

**IN THE INCOME TAX APPELLATE TRIBUNAL,  
MUMBAI BENCH "L", MUMBAI  
BEFORE SHRI D. MANMOHAN (VICE-PRESIDENT)  
&  
SHRI R.K. PANDA (ACCOUNTANT MEMBER)  
I.T.A.No.568/Mum/2009  
(Asst.year: Not applicable)**

M/s.Kansai Nerolac Paints Ltd., Nerolac House, G.K. Marg, Lower Parel, Mumbai-13. PAN: AAACG1376N	Vs.	The Addl. DIT (International Taxation)-1(1), Scindia House, Ballard Pier, Mumbai-400 001.
Appellant		Respondent

Appellant by		Mrs.Aarti Vissanji.
Respondent by		Mrs.Ritakuimari Dokania.

**O R D E R**

**PER BENCH :**

This appeal filed by the assessee is directed against the order dated 22<sup>nd</sup> October, 2008 of the CIT(A)-XXXIII, Mumbai.

2. Facts of the case, in brief, are that the assessee, Goodlass Nerolac Paints Ltd., vide its application u/s.195(2) of the act dated 11<sup>th</sup> February, 2002 requested the Assessing Officer to issue certificate determining the sum chargeable to tax and tax to be deducted at source under the provisions of section 195 of the Income-tax Act, 1961 in respect of fee for computer software of US\$ 43,000 to the non-resident M/s. IXOS Software Asia Pvt. Ltd., Singapore. The assessee vide its letter dated 11<sup>th</sup> February, 2002 submitted its contention before the Assessing Officer as under:

1. *All the aforesaid locations are connected to each other by an online real time accounting system. Everyday a huge volume of data is generated and stored on the main server situated at head office. This adversely affects the processing speed of the accounting system.*
2. *To overcome the above problem, we are planning to buy a software which will regularly transfer the data from main*

*server to an auxiliary server in a compressed form and will retrieve the data in uncompressed form whenever required.*

3. *We, therefore, placed a purchase order with M/s. IXOS Software Asia Pte. Ltd., No. 6 Temasel Boulevard, #2-06, Suntech Tower Four, Singapore 038986 for supply of a software called "IXOX eCON test for R/3". A copy of proforma invoice of USD 43,000 received is enclosed herewith for your perusal. The price stated is net of withholding tax, if any.*
4. *The details of payments to be made are given in the annexure to is letter.*
5. *As per the terms of purchase we will obtain a right to make copies of the program to enable operation of the program within our own business only. No source code or programming language or technique will be provided to us with the program.*
6. *As per provisions of section 9(1)(vi) the price charged by M/s. IXOS Software Asia Pte. Ltd. will be "income deemed to accrue or arise in India" and we are required to deduct tax at source as per Section 195 of the Act.*
7. *However, as per commentary of OECD (which is used for interpretation of Double Taxation Avoidance Agreements) on Article 12, when only rights in relation to act of copying is transferred to enable the effective operation of program by user, the payment for the same will be considered as commercial income in accordance with Article 7. A copy of extract from OECD Commentary is enclosed herewith for your perusal.*
8. *The Article 7 of the Double Taxation Avoidance Agreement (DTAA) between India and Singapore, the profits of M/s. IXOS Software Asia Pte. Ltd. shall be taxable in India only if it carries on business in India through a permanent establishment situated in India.*
9. *At present, M/s. IXOS Software Asia Pte. Ltd. is not authorised to carry on business in India. Thus, as per DTAA the payment to be made M/s. IXOS Software Asia Pte. Ltd. for the software will not be taxable in India.*
10. *Section 90(2) of the Income-tax Act states that where the Central Government has entered into any agreement with the Government of any country outside India, then in relation to assessee whom such agreement applies, the*

*provisions of the Act shall apply to the extent they are more beneficial to the assessee.*

11. *In relation to payment to be made to M/s. IXOS Software Asia Pte. Ltd. for the software, the provisions of Double Taxation Avoidance Agreement (DTAA) between India and Singapore will prevail over provisions of section 9(1)(vi) of the Income-tax Act, 1961 as they are more beneficial and the said payment will not be taxable in India. Thus, the question of deduction of tax at source u/s. 915 will not arise.*
12. *Assuming without admitting that the payment is taxable in India as per provisions of section 9(1)(vi) and tax is required to be deducted at source u/s. 195 of the Act. In such case, as the matter is included in the industrial policy of the Government of India and our terms of import are in accordance with the industrial policy, exemption u/s. 10(6A) should be allowed for tax payable on payment to be made to M/s. IXOS Software Asia Pte. Ltd.*
13. *In view of above, we request you to kindly determine the sum chargeable to tax and tax to be deducted at source under provision of section 195 of the Act.*

3. However, the Assessing Officer did not accept the contention of the assessee. He noted that the assessee itself is doubtful about its claim that the payment to be made to M/s. IXOS Software Asia Pte. Ltd. is commercial income in accordance with Article 7 of the Treaty between India and Singapore. He observed that this claim of the assessee has no basis. The Assessing Officer thereafter analysed the licence agreement between the assessee and M/s. IXOS Software Asia Pte. Ltd. and noted that the Singapore company has granted to the assessee a non exclusive non transferable licence to use the licensed software and the documentation for the term and in the territory in respect of the number of users and installations as referred to in Schedule I of the agreement and may use only the software component of IXOS\_eCon Solution Suite. This clearly shows that the assessee has to make payment to the Singapore company a licence fee for computer software. The terms and conditions of the licence agreement, according to the Assessing Officer, clearly show that the Singapore company remains the absolute owner of the computer software and the assessee has been allowed to use the licensed software for a fee in accordance with the normal

operation procedure set out in the documentation or as notified by the Singapore company, etc. The Assessing Officer held that the payment made by the assessee to Singapore company is in the nature of Royalty as per India-Singapore Treaty. The Assessing Officer accordingly directed the assessee to deduct tax at source @ 15% on the amount of USD 49,500 being the grossed up amount equal to USD 43,000 + tax at 15%. The Assessing Officer also rejected the assessee's claim of exemption u/s. 10(6A) on the ground that the assessee could not support its claim with any documentary evidence.

4. Before the CIT(A), the assessee submitted that it has purchased certain software, IXOS\_eCon test for R/3 from M/s. IXOS Software Asia Pte. Ltd., Singapore (the Singapore company) under an agreement. A lump sum amount of USD 43,000 was the consideration paid for the same. It was submitted that the consideration of USD 43,000 paid to the Singapore company is not liable to tax in India as the price paid for the purchase of the licensed software for its own use and represents commercial profits of the Singapore company. It was submitted that since the Singapore company does not have any PE in India, its profits are not subject to tax in India. The meaning of computer software and computer programme was explained to the CIT(A). The explanation 3 to section 9(1)(vi), Explanation 2 to section 10A, Explanation (b) to section 80HHE were brought to the notice of the CIT(A) and it was submitted that the amount paid towards purchase of the software represents the commercial profits of the Singapore company and is not liable to tax under Article 7 of the Indo-Singapore DTAA.

5. However, the CIT(A) was not convinced with the arguments advanced by the assessee. He noted that as pointed out by the Assessing Officer, Articles 2, 3(1)(a), 3(1)(b), 3.3, 4.1, 4.2, 4.5., 4.7, 4.8, 9, 14.3 and schedule I of the agreement makes it very clear that the assessee is only given licence to use the software and it is not owning any software. He noted that the licence to use the software is for 50 operational users, i.e., 50 users can use the software. They can store the software in the computer. Therefore, copying the software in the computer is given for 50 users. Moreover the intellectual

property of the author of a software is protected through a copyright. The intellectual property owner can exploit the intellectual property by allowing any person to copy the software for a fee. He observed that when they permit the customers to use the software through a licence, it is nothing but granting a right to copy the software programme of the computer in the computer. The payment is made for only getting such a right and without that right, the assessee cannot use the intellectual property contained in the Compact Disc. He also explained the meaning of copyright as per section 14 of the Copyright Act, 1957. He noted that as per section 14(a)(i) of the Copyright Act, 1957 one of the copyright available is reproduction of the work in any material form including the storing of it in any medium by electronic means. In the instant case, the Singapore company has allowed the copying of the work to the purchaser and thereby earn consideration. The purchaser had used the copyright available with the Singapore company for the purpose of its business. Therefore, he was of the view that the consideration paid by the assessee is royalty.

6. The learned CIT(A) thereafter analysed Explanation 2 to section 9(1)(vi) of the Income-tax Act, He noted that sub-clause (v) of the Explanation uses the words “transfer of all or any rights (including the granting of licence) in respect of any copyright”. He noted that the software is a literary work or scientific work in which copyright exists. If the owner of the copyright allows somebody to use the software by granting a licence, naturally the consideration received is for royalty. He noted that sub-clauses (b) and (f) of section 14 of the Copyright Act, 1957, authorise the “right to sell” copies of the software or film as copyright. Sub clause (b) of Explanation to section 9(1)(vi) of the Income-tax Act only exempts the sale of film from the purview of the definition of royalty and it does not allow the exemption of the sale of software from the purview of the definition of “royalty”. Therefore, according to the CIT(A) this shows that the Legislature wanted to treat the consideration for the sale of software as “royalty”.

7. The CIT(A) further analysed the DTAA which defines “royalty” as payment of any kind received as a consideration for the use of, or the right to

use any copyright. Therefore, by this definition also the consideration paid by the assessee is “royalty”. According to the CIT(A) sale of copyright product is different from issue of licence to use a copyright.

8. He thereafter analysed section 117(b) of the Copyright Law of the USA and noted that as per section 117(b) if it is a sale of copyrighted computer programme the owner can lease, sell or otherwise transfer the computer programme. However, in the assessee’s case the assessee has no such right, therefore, the transaction cannot be considered as a sale of a copyrighted article.

9. Similarly, he noted that if it is a sale of the product then the right to further transfer the article also passes to the purchaser simultaneously. But in the instant case no such right is given. Therefore, by no stretch of imagination it can be said that the consideration is for sale of a copyrighted article.

10. The learned CIT(A) further observed that the software is a secret process or formula. He discussed as to how a software works in a series of instruments/operations to achieve the defined result. He noted that what the Singapore company granted to the assessee is only a right to use the software i.e., the right to use the secret process and obtain the results. Relying on a couple of decisions, he was of the view that the payment made by the assessee is for the use of the secret process owned by the Singapore company and, therefore, the payment is a “royalty”. For this proposition, he relied on the decision of the AAR in the case of P.No.30 of 1999 reported in 238 ITR 296. Distinguishing the various decisions cited before him, he held that the payment to be made by the assessee for the use of computer software or right to use the computer software is taxable in India as “royalty” under Article 12 of the DTAA between India and Singapore. He accordingly upheld the order of the Assessing Officer.

11. Aggrieved with such order of the CIT(A), the assessee is in appeal before us with the following grounds of appeal:

1. A. *The learned Commissioner of Income-tax (Appeals) has erred in upholding that payments to be made for the use of computer software or the right to use the computer software owned by M/s. IXOX Software Asia Pte. Ltd. (a Singapore based company) is taxable in India as “Royalty” under Article 12 of the Double Taxation Agreement between India and Singapore.*
- B. *The learned Commissioner of Income-tax (Appeals) has erred in upholding the decision of the Additional Director of Income-tax (International Taxation) directing the appellant to deduct tax at source of USD 7,417.50.*
- II. *The learned Commissioner of Income-tax (Appeals) has erred in upholding the decision of the Additional Director of Income-tax (International Taxation) disallowing the claim of exemption u/s. 10(6A) if the payment is taxable in India.*

12. The learned counsel for the assessee strongly challenged the order of the CIT(A). She submitted that as per the Revenue the payments to be made for the use of the computer software or the right to use the computer software is “royalty” whereas according to the assessee it is an outright purchase of the software. She submitted that the software gives the assessee a license to use like any other software. By making the payment, the purchaser does not get any right in copyright but gets a right only to use. She submitted that the assessee can commercially exploit the software and can do anything. By giving an example, she submitted that there is no difference between a book and a copy righted software. Referring to the order of the CIT(A), she submitted that the CIT(A) has wrongly held that the payment is for copyright, secret process and scientific equipment and therefore amounts to payment of royalty. Referring to page 1 of the Paper Book, which is the copy of the purchase order, she submitted that the assessee purchased IXOX eCON for R/3 which is for 50 users. Referring to page 3 of the Paper Book, which is the sales order, she submitted that the unit price per user was US\$ 1250 and the Singapore company has raised a bill for USD 62,500 @ USD 1250 for 50 users. After giving a discount of USD 19,500, the investment as per the sales order is USD 43,000. Referring to page 15 of the Paper Book, she drew the attention of the Bench to the photograph of the IXOX-eCon Server which is a secured and cost effective

solution for the SAP data archiving need. Referring to pages 26 to 50 of the Paper Book, she drew the attention of the Bench to various clauses of the software agreement between the assessee and the Singapore company. Referring to page 31 of the Paper Book she drew the attention of the Bench to the definition of the licence fee which means the fees specified in schedule I payable by the customer to the Singapore company for the use of the licensed software. Similarly, the licensed software means the software which is in Schedule I consisting of a set of instructions or statements for making readable medium and for enhancement, modifications, new versions or new release of that software or part thereof. Referring to page 33 of the Paper Book she drew the attention of the Bench to clauses 2 and 3 of the agreement which defines grant of licence, delivery and installation of the software. She drew the attention of the Bench to clause 4 which defines licence conditions as per Paper Book page 34. As per clause 6 of the agreement, which speaks of licence conditions, software may be used by the customer as directly or through any contractor or representative of the customer in the course of acting on behalf of the customer and at the site or any other site approved in writing by M/s. IXOS Software Asia Pte. Ltd. which approval shall not be unreasonably withheld. Referring to clause 6 of the agreement which speaks of modifications she submitted that the customer must not modify or extend the licensed software or any other software without the written permission of the Singapore company. Referring to the decision of the Hon'ble Supreme Court in the case of Tata Consultancy Services vs. State of AP, reported in 271 ITR 401, she submitted that the Hon'ble Supreme Court in the said decision has held that a software programme may consist of various commands which enable the computer to perform the designated tasks. The copyright in that programme may remain with the originator of the programme. But the moment copies are made and marketed, it becomes goods which are susceptible to sales tax. Referring to the decision of the AAR in the case of Dassault Systems KK vs. DIT, she drew the attention of the Bench to paras 17.1 and 17.2 of the said order. She also relied on the decisions reported in 93 TTJ 658 at page 659, the decision of the Special Bench of the Tribunal in the case of Motorola Inc., reported in 95

ITD 269 (para 163), the decision reported in 120 TTJ 929 (para 25 and 26), 125 TTJ 53, 9 SOT 756.

13. The learned DR, on the other hand, strongly supported the order of the CIT(A). He submitted that the various decisions relied on by the learned counsel for the assessee are based on factual aspects of each case. Referring to page 2 of the assessment order, he drew the attention of the Bench to para 3 of the order where the Assessing Officer held that the claim of the assessee has no basis for which the same is not acceptable. Referring to paras 4 and 5 of the order he submitted that documentation of the term and in the territory in respect of number of users is very important. He submitted that it is not a case of sale because no agreement is required in case of a sale. In case of normal sale anybody can pay and buy anything whereas in the case of copyright sale or in case of restricted sale an agreement is necessary. Therefore, it is not an ordinary sale as claimed by the learned counsel for the assessee. Referring to the software agreement, a copy of which is placed at Paper Book pages 27-53 the learned DR drew the attention of the Bench to various clauses. Referring to clause 'c' of the recitals, he submitted that the Singapore company has offered to grant the assessee a non-transferable and non-exclusive licence to use the computer software and has offered to provide the assessee with support services and consulting services in respect of the computer software. Referring to page 32 of the Paper Book he submitted that the term of the licence is only for a period of 25 years. Referring to page 43 of the Paper Book, he submitted that the assessee is only having a right to use the software and there is no ownership vested in the assessee and even beyond the period of 25 years the assessee has no right to use the software. Referring to the decision reported in 172 Taxman 284, he submitted that this is not a case of sale and only a royalty agreement. He accordingly supported the order of the CIT(A) and submitted that the grounds raised by the assessee should be dismissed.

14. The learned counsel for the assessee in her rejoinder submitted that the assessee is concerned with Singapore and governed by clause 3(a) and Article 12 of the Treaty. She drew the attention of the Bench to clause 6.1 of

the agreement and submitted that the assessee has paid only for the software and no payment has been made for any support services. She submitted that these are only words used in standard agreement and it is nobody's case that support services have been provided. As regards the argument of the learned DR that the term is only for 25 years and the site is in India, she submitted that in case of a software the life is hardly 5 years. Therefore, 25 years in the agreement is a very long period and is as good as a 99 years lease. As regards the observation of the CIT(A) and the DR that the assessee acquired only a right to use the licensed software and documentation under this agreement and does not acquire any ownership right or title in or to the licensed software or documentation, she submitted that it is a customised software. As regards the decision of the AAR relied on by the learned DR, the learned counsel for the assessee submitted that the later decision of the AAR in the case of Dassault Systems KK (supra) is applicable which is in favour of the assessee.

15. We have considered the rival submissions made by both the sides, perused the orders of the Assessing Officer and the CIT(A) and the Paper Book filed on behalf of the assessee. We have also considered the various decisions cited before us. There is no dispute to the fact that the assessee company has placed an order for supply of IXOS-eCON Test for R/3 for 50 users from the Singapore company. We find the Singapore company vide their sales order dated 18<sup>th</sup> December, 2001 has supplied the licensed software to the assessee for a consideration of USD 43,000. According to the Revenue, tax is deductible from such payment to the Singapore company since it is in the nature of payments towards "royalty", whereas, according to the assessee, the same is for purchase of goods and, therefore, no tax is deductible.

16. We find that Article 12 clause 3(a) of the Indo-Singapore Treaty reads as under :

**“ARTICLE 12 : ROYALTIES AND FEES FOR TECHNICAL SERVICES**

1. ....

2. ....

3. *The term “royalties” as used in this Article means payments of any kind received as a consideration for the use of, or the right to use :**(a) any copyright of a literary, artistic or scientific work, including cinematograph film or films or tapes used for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience, including gains derived from the alienation of any such right, property or information ;*

..... ..”

17. We find that the Hon’ble Supreme Court in the case of Tata Consultancy Services vs. State of Andhra Pradesh as reported in 271 ITR 401, while deciding a sales-tax matter, has held as under (short notes) :

“The term “goods”, for the purposes of sales tax, cannot be given a narrow meaning. Properties which are capable of being abstracted, consumed and used and/or transmitted, transferred, delivered, stored or possessed, etc., are “goods” for the purpose of sales tax. The test to ascertain whether a property is “goods” for the purposes of sales tax is not whether the property is tangible or incorporeal. The test is whether the concerned item is capable of abstraction, consumption and use and whether it can be transmitted, transferred, delivered, stored, possessed, etc. In the case of software, both canned and uncanned, all of these are possible. Intellectual property when it is put on a media becomes goods.

A software programme may consist of various commands which enable the computer to perform a designated task. The copyright in the programme may remain with the originator of the programme. But the moment copies are made and marketed, it becomes goods which are susceptible to sales tax. Even intellectual property, once it is put on to a media, whether it be in the form of books or canvas (in the case of painting) or computer discs or cassettes, and marketed would become “goods”. There is no difference between sale of a software programme on a CD/floppy disc and sale of music on a cassette/CD or sale of a film on a video cassette/CD. In all such cases, the intellectual property has been incorporated on a media for purposes of transfer. Sale is not just of the media which by itself has very little value. The software and the media

cannot be split up. What the buyer purchases and pays for is not the disc or the CD. As in the case of paintings or books or music or films the buyer is purchasing the intellectual property and not the media, i.e., the paper or cassette or disc or CD.

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

18. We find the Bangalore Bench of the Tribunal, in the case of Samsung Electronics Co.Ltd. v. ITO (TDS)-I reported in 94 ITD 91 at paras 18 to 20 of the order, has held as under :

*“18.On perusal of the agreement between the parties, we are of the view that in the present case also what the assessee had acquired is only a copy of the copyrighted articles i.e., software, whereas the copy right remains with the owner, i.e., foreign parties. The decisions relied upon by the learned DR are distinguishable on facts of the case.*

*19.From the aforesaid discussion, we find that the incorporeal right to software i.e., copyright remained with the owner and the same was not transferred to the assessee. We have also noticed that the definition of ‘royalty’ in the DTAA, which has been quoted above. The primary condition for bringing within the definition of ‘royalty’ in DTAA is that the payments of any kind received as consideration for the use of or right to use any copyright of a literary, artistic or scientific work etc., Right to use of a copyright is totally different from right to use the programme embedded in a cassette or CD or it may be a software.*

*20.In this case, the assessee had acquired a ready made off the shelf computer programme for being used in its business. No right was granted to the assessee to utilize the copyright of the computer programme. The assessee had merely purchased a copy of the copyrighted article, namely, a computer programme which is called ‘software’. Looking to the circumstances of the case and*

*considering the fact that the definition of 'royalty' as provided in the treaties does not apply to the facts of the case. We are of the view that the finding recorded by the authorities below cannot be sustained. Accordingly, we hold that the remittance made by the appellant for purchase of software is not an income in India, hence, no tax is to be deducted in India under section 195 of the Income-tax Act, 1961. Since we have decided the issue on merit, therefore, we are not going into the technical objections raised on behalf of the assessee."*

19. Similarly, we find that the Delhi Special Bench of the Tribunal in the case of Motorola Inx. Vs. DCIT reported in 95 ITD 269 (SB) at para 163 has held as under :

"163. We may now briefly deal with the objections of Mr.G.C. Sharma, the learned counsel for the Department. He contended that if a person owns a copyright article then he automatically has a right over the copyright also. With respect, this objection does not appear to us to be correct. Mr. Dastur filed an extract from Iyengar's Copyright Act (3<sup>rd</sup> Edition) edited by R.G. Chaturvedi. The following observations of the author are on the point :

"(h) Copyright is distinct from the material object, copyrighted:

It is an intangible incorporeal right in the nature of a privilege, quite independent of any material substance, such as a manuscript. The copyright owner may dispose of it on such terms as he may see fit. He has an individual right of exclusive enjoyment. The transfer of the manuscript does not, of itself serve to transfer the copyright therein. The transfer of the ownership of a physical thing in which copy right exists given to the purchaser the right to do with it (the physical thing) whatever he pleases, except the right to make copies and issue them to the public" [Emphasis supplied].

The above observations of the author show that one cannot have the copyright right without the copyrighted article but at the same time just because one has the copyrighted article, it does not follow that one has also the copyright in it. Mr. Sharma's objection cannot be accepted."

We find the Id. CIT(A), while holding that the fee paid for acquisition of the software amounts to royalty, has relied on the decision of Authority for Advance

Rulings (AAR) in the case of P.No.30 of 1999 as reported in 238 ITR 296. However, we find that the AAR in the case of Dassault Systems K.K. vs. DIT vide AAR No.821 of 2009 order dated 29-01-2010, a copy of which was filed during the course of hearing, after considering the decision of AAR as relied upon by the CIT(A) at paras 17.1 and 17.2 of his order, has held as under :

“17.1 Passing on a right to use the facilitating the use of a product for which the owner has a copyright is not the same thing as transferring or assigning rights in relation to the copyright. The enjoyment of some or all the rights which the copyright owner has, is necessary to trigger the royalty definition. Viewed from this angle, a non-exclusive and non-transferable licence enabling the use of a copyrighted product cannot be constructed as an authority to enjoy any or all the enumerated rights ingrained in a copyright. Where the purpose of the licence or the transaction is only to establish access to the copyrighted product for internal business purpose, it would not be legally correct to state that the copyright itself has been transferred to any extent. It does not make any difference even if the computer programme passed on to the user is a highly specialized one. The parting of intellectual property inherent in and attached to the software product in favour of the licensee/customer is what is contemplated by the definition clause in the Act as well as the Treaty. As observed earlier, those rights are incorporated in Section 14. Merely authorizing or enabling a customer to have the benefit of data or instructions contained therein without any further right to deal with them independently does not, in our view, amount to transfer of rights in relation to copyright or conferment of the right of using the copyright. However, where, for example, the owner of copyright over a literary work grants an exclusive license to make out copies and distribute them within a specified territory, the grantee will practically step into the shoes of the owner/grantor and he enjoys the copyright to the extent of its grant to the exclusion of others. As the right attached to copyright is conveyed to such licensee, he has the authority to commercially deal with it. In case of infringement of copyright, he can maintain a suit to prevent it. Different considerations will arise if the grant is non-exclusive that too confined to the use purely for in-house or internal purpose. The transfer of rights in or over copyright or the conferment of the right of use of copyright implies that the transferee/licensee should acquire rights – either in entirety or partially co-extensive with the owner/transferor who divests himself of the rights he possesses pro tanto. That is what, in our view, follows

from the language employed in the definition of 'royalty' read with the provisions of Copyright Act, viz., Section 14 and other complementary provisions.

17.2 We may refer to one more aspect here. In the definition of royalty under the Act, the phrase "including the granting of a licence" is found. That does not mean that even a non-exclusive licence permitting user for in-house purpose would be covered by that expression. Any and every licence is not what is contemplated. It should take colour from the preceding expression "transfer of rights in respect of copyright". Apparently, grant of 'licence' has been referred to in the definition to dispel the possible controversy a licence – whatever be its nature, can be characterized as transfer."

In view of the above decisions, we are of the considered opinion that a computer software when put into a media and sold, it becomes goods like any other audio cassette or painting on canvass or book. In view of the decisions cited above, we are of the considered opinion that the amount paid by the assessee towards purchase of IXOS-eCON for R/3 50 users cannot be treated as payment of royalty taxable in India under Article 12 of DTAA between India and Singapore. Therefore, the assessee, in our opinion, is not liable to deduct tax at source. Accordingly, the grounds raised by the assessee are allowed.

20. In the result, the appeal filed by the assessee is allowed.

Order pronounced on the 22nd day of June, 2010.

**Sd/-**  
**(D. MANMOHAN)**  
**VICE-PRESIDENT**

**Sd/-**  
**(R.K. PANDA)**  
**ACCOUNTANT MEMBER**

Mumbai: 22nd June , 2010.

NG:

Copy to :

1. Assessee.
2. Department.
- 3 CIT(A)-XXXIII, Mumbai.
4. DIT(Intl. Taxn.), Mumbaai.
5. DR, "L" Bench, Mumbai.
6. Master file.  
(TRUE COPY)

BY ORDER,

Asst.Registrar, ITAT, Mumbai.

	Details	Date	Initials	Designation
1	Draft dictated on	14-05-2010		Sr.PS/
2	Draft Placed before author	02-06-2010		Sr.PS/
3	Draft proposed & placed before the Second Member	08-06-2010		JM/AM
4	Draft discussed/approved by Second Member	09-06-2010		JM/AM
5.	Approved Draft comes to the Sr.PS/PS	09-06-2010		Sr.PS/
6.	Kept for pronouncement on			Sr.PS/
7.	File sent to the Bench Clerk			Sr.PS/
8	Date on which the file goes to the Head clerk			
9	Date of Dispatch of order			