks in India.

Reliance was placed on the technical service agreement between Qualcomm and Reliance and it was submitted that the agreement was intended to promote CDMA technology in India and that the net work planning is done by Qualcomm and training was also given by Qualcomm to various persons in India for the use of technology. Qualcomm assists in net work deployment and conducted acceptance test and also supervised site preparations. Clause 9.1 states that in case of large CDMA net work, one of the daunting task is to integrate the system to net work effectively and efficiently and that Qualcomm has also undertaken the primary responsibility in Clause 14 for the project implementation. Clause 13 states that Qualcomm has developed this technology and assumes an important role for implementing this technology for Reliance.

41. He further submitted that CDMA technology is not about handsets or equipments. It is a wholesome technology which works on certain defined scientific principles. Qualcomm may have entered into only service agreement with Reliance and may have accepted a business model of charging royalty from the OEMs through the sale of handsets and equipments in India or elsewhere but the fact remains that it is actively involved in the transfer of CDMA technology of which it is the exclusive owner (in the world) to the operators in India.

42. In view of the above, he submitted that the CDMA technology is a right of property of Qualcomm and is used in India.

43. He drew the attention of the Bench to the expression used in the treaty "in relation" and submitted that it would take within its scope use or right to use Qualcomm's property given by the OEMs to Reliance/ Tata in India. He argued that even though full right of commercial exploitation of the property is given or not, as long as the operators in India use the software provided by the OEMs under the license, there is use of property in India. It is needless to repeat that CDMA technology embedded in chipset/ASIC comes to Indian operators for use in India. The DTAA does not provide the manner in which the right or the property comes to be used in the contracting state. The property may come through any medium, whether embedded in hardware or otherwise. The mode of transfer of technology is of no consequence. What the treaty contemplates is the use of the property in the contracting state and not how it has been transferred. Hence, entire argument about copy right and copyrighted article is really not relevant for the determining the applicability of para 7(b).

44. The Appellant has referred to decision of High Court of Delhi in Asia Satellite Telecommunications Co. Ltd [238 ITR 233 (Del)]. The aforesaid decision is clearly distinguishable on facts. In the said case, the High Court observed that the telecasting companies have neither any control over the satellite nor have they access to the same. In the present case, the operators in India have full access to the CDMA technology and have also control over it, in the sense that they can use the way it is useful to them. The only undertaking given is that the use will be for their own business.

45. In support of his argument that CDMA technology in the form of software embedded in handsets / equipments is the property of Qualcomm and is being used in India in terms of DTAA, he placed reliance on the following decisions:

– Millennium IT Software Ltd [338 ITR 391, (AAR)];
– Citrix System Asia Pacific Pty. Ltd , In Re [342 ITR 1,(AAR)];
– Samsung Electronics Co. Ltd [245 CTR 481, (Kar)]

46. He also relied on the clarificatory amendment contained in Explanation 4 introduced by the Finance Act of 2012 and submitted that the same would also apply in the context of treaty for the reason that the source state has the right of taxation under para 2 of Article 12 "according to the laws of that state". Neither the definition of the royalty contained in Para 3 of Article 12 nor the language employed in Para 7(b) place any bar on the application of Explanation 4 introduced in the domestic law. This is so for the reason that the definition of the royalty as contained in Para 3 is similar to the definition of royalty contained in the domestic law. The treaty has not defined the expression "use" to give any restrictive meaning to the term. If domestic laws provide that "use or the right to use" is irrespective of the medium through which such right is transferred, there is nothing in the treaty law to suggest that use or right of use as used in Article 12 would not have the same

meaning.

47. The argument that the agreement with Reliance was reached by LG in 1993 when India was not on the horizon is of little relevance for the reason that for the application of DTAA, one is not concerned with the arrangement/agreement between OEM and Reliance but the issue in terms of para 7(b) is whether the royalty paid to Qualcomm is in relation to the use of the property of Qualcomm in India. The other argument of the appellant that there is no use of technology in India as Indian operators have been given the right to use the product and not the intellectual property is a wholly untenable proposition in the light of the glaring facts stated herein above to demonstrate that not only the products are being sold to Indian operators but there is a licensing of software giving them the right to use the technology and further that there is a transfer of wholesome technology popularly known as CDMA technology to enable the Indian operators to not only set up the CDMA wireless network but also to use it for their purpose.

48. Mr G.C.Srivastava also submitted that there was a transfer of CDMA technology under the composite agreement by way of a separate MOU. CDMA technology cannot be broken down into handsets and equipments as there is no utility of one without the other. The royalty on handsets/equipment is only a measure of degree of commercial exploitation of wholesome CDMA technology. More handsets mean more business for the Indian operator, hence, what QCOM is charging is a return depending on the growth of CDMA technology in India. This was precisely the reason why Central Government believed that it was necessary for Qualcomm to reduce its rate of royalty on Indian handsets to make it affordable and why the Reliance threatened to exit from CDMA technology if Qualcomm did not agree to reduce its royalty rate.

49. The license given to Indian operator by OEMs for the use of

property (software) is contemplated to last till the network exists or till the agreement survives. Nothing else is needed to demonstrate that the royalty is paid in relation to the use of property in India and also to demonstrate the fact the OEMs have source of income in India.

In view of the above, he concluded by submitting that it is evident that royalties relate to the use of right/property owned by Qualcomm by the Indian Operators and it would, therefore, be deemed to arise in India in terms of para 7(b) of Article 12 of the DTAA and would be chargeable to tax under para (2) thereof.

50. In his reply, Mr. Dastur refuted the contentions of the Departmental Counsel and submitted that, as per the Revenue since, the right or property "used in India" by Reliance is the "CDMA technology", the royalty earned by the Appellant albeit from third parties is taxable in India under Article 12(7)(b). Revenue argues that the CDMA technology cannot be broken up into handsets and network equipment, it must be looked at on a wholesome basis; and when so looked at it becomes clear that but for the use of the CDMA technology in India, Qualcomm would not have earned the royalty.

He submitted that the above contention is incorrect for the following reasons:

a. At the outset, Qualcomm is not the exclusive owner of CDMA technology. Qualcomm merely holds a large number of patents in the field of CDMA technology. This is evident from the following facts:

    i. Qualcomm itself obtains licenses from certain 3rd parties (referred to as Company 1 and Company 2) as it is evident from the license agreements (page 247 and page 292 of Appellant's paper book).

    ii. Chipsets which go into the products can be purchased from Qualcomm or from third parties such as Via Telecom

Nokia, STMicro, TI, DSPC, and EoNex, this is evident from the agreement itself which specifically deals with handsets manufactured using third party chipsets, see Paragraph 5.1.1, page 240 of the paper book filed by Qualcomm.

b. As explained earlier the CDMA technology is not exclusively developed by Qualcomm. CDMA Technology symbolizes a standard that has been developed by a collaborative group known as 3GPP2.

c. Qualcomm does not earn anything from the user of telephone in India. Neither Reliance nor Tata nor the eventual subscribers pay any amount to Qualcomm for user of CDMA telephony in India. Reliance/Tata have not been granted any license to use or exploit the patents i.e. the intellectual property (patents) to manufacture the products, as is evident from the Technical Services Agreement between Qualcomm and Reliance/Tata [Para 6/Pg.152 (with Reliance) and Para4/Pg193 (with Tata)]. Hence to say that the right or property for which Qualcomm earns royalty is the CDMA technology is not correct. The phrase "right or property" referred to in the paragraph 7(b) refers to the right or property belonging to Qualcomm, which are the patents that it owns and the royalty earned by it, is earned from the licensing of such patents to OEMs.

d. He also submitted that the right or property is the patents owned by Qualcomm in the field of CDMA technology. These patents have been licensed to the OEMs to enable them to manufacture the products. In order to be concerned under paragraph 7(b) the patents, i.e. the right to manufacture, must be exploited in India or there must be right to exploit the right to manufacture in India.

e. On the facts of the case at hand and insofar as is relevant, ought to read thus:

Where under sub-paragraph (a) royalties do not arise in India or United States of America, and the royalties relate to the use of, or the right to use, the right to manufacture in India, the royalties shall be deemed to arise in India; or

(b) Where under sub-paragraph (a) royalties do not arise in India or United States of America, and the royalties relate to the use of, or the right to use, the patent, the royalties shall be deemed to arise in India.

f. It is an admitted position that the patents of Qualcomm are used to manufacture the products and all the manufacturing activities are carried on outside India.

g. For the royalty to relate to the use of or right to use the right or property in India the agreement between Qualcomm and the OEM should either (a) be confined to India or (b) India should be one of the countries where the right or property must be specified as being. Neither of the aforementioned conditions are satisfied in the facts of the case at hand and hence the royalty cannot be regarded to have deemed to arise in India.

51. In the context of the DTAA , Mr. Srivastava has argued that just as use of a software product in India amounts to a use of the copyright therein, the use of the patented products sold by the OEMs to the Indian carriers amounts to a use of the patents in India. In support thereof reliance was placed on the decisions of the Authority for the Advance Ruling in the case of Millennium IT Software Ltd., In Re (338 ITR 391 and Citrix Systems Asia Pacific Pty. Ltd., In Re (343 ITR 1) as also the decision of the Karnataka High Court in the case of CIT (Intl Tax) vs. Samsung Electronics Co. Ltd (245 CTR 481). Reliance was also

placed on the retrospective insertion of Explanation 4 and it was submitted that that the decision of the Delhi High Court in the case of Ericsson insofar as it held that there is a difference between use of a copyright and a copyrighted article is no longer good law.

52. Insofar as the 3 decisions relied by the Department, Mr. Dastur submitted that all 3 of them are contrary to the decision of the jurisdictional High Court in the case of Ericsson and hence of no assistance. In fact the last of the 3 decisions, namely, the decision of the authority of advance ruling in the case of Citrix Systems Asia Pacific Pty. Ltd., In Re (343 ITR 1) in paragraph 41 thereof, after considering its decision in the case Millennium and that of Karnataka High Court in the case of Samsung, observes the fact that the Delhi High Court in the case of Ericsson has taken a contrary view. However the Authority was not inclined to follow the same. Therefore any view contrary to that held by the Delhi High Court cannot be urged before, far less accepted by, Tribunal sitting in Delhi. Hence, all the 3 decisions relied upon by the revenue to demonstrate that a user of software article in India would amount to user of the copyright in the software and thereby suggest that the use of the patented products in India amongst the use of patents in India, must fall.

53. Regarding the insertion of Explanation 4 is concerned, he submitted that the Explanation deals with the definition of "royalty" under the Act and the Delhi High Court in the case of Ericisson A.B at paragraph 60 held that the definition of royalty under the Act is wider than that under the DTAA and that the distinction under the Act between use of a copyrighted article and that of copyright urged by the Revenue, if there be any, has no merit in the context of the DTAA.

54. He also submitted that the Explanation is of no relevance in the facts of the present case inasmuch as the present controversy deals

with the taxability of patents and not with the taxability of computer software. Further, Explanation 4 is relevant for clause (v) of section 9(1)(vi), the case of the royalty earned by QCOM is covered by clauses (i) and (iii) of Explanation 2 to section 9(1)(vi) and not clause (v) and there is no such Explanation for use of patents covered under clauses (i) and (iii). Hence, Explanation 4 has no impact on the facts of the case at hand.

55. Further he argued that on a more general level, the Revenue has argued that Qualcomm gives technology to Reliance / Tata to set-up network; CDMA is a wholesome technology and it cannot be broken into handset and network; Qualcomm's involvement is extensive; in totality Qualcomm is providing technology and earning royalty (albeit from third party); royalty is not on account of sale but its income from deployment of technology by looking at it on a wholesome basis; hence it is absurd to suggest that income from such deployment is not a source in India.

56. On the above contention of the Revenue, he submitted that the argument of the Revenue is devoid of any merit. At the outset the issue at hand is whether under the deeming fiction of S. 9(1)(vi)(c) of the Act, the income earned by the non-resident OEMs as a result of use of is taxable in India. The involvement of Qualcomm in India to assist Reliance on aspects of effectively running a CDMA network in India has been remunerated and taxed in India. Neither has it been alleged nor can it be stated that any portion of royalty is relatable to such activity (particularly since the agreements with OEMs have been entered into much before CDMA telephony was used in India).

57. Secondly, the decision in the case of DIT Vs. Ericsson A.B., (246 CTR 422), where Ericsson AB and its group companies, an OEM, had entered into an agreement to setup and install a GSM system and in addition Ericsson AB had agreed to assume overall responsibility to the supply and installation agreement even so the Delhi High Court on the

basis of invoking the so called holistic principle did not uphold the charge of tax on the supply component.

58. After conclusion of the hearing, the Appellant vide letter dt. 19th September, 2012 brought to the notice of the Bench a judgement of the Jurisdictional High Court in the case of Director of Income Tax vs M/s Nokia Net Work OY judgement dt. 7.9.2012 and requested the Bench to consider the same while adjudicating the case as the decision settles the issue in favour of the assessee on certain issues disputed in the present appeal.

59. The Bench posted the matter for a hearing on 12th October, 2012 for submission of the Nokia Ruling. The case was once again heard and both parties sought time to file written submissions.

The Ld. Counsel for the Appellant, submitted that in addition to the Ericsson ruling, the Appellant wishes to place reliance on the above decision in support of the following arguments put forth for taxability of royalty income received by Qualcomm under S.9(1)(vi)(c) of the Act and under Article 12 (7)(b) of the DTAA:

a. Software integral to hardware cannot be treated independent of the hardware and has to be treated as supply of goods;
b. The language of the 'royalty' definition under the DTAA differs from the amended definition of 'royalty' under the Act. The distinction between use of a copyrighted article and that of copyright still holds merit in the context of DTAA; and
c. The determinative factor in a transaction of sale of goods is where the property of goods passes. If the title of the property manufactured outside India passes outside India, no part of the sale proceeds would be taxable in India.

60. In his reply, Mr.G.C.Srivastava disputed the applicability of the Nokia ruling to the facts of the present case and submitted that the Question raised before Hon'ble High Court of Delhi as reproduced on Page 12, Para 7 of the judgment were:

– Questions 1 and 2 on whether Nokia has any business connection and / or PE in India.

– Question no.3 on whether the amount was Taxable as royalty.

61. The Hon'ble High Court observed on Page 16 (Para 9) that the Liaison Office cannot be regarded as PE. After coming to this finding once again in Para 22 (Page 26), the High Court proceeded to discuss the recent amendments cannot be read into the Treaty. Questions No 1 and 2 were accordingly decided in favour of the assessee. The Hon'ble High Court proceeded to discuss Questions No. 3 and 5 on Page 29 (Para 25). After reproducing extracts from their earlier judgment in the case of Ericsson, the Hon'ble Court observed that Software had no independent existence leading to the finding that the payment cannot be regarded as "royalty".

62. On the other hand, Grounds of Appeal raised by the appellant before the Hon'ble Tribunal do not dispute the nature and character of payment but the dispute raised is only with regard to situs of income or situs of accrual of such income. (Ground No.1, 2, 3, 4, and 5).

63. The issues before the Hon'ble Bench are entirely different. While in Nokia or Ericsson, the nature of income being Royalty was in dispute, here there is no dispute that the income is by way of royalty. In Nokia (or Ericsson), taxability of OEMs in India was under dispute but in the case of the Appellant, the taxability of licensors of OEMs is in dispute. The scope of Sub. Section 9(1)(i) and 9(1)(vi) are entirely different.

64. Hence a decision which is wholly out of context and hence cannot to be pressed into service. The taxability of licensor may still arise under 9(1)(vi) even if the licensee (i.e. the OEM) is not found to have PE in India (and hence not taxable). The taxability under 9(1)(vi) in the case of the licensor depends on the intellectual property licensed by

him being used for business being carried out in India even if the income of the licensee is not taxable in India due to non-existence of PE etc.

65. A look at the grounds of appeal in the case of the Appellant goes to indicate that Qualcomm is deriving income from license of patented technology, the use of Copyright (as in the case of Nokia/ Ericsson) is not being even remotely suggested.

66. He also drew the attention of this Bench to the Patents Act 1970 , unlike Copyright Act, the Patents Act 1970 (relevant extracts filed before the Hon'ble Bench) defines not only "patent" but also "patented article" and "patented process" to mean respectively an article or process in respect of which a patent is in force. (sub-clause (o) of section2). A computer programmer per se is not patentable (clause k) of section 3). The rights of patentees are explained in section 48 as the right to prevent third parties from act of making, using, selling, or importing those products or processes without the consent of the licensor.

67. Qualcomm's "Chipset" and "ASIC" which contain the core patented technology are sold to OEMs which get embedded in the handsets and equipments manufactured by them and, in turn, sold to India. OEMs cannot use these chipsets and ASIC without the consent of Qualcomm which is given under agreements with OEMs.

68. Tata/ Reliance also can use these patented technology or patented articles without the consent of Qualcomm and OEMs and that is the reason these find place in the agreement by the use of the expression "licensing of software". "Software" is defined in the agreement between Tata and OEM to mean man and machine readable instruction including firmware. Firmware is also defined to mean a combination of hardware and software. The "Equipment" is also defined to mean and include CDMA Equipment. Thus, the network operators in India are given the right to use the patented products and processes of

Qualcomm through OEMs.

69. Referring to the definition of CDMA "ASIC" and "chipset" from the agreement between Qualcomm and OEM (Page 230 of A's PB) , he submitted that they all are patented products or processes. Hence, it is highly illogical for the appellant to rely on cases pertaining to software and draw distinction between Copyright and Copyrighted article when, according to their assertion, their case is in the realm of patents which is an altogether genre of intellectual property. Had it been the case of the use of patent, the Hon'ble High Court of Delhi could not have reached the same conclusion as it did in the case of a Nokia.

70. Coming to ground nos.5 and 6 on the issue of enhancement, the Ld. Sr. Council submitted that the AO assessed the royalty income only in respect of handsets. However, the CIT (A) invoked his powers of enhancement under the Act and brought to tax a new source of income namely the royalty earned from OEMs on network equipments. Referring to the order of CIT (A), he referred to the wordings "might have been licenses" "would have been received". He argued that the CIT (A) can enhance the assessment only in respect of "source" which has been considered and taxed by the AO. When nothing is assessed by the AO on equipments, enhancing assessment based on agreements for purchase of equipment, tantamount to new source of income. He submitted that each agreement is "new source of income". He relied on following case laws:-

– CIT v. Shapoorji Pallonji Mistry [Vol XLIV/ 892 (SC)]
– CIT v. Rai Bahadur Hardutroy Mohilal Chamaria [66 ITR 443 (SC)]
– CIT v. Nirbheram Daluram [224 ITR 610 (SC)]
– CIT v. Union Tyres [240 ITR 556 (Del)]

71. In his reply, Mr. G.C.Srivastava submitted that the subject matter of assessment is the income by way of royalty received as a

consideration for the use of CDMA technology in India. It is immaterial how such royalty is paid but the fact is that royalty is paid for the use of such technology. Handsets and equipments are not two different sources of income. Both form part of same source of income i.e. use of CDMA technology. Hence, when CIT Appeal gave direction to tax the royalty from sale of equipment together with that of handsets, he was not referring to a new source of income but to the same source of income. Some part of income from that source was taxed by the AO while the other part of the income relating to the same source was left to be taxed. Handsets and equipments are not the independent sources of income. These cannot generate any income de hors the overall technology of which these are integral parts. The cases relied upon by the appellant are therefore, out of context and inapplicable to the facts of the present case.

72. On ground no 9, relating to levy of interest under S. 234(A)of the Act, Mr. Dastur submitted that the levy of interest is consequential and did not press for the same.

73. On ground no 10, relating to levy of interest under S. 234 (B) of the Act , he submitted that the issue is already settled in the favor of the Appellant by the decision of the Jurisdictional High Court in the case of DIT vs. Jacabs Civil Incorporated and Mitsubishi Corpn. And Ors (330 ITR 578). Relying of the provisions of the Act and the above judgement, he submitted that if the royalty income is liable to tax under S.9(1)(vi) (c) of the Act, it was the duty of the OEMs to deduct the tax at source under S.195 of the Act, on the failure of the OEMs to do so, no interest could be imposed upon the Appellant under S.234 B of the Act.

74. He also placed reliance on the decision of the Hon'ble Supreme Court in the case of DIT vs. General Electric Inc [2010] 323 ITR (ST) 46. Where in the Hon'ble Supreme Court dismissed the Department's special leave petition against the judgement dated June 22, 2009 of the

Bombay High Court in ITA No 890 of 2009, whereby the High Court following the decision in the case of DIT (Intl.Tax) vs. NGC Network Asia LLC (313 ITR 187) held that when a duty was cast on the payer to deduct the tax at source, on the failure of the payer to do so, no interest could be imposed upon the assessee under S.234 B.

75. On additional grounds, he submitted that ground no.2 to 4 and 5 to be treated as not pressed and ground no 1 and 3 which are on the issue of reopening have already been argued.

Findings:

76. We have heard rival contentions at length. Both parties have filed detailed submissions and other material. We have perused all the papers on record and the orders of the authorities below. The case laws cited are also considered.

77. On a careful consideration of the facts and circumstances of this case, the arguments and the material placed on record, we hold as follows.

78. Reopening of assessments: We first take up the issue of reopening

Admission of the additional grounds of appeal on reopening of assessment

The five additional grounds raised by the Appellant are legal grounds and do not require any investigation into facts on record. Further, the Ld.Spl council for the revenue has also not disputed the admissibility of these additional grounds. Hence by applying the decision of the Hon'ble Supreme Court in the case of M/s Jute Corporation of India Ltd. vs. CIT, (187 ITR 88) and the Jurisdictional High Court decision in the case of Taylor instrument company India Limited vs. CIT (105 CTR 5 (Del)), we admit all the additional grounds.

79. The Appellant's contention, which is common for all the AYs is

that, the AO reopened the assessments merely on surmises and conjectures and that there was no material available to enable the AO to form a belief that the income of the Appellant has escaped assessment. The Revenue contends that there was prima facie some material on the basis of which the AO has formed a belief that the income of the Appellant has escaped assessment.

80. Before we proceed, we extract S.147 of the Income Tax Act, 1961 for ready reference.

"***Section147. Income escaping assessment***.*-If the Assessing Officer, has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year) :*

Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment for that assessment year.

Explanation 1.-Production before the Assessing Officer of account books or other evidence from which material evidence could, with due diligence, have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso.

Explanation 2.-For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely :-

(a) where no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax ;

(b) where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return ;

(c) where an assessment has been made, but-

(i) income chargeable to tax has been under-assessed ; or

(ii) such income has been assessed at too low a rate ; or

(iii) such income has been made the subject of excessive relief under this Act ; or

(iv) excessive loss or depreciation allowance or any other allowance under this Act has been computed."

81. This is a case where the Appellant did not file any return of income for any of the impugned Assessment Years. The Ld.Sr.Counsel for the Appellant contended that since tax was deducted at source for A Y s 2002-03 and 2003-04, the presumption is that there is no escapement of income. We do not agree with this contention. No such presumption can be there. No precedent had been cited before us in support of the said contention. The fact remains that for the AYs 2002-03 and 2003-04 there was income from FTS derived by the Appellant which was subject to tax at source and that no return of income was filed.

82. We now consider a condition that the AO should have some

prima facie material which could lead to formation of a belief that the Appellant had income which has escaped assessment for the impugned AYs. At this stage we deem it appropriate to extract reasons recorded by the AO for ready reference.

<u>83. Reasons for issuance of notice u/s 148 of Income Tax Act, 1961</u>

"*The assessee is a company incorporated in USA and is in the business of developing, manufacturing, marketing, licensing and operating advanced communication systems and products world wide.*

The assessee company is owner of the patented CDMA technology. CDMA systems are utilized in India by various telecom operators viz., Reliance, Tata Indicom etc. Apart from the said patent, the company is into filing and securing patents of a number of technological advancements in telecommunication sector. These patents are then utilized for the purpose of earning royalties world wide including India. The technological patenting profile of the company can be ascertained from the following press release of the assessee:-

Press Release Qualcomm Incorporated
www.qualcomm.com
5775 Morehouse Drive
San Diego, CA 92121-1714
(858) 587-1121

United States Patent Office Reaffirms the Validity of Important Qualcomm CDMA Patent

March 23, 1999 - SAN DIEGO -- March 23, 1999 -- Qualcomm Incorporated (Nasdaq: QCOM) today announced that the validity of one of its key Code Division Multiple Access (CDMA) patents has been reaffirmed. Qualcomm has received notice that the United States Patent *and Trademark Office will issue a Reexamination Certificate confirming the patentability of all 49 claims of U.S.*

Patent 5, 103,459 with minor amendments and allowing 19 additional claims. The patent, which was issued in April 1992, had been the subject of two requests for reexamination filed by anonymous requestors in 1996 and 1997. The requests for reexamination alleged that prior publications not originally considered by the Patent Office rendered the patent invalid. In total, more than 80 additional references were submitted to the Patent Office during the reexamination proceedings by the requestors and Qualcomm. The Patent Office, after carefully reviewing all the additional prior art, concluded that the patent was valid and that Qualcomm was also entitled to 19 new claims.

The 459 Patent, entitled "System and Method for Generating Signal Waveforms in a CDMA Cellular Telephone System," describes inventions for generating the basic CDMA waveforms used in CDMA wireless systems such as IS-95 and others. The same basic waveforms are also utilized in CDMA systems proposed for third-generation standards. The inventions of the 459 Patent enable multiple callers in a CDMA wireless telecommunications network to efficiently use the same frequency band without mutual interference, allowing for greater system capacity and better link performance.

Qualcomm's pioneering efforts in the development of CDMA cellular technology have yielded more than 200 issued U.S. patents relating to CDMA and hundreds of issued and pending CDMA patent applications around the world. While no single patent is critical to Qualcomm's coverage of second or third generation CDMA wireless standards because Qualcomm holds dozens of patents that are essential to the leading standards, the 459 Patent covers fundamental techniques for achieving high capacity in such CDMA systems. More than 60 major manufacturers of telecommunications equipment have taken royalty-bearing licenses under Qualcomm's patent portfolio.

Qualcomm Incorporated (Nasdaq: QCOM) is a leader in developing and delivering innovative digital wireless communications products and services based on the Company's CDMA digital technology. The Company's major business areas include CDMA phones; integrated CDMA chipsets and system software; wireless infrastructure; technology licensing; and satellite-based systems including OmniTRACS and portions of the Globalstar system. Qualcomm is headquartered in San Diego, Calif. Qualcomm's fiscal 1998 revenues exceeded U.S. $3 billion. For more information, please visit the Company's web site at http:// www.qualcomm.com.

Except for the historical information contained herein, this news release contains forward-looking statements that are subject to risks and uncertainties, including timely product development, the Company's ability to successfully manufacture significant quantities of CDMA or other equipment on a timely and profitable basis, and those related to performance guarantees, change in economic conditions of the various markets the company serves, as well as the other risks detailed from time to time in the company's SEC reports, including the report on Form 10-K for the year ended September 27, 1998, and most recent Form 10-Q.

Qualcomm and OmniTRACS are registered trade marks of Qualcomm Incorporated. Globalstar is a trade mark of Loral Qualcomm Satellite Services, Incorporated.

The assessee is having full fledged 'research and development centres' in India. Many of the technological developments are undertaken at these development centres located in India. These products are patented by the assessee, and are exploited commercially worldwide including in India. These facts can be ascertained from the following news clippings:-

New Delhi, June 28

Qualcomm Inc has told the Union Communications and IT Minister, Mr Dayanidhi Maran, that the company would enable setting up of Code

Division Multiple Access (CDMA) handset manufacturing unit in the country. The company also said that it was working towards enabling cheaper CDMA handsets apart from leveraging its research and development centres in India for Qualcomm's global requirement by Increasing the headcount.

After a closed-door meeting with Mr. Maran, Qualcomm's Chief Executive Officer, Dr Paul Jacobs, said, "We had a discussion on manufacturing. I cannot disclose details, as we now have to go back to do a lot of work before that happens. We are actually going to get more manufacturers to the market."

Dr Jacobs said that Qualcomm would come in with design, the latest chipset, and hardware with engineering resources to enable local manufacturing. While the company does not manufacture handsets directly, It gives licenses to companies such as LG and Samsung to produce CDMA handsets,

During the meeting, Mr Maran is understood to have told Qualcomm to remove all bottlenecks hindering the growth of CDMA services in the country. The Communications Ministry had earlier indicated that high royalty charges being paid to Qualcomm were coming in the way of cheaper handsets. Dr Jacobs said that there was a meeting of minds with Mr. Maran over the issue. "More than affecting a reduction in the royalty charges, we would look to bringing down the cost of handsets through technological innovations."

Meeting with Anil Ambani:

India's leading CDMA player Reliance Communications has also demanded a cut in royalty payments to Qualcomm. Reliance has even proposed to shift to the rival GSM technology. Mr. Jacobs is expected to meet Mr .Anil Ambani on Thursday in Mumbai.

(Source: Hindu Business Line)

Thus it is seen that the assessee company, which is undisputedly into the Business of earning royalties from patenting the technological *innovations in the field of communication technology, is undertaking its core business of research and development from the centers located in India. Therefore these locations in India constitute the business connection as well as permanent establishment of the assessee in India. It is also observed that the assessee company is directly negotiating with the customers of CDMA technologies like Reliance for the price of royalties to be embedded in the cost of cell phone. Cellphones compatible to the use of CDMA technology are manufactured by the companies like LG, Samsung, Nokia etc., but cost of royalties is to be determined and negotiated directly by the telecom operators, who purchase such handsets in bulk for distribution among their customers. The royalties to be charged by the assessee in respect of handsets, differs from country to country. For example the assessee charges at the rate of 2% in china while it charges at the rate of 7% in respect of handsets sold to Indian telecom operators. This is further evident from the newspaper reports on the dispute between Reliance and the assessee regarding the cost of royalties embedded in the handset price.*

Some of the reports are extracted below:-
Royalty issue: Qualcomm CEO likely to visit India
Tata Teleservices not considering GSM roll-out for now
New Delhi, June 15

Under pressure from the industry and the Communication Ministry to lower its royalty, rates, the US based CDMA technology promoter firm Qualcomm's world wide CEO, Mr.Paul Jacob, is likely to visit India next week.

Mr.Jacob is expected to meet the Communication and IT Minister, Mr.Dayanidhi Maran, and CDMA operators as well. The move comes after India's largest CDMA payer Reliance Communication announced its plans to roll out GSM based cellular services in the country.

The agency responsible for Qualcomm India's press relations said that Qualcomm Inc had not made any announcement in this regard yet. Mr.

Kanwalinder Singh, president Qualcomm India, could not be contacted as he is away at the company's global headquarters in San Diego. However, industry sources said Mr .Jacob's visit has been scheduled for next week.

(Source: Hindu Business Line)

Reliance had earlier requested Qualcomm to bring down its royalty from the current levels of 7 per cent, as it was adding to the cost of services. Sources pointed out that in China, Qualcomm was charging a royalty of only 2 per cent. Mr.Maran is also understood to have observed recently that CDMA operators were at a disadvantage due to their royalty obligations, which made it difficult to bring down the prices of handsets.

Qualcomm stand :

However, Qualcomm has maintained that the royalty was being charged from Hand set manufacturers and not toe operators and, therefore, the additional cost was only marginal.

Industry observers also pointed that while equipment majors and hand set manufacturers are setting up base in India to manufacture GSM gear, no CDMA player has announced manufacturing plans.

Meanwhile, the other CDMA operators in India – Tata Teleservices said that it was not considering rolling out GSM services. Tatas said that it was closely watching Reliance's application to offer GSM services in the country.

Qualcomm, Reliance meet ends in stalemate
Our Bureau
Another meet likely on Tuesday
Mumbai, July 29

A marathon eight-hour meeting on Thursday between the Qualcomm delegation headed by its CEO, Mr. Paul Jacobs, and Reliance Communications in Mumbai ended in a stalemate, according to sources. .

"In fact postures hardened on both sides," said one of them.

The issue of disagreement between the two is the royalty charged by Qualcomm on Code Division Multiple Access (CDMA) handsets, which Reliance Communications wants decreased.

In fact to show that it meant business, the telephony operator had, in a surprise move recently, applied for spectrum for the rival GSM technology in the prime circles of Mumbai and Delhi, saying that it was merely doing this to offer its customers the best choice available.

Sources said that neither party made any headway during Thursday's discussions. However, the Qualcomm CEO and Mr. Anil Ambani, who heads Reliance Communications were scheduled to meet over dinner again on Tuesday, possibly to continue the discussions.

Qualcomm, while being unrelenting on royalty charges, appeared to show some willingness to offer some concessions, which would be a variable of the volumes that Reliance can generate, said sources. They said that Qualcomm said it might agree to negotiate with equipment manufacturers and look at lowering the cost element of handset prices based on volumes.

Reliance Communications was also equally unrelenting in its stance, said sources. Its bargaining confidence probably comes from the fact that it is the largest mobile telephony service operator in India, the fastest growing telephony market in the world, said analysts.

They added that the relative silence of the other CDMA operator Tata Teleservices on the royalty issue could strengthen Qualcomm's case in a small way.

(Source: Hindu Business Line)

From the observations made above, it is seen that the assessee company is Earning royalties in respect of handsets operational in India. These handsets. Though are got manufactured by the Indian Telecom Operators from LG, samsung etc. but the price of the royalty component for use of CDMA technology are directly negotiated and finalized by the *assessee and the Indian Telecom Operators in India. Only the payments of royalties are routed through the manufacturer on the basis of price rate agreed between the assessee and the Indian telephone operators. Therefore, it can safely be held that the royalties to the assessee not only arise in India but also paid by Indian concerns indirectly."*

84. On perusal of the reasons, the material available with the Assessing Officer at the time of recording the reasons is as follows:-

i. Press release dt. 23rd March 1999 issued by the Appellant in USA, which states that the Appellant got several patents pertaining to CDMA technology.

ii. Newspaper article dt. 28th June, 2006 stating that the Appellant has research and development centre located in India.

iii)Newspaper article dt. 15th June,2006 and 29th July,2006 showing that the Chief Executive Officer of Qualccom Dr.Paul Jacob visited India and had interacted with the Government of India as well as Reliance Communications Ltd. and the issue of bringing down the cost of handsets through reduction in rate of royalties was a topic of discussion.

iv. Material to show that the Appellant earned fees from 'included services' from Reliance Communications Infrastructure Ltd. for utilization of products in India.

85. Thus the short question before us is whether the AO could have reason to believe, on the basis of the aforesaid material that the Appellant had income which escaped from tax for the impugned AYs

86. The Hon'ble Supreme Court in the case of Raymond Woollen Mills Ltd. vs. ITO and others, (236 ITR 434) laid down that what has to be seen, is whether there was prima facie material on the basis of which

the department could reopen the case. The sufficiency of correctness of the material is not a thing to be considered at this stage.

87. In the case of ACIT vs. Rajesh Jhaveri Stock Brokers P.Ltd.(291 ITR 500), the Hon'ble Supreme Court held as follows:-

"16. *Section 147 authorizes and permits the Assessing Officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word "reason" in the phrase "reason to believe" would mean cause or justification. If the Assessing Officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion. The function of the Assessing Officer is to administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers. As observed by the Supreme Court in Central Provinces Manganese Ore Co. Ltd. v. ITO [1991] 191 ITR 662, for initiation of action under section 147(a) (as the provision stood at the relevant time) fulfillment of the two requisite conditions in that regard is essential.* ***At that stage, the final outcome of the proceeding is not relevant. In other words, at the initiation stage, what is required is "reason to believe", but not the established fact of escapement of income. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the materials would conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief by the Assessing Officer is within the realm of subjective satisfaction*** *(see ITO v. Selected Dalurband Coal Co. P. Ltd. [1996] 217 ITR 597 (SC) ; Raymond Woollen Mills Ltd. v. ITO [1999] 236 ITR 34 (SC).*

The scope and effect of section 147 as substituted with effect from April

1, 1989, as also sections 148 to 152 are substantially different from the provisions as they stood prior to such substitution. Under the old provisions of section 147, separate clauses (a) and (b) laid down the circumstances under which income escaping assessment for the past assessment years could be assessed or reassessed. To confer jurisdiction under section 147(a) two conditions were required to be satisfied : firstly the Assessing Officer must have reason to believe that income, profits or gains chargeable to income tax have escaped assessment, and secondly he must also have reason to believe that such escapement has occurred by reason of either omission or failure on the part of the assessee to disclose fully or truly all material facts necessary for his assessment of that year. Both these conditions were conditions precedent to be satisfied before the Assessing Officer could have jurisdiction to issue notice under section 148 read with section 147(a). But under the substituted section 147 existence of only the first condition suffices. In other words if the Assessing Officer for whatever reason has reason to believe that income has escaped assessment it confers jurisdiction to reopen the assessment. It is, however, to be noted that both the conditions must be fulfilled if the case falls within the ambit of the proviso to section 147. The case at hand is covered by the main provision and not the proviso.

So long as the ingredients of section 147 are fulfilled, the Assessing Officer is free to initiate proceeding under section 147 and failure to take steps under section 143(3) will not render the Assessing Officer powerless to initiate reassessment proceedings even when intimation under section 143(1) had been issued."(Emphasis ours)

88. As laid down by the Hon'ble Supreme Court, the test that has to be applied is whether there is information (and not evidence) and whether based on such information, the AO prima facie has a justification for having a reason to believe that income of the assessee has escaped assessment. In our opinion in the facts and

circumstances of this case, the AO had a bonafide belief that the income chargeable to tax escaped assessment based on material, which in our opinion, reasonably supports such belief. The opinion formed, to a mind, is one which a rational man would have come to such conclusion on this material. We hold so because the information is that Qualcomm is a world leader in holding patents relating to CDMA technology and that Reliance and Tata Telecommunications are introducing CDMA technology into India and the information that negotiations have taken place between the Government and the Representative of Qualcomm on the subject and that discussions were held by the assessee with Reliance on the issue of royalty charged on handsets, would lead any reasonable person to a conclusion that Qualcomm might have earned income in India and that such income would have escaped assessment. The satisfaction in question is the subjective satisfaction of the AO at that point of time. It cannot be said that there is no nexus between the material and the belief of escapement of income. It also cannot be said that the material in possession of the AO does not enable him to draw an inference that income has escaped assessment. There is a rational connection, direct nexus and live link between the material and the belief. The reason is based on material which prima facie showed that income has escaped assessment. At that stage, the final outcome of the proceeding is not relevant and the fact of escapement of income need not be established. Whether the materials would conclusively prove the escapement is not the concern at that stage.

89. It is well settled that the Court cannot examine the sufficiency of the reason to believe. Factually it cannot be said that the material in question is vague, indefinite, distant, remote or farfetched as claimed by the Ld Sr. Council. It also cannot be said that the assumption of jurisdiction is arbitrary or malafide nor can it be said that there is non-application of mind. The material definitely indicates that the assessee

has a role and was involved in promoting and launching of CDMA Technology in India. Where such involvement ultimately results in the assessee being assessed to tax is another issue.

90. With this background, we consider each of the contentions of the Ld.Sr. Counsel for the Appellant as well as the case laws cited by them.

91. The first contention of Mr. Dastur was that news paper articles can not constitute information/evidence as contemplated under the Act. Reliance was placed on the decision in the case of M/s Namit Verma vs. UOI (supra) and Sikkim Subba Associates vs. UOI and others (supra). In the case of M/s Namit Verma vs. UOI (supra) the Hon'ble Delhi High Court was considering a Public Interest Litigation (PIL) wherein the intervention of the Court was sought to redress the grievance resulting from alleged inaction of the government. The petitioner placed reliance on some news paper reports. The Hon'ble High Court dismissed the petition and in this context, the Delhi High Court observed that on the basis of material placed before the Court, an inference cannot be drawn that the government authorities are not acting according to law. The Hon'ble Court held that news paper reports do not constitute evidence. This proposition cannot be interpreted to mean that news paper reports do not constitute information or material. In our considered view, news paper reports can constitute information/material, which can form the basis for the AO to form a reason to believe that income liable to tax has escaped assessment. It is not the case of the assessee that the newspaper reports are false or inaccurate.

92. Coming to the decision in the case of Sikkim Subba Associates vs. UOI and others (supra) the Hon'ble High Court of Sikkim found fault with the initiation of search under Section 132 of the Act on the basis of CAG report obtained even before it was laid before the house

and on the basis of certain magazine reports, which were subsequently found to be fake and fabricated magazine. This decision was rendered by the Hon'ble High Court on the peculiar set of facts and in the context of initiation of search under Section 132 of the Income Tax Act, 1961. In our considered view, this decision is not applicable to the facts of the case. In this case the assessee does not allege that the reports are false or fabricated. News paper reports are relevant material and it is open to the assessee to challenge the veracity of the reports. News papers give information and this can be relevant material. On obtaining copy of the reasons the assessee can always state his objections. Hence we do not agree with this argument.

93. The second contention of the Appellant is that the proceedings under Section 147 of the Income Tax Act, 1961 cannot be based on mere conjectures and surmises. Reliance was placed in the case of German Remedies (supra); A Raman & Co. (supra); Lakhmani Mewaldas (supra). While there is no dispute with regard to the legal proposition laid out in the judgments relied by the Appellant, we have to examine whether the AO acted upon conjectures or surmises and whether the reasons recorded by him are only pretence. These are questions of fact, which we would be once again specifically dealing hereinafter.

94. In the case of Sarthak Securities P.Ltd. (supra) the Hon'ble Delhi High Court found that the reasons recorded were contrary to the law laid down by the Hon'ble Apex Court in the case of Lovely Exports P.Ltd.(216 CTR (SC) 195) while quashing the notice issued under Section 148 of the Income Tax Act, 1961. No such situation prevails in this case.

95. The Appellant contended that there is no nexus between the material available before the AO and the belief formed by him. It was pointed out that news paper articles were published in 2006, and hence cannot be regarded as material having live link/close nexus with years

which ended between March, 2000 and 31st March,2004. It was contended that there was reason to suspect but there was no reason to believe and the reasons must relate to the year in which the notice was issued. It was pointed out that nothing in the reasons recorded show that any income was earned by the Appellant during the F.Y. ended 31st March, 2000 to 31st March, 2004. Reliance was placed on the following decisions:-

i. Kelvinator of India Ltd. (supra)
ii. Lakhmani Mewal Das (supra)
iii. Ganga Saran and Sons P.Ltd. (supra)
iv. Grindlays Bank Ltd. (supra)
v. Mesco Labs Ltd. (supra)

Reliance was also placed on the CBDT Circular no.549 dt. 31st October, 1989.

96. A perusal of the reasons and the material demonstrate that the Appellant is the owner of patents pertaining to CDMA technology and that the Appellant earns royalty from such patents and that CDMA mobile services/technology has been launched and used in India. This information and material, in our considered opinion is sufficient, prima facie, to come to a conclusion that the Appellant has earned certain income in India. The information by way of press releases, news paper articles etc. could lead any reasonable person to believe at that the Appellant who owns several patents pertaining to CDMA technology would have income, as such, technology is used in India. In our opinion the AO had an honest belief, and has come to a conclusion, as a rational man would, based on the material that income chargeable to tax has escaped assessment. The satisfaction in question is that of the AO at that point of time. It cannot be said that the AO had no cause or justification to suppose that income has escaped assessment. The phrase 'reason to believe' cannot be read to mean that the AO should have finally ascertained the fact by legal evidence or conclusion.

Whether the material would conclusively prove the escapement of income is not the concern at this stage.

97. The argument that the material relied upon by the AO has to be specific to a particular year is neither supported by any provision of the Income Tax Act, 1961 nor by any case laws. News paper article published in 2006, can be a basis for formation of belief that income chargeable to tax has escaped assessment during the years prior to such publication when the CDMA mobile services were available in India. The notice under Section 148 was issued on 29.3.2007 and information on all the impugned AYs were available as on that date of recording the reasons.

98. The AO reopened assessments from the Assessment Year 2000-01 to 2006-07 in respect of income earned for the period from 1.4.99 to 31.3.2006 and the income that was sought to be taxed in these reopened assessments was the income accruing to the appellant from the patents registered in its favour in respect of CDMA technology. The nature of income sought to be taxed was royalties and fees for 'included services'.

99. The AO based on the material formed a prima facie belief that the Appellant is earning royalty income or fees from 'included services' which is taxable in India under S.9 of the Act as well as the DTAA. To put it the other way, there is no prohibition under the Act in taxing these incomes in India. Whether on consideration of all the facts and the provisions of law, it can be concluded that these incomes can be brought to tax in India, is altogether the different question and the AO cannot be compelled to prejudge the issue while reopening the assessments.

100. At the time of recording the reasons for reopening, based on the material i.e. press releases, news paper articles etc., the AO believed

that the Appellant is holding certain patents developed under CDMA technology and that the technology is being used in various parts of the world including India and that certain Indian companies are providing CDMA wireless net work services and for this purpose the Indian companies are paying to the Appellant company royalty as part of the price of the hand set purchased from the OEMs outside India. The news paper reports definitely indicate that the Appellant was negotiating with the OEMs for the benefit of Indian operators and users of CDMA technology. These facts indicate that in recording his belief the AO has acted in a bonafide manner and that he was in possession of relevant material to enable him to form a prima facie belief that the Appellant was having income taxable in India for the impugned Assessment Years.

101. Further, the Appellant has not chosen to file a return of income in India though it had taxable income at least for two A.Ys.

102. Coming to the contention of the Ld.Sr.Counsel that when there are multiple reasons, some relevant and others irrelevant or incorrect then the reopening must be quashed since it is unclear as to which reason the AO has relied upon and his reliance in the case of Sagar Enterprises vs. ACIT we hold as follows:-

103. In the case of Sagar Enterprises vs. ACIT, 257 ITR 335 (supra) the facts are as under:-

> *"i) vide reasons recorded on 18th August, 1997 the case of the assessee partnership firm was reopened for the A.y.1991-92.*
> *ii) In the reasons recorded, the assessing officer placed heavy reliance on the fact that the partnership firm did not file the Return of income for the A.Y.1991-92, while the high court found that the return of income was actually filed on 28th August, 1991 itself.*
> *iii) The undisclosed income sought to be assessed for A.Y.1991-92 was already assessed in the A.Y.1992-93 on a protective basis.*
> *iv) When the addition made in the protective assessment was*

deleted by the CIT(A) vide his order dt.26th January, 1996, the assessing officer sought to reopen the assessment for A.Y.1991-92 to make the very same addition on a substantive basis.

On these facts, the Hon'ble High Court held as under:

" From the facts that have come on record, protective assessment for asst. yr. 1992-93 was carried in appeal by the assessee and on the assessee succeeding before the CIT(A), the Revenue has filed second appeal before the Tribunal which is stated to be pending. It is pertinent to note that the first appellate authority decided the appeal for asst. yr. 1992-93 on 26th Jan., 1996 (sic) and the reasons have been recorded thereafter on 18th Aug., 1997.

Therefore, taking into consideration the totality of the circumstances and the facts which have come on record, it is apparent that the respondent himself is not sure as to the year of taxability and whether the said item requires to be taxed in. asst. yr. 1991-92 or asst. yr. 1992-93. In such a situation, it is not possible to agree with the stand of the Revenue that any income could be stated to have escaped the assessment for asst. yr. 1991-92 as a consequence of any failure or omission on the part of the assessee.

The petition is therefore allowed. The impugned notice dt. 3rd Oct., 1997 (Annexure R) is quashed and set aside. Rule is made absolute with no order as to costs."

104. We find that the facts in the above case are completely different from the facts of case before us. In the case of the appellant, the assessing officer sought to tax income accruing to the appellant from the patents in respect of CDMA technology owned by the appellant. The assessing officer considered that the income from the patents would be in the form of Royalties, Fees from included services or business profits. But there is no error in his finding that the appellant has income from the patents. Therefore, we do not find force in the

contention of the appellant that the reasons recorded are not clear or irrelevant and therefore we are unable to quash the reopening of the assessments on this score.

105. In this regard, we draw strength from the case of Inductotherm (India) Private Limited (Formerly Inductotherm India) Vs. M.Gopalan, DCIT in Special Civil Application NO.858 of 2006 as the facts are much nearer to the facts in the case of the appellant. In this case, the assessing officer reopened the assessment for four reasons. The Hon'ble Gujarat High court was of the view that reopening could not have been done in respect of two reasons. However, they upheld the validity of notice issued u/s 148 as they found that the reopening in respect of the other two reasons was validly done. The findings of the Hon'ble Gujarat high court are as under:

> *"18. Reverting to the facts of the present case, we notice that in two out of four reasons recorded by the Assessing Officer for reopening the assessment, he stated that he need to verify the claims. In the second ground, he had recorded that admissibility of the bad debts written off required to be verified. In the fourth ground also, he had recorded that admissibility of royalty claim was required to be verified. We are in agreement with the contention of the counsel for the petitioner that for mere verification of the claim, power for reopening of assessment could not be exercised. The Assessing Officer in guise of power to reopen an assessment, cannot seek to undertake a fishing or roving inquiry and seek to verify the claims as if it were a scrutiny assessment.*
>
> *19. With respect to other two grounds, however, we find that the Assessing Officer had some material at his command to form a belief that income chargeable to tax had escaped assessment. Ground NO.1 pertained to the claim of deduction under section 80HHC of the Act and the Assessing Officer was of the opinion*

> *that the Central as well as the State Sales Tax and other income in the net profit would not qualify for deduction under section 80HHC of the Act. It may be that he referred to the decisions of the Apex Court in the case of Sterling Foods Ltd., however, mere wrong reference to a judgment would not invalidate the ground if otherwise was valid in law. Equally, in the third ground, the Assessing Officer noted that the assessee had debited warranty expenses of Rs.l,43,48,347/- to the P & L Account, out of which an amount of Rs.l,05,48,633/- was incurred during the financial year under consideration. He was, therefore, of the opinion that remaining amount of Rs.37,99,714j- is not allowable expenditure. We are of the opinion that such reason also would permit the Assessing Officer to reopen the assessment. The Assessing Officer has found that a claim not arising during the year under consideration was made. He desires to disallow such a claim. It cannot be stated that the ground was not germane. The counsel for the petitioner, however, vehemently contended that the petitioner's claim in this respect has been accepted by this Court. He drew our attention to an order dated 27.12.2011 passed in Tax Appeal NO.2087 of 2010, wherein this Court had rejected the revenue's appeal in which one of the issues was with respect to such warranty expenditure. Counsel for the revenue, however, pointed out that the Department has not accepted this decision of the High Court.*
>
> *20. In view of the above discussion, we do not find that the notice for reopening is invalid or lacks jurisdiction. The petition is, accordingly, dismissed. Rule is discharged. Interim relief granted earlier stands vacated."*

106. We also draw strength from the judgment of the Hon'ble Calcutta High Court in the case of CIT vs. Anand & Co.(191 ITR 82) wherein it is held as follows:- "*If the Assessing Officer, initially proceeded to reopen the assessment for several items of income believed to have escaped assessment and if it is ultimately found that only one such item has escaped assessment, that will not vitiate the proceedings. All the reasons given by the Assessing Officer for reopening the assessment might not be tenable, but even if one of the grounds is such that it would lead prima facie to a reasonable belief that the income escaped assessment, the jurisdiction of the ITO to initiate proceedings cannot be successfully questioned*".

107. The next contention of the Ld.Sr.Counsel is that the AO stated that the Appellant is having a P.E./Business Connection in India and whereas in the assessment order royalty income was taxed on gross basis under Article 12(vii)(b) of the DTAA and not under Article 12(7)(a) of the DTAA and since the foundation of the reassessment was something and the actual reassessment was something else, the proceedings have to be quashed. Reliance was placed on the decision in the case of CIT vs. Jet Airways India Ltd. (supra) and Ranbaxy Laboratories Ltd. (supra). We have perused both these decisions. In the case of CIT vs. Jet Airways India Ltd. 331 ITR 236 (Bom.) (supra) at para 21 and 22 it is held as follows:-

> *"20. Parliament, when it enacted the Expln. (3) to s. 147 by the Finance (No. 2) Act, 2009 clearly had before it both the lines of precedent on the subject. The precedent dealt with two separate questions. When it effected the amendment by bringing in Expln. 3 to s. 147, Parliament stepped in to correct what it regarded as an interpretational error in the view which was taken by certain Courts that the AO has to restrict the assessment or reassessment proceedings only to the issues in respect of which reasons were recorded for reopening the assessment. The corrective exercise embarked upon by "Parliament in the form of Expln. 3 consequently provides that the AO may assess or reassess the income in respect of any issue which comes to his notice subsequently in the course of the proceedings though the reasons for such issue were not included in the notice under Section 148(2). The decisions of the Kerala High Court in Travancore Cements Ltd. (2008) 305 ITR 170 and of the Punjab and Haryana High Court in Vipan Khanna (2002) 255 ITR 220 would, therefore, no longer hold the field. However, in so far as the second line of authority is concerned, which is reflected in the judgement of the Rajasthan High Court in Shri Ram Singh (2008) 306 ITR 343, Explanation 3 as inserted by Parliament would not take away the basis of that decision. The view which was taken by the Rajasthan High Court was also taken in another judgement of the Punjab and Haryana High Court in CIT vs. Atlas Cycle Industries (1989) 180 ITR 319. The decision in Atlas Cycle Industries (1989) 180 ITR 319 held that the Assessing Officer did not have jurisdiction to proceed with the reassessment, once he found that the two grounds mentioned in the notice under Section 148 were incorrect or nonexistent. The decisions of the Punjab and Haryana High Court in Atlas Cycle*

Industries (1989) 180 ITR 319 and of the Rajasthan High Court in Shri Ram Singh (2008) 306 ITR 343 would not be affected by the amendment brought in by the insertion of Explanation 3 to section 147.

Explanation 3 lifts the embargo, which was inserted by judicial interpretation, on the making of an assessment of reassessment on grounds other than those on the basis of which a notice was issued under Section 148. Setting out the reasons, for the belief that income had escaped assessment. Those judicial decisions had held that when the assessment was sought to be reopened on the ground that income had escaped assessment on a certain issue, the Assessing Officer could not make an assessment or reassessment on another issue which came to his notice during the proceedings. This interpretation will no longer hold the field after the insertion of Explanation 3 by the Finance (No.2) Act of 2009. However, Explanation 3 does not and cannot over ride the necessity of fulfilling the conditions set out in the substantive part of section 147. An Explanation to a statutory provision is intended to explain its contents and cannot be construed to override it or render the substance and core nugatory. S.147 has this effect that the Assessing Officer has to assess or reassess the income ("such income") which escaped assessment and which was the basis of the formation of belief and if he does so, he can also assess or reassess any other income which has escaped assessment and which comes to his notice during the course of the proceedings. ***However, if after issuing a notice under Section 148, he accepted the contention of the assessee and holds that the income which he has initially formed a reason to believe had escaped assessment, has as a matter of fact not escaped assessment, it is not open to him independently to assess some other income. If he intends to do so, a fresh notice under Section 148 would be necessary, the legality of which would be tested in the event of a challenge by the assessee." (emphasis ours)***

108. Applying the above ratio, the Hon'ble Delhi High Court in the case of Ranbaxy India (supra) allowed the Appellant's appeal. In this case reopening was made for making the addition towards club fees, gifts and presents and in the final assessment the AO reworked deduction under Section 80HHC and 80 I only. In our opinion both these cases are not applicable to the case on hand. As already stated

the assessment was reopened to assess the royalty income accruing to assessee in India, in respect of patents relating to CDMA technology. The income assessed in the reassessment proceedings was also the same. Thus we reject the contentions of the Ld.Counsel for the Appellant.

109. The Ld.Counsel for the Appellant contended that the first CDMA mobile services were launched by Reliance Infocomm on 15.1.2003 and therefore for the Assessment Year 2000-2001 and 2001-02 the notice issued under Section 148 is invalid. As already stated, the income sought to be taxed by the AO is the income of the Appellant from the patents with regard to CDMA technology owned by it. From the press release dt. 23rd March, 1999, the AO got information that the Appellant has several patents registered in its favour with regard to CDMA technology. On the foundation of this and on the basis of series of developments the information which was gathered from news paper reports and other sources, the AO had a reason to believe that the Appellant had income taxable in India in respect of these patents. Once the AO had formed a prima facie belief on relevant material, any facts which subsequently surface, in the course of assessment proceedings, which contradict the basis on which belief was formed, cannot vitiate the reassessment proceedings.

110. The next contention of the Ld.Sr.Counsel is that for the A.Y 2000-2001 reasons for reopening are furnished after the expiry of six years from the end of the Assessment Year and hence the reassessment proceedings are barred by limitation. The provisions of the Act permit reopening of assessment within a period of six years from the end of the A.Y. Thus the AO can record reasons and issue a notice under S.148 on or before 31st march, 2007. In the case before us, notice under S.148 of the Act was issued on 29th March, 2007. It is not stipulated under the Act that the AO has to furnish reasons for reopening along with the

notice under S.148 of the Act. In the case of DKN Drive Shafts India Ltd. 259 ITR 19 (SC), the Hon'ble Apex Court held that, the proper course of action when a notice is issued under S.148 is that, the assessee is required to file the return of income and if he desires can seek a copy of the reasons recorded and then the AO has to furnish the same within a reasonable period. Thus the duty of the AO to furnish the reasons is triggered only on the assessee filing the return of income in response to a notice under S.148 of the Act. If we accept the argument of the Ld.Sr.Counsel, then this would defeat the provisions of the Act. We draw strength from the decision of the Jurisdictional High Court in the case of AG Holdings P.Ltd. vs ITO (2012) 72 DTR (Delhi) 346. Hence this argument is not accepted.

111. The next contention of the Ld.Sr.Counsel with specific reference to 2000-2001 and 2001-2002 is that the notice under Section 148 was issued without the sanction of the appropriate authority. The pith and substance of the arguments of the Ld.Sr.Counsel is that notice under Sec.148 should be issued only after the JCIT is satisfied on the reasons recorded by the AO that it is a fit case for the issue of such notice. The case of the assessee is that sanction for issue of notice under Section 148 was given by the Addl.DIT whereas the sanction ought to have been given only by the JCIT as mandated by the provisions of S.151 of the Act. Since the notice was issued without sanction of the appropriate authority, the Ld.Sr.Counsel argued that the same is liable to be quashed as void ab initio. Reliance was placed in the case of ITO vs. Mrs.Navin Khanna. In the case of Mrs.Navin Khanna approval was given by higher authority i.e. the CIT, whereas, the JCIT was the designated authority. The case on hand Ms.Sumedha Verma Ojha gave sanction for issue of notice under Section 148. She was authorized to exercise the power of an Addl.CIT. Under Section 2(28 C) of the Income Tax Act, 1961 a JCIT means a Jt.Commissioner or an Additional Commissioner of Income Tax. Thus the sanction in this case

is by an appropriate authority. One cannot go by the nomenclature or rank of the Officer but what has to be seen is whether the Officer is having current jurisdiction conferred by the Board.

112. We draw strength from the decision of the Hon'ble Gauhati High Court in the case of CIT vs. Narendra Narayan Panicker 320 ITR, 436 (Gau) where it has been held as follows:-

"The CIT is an authority who is entrusted with the duty and responsibility to ensure the smooth conduct of work in his commissionerate. The head of the commissionerate is empowered and competent to make an officiating arrangement by vesting certain powers in an officer in addition to the normal powers to be exercised by such an officer in times of necessity and public policy.

The CIT initiated suo motu proceedings under Section 263 of the Income Tax Act, 1961 in respect of the assessee's assessments. During the pendency of the proceedings, the assessee preferred appeals against the assessment orders passed by the Assessing Officer which were closed as having become infructuous. On appeals preferred by the assessees against the orders passed by the CIT under Section 263 of the Income Tax Act, 1961 as well as the appeals filed against the orders holding the assessment orders as infructuous, the Tribunal held that under Section 158 BC of the Income Tax Act, 1961, the assessments in block cases were to be finalized by an officer not below the rank of an ACIT and the initial orders of assessments under appeals having been passed by the incumbent while holding the post of an ITO were null and void. On appeals:
Held, allowing the appeals, that the CIT had made the officiating arrangement in 1999 by vesting the powers of the ACIT in the Assessing Officer. The AO was regularly promoted to the post of the ACIT in 2001 and had exercised the powers of the ACIT for over a period of two years. Therefore, the Assessing Officer was competent in law to make the initial block assessments and the orders of the Tribunal overlooking the materials available on record were not sustainable. (The matters were remanded to the Tribunal for fresh disposal)."

Hence we are unable to accept this argument of the Ld.Counsel for the Appellant.

113. Yet another contention of the Ld.Sr.Counsel was that the sanction was issued by the Additional Director of Income Tax is mechanical without proper application of mind.

Reliance was placed on the following judgements:-

a) Chugmal Rajpal vs SP Chaliah (Supra)

b) Central India Electrical Supply Company Ltd. vs. ITO (Supra)

c) CIT vs. Mesco Laboratories Ltd.(Supra).

114. On a perusal of these case laws, we find that in the case of Chugmal Rajpal (supra) the AO did not mention in the report seeking sanction the material available before him on the basis of which he had reason to believe that income has escaped assessment. He further specifically mentioned therein that reassessment proceedings were initiated to conduct further investigation. On these facts, it was held that the authorized Officer could not have given sanction for issue of notice under Section 148 on the basis of such incomplete and insufficient reasons.

115. In the case of the Central India Electric Supply Company Ltd. vs. ITO, 333 ITR 237 (supra) the facts as noticed by the Hon'ble High Court was as under:-

"The assessee company was engaged in the generation and supply of electricity from its units at Bilaspur and Katni. These units were acquired by the Government of Madhya Pradesh in the year 1964 when the appellant's license expired and not renewed. The compensation for compulsory acquisition of both units was fixed at Rs.5,85,000/- and paid to the assessee in the year 1964 itself. The assessee filed its return on October 7, 1965, claiming a loss of Rs.50,572/- and thereafter revised return on December 16, 1867 declaring a loss of Rs.1,07,183 on account of retrenchment. The assessment was completed at the behest of the assessee at a total loss of Rs.56,611/-on January 13, 1969, for the Assessment Year 1965-66 which was not allowed to be carried forward due to closure of business. It is not disputed that the assessee company also delivered possession to the M.P. Electricity Board in the year 1964 itself.

The Hon'ble Delhi High Court held allowing the appeal, (i) that reasons are the link between the material placed on record and the conclusion reached by an authority in respect of an issue, since they help in discerning the manner in which the conclusion is reached by the concerned authority. ***It was a case where literally a mere stamp was affixed and was signed by an Under Secretary underneath a stamped "yes" against the column which queried as to whether***

the approval of the Board had been taken. Rubber stamping of underlying material suggested that the decision was taken in a mechanical manner. Thus, a proper application of mind had not taken place."

116. In the case on hand, the Addl.DIT's findings are typed and the signature is made below this. Just because the findings of the Addl.DIT are typed, it cannot be concluded that these are not the thought process of the Addl.DIT. Hence these case laws are not applicable to the facts of the case.

117. Coming to the decision in the case of Mesco Labs (supra), we find that the assessment for the A.Y. 1995-96 was reopened for the reasons that the assessee moved the Settlement Commission for the A.Y.s 1989-90 to 1994-95. The reopening was quashed for the reason that there was no nexus between the reasons recorded and the belief formed in as much as there was no such application before the Settlement Commission for the Assessment Year 1995-96. No such facts exist in this case. In our opinion, we do not find any material, to agree with the submissions of the Ld. Sr.Counsel that the sanction in this case has been accorded by the Additional Director of Income tax without application of mind.

118. In view of the detailed reasons cited above, we uphold the reopening of assessments for all the AYs under appeal. Accordingly, the notice issued under S.148 of the Act is held to be valid.

Enhancement of income by the C.I.T(A):-

119. On the issue of the enhancement of income, we are unable to agree with the contention of Mr. Dastur that the CIT (A) cannot enhance the income on the facts and circumstances of this case. The Hon'ble Supreme Court in the case of Jute Corporation (187 ITR 688 at page 693) and in CIT vs. Kanpur Syndicate (53 ITR 225 at page 229) held that the power of the Appellate Assistant Commissioner is coterminous with that of the Income –tax Officer. The first appellate authority can do what the AO can do and also direct him to do what he has failed to do.

120. In the case on hand, the enhancement is emanating from the same source that is royalty income from licensing of CDMA patents for manufacture of CDMA products. Hence, in our view handsets and equipments cannot be treated as two different sources of income.

121. The Hon'ble Delhi High Court in the case of Gurinder Mohan Singh Nindrajog vs. CIT (348 ITR 0170) after considering the judgements of the Hon'ble Supreme Court in CIT v. Shapoorji Pallonji Mistry, CIT v. Rai Bahadur Hardutroy Mohilal Chamaria, CIT v. Nirbheram Daluram [224 (Supra) and the full bench decision of the Delhi High Court in the case CIT vs Sardari lal & Co (251 ITR 864 (FB)), CIT v. Union Tyres (Supra) held as under:

> ***"22.*** *We do not agree with this submission. Obviously, when this matter/item is considered but addition on that account is not made in the assessment order, it would clearly follow that the Assessing Officer had "determined" the same in the course of assessment by deciding not to make any addition.*
>
> ***23.*** *In the case of Shapoorji Pallonji Mistry v. CIT [1958] 34 ITR 342 (Bom.) (which has been affirmed by the Supreme Court), the Bombay High Court clarified that "source" of income would not mean source in the sense of head of income as used in the Income-Tax Act but would mean a specific source from which a particular income spank or arose. It was clarified that:-*
>
> *".......If a particular source or item of income had been considered by the Income-tax Officer and had been subjected to the process of assessment, then even though the assessee may not have appealed against that particular source or item, one once the appeal was before the Appellate Assistant Commissioner his power extended not merely to the subject-matter of the appeal, but to the whole subject-*

matter of assessment. What gave the power to the Appellate Assistant Commissioner was the fact that a particular item or source had been subjected to the process of assessment. Now, the process of assessment would include, not only the subjecting of an item or source to tax, but equally holding that the particular source or item was not subjected to tax."

We are of the opinion that the aforesaid item or source had been subjected to the process of assessment. Merely because the ultimate order passed by the Assessing Officer is silent about this item and there is no discussion thereupon would not mean that the Assessing officer had not considered the same. It is trite law that the Assessing Officer is not supposed to frame the assessment order like a judgment of the Court and would discuss each and every item and aspects specifically. It is clear from the record that import and impact of every document seized including page No. 21 was considered by the Assessing Officer; he went into the matter by issuing a questionnaire; calling upon the assessee to give reply and reply/clarification was received from the assessee. It is thereafter only that addition on the basis of page No. 21 was not made in respect of the properties in question.

***24.** We thus answer question No. 2 in favour of the Revenue and against the assessee holding that on the facts of this case, the CIT (A) rightly exercised his powers under Section 251(1) of the Act."*

122. In the present case, the fact that the Appellant also earns royalty income from network equipment was before the AO. This fact was also discussed by the AO in her assessment order. The AO enquired into the matter by issuing a questionnaire, calling upon the Appellant to give reply/information with respect to the royalty income from network equipment. Thereafter, the AO concluded the assessment by taxing only the royalty income from handsets.

123. The AO while taxing the royalty income earned by the Appellant

under the provisions of the Act held as under:

"In this case, we are concerned only with the royalty payable by the OEMs to Qualcomm based on the ***net work equipment/hand sets*** *sold by them to parties in India. It is not our case to tax the royalty arising out of the global contract between OEMs and Qualcomm but only so much of the royalty which pertains to sales made in India. The source of income of the OEMs is sales made to parties in India based on which royalties are paid to Qualcomm. Thus in terms of S.9(1)(vi)(c) of the Income Tax Act, 1961 royalties payable to Qualcomm are deemed to accrue and arise in India."*

124. A reading of the assessment order clearly brings out the fact that this source was always part of the assessment proceedings .However while quantifying the royalty income, the AO did not bring the royalty income arising from network equipment to tax. Hence the same would not constitute a new source of income and therefore the income can be enhanced by the CIT(A) u/s.251 of the Act.

125. Even assuming for a moment that the argument of Mr. Dastur that each agreement would constitute a new source of income and therefore, the royalty earned from OEMs on network equipments would tantamount to new source is accepted. It is pertinent to note that for the AYs under appeal, there is no separate network equipment license agreement entered by Qualcomm with the OEMs. All the 16 license agreements filed by the Appellant relates to either subscriber units (ie handsets) or Subscriber units and infrastructure network equipment. Hence, in our view, the enhancement of royalty income from network equipment by the CIT(A) emanates from the same source but from a different product manufactured under the same license agreement. Therefore, this contention is rejected.

126. In view of the above discussions, we hold that the CIT(A) has rightly exercised his jurisdiction under section 251 to enhance income

of the Appellant.

127. On Merits :- We now proceed to dispose of the merits:

Whether the 'royalty' income earned by Qualcomm from OEMs is taxable under S.9(1)(vi)(c) of the Income Tax Act 1961:

The issue in question is whether the said "royalty" is taxable under Sec.9(1)(vi)(c) of the Act. For ready reference S.9(1)(vi) of the Act is extracted below.

S.9(1)(vi):

"(vi) income by way of royalty payable by –

(a) The Government; or

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

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

128. Section 9(1)(vi)(c) is a deeming provision and has to be construed strictly. A plain reading of this section shows that any income by way of royalty is taxable in India**, if such royalty is payable by a non-resident in respect of any right, property or information used** or **services utilized**

(a) for the purposes of business, or Profession carried on by such person outside India or

(b) for the purpose of making or earning any income from any source outside India.

129. When an assessee claims that it is covered by exceptions to clause (b) to sub clause (vi) to S.9(1), the burden lies on the tax payer to prove that it falls within those exemption provisions. In comparison, when it is claimed by revenue that the income falls under Clause (c) to Sub Clause (vi) of S.9(1) the burden is on the Revenue to prove the same.

130. Thus to tax the royalty income earned by Qualcomm from OEM's located outside India, under the deeming provision of S. 9(1)(vi) (c) of the Act, the burden is on the Revenue to prove that the OEMs carry on business in India and that they have used Qualcomm's patents for the purposes of, such business in India; or that they have used Qualcomm's patents for the purpose of, making or earning income from a source in India. Thus we agree with the arguments of the Ld.Counsel for the Appellant that the burden of proof when it falls within the exceptions to S. 9(1)(vi)(b) is on the assessee and on the contrary the burden is on the Revenue when they chose to invoke S.9(1)(vi)(c). This proposition was also accepted by the Revenue.

131. The Ld. Special Counsel for the revenue, submitted that the language employed in S.9(1)(vi) (c) is "used for the purpose of" in contradistinguished from "utilized in the business" used in S.9(1)(vii)(c). Relying on the language employed in both the sections, he submitted that the situs of the use intellectual property is not material. It may be used anywhere (in or outside India). He submitted that what is material is the purpose of the use of the property, whether it is used for the purpose of business carried on in India or for the purpose of earning income from a source in India, then S.9(1)(vi)(c) of the Act is attracted.

132. In our view what is important is not whether right to property is used "in" or "for the purpose of" a business, but to determine whether such business is "carried on by such person in India".

133. The other issue is whether the Indian carriers constitute a source of income for the OEMs in India and whether licensing the patented intellectual property to the OEMs, has resulted in making available the patented IP's to the Indian telecom operators for commercially exploiting the CDMA technology in India. In our view neither the AO nor the CIT(A)'s have demonstrated, that for the years under appeal, the OEMs have used Qualcomm's right/ information/ property (ie patents) for the purpose of carrying on business in India or the for the purpose of making or earning income from a source in India.

134. The ld A.O. as well as the Ld. C.I.T.(A) have based there findings only on the 16 licensing agreements between OEM's and the assessee. The Ld. Spl. Counsel. Mr. G.C. Srivastava for the first time before this tribunal filed the following agreements as additional evidence to substantiate the case of Revenue to tax that the royalty income earned by Qualcomm under S. 9(1)(vi) (c) of the Act:-

i. Equipment purchase agreement between the Tata Tele Services and Motorola Inc. **dt. 8.12.2007**;
ii. Equipment purchased agreement between the Tata Tele Services and ZTE Corporation **dt. 19.2.2007**.

135. We agree with Mr. Dastur, that cognizance cannot be taken of these agreements as they relate to the F.Y.2006-07 relevant to AY 2007-08 and AY 2007-08 and have no relevance to the case on hand. The ld Spl council sought to make out a new case with the aid of these additional agreements.

136. Nevertheless we consider Mr. G.C. Srivastava submission that these agreements of Tata Tele Services can be relied upon for the limited purpose of understanding the business model of the OEMs in relation to sale of CDMA products to India. The plea that similar agreements would have been entered into by the India Telecom operators with the OEMs for purchase of network equipment, cannot be

accepted as it would be a conjecture and surmise.

137. The AO as well as the CIT(A)'s order are based on 16 license agreements entered into by Qualcomm with OEMs. Redacted copies of the license agreement were filed before us. The Appellant during the course of the hearing filed an affidavit disclosing the names of the OEMs along with the dates of execution of the license agreements. Admittedly these agreements were entered into on 13th August, 1993 and certain other dates. Majority of the agreements were executed prior to year 2000 ie. before CDMA services were launched in India. We are basically concerned with these agreements only.

For ready reference we extract relevant clauses from the following agreements.

i. Subscriber Unit License agreement by and between Qualcomm and the OEM;
ii. Subscriber Unit and Infrastructure Equipment License Agreement between QUALCOMM and the OEM;

   We also extract the clauses relied upon by the revenue in the fallowing agreements to consider the without prejudice arguments of the assessee.

iii. Equipment purchase agreement between the Tata Tele Services and Motorola Inc. dt. 8.12.2007;
iv. Equipment purchased agreement between the Tata Tele Services and ZTE Corporation dt. 19.2.2007.

138. In addition, certain clauses from the following two agreements are also extracted as reliance was placed on the same.

i. MOU dt. 26.03.2001 by and between Reliance and Qualcomm (Revenue paper book dt.29.06.2012)
ii. Technical services agreement between Qualcomm and Reliance dt.16.10.2001.

Subscriber Unit License Agreement between Qualcomm and the OEMs for manufacture of CDMA handsets

[Agreement reference page no 226 to Page no 263 of the Appellant's paper book]

Extract of relevant clauses from the Agreement in relation to grant of license.

Clause 5.1 Grant of license

"Subject to the terms and conditions of this Agreement, including but not limited to timely payment of the royalties set forth herein, QUALCOMM hereby **grants** to LICENSEE a personal**, nontransferable, worldwide and non-exclusive license under** ***QUALCOMM's Intellectual Property*** solely for Wireless Applications to **(a) make (**and have made), import, use and sell, lease or otherwise dispose of ***Subscriber Units,*** and **(b) to make** (and have made) ***Components*** (provided such Components have been exclusively designed by LICENSEE and which design is owned and used exclusively by LICENSEE) and import, use and sell, lease and otherwise dispose of Components but only if such Components are included as part of and within Subscriber Units Sold by LICENSEE (or as replacement parts for Subscriber Units previously sold by LICENSEE). No other, further or different license is hereby granted or implied.

QUALCOMM's Intellectual Property (page no 236 of the paper book)

"QUALCOMM's Intellectual Property" means QUALCOMM's Technically Necessary IPR and QUALCOMM's Included Commercially Necessary IPR and Company 3 Patents; provided that, notwithstanding the foregoing, the term "QUALCOMM's Intellectual Property" shall not include any intellectual property, including but not limited to patents, owned by SnapTrack,Inc.

Subscriber Unit (Page no 238 of the paperbook):

"Subscriber Unit" means a Complete CDMA Telephone, a Cordless Base Station and/or a CDMA Subscriber Knockdown Kit and "Subscriber Units" means a complete CDMA Telephones, a Cordless Base Stations and CDMA Subscriber Knockdown Kits.

Components (Page no 233 of the paper book):

"**Components" means application specific integrated circuits** ("ASIC's"), **electronic devices**, **integrated circuits, including firmware thereon and accompanying software,** and/ or families of devices for use in wireless subscriber equipment.

CDMA ASIC (Page no 231):

"CDMA ASIC" means QUALCOMM's mobile station modem (MSM) CDMA application specific integrated circuit, and any revision, generation, modifications or integration to or of the MSM, purchased by LICENSEE from QUALCOMM.

ii) Subscriber Unit and Infrastructure Equipment License Agreement between QUALCOMM and Licensee (i.e. OEM).[

[Agreement reference - Page no 264 to Page no 316 of the Appellant's paper book]

Extract of relevant clauses from the Agreement in relation to grant of license

Clause 4.1 - Grant of license from QUALCOMM (Page no 279):

" Subject to the terms and conditions of this Agreement, including but not limited to timely payment of the license fees and royalties set forth herein, on the Effective Date, "**QUALCOMM hereby grants** to Licensee, solely for Wireless Applications, a personal, non transferable, worldwide and nonexclusive license (without the right to sublicense) (1) under

QUALCOMM's Applicable Subscriber Patents to **(a) make** (and have made), import, use, sell, offer to sell, lease or otherwise dispose of ***Subscriber Units*** and ***Radiomodules*** and (b) **to make** (and have made) ***Components*** and import, use, sell, offer to sell, lease and otherwise dispose of Components but only if such Components are included as part of and Sold within Licensee Subscriber Units or Licensee Radiomodules (or as replacement parts for Subscriber Units or Radiomodules previously Sold by Licensee) and (2) under ***QUALCOMM's Applicable Infrastructure Patents*** to **(a) make** (and have made), import, use, sell, offer to sell, lease or otherwise dispose of ***Infrastructure Equipment*** and **(b) to make** (and have made) **Components** and import, use, sell, offer to sell, lease and otherwise dispose of Components but only if such Components are included as part of and Sold within Licensee Infrastructure Equipment (or as replacement parts for Infrastructure Equipment previously Sold by Licensee). No other, further or different license is hereby granted or implied. Notwithstanding the foregoing, Licensee, may exercise its "have made" rights above with respect to Components not designed by or for Licensee (according to specifications provided by Licensee) only to the extent that the third party benefiting from such "have made" rights does not Assert, through itself or its affiliated entities, patent infringement litigation against QUALCOMM or Licensee and QUALCOMM agrees that it will not charge royalties to any third party with respect to the sale by such third party of Components to Licensee to the extent that such third party is making such sale under Licensee "have made" rights and is not using or otherwise infringing upon any of QUALCOMM's patents not the subject of such "have made" rights."

QUALCOMM's Applicable Subscriber Patents (Page no 275):

"QUALCOMM's Applicable Subscriber Patents" means QUALCOMM's Early Patents and, only if Licensee elects under Section 4.4.6, either

QUALCOMM's Later Patents or QUALCOMM's Other Patents, as the case may be.

Subscriber Unit (Page no 278):

"Subscriber Unit" means a complete CDMA and/or Multi-Mode CDMA user terminal, including but not limited to mobile, transportable, and portable telephones, which can be used, without any additional equipment or components being attached thereto, to transmit and/or receive transmissions for Wireless Applications.

Radiomodule (Page no 277):

"**Radiomodule" means an electronics subassembly for Wireless Applications** which (i) includes, at a minimum, a printed circuit board, multiple individually packaged integrated circuits mounted on the printed circuit board, a CDMA Component, and any embedded software, and (ii) provides RF/analog and digital and baseband processing necessary to implement the functions of a CDMA Subscriber Unit such as to initiate and/or receive Wireless telecommunications transmissions; provided that a Radiomodule shall not be capable of initiating and/or receiving Wireless telecommunication transmissions without being incorporated into or attached to the product of which it is intended to be a subassembly.

Components (Page no 271):

"Components" means application specific integrated circuits (ASIC's), electronic devices, multi-chip modules, integrated circuits and/or families of devices, including firmware thereon and software associated therewith, for use in Wireless Applications.

QUALCOMM's Applicable Infrastructure Patents (Page no 275):

"QUALCOMM's Applicable Infrastructure Patents" means (i) every patent issued or to be issued to QUALCOMM in any country of the world which claims priority from a patent application filed anywhere in the world on or prior to the Effective Date and (ii) every patent issued or to be issued to QUALCOMM in any country of the world which (a) claims priority from a patent application filed anywhere in the world during the life of the applicable CDMA Wireless standard and (b) are technically necessary to use, make and/or sell Infrastructure Equipment compliant with such standard.

Infrastructure Equipment (Page no 272):

"**Infrastructure Equipment" means network equipment for use as a part of any land mobile radio-telephone system for Wireless Applications**, including but not limited to BTSs, BSCs and System Switches (and equipment and software for incorporation therein), but the term does not include, by way of example and not by way of limitation, Components, Subscriber Units, Radiomodules or any other subscriber equipment.

2. Agreement between Tata Teleservices Limited and ZTE Corporation for supply of CDMA Equipment [reference – Agreement 2 filed by the Revenue as additional evidence]

Extract of relevant clauses from the agreement on transfer of title and risk of the equipment

Clause 14.1 - Title and risk of loss (Page no 33):

"Without prejudice to TTSL's right to reject as set forth in Article 6.4 of this Agreement, the **title of all Equipment sold hereunder shall pass form the Supplier to TTSL in high seas before arrival In India** and **the risk of loss to the Hardware portion of all Equipment shall pass from Supplier to TTSL upon Provisional Acceptance.**"

3. <u>Agreement between Tata Teleservices Limited and Motorola Inc for supply of equipment [Agreement 1 filed by the Revenue]</u>

Extract of relevant clauses from the agreement in relation to transfer of title and risk of the equipment

Clause 14.1 - Title and risk of loss (Page no 14):

"Without prejudice to TTSL's right to reject as set forth in Article 6.4 of this Agreement, **the title and the risk of loss to the Hardware portion of all Equipment sold hereunder shall pass from Supplier to TTSL upon Delivery in accordance with CIP Incoterms 2000 port of shipment**."

139. Based on the above, we now proceed to answer the first question as to whether the OEMs have carried on the business in India and that they have used the Appellant's patents for the purpose of carrying on such business in India.

140. What is licensed in these 16 agreements is the use of 'intellectual property" owned and patented by QUALCOMM for the purpose of manufacture of subscriber units and infrastructure equipment. These agreements were entered much before CDMA technology was introduced in India. A perusal of these agreements does not demonstrate that these are India specific. In fact they are not specific to any particular country. The OEM's manufactured products outside India and sold them to not only service providers in India but also to number of others in other countries. The license to manufacture products by using the patented Intellectual Property of the assessee has not been used in India as the products are manufactured outside

India and when such products are sold to parties in India it cannot be said that OEM's have done business in India.

141. The Revenue heavily relied on the equipment purchase agreement entered by Tata with Motorola and ZTE to prove that the OEMs carry on business in India and that they have used the Qualcomm patents for the purpose of carrying on such business in India. His contention that the OEMs carry on business in India is mainly based on the following:

a. The word "business" defined under the Act is of wide import and encompasses a host of activities. He contended that if manufacturing is done in one jurisdiction and sale in the other, it cannot be said that business is done in one and not in the other jurisdiction.
b. OEMs carry out installation of equipment in India for the Indian Telecom operators;
c. The entire supply of handsets and equipments though manufactured outside India are India specific and not off the shelf products which can be sold to anyone in any location. The technology is used by the OEMs to manufacture India specific supplies. Hence there is a certain degree of use of the property for the purpose of carrying on business in India;
d. Placing reliance on the decision of the Hon'ble AP High Court in the case of Syed Asiffudin and others (Supra), he submitted that the handsets are specifically designed and programmed for Reliance.
e. Relying on various clauses in the equipment purchase agreement entered by Tata with ZTE and Motorola, he contended that despite the declaration in clause 14.1 to the agreements, the agreement has to be read as a whole to ascertain the intent of the parties. He submitted that if the agreement is read as a whole, the intent of the parties is amply clear that the title of the

equipment passes in India at the site where the deliveries are made or in a worst scenario at the airport/ seaports in India.

142. We are unable to agree with the contention of the Ld. Spl. Counsel for the following reasons:

a. Accepting such a proposition would lead to a situation where every purchase and sale of goods made by any party in India with any party in other countries would be considered as if those parties are doing business in India. A sale to India without any operations being carried out in India would amount to business with India and not business in India. For the business to be carried out in India there should be some activity carried out in India. Thus the argument that if manufacturing is done in one jurisdiction and sales in the other jurisdiction, then there is business in another jurisdiction is devoid of merit. Further on the facts of the case, for the reasons given later in this order, even the sale cannot be said to have been done in India.
b. The contention of the Revenue that OEMs (ie Motorola and ZTE) carries out installation work for Tata and hence there is some business activity being carried by the OEM in India is factually incorrect and contrary to the clauses in the equipment purchase agreement which clearly states that installation of the equipment is carried out by a third party appointed by the purchaser (ie Tata) in consultation with the Supplier.

   Even presuming for a moment that the installation of the equipment is done by the OEMs in India, the Revenue has failed to demonstrate/prove that the patents licensed by Qualcomm are used by Motorola/ ZTE for carrying out such installation activities in India.
c. The next contention of the Revenue that the patented technology is used by the OEMs to manufacture India specific products and

that the handsets are customized and programmed to include a code assigned to a specific operator. Hence there is a certain degree of use of the property for the purpose of carrying on business in India.

143. This arguments cannot be accepted for the following reasons:-

i. During the course of hearing it is admitted that handsets in question embody two technologies (a) technology with respect to the functionality of the hand sets and (b) technology with respect to CDMA connectivity.

ii. The patents of Qualcomm are admittedly for manufacture of handsets and infrastructure equipment which are sold worldwide. There are no patents of Qualcomm which are used for customization of handset with respect to CDMA connectivity.

iii. The patents in question, on which royalty is sought to be taxed, have nothing to do with the functionality of the hand sets. Functionality of the handsets may be customer specific or operator specific or India specific but technology with respect to CDMA connectivity, is a universal technology and is not customer specific.

iv. Customisation such as locking the handset to enable operation only with a specific operator and other operators with whom reciprocal or other arrangements are available, inclusion of Hindi or other regional languages, calculator, music, ring tones, browsers and numerous other features are no way connected with patents of Qualcomm in these 16 agreements which are for manufacture of CDMA handsets and equipments. In fact in each hand set a number of patented technologies other than patents with respect to CDMA connectivity are also used. Hence the argument that patents relating to CDMA technology are customer specific, service provider specific or country specific is factually incorrect. There is no customization of hand set qua the CDMA connectivity.

v. Coming to the argument that hand set are programmed to a particular net work service provider and hence it is India specific is not tenable. As rightly pointed out by Mr. Dastur locking of a handset to network is a requirement of the network service provider depending upon its business plans and exigencies and does not affect the ability of the handset to operate on any CDMA telecom network, which is evident from the fact that once the network lock is broken the handset can operate on any network. This fact is also supported by the decision of the AP High court in the case of Asifuddin and others (Supra).Hence it cannot be concluded that CDMA technology was service provider specific.

Network locks are requested by network service providers to keep the subscribers with them for an extended period. There is no dispute that the locked handset is capable of working anywhere in the world. This is evident from the scheme on international roaming using CDMA handsets downloaded from the website of Reliance Communications. Further there is also no dispute that all telecom operators permit international roaming. Though handsets that may have been purchased under certain terms are locked with a particular network service provider, the handset is capable of working in any country of the world with which that particular network service provider has commercial understanding. This clearly demonstrates that the CDMA connectivity of the phone is in no manner connected with the locking of the phone with a network service provider. Hence, in our view the decision of the A.P High court in the case Syed Asiffudin and others (Supra) is not relevant .

144. Even otherwise, we are unable to understand as to how sale of India specific handsets can be a basis of coming to the conclusion that the OEMs are carrying on business in India. There are numerous patented IPR's belonging to not only Qualcomm but also to a number of other parties, as well as the OEM's themselves and all these patented IPR's are used for manufacturing certain products which are sold to parties in India. The purchaser may have the option to chose the technologies available or even specify certain additional requirements. Sale of such customised products by no stretch of imagination can be considered as business being done in India. A buyer of a product may specify his requirements and when the product is manufactured to such specification it does not tantamount to carrying on business in India. It does not cease to be a sale of a product. No such allegation was made with respect to network equipment being India specific has been made. Technology for manufacturing products is different from products which are manufactured from the use of the technology for which Qualcomm has patents. The role of Qualcomm ends when it licensed its patents on IPR's pertaining to CDMA products for manufacture and when it collects royalty from OEM's on these products, when they are shipped out of the country of manufacture. There is no activity for Qualcomm after this sale and shipment under these 16 agreements. For the OEM's it is a sale of a product which is the end of the activity. The revenues are generated on sale only. There are no revenues either to the OEM's or to

Qualcomm after the sale of the products. The sale is of a chattel as a chattel. The product is a combination of Hardware, integrated circuits, designs, multiple application software, CDMA components, chipsets with embedded software etc. The revenues attempt to break down the sale into various components is not supported by the terms of the agreements and the facts of this case. It cannot be said that every item other than software was sold and that software which is embedded has been separately licensed. It is not the case of the revenue that the OEM's have income in India from these sales or that they have income from licensing of software in these products which is assessable to tax. There is no finding that the OEM's have carried on business in India much less that a part of the sale consideration is attributable to any sale or licensing of software carried out in India. When OEM's itself are not brought to tax, to hold that Qualcomm is taxable in not correct. This is not a case of the OEM's being not taxed due to a lapse of the officer concerned or being let off by the revenue by mistake or oversight. It is not brought to our notice that the OEM's have been brought to tax in any of the subsequent years. Thus the argument that two wrongs do not make a right does not apply to the situation on hand.

145. Regarding passing of the title in the equipment, there is no evidence with the revenue, for any of the assessment years before us that the title passed in India and that certain further activity was done by the OEM's in India after the sale. As already stated the burden is on revenue to prove that business is carried on in India by the OEM's. Arguments have been made without the support of any document or evidence pertaining to these years. The revenue contended that the title in the goods passes to Tata at the port of destination i.e. India based on agreements of 2007. Though these documents have no relevance for the years under consideration, on

a perusal of these 2007 agreements we find that there is no clause in both the agreements to support the contentions of the Revenue that the title in the goods passes at the "port of destination".

Clause 14.1 of the agreement between Tata and ZTE read as under. " ***Without prejudice to TTSL's right to reject as set forth in Article 6.4 of this agreement , the title of all equipment sold hereunder shall pass from the supplier to the TTSL in high seas before arrival in India and the risk to loss to the Hardware portion of all equipment shall pass from supplier to TTSL upon provisional acceptance".***

146. From the above clause, it is evident that title of the equipment has passed to Tata in high seas before arrival in India. The fact that the risk to the equipment shall pass on provisional acceptance is not relevant for determining where the title in the equipment passes, which in this case is clearly outside India as per the specific understanding of the parties. The plea to infer otherwise is to be rejected as it is against the express intent of the parties.

147. In our view this issue stands covered by the decision of the Hon'ble Delhi High Court in the case of Ericsson AB (Supra) . Ericsson and Nokia's was the case of the OEM's who are into supply of GSM equipment to Indian telecom operators for use in fixed/mobile GSM telecommunication. The equipment was manufactured and supplied from overseas; installation was carried out by their respective affiliates in India. Along with hardware, perpetual license was granted by all the three companies for use of software . Software was inseparable and integral part of hardware, without which hardware could not function. Significant restrictions were placed on the Indian telecom operators on use of software. (The Indian telecom operators

could not onward sell the software independently without sale of the hardware, etc). there were distinct agreements with an overall agreement for supply and installation of GSM Systems, through split into separate agreements , one for supply and the other for installation which was left to the subsidiaries. The facts of this case are similar to the facts of the case of Ericsson AB.

The Hon'ble Delhi High Court held as under:

Para 41. "We find that the terms of contract make it clear that acceptance test is not a material event for passing of the title and risk in the equipment supplied. It is because of the reason that even if such test found out that the system did not conform to the contractive parameters, as per art. 21.1 of the supply contract, the only consequence would be that the cellular operator would be entitled to call upon the assessee to cure the defect by repairing or replacing the defective part. If there was delay caused due to the acceptance test not being complied with, art. 19 of the supply contract provided for damages. Thus, the taxable event took place outside India with the passing of the property from seller to buyer and acceptance test was not determinative of this factor. The position might have been different if the buyer had the right to reject the equipment on the failure of the acceptance test carried out in India. In Skoda Export (supra), the Andhra Pradesh High Court dealt with this issue in the following manner

"We may also mention that learned standing counsel for the Department challenged the finding of the Tribunal that the sale of machinery was completed outside India. According to him, the sale was completed only in India, in as much as the assessee was entitled to and satisfy itself about the quality and standard of the machinery supplied. We do not see any substance in this contention. The various clauses in the agreement referred to above make it clear that the sale of machinery was F.O.B., European

port, and the time of fulfillment of delivery was prescribed as the date of the bills of lading. The payment was also to be made outside India. The agreement further makes it clear that the insurance risk during the course of the journey was that of the assessee and it paid for the same: even the freight charges from the European port to the place of destination were paid by the assessee. Thus, judged from any angle, the sale of machinery, which are 'goods' within the meaning of the Sale of Goods Act, was completely outside India. A mere provision in the agreement that the assessee is entitled to satisfy itself about the quality and standard of the machinery in India cannot, in the circumstances of this case, detract from the fundamental position that the sale took place outside India. In such a situation, one has to apply the test of predominance and decide where the sale took place ? On a combined reading of the clauses of the agreement, we have no doubt that the sale of machinery did take place outside India."

149. We would discuss the propositions laid down in this case in greater detail later in this order

150. Coming to Clause 14.1 of the agreement between Tata and Motorola it read as under:

Clause 14.1 - Title and risk of loss (Page no 14):

"***Without prejudice to TTSL's right to reject as set forth in Article 6.4 of this Agreement, the title and the risk of loss to the Hardware portion of all Equipment sold hereunder shall pass from Supplier to TTSL upon Delivery in accordance with CIP Incoterms 2000 port of shipment***."

Delivery (Page no 44) is defined to mean *-"Delivery" or*

"Delivered" or "Deliveries" shall mean ***the physical delivery by the Supplier,*** *of the Equipment ordered by TTSL on CIP terms (as defined above),* ***at airports/ seaports mutually designated by the Parties.***

CIP (Page no 43): "*CIP" means "Cost, Insurance Paid" to airport/ seaport in India as defined in Incoterms 2000. It means that supplier shall pay and bear the cost of packing/loading/unloading, transportation, carriage , freight, unloading charges, insurance and any other cost or any nature at any time prior to Delivery.*

151. It is the submission of the Revenue that entire risk is borne by Motorola and the carriage, insurance is paid till the delivery at seaports / airports in India. Hence ,the sale concludes in India. The reference by the Appellant to CIP Incoterms 2000 does not alter the situation because the expression by its very definition in the agreement means obligation to bear carriage and insurance charges up to airports/ seaports in India.

152. At this stage, we find it relevant to extracts the definition of CIP from Incoterms 2000.

CIP*-" Carriage and Insurance Paid to …" means that the seller delivers the goods to the* ***carrier*** *nominated by him but the seller must in addition pay the cost of carriage necessary to bring the goods to the named destination****. This means that the buyer bears all risks and any additional costs occurring after the goods have been so delivered. However, in CIP the seller also has to procure insurance against the buyer's risk of loss or***

damage to the goods during the carriage.

"**Carrier"** *means any person who, in a contract of carriage, undertakes to perform or to procure the performance of transport, by rail, road, air, sea, inland waterway or by a combination of such modes.*

*"**Delivery"** -The seller must deliver the goods to the carrier contracted in accordance with the contract of carriage or, if there are subsequent carriers to the first carrier, for transport to the agreed point at the named place on the date or within the agreed period.*

153. On conjoint reading of the agreement with the definitions from Incoterms 2000, it is very clear that the title and risk of loss passes to the buyer, on the physical delivery of the equipment by the OEM to the carrier, at the port of shipment. The term "port of shipment" is definitely not a port in India. CIP Inco terms 2000 provides that the delivery from the seller to the buyer concludes at the port of shipment upon delivery to the carrier. The obligation on Motorola to bear the cost of delivery up to the port of destination (ie India) is irrelevant to decide where the title passes. This is merely a contractual term between the parties to clarify who is to bear the cost of transshipment, insurance etc. The argument that the contract has to be read as whole to ascertain the intention of the parties as to when the title and the risk passed in goods is devoid of merit in the present case as the agreement itself are very specific as to when the title and the risk where to pass.

153 A. As already stated under identical facts in the case of Ericsson A.B., the Delhi Special Bench in Motorola Inc vs. DCIT [95 ITD 269] held that the title of the GSM equipment passed outside India. The

order of the Delhi Special Bench decision in the case of Ericsson was latter affirmed by the Delhi High Court in DIT vs. Ericsson A.B.(Supra). Regarding the applicability of Ericsson and Nokia ruling, we are unable to appreciate the argument that the propositions in these judgments would not be applicable to the facts of the present case. To tax the royalty income earned by Qualcomm, the Revenue must show that the OEMs have used Qualcomm's patents for a business carried on in India or for making or earning income from a source in India, which leads to the taxability of the OEMs. Therefore, the taxability of Qualcomm directly depends on the OEMs taxability in India.

154. Ericsson was a company incorporated in Sweden. It was engaged in the business of supply of hardware and software. It entered into an agreement with 10 Cellular operators in India for supply of telecommunication systems. These were installed and commissioned in India by two sister concerns of Ericsson, one being a branch of Non-Resident group company, and the other being Resident company of the same group. There was an overall agreement with the operators for supply and installation of GSM systems. The supply of equipment was made on continuous basis. The supply had to satisfy the acceptance test. The issue before the Court was the taxability of such supplies in respect of which title and risk in the goods passed to the customers before the goods were delivered in India. The Assessing Officer held that the assessee company had a business connection under domestic law and that it had a Permanent Establishment under the Double Taxation Avoidance Agreement between India and Sweden. Business

profits were estimated. Entire consideration for supply of software was brought to tax. Income from hardware was estimated at 26% of the billed supplies of hardware. The Hon'ble High Court held that:-

a) The title in the goods passed to the buyer before the goods reached the Indian shores and hence no profit could accrue to the Non-Resident. Sec.19 of the Sale of the Goods Act would have application.

b) The fact that the contract itself is signed in India or that the freight charges are borne by the importer would make no difference to the inference as was pointed out by the Hon'ble A.P. High Court in the case of Addl.CIT vs. Skoda Exports.

c) The fact that the insurance risk was with the supplier before landing does not alter the situation.

d) Acceptance test can not also lead to a different conclusion as it was meant for ensuring that the supply conforms to the contract para meters.

e) The right to get back the goods after landing, if the importer does not take delivery for whatever reason, could also make no difference since the title has passed to the buyer before landing.

f) Since the installation was also not undertaken by the assessee company, no income therefrom can be brought to tax.

g) The issue whether the assessee had a Permanent Establishment in India during the year is academic in the light of the fact that the assessee has no business connection.

h) That since software is loaded on the hardware in terms of contract, it did not have any independent existence, so as to justify the inference that there has been supply of software.

i) The decision of the Hon'ble Supreme Court in the case of Tata Consultancy Services vs. State of A.P. making a distinction between assignment of "copyright right" and sale of "copy righted product" could not be disregarded.

j) Computer programmes are goods and merely because the software was unloaded from dumb C.D. from the computer, usable only when it is activated, it does not cease to be goods.

k) The payment to the assessee cannot be split up as between supply and royalty/technical fees.

l) There is no assignment of any copy right in the facts of the case, in the sense contemplated under Section 14 of the Copy Rights Act, 1957 as a consequence of either the overall agreement or the supply contract.

m) The difference between acquisition of a "copyright right" and a "copy righted product" was pointed out.

155. In the case of Director of Income Tax vs. Nokia Net Works O.Y. 212 Taxman 618, the relevant facts are:- The assessee, a

company incorporated under the laws of Finland, was a leading manufacturer of advanced telecommunication systems and equipment (GSM equipment), which were used in fixed and mobile phone net works. During the Previous years, the assessee maintained a LO and also had a subsidiary in India, known as, Nokia India P.Ltd.(NIPL). Its activities involved supply of hardware and software as well as installation and commissioning and also after sale services. It entered into agreements with various Indian telecom/cellular operators and entered into three contracts with them, namely, (1) overall agreement, (2) supply agreement and 3) installation agreement. The assessee supplied GSM equipment, i.e. both hardware and software manufactured in Finland to Indian telecom operators from outside India on a principal to principal basis under independent buyer/seller arrangements. Installation activities were undertaken by NIPL under its independent contracts with Indian telecom operators. The Assessing Officer held that the assessee was carrying on business in India through a PE. Both the LO and NIPL constituted a PE of the assessee in India. 70 per cent of the total equipment revenue attributed to sale of hardware. The remaining 30 per cent of the equipment revenue attributed towards supply of software and the same was taxed as royalty both under Section 9(1)(vi) and under Article 12 of DTAA between India and Finland holding that software was not sold but licensed to the Indian telecom operators.

The Hon'ble High Court held as follows:-

a) if supply agreement is taken as a stand alone agreement, the property in the goods passes to the buyer outside India and hence not taxable in India.

b) S.19 of the Sale of the Goods Act, 1930 makes it clear that property in the goods passes when the parties intend it to pass. The intention of the parties is manifest in Article 13 of the Supply Contract and provisions of Article 15 in no manner militate against such intention. There is nothing in the conduct of the parties, which would suggest that the express provision of Article 13 have been given a go by.

c) The fact that the supply contract was signed in India does not change the circumstance. Acceptance test, which was performed in India, is not a relevant circumstance for determining as to whether income has accrued in India. Acceptance test is not material even for passing of title and risk in the equipment supplied.

d) The submission of the revenue that the three agreements, namely, overall agreement, supply agreement and installation agreement, are to be taken to form an integrated business arrangement between the parties which was governed by the overall agreement proceeded on the basis that the assessee had entered into contracts with cellular operators in India for setting up of GSM system in India, the hardware and software for which were supplied by the assessee, and the installation thereof was also overseen by the assessee, who was to ensure that it was carried out to the satisfaction of Indian buyers in accordance with the terms of the contract. This was also considered by the Court and it was held that the taxable event took place outside India with the passing of the property from seller to buyer.

e) The decision might have been different if the buyer had the right to reject the equipment on failure of acceptance test.

f) The overall agreement does not result in the income accruing in India. The execution of the overall agreement is prompted by pure commercial considerations.

g) Board Instruction No. 1829 dt. 29.1.1989 must continue to govern the assessment for the relevant years, despite withdrawal of this Instruction by CBDT by virtue of Circular no. 7/2008 dt. 22.10.2009.

h) The place of negotiation, the place of signing of agreement or formal acceptance thereof or overall responsibility of the assessee are irrelevant circumstances as the transaction relates to the sale of goods and the relevant factor and determinating factor would be as to where the property in the goods passes. In the instant case the property passed on the high seas.

i) Even if it is a case of a composite contract, the supply has to be segregated from the installation and only then the question of apportionment would arise.

j) That the Amendment to S.9 vide Finance Act, 2012 wherein Explanation IV, V and VI have been added to S.9 seeking to clarify the scope of Clause (vi) of Sub-section (1) of S.9, it was held that the amendment cannot be read into the treaty.

k) The reasoning given in Ericsson AB's case would apply to Nokia Net Work O.Y.

156. In the facts of the present case, Motorola and ZTE are OEMs supplying CDMA equipment to the Tata an Indian telecom operator. Their business model and supply contract for CDMA equipment is similar to the supply contract entered by the Ericsson and Nokia for supply of GSM equipment. Hence, we are of the view that the propositions laid by the Hon'ble Delhi High Court with respect to taxability of GSM equipment with embedded software would be squarely applicable to taxability of OEM's supplying CDMA handsets and equipment..

157. Applying these principles laid down in Erricson"s case, to the facts of the case on hand we have to hold that the title in the goods in this case has passed outside India as per the clauses in the agreement when read with CIP Inco Terms 2000.

158. Even otherwise mere passing of title in goods imported into India, in India, at the port of destination cannot lead to a conclusion that the OEM's carry on business in India. It is business with India and

not business in India. The mere passing of the title with no other activity does not result in any income being attributable in India.

159. For all aforesaid reasons, we uphold the arguments of Shri. Soli Dastur, the Ld. Sr. Counsel, that OEMs have not carried on business in India, and that the OEMs cannot be said to have used Qualcomm patents for the purpose of such business in India.

160. Before we come to the second limb of argument, we agree with the argument of Mr Dastur that:

Limb i. covers cases where the right property or information has been used by the non-resident payer (OEM) itself and is so used in a business carried on by OEM's in India.

Limb ii. covers a case where the right property or information has not been used by the non-resident payer (OEM) itself in the business carried on by it, but the right property or information has been dealt with in such a manner as would result in earning or making income from a source in India. Any other interpretation to our mind would not be harmonious, as it would make limb(i) otiose.

161. Now we come to the second limb of the issue that is, whether the OEMs have used Qualcomm's patents for the purpose of making or earning income from a source in India. The Revenue once again heavily relied on the CDMA equipment purchase agreement between Tata and ZTE and Tata and Motorola to demonstrate that OEMs have used the Qualcomm's patents for the purpose of making or earning income from a source in India. On the basis of the equipment purchase agreement of 2007, it was submitted that the two agreements between Indian operators and OEMs make a distinction between sale of equipment and licensing of software embedded in the firm ware. It was submitted that Indian operators have agreed to purchase the equipment and take licenses for the software.

In addition, the Revenue has also contended that Indian operators constitute a source of income for the OEMs in India.

162. Reliance was placed on Clause 19.5 of the agreement with ZTE dt. 19th December, 2007, wherein it is recorded that all licensed material are the property of the supplier or its suppliers. Hence it is argued that the supplier of OEMs is Qualcomm which supplied the intellectual property to be used under license for manufacturing of handsets/equipment. It was further submitted that the agreement between Qualcomm and the OEMs, which was the basis for the AO to assess the income, states in the Preamble that OEMs desired to obtain licenses of Qualcomm's intellectual property to manufacture and sell subscriber units.

163. Reliance was placed on the definition of the term 'chip sets' in the agreement, as well as other definitions such as "CDMA, ASIC" and it was argued that OEMs have given license to use chip sets/ASICs purchased from Qualcomm in manufacturing the handsets/equipment. It was argued that CDMA technology belonging to Qualcomm is embedded in chip sets which are used by the OEMs and licensed to Indian customers for further used by them. He further submitted that , if this basic proposition is under dispute, relying on the decision of the Hon'ble Supreme Court he submitted that the matter needs a more critical examination by someone who understands CDMA technology.

164. Clause 5.1 of the license agreement is relied upon and it is pointed out that Qualcomm has granted worldwide licenses under Qualcomm's Intellectual Property to make, import, use, sell or lease or otherwise dispose of subscriber units and to make components and use and sell such components and hence it is only software that was licensed by Qualcomm to OEMs. It was further contended that intellectual property cannot be anything other than chip sets or some other software going to be embedded in the handsets/equipment.

165. Reliance was also placed on Finance Act, 2012 wherein Explanation IV to S.9(1)((vi) has been inserted. It was submitted that the argument that OEM sell copyrighted article or thing and the argument and that they do not give any right in the copy right, is of no consequence post this amendment as the transfer of any rights in an intellectual property includes transfer of any right to use of a computer software irrespective of the medium through which it is transferred.

166. In a nutshell the submissions of the Revenue are that Qualcomm has made available to the OEMs its patented intellectual property relating to CDMA technology in the form of chip sets/ASIC and that OEMs have inserted these chip sets into the handsets/network equipment manufactured by them and that these in turn have been licensed to Indian operators for which OEMs have received a consideration and hence they have a source of income in India.

167. These arguments of the Revenue are in our view not acceptable for the following reasons:

a. The AO assessed the royalty arising from licensing of CDMA patents by Qualcomm to OEMs. The royalty which is brought to tax by the AO does not refer to any software being provided. It is not demonstrated by the Revenue that the software is provided as part of the licensing of Qualcomm patents.
b. The software embedded in the hardware sold to Indian carriers by the OEMs belong to the OEMs. The software may have been self generated or procured by the OEM's.
c. None of the 16 agreements between Qualcomm and OEMs which form the basis for assessment in these cases, refer to licensing of software. Thus to argue that software is licensed from by Qualcomm to OEMs and which are in turn sub licensed to the Indian Carriers is contrary to the facts of the case. The software which is licensed at best relates to the functionality

aspect of the product and has nothing to do with the capability to provide CDMA connectivity.

168. The revenue for the first time before the Tribunal argued that chip sets are purchased by OEMs from Qualcomm and these chip sets which has embedded software and helps in function of the hardware. This is not the basis on which either the AO or the CIT (A) proceeded to tax in this case.

169. It is not necessary for the OEMs to purchase chip sets from Qualcomm only. The OEMs can also purchase the chip sets from a third party other than Qualcomm. In fact, the AO in his assessment order had specifically held that the income of QCT division from the sale of chip sets is not assessable and that the assessment is confined to the income received by QTL division i.e. the business segment of Qualcomm which is involved in licensing of the patents to manufacture the products. We emphasis that what is brought to tax is the royalty earned from the licensing of patents and not royalty earned on software embedded in the chip sets.

170. Regarding the request made by the revenue for remand of the case for examination by a technical expert, We do not find it necessary at this stage as there is no dispute that the software is embedded in the chipset and the same is installed in the CDMA equipment. Selling of the chipsets is a part of Appellant's QCT division activity and what is brought to tax by the AO is the income of QTL division.

171. Even otherwise, the software is embedded in the chip set and is an integral part of the chipset. Further, the chip set is embedded in the hand set/equipment and these are sold outside India. Further , the total price is fixed for the equipment as a whole and there is no separate consideration for the licensed material .

172. Clause 19 of both the agreements which deals with provisions applicable to licensed materials places significant restrictions (listed below) on Tata for use of the licensed material.

i. The object code version of the software and related documentation could only be used along with the equipment;

ii. Tata has no right to sell or sub license the licensed materials or modify, decompile or disassemble the software furnished as object code to generate the corresponding source code (part of firmware) embedded in the equipment.;

iii. Tata shall hold the licensed materials in confidence and shall not, without Motorola and ZTE's consent , disclose, provide or otherwise make available, in whole or in part , any licensed material to anyone , excepts to its employees having a need –to-know. Tata shall not copy software embodied in the firmware.

iv. Tata is obligated to return all copies of the licensed materials to Motorola and ZTE when the licensed materials are no longer needed by Tata or if Tata's license in respect thereof is cancelled or terminated by the Supplier.

v. Further, equipment has been defined under the agreement to mean and include certain CDMA equipment, including but not limited to the hardware, the software, the firmware, the licensed material, and parts thereof and related spares to be supplied by the supplier to Tata under the agreement.

vi. Further firmware and software have been defined in the agreements as under:

"Firmware" shall mean a combination of hardware and software represented by a pattern of bits contained in such hardware.

"Software" shall mean a set of man and machine readable instructions on magnetic or other appropriate media, including firmware, which is necessary for the control, operation and performance of the equipment in accordance with the requirements of the specification contained in the agreement.

173. In view of the specific clauses in the agreement, it is clear that the software does not have an independent use and is a integral part of the hardware without which the hardware cannot function. The software supplied was a copyrighted article and not a copyright right.

174. Applying the propositions laid down by the Jurisdictional High Court in the case of Ericsson/Nokia (Supra), the income from embedded software cannot be taxed in India. The software is only used with the hard ware and is not independent of the Equipment or the chipset. Further, no separate consideration is paid by Tata for licensing of the software under the Equipment purchase agreement. Consideration is paid only for the equipment which has numerous patented technologies, chip sets and software which enables the hardware to function. The sale cannot be bifurcated or broken-down into different components.

175. Under the 16 licensed agreements between Qualcomm and the OEM which is the basis for the AO as well as the CIT(A) to raise a demand, what is licensed is the right to manufacture "subscriber units". Under these agreements subscriber unit is defined as "complete CDMA telephone of which chip set is only one part". Hence the arguments of the revenue is devoid of merit.

176. Coming to the argument that the Indian telecom operators in India constitute a source for the OEMs, the Privy Council in the case of Rhodesia Metals Limited Vs. CIT (Supra) and the jurisdictional High Court in the case of CIT Vs. Havells India Limited [ITA No.55/2012, ITA 57/2012] have laid down that the source is the activity that gives raise to income. In the present case, the right property or information licensed to OEMs relates to the manufacture of the products and hence the source of royalty is the activity of manufacturing. Though cited by

the Revenue, Rhodesia Metals in our view entirely supports the Appellant's case. In that case, Rhodesia Metals Ltd. carried on the business of developing mines in Southern Rhodesia and then selling rights therein. The head seat and directing power of the company was situated in England, the contracts of purchase and sale of the mining rights were entered into in England and the consideration for sale of the mining rights was received in England (paragraph 2 at Page 50 of the order). Despite all this, the Privy Council upheld the contention of the company that the amount earned on sale of such mining rights was not chargeable to tax in England since the source of income was the development of the mines, which activity was carried out in Southern Rhodesia. Applying this principle to the facts of the case at hand, it becomes clear that the source of the royalty is the place where patent (right property or information) is exploited, viz. where the manufacturing activity takes place, which is outside India. Hence, we are unable to accept the contention that Indian telecom operators would constitute source of income for the OEMs.

177. Coming to the insertion of Explanation IV to S.9(1)(vi)of the Act, we find that the amendment has no effect in the present case as a controversy in this case is taxability of royalty on patents relating to intellectual property for manufacture of CDMA handsets and equipment and does not relate to royalty on licensing of any computer software. The OEMs received no income from licensing in computer software. The OEMs sells handsets/equipments to the service providers, outside India and hence the OEMs have no source of income in India.

178. Thus, for all these reasons, we are of the considered opinion that the assessee was right in his argument that the Revenue has not proved that the OEMs have carried on the business in India and that they have used Qualcomm's patents for carrying on such business in India nor the Revenue has proved that the OEMs have used

Qualcomm's patents for the purpose of making/earning income from a source in India. Thus we hold that the royalty in question cannot be brought to tax under S.9(1)(vi)(c) of the Act.

179. The next issue is Whether the royalty paid by Qualcomm to OEMs can be taxed in India under Article 12(7)(b) of the DTAA between India and USA.

180. As we have held that the royalty in question cannot be brought to tax under the Income Tax Act, 1961, we need not go into the question of applicability under DTAA between India and USA as it would be an academic exercise.

181. Before we part, we observe that the Revenue in his effort to support the order of the AO as well as the CIT(A) brought in agreements entered into by Tata in later years i.e. in the F.Y. 2006-07 and 2007-08. It further widened the grounds of assessment by bringing in not only new material but fresh submissions like licensing of software, chip sets etc. Further, it also brought in a fresh argument that CDMA is a wholesome technology and that Qualcomm is the exclusive owner of the CDMA technology. He submitted that CDMS technology works on certain scientific principles and cannot be broken into handsets and network and this technology is provided by Qualcomm to Reliance/ Tata for earning royalty from third party.

182. On the issue as to whether the CDMA technology is a wholesome technology and whether Qualcomm per se is the exclusive owner of this technology we find the fallowing from the information gathered by us. .

183. CDMA is a channel access method used by various radio communication technologies. It is a method of wireless data communication that was originally invented during world war II in England to thawart German wire interference. CDMA history can be directly linked back to the 1940s when this form of transmission was first envisaged. This technology has been used in many communication

systems , including the Global Positioning System and in the Omni Tracs. The other form of digital technologies currently used to transmit in a wireless transmission is Frequency division multiple access (FDMA) and Time Division Multiple access (TDMA). TDMA is the primary commercial form of GSM phones (Source: Wikepedia, http://www.radio-electronics.com/info/rf-technology-design/cdma/what-is-cdma-basics-tutorial.php)

184. Qualcomm was the first company to commercialize this technology in OmniTracs (a fleet management system). Qualcomm publicly introduced the concept that CDMA a digital communication technique method could be commercially successful in cellular wireless communication applications. Qualcomm was joined by US net work operators Nynx and Ameritch to develop the first generation of CDMA telecommunication system. Later this team was joined by Motorola and AT&T. As a result of this it was possible to start writing of specification for CDMA in 1990. It was then a standard groups was set up with the support of cellular telecommunications industry Association (CTIA) and the telecommunication Industry Association (TIA). This group then published the standard of first CDMA system in the form of IS 95 resulting in the formal publication of IS 95A in 1995. (Source: Wikepedia, The first CDMA system was launched in September, 1995 by Hutchson Telephone Co. Ltd. in Hongkong and SA Telecommunications in Korea soon to be followed along with the net works in the USA. Later CDMA 2000series of standards were developed. The standards for CDMA are specified by 3GPP2 .(Source: http://www.radio-electronics.com/info/rf-technology-design/cdma/what-is-cdma-basics-tutorial.php,http://webopedia.com/TERM/C/CDMA.html)

A look at Wikipedia discloses the following:-

> *"3GPP2 is the standardization group for CDMA 2000, they set 3G standard based on earlier 2G CDMA technology.*

The participating associations are five officially recognized Standard Development Organizations ('SDOs'). They are:
ARIB - Association of Radio Industries and Businesses (Japan)
CCSA - China Communications Standards Association (China)
TIA - Telecommunications Industry Association (North America)
TTA - Telecommunications Technology Association (Korea)
TTC - Telecommunications Technology Committee (Japan)
These SDOs are known as the Project's Organizational Partners. 3GPP2 requires that a participating individual member company be affiliated with at least one of the Organizational Partners. In addition, the Project has welcomed Market Representation Partners (MRPs) who offer market advice to 3GPP2 and bring a consensus view of market requirements (e.g., services, features and functionality) falling within the 3GPP2 scope. They are:
The CDMA Development Group (CDG) IPv6 Forum and Femto Forum
The work of producing 3GPP2's specifications resides in the Project's four Technical Specification Groups (TSGs) comprised of representatives from the Project's Individual Member companies. The TSGs are:
TSG-A (Access Network Interfaces)
TSG-C (cdma2000ilil)
TSG-S (Services and Systems Aspects)
TSG-X (Core Networks)
Each TSG meets, on average, ten times a year to produce technical specifications and reports. Since 3GPP2 has no legal status, ownership and copyright of these output documents is shared between the Organizational Partners. The documents cover all areas of the Project's charter, including cdma2000 and its enhancements."

185. In view of the above, it would be incorrect to say that Qualcomm is the owner of CDMA technology. What Qualcomm owns are essential patents in respect of numerous intellectual properties based on CDMA technology. This fact is evident from the clauses in the license agreements. A perusal of the license agreements shows that Qualcomm itself obtains licenses from certain third parties to use their CDMA patents.(page 247 and 292 of the paper book filed by the Appellant). Thus the argument that CDMA is a technology owned by Qualcomm is devoid of merit. All that Qualcomm owns is essential patented intellectual properties developed under CDMA technology. To put it in

simple words a mobile phone or a cell phone is a wireless data communication device which works on wireless technology, while phone is a device that can make and receive telephone calls over a radio link while moving around a wide geographic area. It does so by connecting to the cellular net work provided by a mobile telephone operator. This would allow access to the public telephone net work. In addition to voice data transmission modern mobile phones also support a wide variety of other services such as text messaging, MMS, e-mail, inter-net access, short range wireless communication, blue tooth, business applications, gaming and photography. Such mobile phones are also referred to as a 'smart phones'. The other forms of wireless data communication technologies currently in use are WiFi, global positioning system (GPS), blue tooth, gig B, satellite television, wireless USB etc. From the above it is clear that there are many digital technologies used to transmit data in wireless form. Hence the argument that CDMA is a wholesome technology and that Qualcomm is the exclusive owner of such technology cannot be accepted.

186. There are a number of simple wireless technologies that are used by us in our daily life. A T.V. remote or an A.C. remote have wireless technology and it transmits signals between two points. Many other devices such as washing machines,microwaves,cars,computers and even fixed landline telephones, fax machines etc. have chipsets with embedded software which enable the equipment to work. Technology in a sense, the patent of which is owned by someone, is being used in India. All these devices which have chipsets with some embedded software when operated may in a way result in use of licensed software or IPR's in India. The use of such equipment cannot result in a source of income for the as it is sale of a the equipment is as a "Chattel", the title of

which gets transferred. The software is embedded in the chipset and the chipset is part of the equipment. Hence this argument is devoid of merit and hence cannot be accepted.

187. In the result this issue of taxability of the “royalty” paid by OEM’s to the assessee is decided in favour of the assessee. Hence these grounds are allowed.

188. **Regarding levy of interest under S. 234A of the Act-** The Hon’ble Supreme Court in the case of CIT vs. Anjum Ghaswala (252 ITR 1) held that the levy of interest under S. 234A to be mandatory in nature. Respectfully following the decision of the Hon’ble Supreme Court, we uphold that levy of interest under S. 234A of the Act. This ground is dismissed.

189. **Regarding levy of interest under S.234B of the Act**- The decision of the Jurisdictional High Court in the case DIT vs. Jacabs Civil Incorporated and Mitsubishi Corpn. And Ors (330 ITR 578) is in favour of the assessee. The above decision is also relied by the Jurisdictional High Court in the case of Ericsson (Supra). Therefore, respectfully following the decision of the Hon’ble Supreme Court and the Delhi High Court, we hold that the Appellant is not liable to pay interest under S.234 B of the Act.

190. In the result all the appeals of the assessee are allowed in part.

Order pronounced in the Open Court on 31st January 2013.

Sd/-	Sd/-
(C.M. GARG)	(J.SUDHAKAR REDDY)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated: the 31st January, 2013

*manga

Copy of the Order forwarded to:

1. Appellant; 2.Respondent; 3.CIT; 4.CIT(A); 5.DR; 6.Guard File

By Order

Dy. Registrar

// C O P Y //

Date of Dictation:

Draft placed before the Author on:

Draft pronounced and placed before Second Member on:

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Date of Pronouncement :

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Date on which file given to Head Clerk on:

Date of dispatching the Order on**:**