IN THE INCOME TAX APPELLATE TRIBUNAL

HYDERABAD BENCH 'A', HYDERABAD

BEFORE SHRI P.M.JAGTAP, ACCOUNTANT MEMBER

AND SHRI SAKTIJIT DEY, JUDICIAL MEMBER

ITA No.692/Hyd/14	**:**	**Assessment year 2007-08**
ITA No.693/Hyd/14	**:**	**Assessment year 2008-09**
ITA No.694/Hyd/14	**:**	**Assessment year 2009-10**
ITA No.695/Hyd/14	**:**	**Assessment year 2010-11**

M/s. AMD Research & Development Center India Private Limited, Hyderabad	V/s.	Dy. Commissioner of Income-tax, Circle 1(2), Hyderabad

(PAN - AABCC 3447 R)

(Appellant) (Respondent)

Appellant *by* **:** *Shri S.Raghunathan S.*

Respondent by : *Shri P.Soma Sekhar Reddy DR*

Date of Hearing	09.10.2014
Date of Pronouncement	22.10.2014

O R D E R

Per P.M.Jagtap, Accountant Member :

These four appeals filed by the assessee are directed against a common order of the learned Commissioner of Income-tax(Appeals) V, Hyderabad dated 31.1.2014, whereby he disposed off the appeals filed by the assessee against a common order of the Asst. Commissioner of Income-tax (International Taxation)-I, Hyderabad **(Assessing Officer),** dated 28.1.2013 passed under S.201(1)/S.201(1A) of the Act, treating the assessee as in default for non-deduction of tax at source for the assessment years 2007-08 to 2010-11.

2. The assessee in the present case is a company, which was a subsidiary of ATI Technologies, Canada during the years under consideration. It is basically set up as a R&D and Design Centre for providing captive services to its parent company in Canada. The services rendered by it mainly include development of software and hardware solutions in support of handheld and digital TV products, graphics and CPU and testing and validation of developed software and hardware and assistance in designs, development and support for the software and hardware solutions. During the years under consideration, the assessee had made the following payments to its parent company, ATI Technologies, Canada on account of software expenses and engineering expenses-

Financial Year	Software Expenses		Engineering Expenses	
	Amount (USD)	Amount (INR)	Amount (USD	Amount (INR)
2006-07	13,46,924	6,07,40,520	3,51,910	1,58,81,871
2007-08	2,01,464	85,70,772	9,66,547	3,86,04,499
2008-09	...		22,70,804	10,76,77,131
2009-10	--		8,79,220	4,33,89,940
TOTAL	15,48,387	6,93,11,291	44,68,481	20,55,53,441

Since no tax at source was deducted by the assessee from the above remittances made to its parent company abroad, as required by the provisions of S.195 of the Income Tax Act, 1961, the assessee was called upon by the Assessing Officer to explain why it should not be treated as an assessee in default for its failure to do so.

3. In reply, it was submitted by the assessee that the amount on account of engineering expenses was paid by it to ATI Technologies, Canada for the engineering services, which were

actually received from M/s. Soctronics India Private Limited, Hyderabad. It was contended that payment for the said services availed by the assessee was initially made by ATI Technologies, Canada to Soctronics India Private Limited and the same was subsequently reimbursed by the assessee company to ATI Technologies, Canada. It was contended that the payment made by the assessee company to ATI Technologies, Canada towards engineering services thus was nothing but reimbursement of expenses incurred by ATI Technologies, Canada on behalf of the assessee company and there being no element of profit involved in the said payment, there was no requirement of deduction of tax at source.

4. The above contention of the assessee was not found acceptable by the Assessing Officer in the absence of any agreement between the assessee and the ATI Technologies, Canada or between the assessee and Soctronics India Private Limited produced for his verification. The only evidence produced by the assessee in the form of invoices raised by its parent company ATI Technologies, Canada was not found to be sufficient by the Assessing Officer to support the claim of the assessee. He also recorded the statement of the Chartered Accountant who had issued certificates in Form Nos.15CA/15CB for 'No TDS' from the remittances of reimbursement by the assessee to ATI Technologies, Canada and inferred from the said statement that the certificates were issued by the said Chartered Accountant on the basis of oral explanation given by the officers of the assessee company without any specific analysis or verification. He also recorded the statements of the directors of Soctronics Technologies P. Ltd. and inferred from the said statements that the said company was actually working for the ATI Technologies, Canada as an

independent service provider. He also inferred that all the technical deliverables/outputs/services provided by Soctronics India Private Limited were 'made available' in the repository of the recipient, ATI Technologies, Canada to enable them to use the same on their own. He therefore, held that the claim of the assessee of having remitted the amount on account of engineering expenses to ATI Technologies, Canada as reimbursement of expenses actually incurred by the assessee company on its behalf was untenable. He also noted that the so-called reimbursement had actually happened at a much later point in time than the corresponding dates of the invoices of rendering of services by Soctronics India Private Limited. He further noted that the assessee did not have separate account head for reimbursement to its parent company and all these reimbursement expenses were claimed under various heads of expenses like 'consultancy and contractual charges' or 'deliverable/consultancy service', 'software licence/IT services coupons', 'administrative expenses' etc. across the various years. The Assessing Officer also found from the information provided by the Directors of Soctronics India Private Limited that the payments received by the said concern from ATI Technologies, Canada were recorded as export sales during the years under consideration.

5. As regards the payments made to ATI Technologies, Canada on account of software expense, it was explained on behalf of the assessee company before the Assessing Officer that ATI Technologies, Canada during the years under consideration had purchased certain software applications from foreign vendors in its name and the said software applications were installed on the servers outside India for use of the group entities including the assessee company. It was submitted that the cost incurred for purchasing the said software was cross-charged by ATI

Technologies, Canada to the group entities including the assessee company for usage of such software applications. It was contended that the software expense actually incurred by the ATI Technologies, Canada thus, were allocated to group entities including the assessee company at cost and since there was no profit element embedded in it, it was a case of reimbursement of actual expense incurred which did not attract TDS provisions. As an alternative contention, it was also submitted by the assessee company that it was granted merely the user right by ATI Technologies, Canada in the copy-righted software application and since there was no right to use the copy right, the amount paid towards software expenses was not in the nature of royalty as per Article 12(3) of India Canada DTAA, which is liable to tax in India in the hands of the ATI Technologies, Canada. It was contended that there was thus no obligation to deduct tax at source from the said payment even on this ground.

6. The explanation of the assessee on the issue of payment of software expenses was not found acceptable by the Assessing Officer. According to him, there was no evidence provided by the assessee as to what were the licences that were provided to it by the parent company, how are those licences used by the assessee company and what were the matrix that were used to measure the cost that has to be shared by the assessee company. In the absence of all these details as well as supporting documentary evidence, the Assessing Officer doubted the very genuineness of the software expenses claimed to be paid by the assessee to the ATI Technologies, Canada. Accordingly, after anlalysing all the facts of the case, various evidences, enquiries and investigations conducted by him, the Assessing Officer finally recorded his adverse findings in relation to the assessee's claim of

having remitted the amount in question to ATI Technologies, Canada towards reimbursement of engineering expenses and software expenses as under-

"(a) There are no agreements or any other documentary evidences like statements of work issued by the assessee to M/s. Soctronics, to show as to how the services of M/s. Soctronics were received, utilized wholly and solely by the assessee, priced delivered to the claimed recipient i.e., the assessee M/s. AMD R&D India (P)Ltd.

(b) There was no proof provided by the assessee to establish that the services were rendered by M/s. Soctronics to the Indian entity, the assessee M/s. AMD R&D India (P)Ltd. only. It is not possible also, since the service provider M/s. Soctroncis itself has claimed the services as "export' to M/s. ATI Technologies Inc. Canada. Therefore, the claim of the assessee is baseless, factually incorrect and untenable for the purposes of IT Act, 1961.

(c) As seen from the Ledger Copies produced during the course of proceedings u/s. 201(1) of the Act it is noticed that the entire "reimbursement" was made during the financial years 2009-10 & 2010-11 though the expenditure was incurred during the financial years 2006-07 to 20011-12.

(d) Further, it is also noticed that assessee does not have any agreement with M/s. Scotronics for the work done during the financial years 2006-07 to 2008-09. It is also noticed form the Ledger extracts of M/s. SoCtronics provided during the course of proceedings u/s. 131 of the I.T. Act, 1961, it

has booked the income towards "Software sales to abroad" during financial years 2006-07 to 2008-09. However, during the financial years 2009-10 to 2011-12 payments received from the assessee i.e., M/s. AMD India R&D Ltd., have been booked towards "domestic sales of software".

(e) As seen from the statements of the Director, Finance Controller of the service provider, M/s. SoCtronics, it is absolutely clear that the assessee has never received any services from M/s. Soctronics in the financial year 2006-09, instead it was assessee's parent i.e., M/s. ATI Technologies, which has received the services.

(f) As can be seen from the statements of the CAS also, it is abundantly clear that they have not been provided with all the relevant information and accordingly they allowed the remittance to happen without deducting any taxes under section 195 of the IT Act, 1961.

(g) Therefore, the actual nature of transactions can be understood as an unsubstantiated and unacceptable cross charge of expenses incurred by the parent of the assessee M/s. ATI Technologies Inc, Canada on to its subsidiary in India, the assessee, M/.s AMD R&D Center, India (P)Ltd. for the subcontracting expenses of the software services received from M/s. SoCtronics incurred by M/s. ATI Technologies Inc. Canada. The provision of services by M/s. Soctronics and the so-called reimbursements by the assessee are totally unrelated since the real beneficiary of the services by M/s. Soctronics is M/s. ATI Canada only.

(h) Thus these expenses by M/s. AMD R&D (P) Ltd., are the expenses not for the purpose of business, as laid out in the scope of section 37 of the IT Act, 1961 and accordingly the payments in the guise of reimbursement are not to make good any business expenses of the assessee, that are originally paid by its parent, instead they are fresh income/cash to M/s ATI Technologies, Canada which ought to have been subjected to tax under section 195 of the IT Act, 1961."

7. On the basis of the above findings, the Assessing Officer came to the conclusion that the remittances made by the assessee to ATI Technologies, Canada in the guise of reimbursement of engineering and software expense actually represented fresh cash/income paid to the said non-resident company and the same, therefore, the amount so remitted was chargeable to tax in the hands of the ATI Technologies, Canada in India under the head 'income from other sources' as per Income Tax Act,1961 . For this conclusion, he also relied on Article 21(3) of India Canada DTAA, which provides that the income arising to the non-residents in India from other sources shall be taxable in India.

8. The Assessing Officer accordingly held that the remittance made by the assessee to ATI Technologies, Canada constituting income from other sources was chargeable to tax in the hands of the said foreign company at the rate of 40% with surcharge and education cess as applicable and the assessee was liable to be treated as in default to the extent of such tax liability under S.201(1) of the Act, having failed to deduct tax at source as per the provisions of S.195 of the Act. He accordingly quantified the amount payable by the assessee under S.201(1) as under-

Financial Year	Software Expenses		Engineering Expenses		Proposed Total Tax Payable by M/s. AMD R&D (P) Limited, Hyderabad
	Amount (USD)	Amount (INR)	Amount (USD)	Amount (INR)	Tax Amount U/s. 201(1) of IT Act, 1961 (INR)
2006-07	13,46,924	6,07,40,520	3,51,910	1,58,81,871	3,23,57,638
2007-08	2,01,464	85,70,772	9,66,547	3,86,04,499	1,99,22,117
2008-09	...		22,70,804	10,76,77,131	4,54,72,052
2009-10	--		8,79,220	4,33,89,940	1,83,23,572
TOTAL	15,48,387	6,93,11,291	44,68,481	20,55,53,441	11,60,75,379

9. Before treating the assessee company as an assessee in default under S.201(1) for its failure to deduct tax at source from the payments made to the parent company ATI Technologies, Canada as above, one final opportunity was given by the Assessing Officer to the assessee to offer its explanation in the matter. Availing the said opportunity, it was pointed out by the assessee that the reimbursement of software and engineering expenses was recorded in its books of account at cost on accrual basis, as per the debit invoices received from the ATI Technologies, Canada, and the same was subsequently recovered with mark up from ATI Technologies, Canada by raising the service invoices. It was contended that the ATI Technologies, Canada thus, did not derive any benefit from these transactions as alleged by the Assessing Officer, and it was not a case of diversion or transfer of profit by the assessee company to ATI Technologies, Canada. The assessee company also sought an opportunity to cross examine the officers of Soctronics Technologies P. Ltd. as well as Chartered Accountant, whose statements recorded by the Assessing Officer were relied upon to draw an adverse inference against it. Accordingly, such opportunity was provided by the Assessing Officer to the assessee and the sworn statement of the witnesses were

recorded during the cross examination. Although the assessee company made an attempt to support its case of having remitted the amounts on account of engineering expenses to ATI Technologies, Canada only towards reimbursement of the amounts paid by the said company to Soctronics Technologies P. Ltd. for the services actually availed by the assessee company on the basis of the cross-examination of the concerned witnesses, the Assessing Officer did not find the same to be acceptable. According to him, the statements recorded during the course of cross-examination failed to bring out any contradiction in the statements recorded earlier and there was nothing brought out in the said cross examination to show that the real beneficiary of the services rendered by Soctronics Technologies P. Ltd. was actually the assessee company and not the ATI Technologies, Canada. He held that the services rendered by Soctronics Technologies P. Ltd. as main contractor were for the benefit of ATI Technologies, Canada alone and even the access credential, such as log-in-id and pass-word to the repository in which the deliverables were provided by Soctronics Technologies P. Ltd. were provided only to ATI Technologies, Canada.

10. Before the Assessing Officer, an order of Commissioner of Service Tax, Hyderabad was also filed by the assessee, wherein it was held that technical services were availed by the assessee company from ATI Technologies, Canada through Soctronics Technologies P. Ltd. The said order passed by the Commissioner of Service Tax was relied upon by the assessee in support of its stand that the services rendered by Soctronics Technologies P. Ltd. were availed by it through ATI Technologies, Canada, and the amount in question was remitted to ATI Technologies, Canada towards reimbursement of the payment made by the said company to

Soctronics Technologies P. Ltd. on behalf of the assessee company. The Assessing Officer, however, noted that the order of the Commissioner of Service Tax was passed on 23.7.2012, whereas all the investigations made by him thereafter had clearly revealed that the real beneficiary of the services rendered by Soctronics Technologies P. Ltd. was ATI Technologies, Canada and not the assessee company. The Assessing Officer also held that the order of the Commissioner of Service Tax, in any case, did not provide any evidence to reach the conclusion that the services provided by Soctronics Technologies P. Ltd. were for the benefit of the assessee company alone. According to him, if one were to go by the order of the Commissioner of Service Tax, the payment/reimbursement made by the assessee company to ATI Technologies, Canada clearly represented 'fee for technical services' and the same were liable for tax in India in the hands of the ATI Technologies, Canada as 'fees for included services' as per India Canada DTAA. He also observed that the order of the Commissioner of Service Tax passed on 23.7.2012 was deliberately produced by the assessee only on 31.12.2012, by which time strong evidence was collected which proved beyond doubt that the services of Soctronics Technologies P. Ltd. were for the benefit of ATI Technologies, Canada and therefore, reimbursement claimed by the assessee was nothing but in the nature of fresh income or cash in the hands of the ATI Technologies, Canada.

11. Before the Assessing Officer, an alternative contention was raised by the assessee without prejudice to its earlier submissions that the amount in question paid to ATI Technologies, Canada may be treated as dividend. This alternative contention of the assessee was also not found acceptable by the Assessing Officer in the absence of any approval given either by its Board of Directors

or even by the Reserve Bank of India to distribute or pay any dividend to the non-resident share-holders. He held hat this alternative contention of the assessee thus was nothing but a ploy by the assessee to seek relief under relevant Article of the DTAA that imposed a lower tax liability on dividend income in the hands of the foreign company.

12. The Assessing Officer thus did not accept any of the contentions raised by the assessee company and rejecting the same, he summarized his conclusions on all the relevant aspects of the issue of the taxability of the amount in question remitted by the assessee company to ATI Technologies, Canada as under-

"Conclusion:

(a) It is noteworthy that the place of rendering the service is immaterial, for ease of communication, collaboration, if the engineers of M/s. Scotroncis perform their contractual obligation in the premises of AMD India, under the supervision of their manager, it does not mean that the entire work is being done wholly and solely for the benefit of M/s. AMD India(assessee) alone.

(b) It is also not the case that, AMD India has provided any evidence that all the manpower employed by M/s. Soctronics for executing the contract with ATI Canada, was only for the support services to AMD India. It has been stated that both the officials of Soctroncis that the engineers of Soctronics interact with global teams and even visited the premises of ATI Technologies, Canada.

(c) Thus, it is a clear case of collaboration and not one of captive service consumption. Thus the real beneficiary of the services provided by M/s. Scotronics is M/s.ATI Canada only.

(d) It is also seen that, in this case, in violation to the normal practice of the Software industry, there are no Statements of Work that have been issued by the assessee company. In fact, the

Statements of Work, as laid out in the contract between M/s. ATI Canada and Ms. Soctronics have originated from M/s. ATI Canada only (Exhibits 7 to 10)

(e) It is also note worthy that the assessee has not provided any positive evidence to show that every payment by M/s. ATI Canada to M/s. Soctronics was preceded by any verification, approval from the assessee's management, neither have the payments been routed through the bank of the assessee. Since this kind of practice does not obtain in an arms/length business situation, it is impossible to accept the claim of the assessee that the parent company had made its payments to M/s. Soctroncis which are to accepted by M/s. AMD R&D India, without any negotiation/veri- fication when it is M/s. AMD R&D India, which is as claimed, the actual recipient of services form M/s. Soctronics. It is also noteworthy that, it is not the case that the assessee is not capable of entering into any of its contracts on its own, as it has been evidenced in a separate agreement with M/s. Scotroncis itself, from the AY 2009 onwards. Moreover, it is not the case that M/s.Scotronics is a service provider to M/s. ATI Canada and many other subsidiaries of M/s. ATI Canada, which can be a basis for M/s. ATI Canada to enter into a common agreement on the behalf of all of its subsidiaries. In any case the parent company itself will also be a service recipient in such arrangements. It is only in such a scenario that the parent usually enters into an agreement with a vendor, for itself and on behalf of its multiple subsidiaries to ensure better payment terms.

(f) Thus, the clams of the assessee are totally against the practices of the information technology/ semi-conductor/software industry, where it is being claimed by the assessee that although the parent has entered into a contract and invoices have been raised on its name, the whole and sole real beneficiary is the assessee.

(g) On the prudence and purpose of this arrangement, it suffices to say that, in the absence of the accounts of M/s. ATI Canada duly audited by the Canadian Revenue authorities, it is difficult to conclude whether there has been a double debit of expense, one on account of the

payments made by it to M/s. Soctroncis against the invoices raised on it, and another on the payment made to the assessee alognwith a mark up on the so-called reimbursement. Moreover it is noteworthy that the payments to M/s. Scotroncis have also not been subjected to any TDS u/s. 194C by virtue of this arrangement.

(h) As regards the reimbursement for 'Software Expenses', it has been mentioned in the show cause dtd 19/10/2012 and also in this order vide para 4 that there was no evidence provided by the assessee as to what were the licenses that were provided to the assessee by the parent company, how were the licences were used by the assessee company, what were the metrics that were used to measure the cost that has to be shared by the assessee company.

(i) The assessee in its reply to the show cause notice has contended that the definition in the India-Canada DTAA has not been amended and accordingly the payments for licence fee are not covered under the definition of Royalty in the Article 12 of DTAA.

(j) Be that as it may, and without prejudice to the aforementioned treatment that the payments under the guise of reimbursement for licence fee, without any positive evidence on the specific product used, metrics of usage by the assessee and the basis for reimbursement, it only represents a fresh/cash income to M/s. ATI Canada; it can be seen that payments for 'licence fee' in general, are also chargeable to tax as Royalties with retrospective effect from 1976, vide the Explanation 4 to section 9(1)(vi) of the IT Act, 1961. In this regard the following analysis clearly shows that the licence fees are indeed covered under the definition of Royalty as per Article 12 of the DTAA:

"(i) "The term 'royalty" as used in this Article means: (a) payments of any kind received as a consideration for the use of, or the right to use, <u>any copyright of</u> a literary, artistic, or <u>scientific work</u>, including cinematograph films or work on films, tape or other means of reproduction for use in connection with 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 form the alienation of any such right or property which are contingent on the productivity, use, or disposition thereof; and (b) payments of any kind received as consideration for the use of, or the right to use, any industrial, commercial or scientific equipment other than payments derived by an enterprise described in paragraph 1 of Article 8 (Shipping and Air Transport) from activities described in paragraph 3(c) or 4 of Article 8: (Emphasis supplied)

(ii) As can be seen from the aforementioned definition, payment for use of copyright or a scientific work is termed as Royalty that can be taxed in the source country form which this income arises. The use of a licence translates to use of a copyright of the copyrighted software as laid out below

- ***A licenced software can be used only if the lincence is purchased.***
- ***In technical terms, this translates to having a "verification code/key" or "a file with the encrypted key/validation code' with the user of the licence.***
- ***A part of the copyrighted software, validations the licence available with the user of the licence. The validation is performed by a copy of the copyrighted software in the computer owned by the user OR in the server owned by the vendor.***
- ***Finally, when the licence is found to be valid, a copy of the copyrighted software is loaded into the primary memory of the computer of the user from the server of the vendor or from the secondary memory (hard drive) of the user or from a CD given by the vendor***
- ***The aforementioned steps are executed each time the user uses the copyrighted software.***

(iii) Thus, in each time there is a use of the Copy Righted software, as in steps laid out above, there is a use of copyright in terms of making a single copy (of the copyrighted software) available for the user.

(iv) It is important to note that DTAA does not specify that user of copyright forming a copy for one's own use as NOT being covered under Royalty.

(v) Alternatively, if the contentions is that there is no commercial application/exploitation of the copyright, the following needs to be analysed

- ***The usage of a copyrighted software is akin to the usage of a patented technology as an input/enabler in the commercial application of the user.***
- ***The element of commercial exploitation comes in because the user of the licenced software harnesses the software for his own business purposes by making a copy of the copyrighted software each time he uses it.***
- ***Therefore, it is a clearly covered case using a copyright as per DTAA and accordingly needs to be taxed as 'Royalty'.***

(k) However, as evidenced in the exhibits 2 & 3, the debit notes are extremely simplistic and do not provide any basis for the reimbursement of the claimed licence fees. Therefore, the payments under the guise of reimbursements for licence fee, without any positive evidence on the specific product used, metrics of usage by the assessee and the basis for reimbursement, it only represents a fresh/cash income to M/s. ATI Canada. Thus these payments represent fresh cash/income to M/s. ATI Canada chargeable to tax as "Income from other sources" as per IT Act, 1961 and under the head "Other sources' as per Article 21 (3) of the India-Canada DTAA."

13. The Assessing Officer finally held that the entire amount claimed to be remitted by the assessee to ATI Technologies, Canada on account of reimbursement of software expense and engineering expense represented fresh income/cash in the hands of ATI Technologies, Canada, which was chargeable to tax in India as 'income from other sources' as per Income tax Act, 1961 as well as Article 21(3) of the India Canada DTAA. He also held that the

assessee thus was liable to deduct tax at source aggregating to Rs.11,60,75,379 from the total amount remitted to the ATI Technologies, Canada during all the four years under consideration as per the provisions of S.195 of the Act, and having failed to do so, it was liable to be treated as assessee in default under S.201(1) of the Act, and interest was payable thereon amounting to Rs.8,38,95,805 under S.201(1A) of the Act. Accordingly, the assessee was treated as in default by the Assessing Officer for a total amount of Rs.19,99,69,184 by the impugned order dated 28.1.2013 passed under S.201(1)/201(1A) of the Act.

14. Against the common order passed by the Assessing Officer under S.201(1)/201(1A) for all the four years under consideration, appeals were preferred by the assessee before the learned CIT(A). During the course of appellate proceedings before the learned CIT(A), further submissions were made on behalf of the assessee company, relying on documentary evidence filed as additional evidence for the first time before the learned CIT(A), such as few e-mails, invoices raised by Soctronics Technologies P. Ltd., duly approved by the employees of the assessee company by putting its signature, invoices for purchase of software licences by ATI Technologies, Canada, internal correspondence for cross charges, etc. The same were forwarded by the learned CIT(A) to the Assessing Officer alongwith the additional evidence filed by the assessee in support for verification and comments. In the remand report submitted vide letter dated 30.12.2013 to the learned CIT(A), the Assessing Officer offered his comments, as extracted from the impugned order of the CIT(A), as under-

2.1 As per the above referred directions, the office of the undersigned has called for a personal hearing of the appellant on 12/09/2013. The officials from the appellant-company attended and provided a copy of the master services agreement with ATI, Canada, computations of the income offered for tax by the appellant for AYs 2007-08 to 2010-11 and certain e-mails and invoices in support of the debit notes raised for the claimed-to-be software license expenditure which was reimbursed by the appellant to its parent ATI, Canada in partial submissions, by 24/12/2013.

2.2 Apart from the fresh evidence discussed above, the undersigned has also examined all the written submissions of the appellant and the grounds raised in the appeal before Hon'ble CIT(A)-V, Hyderabad. A detailed rebuttal of all the grounds raised by the appellant and analysis of the fresh evidence submitted by the appellant is discussed here-under in the following paragraphs, in which it is clearly established that the claim of the appellant that it is the beneficiary of the services of M/s Soctronics, another independent contractor of its parent M/s ATI Canada, is found to be false and liable for summary rejection, thereby necessitating the upholding of the order u/s 201(1)(1A) in the appeal proceedings before your honor.

3. Examination of Fresh Evidence - E-Mails & Approval of invoice raised by Soctronics by employee/manager of appellant

3.1 Claim of the appellant: It is seen that the appellant has submitted certain e-mails that were exchanged while the departmental witnesses from M/s Soctronics, Sri P Raghavendra Sarma and Sri Dasaradh Gude were employed with the appellant and while Sri P Krishna Prasad clarified certain issues from the side of M/s Soctronics. As per the appellant, these emails indicate that Sri P Raghavendra Sarma and Sri Dasaradh Gude have approved the cross-charge of the costs incurred by ATI, Canada on payments made to M/s Soctronics, to be reimbursed by the appellant and Sri Krishna Prasad was also aware of the same. Also, an employee of the appellant Mr K Balaji, who was a manager, is shown to have approved the invoice raised by M/s Soctronics on ATI,Canada, thus the claim of the appellant that the ultimate beneficiary of the services rendered by M/s Soctronics was the appellant only and not ATI, Canada, as established in the order u/s 201(1)(1A), stands validated. However the appellant claims that Sri P Raghavendra Sarma and Sri Dasaradh Gude, being interested parties, have denied this in their sworn statements, and hence their statements do not have any evidentiary value.

3.2 Analysis: The appellant, during the proceedings u/s 201(1)(1A), has already chosen to cross-examine all three witnesses from M/s Soctronics, Sri P Raghavendra Sarma, Sri Dasaradh Gude and Sri P Krishna Prasad, and raised this issue of approving the cross-charge to appellant by ATI, Canada and sought for an explanation for such approval. However, it was clearly discussed in the order u/s 201(1)(1A) as to how the appellant failed to provide any reason or evidence and thus failed to controvert the categorical assertions by Sri P Raghavendra Sarma, Sri Dasaradh Gude and Sri P Krishna Prasad in their original statements given to the undersigned as well as during the statements recorded in cross-examination by the appellant that:

3.2.1 The ultimate beneficiary of the services rendered by the engineers of M/s Soctronics, either from the commercial space of appellant, (sometimes under the supervision of the managers of the appellant as shown by the appellant in the case of Mr K Balaji), or from its own office (office space of M/s Soctronics, Hyderabad) or other global locations including ATI, Canada was always ATI, Canada only and not the appellant.

3.2.2 As per guidance of the corporate finance, Sri Dasaradh Gude has signed the financials approving the cross-charge of expenses incurred by ATI, Canada.

3.2.3 As per clause 5 of Master Service Agreement submitted by the appellant, the appellant does not have any ownership in any technology/know-how/output created by the appellant. Thus, the claim of appellant that it is the ultimate beneficiary of the services provided by M/s Soctronics, is untenable,

3.2.4 The appellant so far has not controverted the sworn statements of Sri Dasaradh Gude, Sri K Prasad that the engineers of M/s Soctronics interact with global teams of ATI as an independent contractor, and also travel to various locations of ATI to meet its contractual obligations with ATI, Canada, thus invalidating the claim of appellant as the ultimate beneficiary of the services rendered by M/s Soctronics is appellant only.

3.2.5 Most importantly, the factual evidences in terms of the Purchase Orders raised by ATI, Canada on M/s Soctronics, with the place of delivery mentioned as Canada contradistinguished from the Purchase Orders raised by appellant with place of delivery as Hyderabad (Exhibits 10, 11 respectively in the order u/s 201(1)(1A)), have not been controverted or explained by the appellant so far.

3.6.1 Conclusion on fresh evidence of E-Mails: In view of the aforementioned discussion, it can be seen that, the e-mails and the approval of one invoice by manager of appellant (AMD India), do not bring any new facts for examination and do not controvert the evidence on record that the cross-charge of payment by ATI, Canada to appellant was against the factual position of rendering of services by M/s Soctronics for the benefit of ATI, Canada only and not to the appellant at all.

4.Examination of Fresh Evidence - Invoices for Software Licenses and Internal correspondence for cross-charge

It is seen that, the appellant for the first-time, has provided certain invoices in support of the claim for reimbursing the software license expenditure incurred by ATI, Canada on behalf of the appellant.

4.1 Claim of the appellant: In view of the sample invoices and the internal correspondence with the finance personnel of ATI, Canada, it is claimed by the appellant that the cross-charges on software license expenses are genuine and do not represent any fresh-cash/income in the hands of ATI, Canada as held in the order u/s 201(1)(1A).

4.2 Analysis: The invoices and the internal correspondences submitted by the appellant have been examined. It is seen that, as per the normal practice in software industry, the software licenses are procured by the parent and the expenses thereof are usually shared

across the group members on usage basis. Despite repeated opportunities, the appellant has failed to produce any evidence with respect to the number of licenses allocated to India, the number of engineers in various projects, who used it, to justify the cross charge to the appellant, by its parent. Accordingly, in view of the fresh evidences provided by the appellant, the genuineness of the expenses for software licenses by the AMD/ATI group is found to be acceptable, however the extent of cross-charge to appellant remains un-substantiated. Therefore, in the absence of any supporting evidence provided by the appellant, it is proposed to accord a 50% recognition to the cross-charge on software license expenses to the appellant, which as discussed in para 11.13(j) of the order u/s 201(1)(1A) the reimbursements for these cross-charges were to be protectively treated as Royalty payments for the use of copyrighted software by the appellant through licenses procured by ATI, Canada, in case the reimbursements were found to be for genuine purposes. The remaining 50% is to be treated as "Income from other sources" as in the original order u/s 201(1)(1A).

4.3 Conclusion: In view of the aforementioned discussion, 50% of the total amount of Rs.6,93,11,292/- i.e., Rs.3,46,55,646/- reimbursed by the appellant to ATI, Canada for the cross-charge of software licenses, is subject to a withholding tax rate of 15% in view of Article 12 of India-Canada DTAA, where as the remaining 50%, estimated to be an excessive cross-charge, in view of the absence of any evidence on usage by engineers of appellant in the years under consideration, Rs. Rs.3,46,55,646/- is subject to a withholding tax rate of 40% in view of Article 21(3) of the India-Canada DTAA.

4. Comments on appellant's claim that there is no tax benefit to the AMD/ATI group in the transaction

4.1 Claim of the appellant: The appellant has vehemently claimed that, as a group, AMD/ATI has not benefitted as a result of this reimbursement, where as the Revenue has benefitted from a higher Revenue offered for taxes. Allusion was also made to the yet to be enforceable provisions of the General Anti Avoidance Rules (GAAR), that unless the 'tax-benefit' has not been proved, there is no question of treating any transaction as a sham transaction, and as per the appellant, the entire arrangement does not provide any tax benefit to the AMD/ATI Group.

4.2 Analysis: First and foremost, it is to be seen that it is beyond the scope of section 195 to examine the mens-rea or otherwise in terms of poor tax-planning or inefficient structuring of payments by and between the appellant and its parent to determine the liability to withhold taxes on the income of Non-Residents. Therefore, it is unnecessary to advert to any kind of avoidance discourse, let alone GAAR, in the instant case, where the mechanical application of the section 195 operates, when reimbursements are made by the appellant, in a case where there is no service received from the Non-Resident parent of appellant, ATI Canada, thus rendering them as fresh cash/income chargeable to tax as per section 56 of the IT Act,1961 and Article 21(3) of the India-Canada DTAA liable for TDS u/s 195 at the rate of 40%. Secondly, it is not all difficult to see the benefit of this arrangement to the overall group, as laid out in the in the order u/s 201(1)(1A) itself, that the immediate benefit to ATI, Canada is a double debit of expenses, apart from the benefit of higher claims of amounts under section 10A of the IT

Act,1961, thus leaving the group with higher amounts of tax-exempt monies. Therefore there is no need for advertence to any extravagant concepts like GAAR in the instant case in hand, however, even for academic purposes, when it is factually proved beyond doubt that, the real beneficiary of the services by M/s Soctronics is the parent of the appellant, M/s ATI Canada, and not the appellant, thereby rendering the so-called reimbursements and the receipt of such monies with mark-up as gratuitous, in the least, if not a means to reduce tax liability in Canada and generating higher amounts of tax-exempt monies/cash in the group at large, the test of tax-benefit to the group as per GAAR results in a conclusion against the appellant.

5. *Comments and rebuttal of grounds raised by the appellant in appeal before Hon'ble CIT(Appeal)-V, Hyderabad*

A) *Ground 1:*
The order u/s 201(1)(1A) is contrary to facts and circumstances and is liable to be set aside.

Rebuttal:

In view of the aforementioned discussion, when even the so-called new evidences, by the appellant do not controvert the fact that the real beneficiary of the services of M/s Soctronics is the NR parent of appellant, M/s ATI Canada, and not the appellant, rendering the reimbursements to be mere fresh cash/income in the hands of M/s ATI Canada, liable for TDS @ 40% u/s 195, as held in the order u/s 201(1)(1A) and as upheld by the Hon'ble DRP, Hyderabad. Therefore this ground of the appellant is liable for summary rejection.

B) *Ground 2:*

Contrary to the facts and circumstances of the case, appellant has been held to be an appellant-in-default, which is bad in law.

Rebuttal:

As discussed in the rebuttal to Ground 1, the appellant has rightly been held as appellant-in-default, in view of the failure to perform TDS @ 40% u/s 195, on the reimbursements made by the appellant to its parent, as held in the order u/s 201(1)(1A), and as upheld by the Hon'ble DRP, Hyderabad. Therefore this ground of the appellant is liable for summary rejection.

C) *Ground 3:*

The order u/s 201(1)(1A) has erred in holding that the reimbursements for Software License expenses, Software Engineering Expenses, represent fresh cash/income in the hands of ATI Canada, which is chargeable to tax in India, as 'Income from other sources' in view of Article 21(3) of the India-Canada DTAA.

Rebuttal:

Software Licenses – As discussed in para 4.3 of this report, an amount of Rs. 3,46,55,646/- is held to be income from other sources to be taxed @ 40%, and another Rs. 3,46,55,646/- is to be taxed as Royalty at 15% as per India-Canada DTAA.

Software Engineering expenses – As discussed above in this report, given the fact that the real beneficiary of the services of M/s Soctronics is the NR parent of appellant, M/s ATI Canada, and not the appellant, rendering the reimbursements to be mere fresh cash/income in the hands of M/s ATI Canada, liable for TDS @ 40% u/s 195, as held in the order u/s 201(1)(1A) and as upheld by the Hon'ble DRP, Hyderabad. Therefore this ground of the appellant is liable for summary rejection.

D) ***Ground 4:***

The order u/s 201(1)(1A) failed to appreciate that (i) in view of the accounting of the cross-charges as costs of the appellant, and claiming a mark-up on the same from its parent, there was actual inflow of profits, as against the claim that there's an outflow of cash/profits in the order (ii) the statements of the officials of Soctronics can't be relied upon, as they are an interested party to the order u/s 201(1)(1A).

Rebuttal:

As discussed in paragraph 5 of this report, for the purposes of section 195, the simple question that needs to be answered is, if there are any services received in respect of the reimbursements being made, and the answer to which was clearly in negative, as affirmed by the Hon'ble DRP also. It was also discussed in para 5 of this report, that the overall effect of tax-exempt money generation for the group is quite clearly obvious as a result of these remittances.

Regarding the claim that the statements of the officials of M/s Soctronics, can't be relied upon, it can only be said that the appellant itself chose to cross-examine the officials of Soctronics and it is beyond reason to claim that their statements are unreliable, when the appellant has failed to controvert any of their contentions, during or after the cross-examination of the same officials by the appellant.

Therefore, this ground of the appellant is also liable for summary rejection.

E) ***Ground 5: The findings of the Commissioner of Service Tax, in his order dtd 23/07/2012 have been brushed aside, without cross-verification of facts and without providing any cogent reasons for not considering the findings in that order.***

Rebuttal:

Firstly, it is to be seen that, vide para 11.9 of the order u/s 201(1)(1A) (pages 74-75), a detailed discussion on the order of the Ld.Commissioner of Service Tax and its relevance to the order at hand has been elaborately discussed. Even if the order passed by the Commissioner of Service Tax is to be relied upon, it automatically casts an obligation on the appellant to treat the reimbursements of the engineering expenses made to ATI, Canada as Fee for Technical Services in terms of Section 9(i)(vii) of the IT Act,1961 as well as Article 12 of the India – Canada DTAA, which the appellant has not discharged, as discussed in para 11.9 of the order u/s 201(1)(1A). Therefore, the double-standard of the appellant are exposed and the ground of the appellant is factually incorrect and is liable for summary rejection.

F) ***Ground 6: The reimbursements by appellant to its parent were 'at cost', and devoid of any income element, thus there is no obligation to withhold taxes u/s 195.***

Rebuttal:

In view of the aforementioned discussion in this report, it has been amply proved that the cost of software engineering expenses paid by M/s ATI Canada, was its cost only, for the services received by M/s ATI Canada from M/s Soctronics, and not the cost of the appellant M/s AMD India, as upheld by the order of Hon'ble DRP also. Therefore the reimbursements by appellant represented fresh cash/income in the hands of M/s ATI Canada which were liable for TDS u/s 195. Accordingly, this ground of the appellant is also liable for summary rejection.

G) ***Ground 7:***

The reimbursements by appellant to its parent M/s ATI Canada, represent 'deemed dividend' payments to its parent, as per the provisions of Section 2(22)(e) of the IT Act, 1961 and hence not subject to TDS u/s 195 in the hands of the appellant.

Rebuttal:

It is to be seen that as per the provisions of the Section 2(22)(e), the payments by a subsidiary to its parent can be treated as deemed dividend only if an 'advance or loan' is credited/paid to the shareholder. As can be seen in this case, there is no question of any advance/loan being given to ATI, Canada. Instead the instant transaction is one which has passed through the P & L of the appellant and interestingly, the appellant is in receipt of the funds with certain markup as well. Thus, the basic tests that are needed to characterize the reimbursements as deemed dividends are clearly failing in this case and therefore the bogey of deemed dividends needs to be summarily rejected.

6. ***Evidences and analysis in the order u/s 201(1)(1A) that were not challenged by the appellant even in appeal proceedings***

- *Purchase orders raised by M/s ATI Canada, on M/s Soctronics, pursuant to the contract signed between them, was providing the address of delivery to be Canada and the manager in-charge of the deliverable to be an employee of M/s ATI, Canada. However, the address of delivery in the purchase orders placed by AMD India, pursuant to its contract with M/s Soctronics (from AY 2010-11 onwards) shows the place of delivery as Hyderabad. (Exhibits 7 to 12 on pgs 58 to 63 of the order u/s 201(1)(1A)).*
- *The appellant does not have any ledger in the name of M/s Soctronics, if as per the appellant, M/s Soctronics was its Creditor (provider of services), as opposed to the clearly separate accounting treatments given by M/s Soctronics in its books for the services rendered to ATI, Canada and the appellant from the AY 2009-10 onwards. Any claim of subsuming these transactions in other ledgers is highly unacceptable and renders the accounts of the appellant to be liable for rejection, since the basic norm of accounting of 'disclosure' and representing the actual business transaction in the books of account is conspicuous only by absence in the case of appellant.*
- *Even if the order passed by the Commissioner of Service Tax is to be relied upon, it automatically casts an obligation on the appellant to treat the reimbursements of the engineering expenses made to ATI, Canada as Fee for Technical Services in terms of Section 9(i)(vii) of the IT Act,1961 as well as Article 12 of the India – Canada DTAA, which the appellant has not discharged, as discussed in para 11.13(j) of the order u/s 201(1)(1A).*
- *More importantly, as the appellant does not own any product, technology by its own the claim of the appellant that it was the sole beneficiary of M/s Soctronics is untenable. Infact, M/s Soctronics and the appellant are only*

independent contractors collaborating on the deliverables to be given to ATI, Canada. If M/s Soctronics was the sub-contractor of appellant only, the agreement, statements of work, purchase orders would be issued by appellant and not by its parent. Similarly, all the payments to M/s Soctronics would have come from the appellant and not from its parent M/s ATI Canada as Foreign Inward Remittances. As discussed above, the appellant does not even have the true and fair recording of accounts to support its claim: There is no ledger maintained by the appellant in the name of M/s Soctronics, who it claims to be its sub-contractor. The accounts of the appellant thus fall seriously short of the disclosure norms and purposes of accounting. On this ground also, the claims of the appellant are exposed to be hollow and baseless and liable for summary rejection.

7. Order of the Hon'ble DRP, Hyderabad in the case of appellant for AY 2010-11 upholding the findings of the order u/s 201(1)(1A)

It is noteworthy that the Hon'ble DRP, Hyderabad has in its order dtd. 26/11/2013 (enclosed as Annexure – 1 for your kind perusal) adjudicating the order of the Tranfer Pricing officer, Hyderabad treating the ALP (Arm's Length Price) of the reimbursement of Rs.17,88,20,166/- as NIL, (based on the investigations and order u/s 201(1)(1A) passed by the undersigned, and which is the subject matter of the current appeal proceedings with your honor), has held the following:

"2.6 From the facts stated above, we find that there is no evidence of any service being rendered by SIPL (M/s Soctronics Private Limited) to AMD India. The TPO therefore is justified in taking the ALP at NIL."

Conclusion

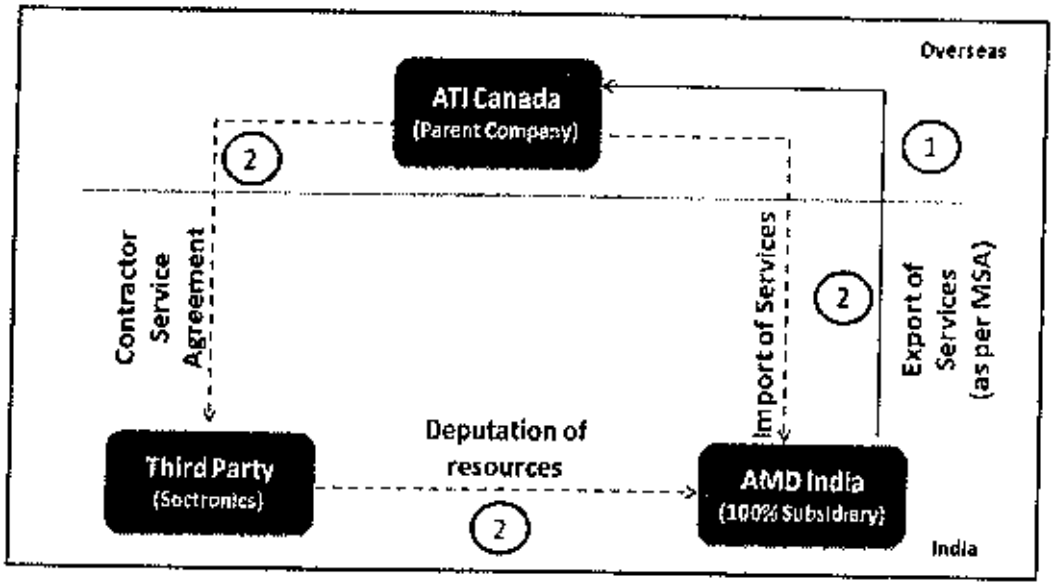
Based on the evidences and analysis thereof, as discussed above, it is to be seen that the services of M/s Soctronics as an independent contractor were solely for the benefit of M/s ATI Canada only. Therefore the claim of the appellant that it was the real beneficiary of such services ought to be rejected and the fresh cash/income in the hands of M/s ATI, Canada needs to be taxed as 'Income from other sources' only, as laid out in the order u/s 201(1)(1A).

It is to be seen that, if the claim of the appellant is to be allowed, there arises a situation where two companies viz. appellant as well as M/s Soctronics end up getting the benefit of Section 10A for the services rendered by M/s Soctronics to M/s ATI Canada. This perilous situation needs to be avoided, and as seen from the above discussion, the evidence clearly shows that M/s Soctronics was the real exporter of software to M/s ATI Canada, and there is no reason for the appellant to claim ownership of such services and reimburse its parent for the same. "

15. A copy of the remand report submitted by the Assessing Officer was provided by the learned CIT(A) to the assessee for the latter's counter-comments. Accordingly, the assessee filed written submissions offering its counter comments, as extracted from the impugned order of the CIT(A), as under-

"1. ***Reimbursement of engineering services:***

(i) The Ld. ADIT failed to appreciate the facts of the case which is explained hereunder by way of pictorial presentation along with brief description of the business model followed by it:



Brief description of business model followed by the Appellant Company:

(a) ATI Canada engaged the Appellant Company to render chip designing and software development services in connection with the development of consumer technologies as per the MSA;

(b) The Appellant Company did not have complete skill set to render the agreed full set of services;

(c) In order to make the Appellant Company capable of rendering the complete bouquet of services, ATI Canada engaged M/s Soctronics to provide the requisite portion of service, on behalf of the Appellant Company;

*(d) As per the engagement between the M/s Soctronics and the ATI Canada, M/s **Soctronics supplied skilled resources to the Appellant Company to provide requisite service;***

*(e) The services of the skilled resources supplied by M/s Soctronics got **subsumed** in the development services undertaken by the Appellant Company;*

(f) The entire full set of agreed software development services were delivered by the Appellant Company to the ATI Canada;

(g) As the agreement to supply the resources was entered into between M/s Soctronics and ATI Canada, ATI Canada accordingly paid M/s Soctronics for the said services and later cross charged the same to the Appellant Company, being the ultimate beneficiary of such services.

*(ii) The above fact is clearly supported by **the order of the Commissioner of Customs, Central Excise and Service Tax** (hereinafter referred to as the 'Service Tax Order'), an authority which is also part of the Department of Revenue, Ministry of Finance, Government of India, copy of which has already been submitted before your Honour. The said Service Tax Order was passed on the basis of search conducted by the Service tax wing and their investigations of the records and facts of the Appellant. Based on such investigations, **it was concluded that ATI Canada provided services to the Appellant through Soctronics who has provided the required number of engineers to the Appellant to accomplish tasks relating to research and development undertaken by the Company for the group company**. The relevant extract from the said Service Tax Order is reproduced hereunder:*

"6.2 On verification of the documents, it is noticed that ATI/AMD (foreign company) has Contractor Service agreements with M/s GD Micro Systems to undertake the projects broadly relating to Physical design, verification and software development. As per this AMD, Canada, through a vendor viz. M/s GD Micro Systems has provided the required number of engineers to accomplish tasks relating to research and development to M/s AMD R&D India. The remuneration for services were charged per person per month basis. It is further notice from the statements of work between M/s GD Micro Systems (subsequently name changed as M/s. Soctronics) and AMD Canada, which is submitted by the assesses, that the services provided comprised of both hardware consultancy and software engineering service for the various projects of M/s AMD. The tasks accomplished, by the engineers pertains to design, verification, model building, test plan creation, test writing, regression and coverage analysis, software development/testing, chip qualification debugging activities of Application Integrated Circuits for which the payments are made in Foreign Currency to M/s AMD America."

.....

6.4 The ATI/AMD (Foreign Company) has software license agreements with services providers like Apache Design Solution Inc., Cadence Design Systems Inc etc. These services are procured by ATI/AMD (Foreign Company) for AMD R&D India, and the expenditure was cross-charged to AMD R&D India in terms of Master Pricing Agreement and are utilized by M/s AMD R&D India in rendering Software development and research services exported to its clients."

(iii) ***From the Remand Report of the Ld. ADIT, it can be seen that the Ld. ADIT has not refuted the findings in the Service Tax Order. In fact the Ld. ADIT mentioned that if the order of the service tax authority is to be relied upon, then the payments should be liable to tax as Fees for technical services (Please refer para 6E page 10 of Remand report).*** *In this regard, the Appellant Company would like to submit that it had made a detailed submission as to why the said reimbursement cannot be taxes under* ***"Fees for technical services"*** *vide its submission dated 18 June 2012 made before Ld ADIT.*

(iv) *The Ld. ADIT while coming to conclusion that the Appellant Company was not the beneficiary of the services provided by M/s Soctronics, completely relied on the statements made by the officials of M/s Soctronics. The Appellant Company wishes to submit that the Ld. ADIT erred in ignoring the findings of the Service Tax authority (an independent revenue authority) and instead completely relied on the statement of the officials of Soctronics knowing very well that they were interested parties to the outcome of the findings of this case.* ***As per the settled judicial principles, statements of interested parties cannot be considered as reliable evidence.***

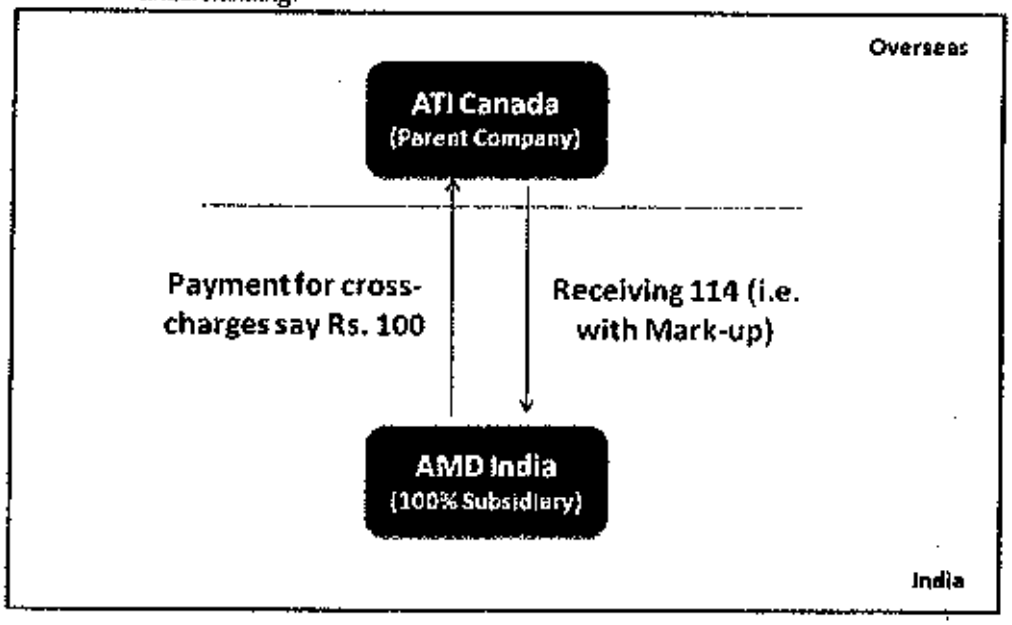
(v) *Further, the Company would like to bring to the notice of your Honour that the Appellant Company had made a detailed submission dated 28 October 2013 before the Ld. ADIT (copy of which has already submitted before your Honour), wherein it is clearly demonstrated that the Company was the beneficiary of the services provided by M/s Soctronics [as is also the finding in the order of the Commissioner of Customs, Central Excise Duty and Service tax ('Service tax Order')]. The Appellant Company has in the said submission provided additional evidences viz., e-mail communications to support the said contention. The Appellant Company has also raised some pertinent questions in the said submission and clearly established the contradictions in the statements made by the Officials of Soctronics – it is surprising to see that the Ld. ADIT in its Remand report has failed to bring out the substantial facts and contradictions brought out by the Appellant Company in its said submission dated 28 October 2013.*

Further, inspite of the said additional evidences provided by the Company, the Ld. ADIT chose not to cross question the Officials of M/s Soctronics on the same.

(vi) ***The Ld. ADIT failed to appreciate that there was no diversion of income from the Appellant Company or fresh cash/income in the hands of ATI Canada on account of the cross-charge. On the contrary there was infact more income/cash flow to the Appellant Company on account of the cross-charge***

(a) *The Appellant Company reiterates the fact that it is providing services to ATI Canada **on a full cost plus mark-up basis** as per the MSA. Which means that whatever cost is incurred by the Appellant Company, the same is realized from ATI Canada as a part of service charges with a mark-up. The cross-charges made by ATI Canada formed part of the cost base of the Appellant Company and hence the same was realized back with a mark-up, thus resulting in net additional income/cash flow to the Appellant Company as against diversion of income/cash from the Appellant Company to ATI Canada as has been alleged by the Ld. ADIT.*

(b) *The pictorial diagram of the transaction flow is depicted below for easy understanding:*



(c) *A detailed submission in this regard was made by the Appellant Company vide its submission dated 15 May 2012 before the Ld ADIT and reiterated the same in all subsequent submissions. The Ld. ADIT did not bring on record anything to the contrary to the above facts but simply continued to conclude without any concrete basis whatsoever that there was diversion of cash/income by Appellant Company in favour of ATI Canada.*

(d) ***The Ld. ADIT failed to appreciate that the AMD group would have been overall better off from a tax perspective had there been no cross-charges by ATI Canada to the Appellant Company.***
*If there would have been no cross charges, there would have been a lower cost base for the Appellant Company and thus there would have been lower service income in the books of the Appellant Company and on a net basis there would have been lower income in the books of the Appellant Company to the extent of mark-up. The Ld. ADIT failed to appreciate that if **there was no tax advantage to the Appellant Company because of the cross-charge, rather a tax disadvantage**, on what basis the cross-charge can be considered as a colorable device.*

(vii) *Further the Appellant Company submits that the remittances towards cross-charge was made much later than the dates of actual cross-charge due to which the realization of the cross-charge with mark, as part of services charges made by the Appellant Company from ATI Canada, happened much earlier than the actual pay-out to ATI Canada towards the cross-charge. Thus, instead of gaining anything from the cross-charge, as has been alleged by the Ld. ADIT, ATI Canada in fact lost on account of interest on the funds locked up. The funds lock-up happened because ATI Canada paid to M/s Soctronics first for the services and towards procurement of software licenses and then it also paid to the Appellant Company towards the services charges as per the MSA (which included the cross charges of M/s Soctronics invoices by ATI Canada to the Appellant Company). Thus, the funds got locked-up since the same was realized much later in time. The Ld. ADIT failed to appreciate this fact. Further, on the contrary, **it was commercially prudent not to cross charge, but the AMD Group did not wish to take that path since that would not have reflected the correct nature of the transaction and true profits in the books of the Appellant Company.** The Ld. ADIT has in fact has penalized the Appellant Company for being honest and reflecting the true and correct state of affairs by passing such an Order.*

(viii) *The Appellant Company would like to submit that as per General Anti-Avoidance Rules ('GAAR'), before considering any transaction as 'impermissible avoidance arrangement' (i.e. a transaction/arrangement designed to avoid Indian Income tax), the Assessing Officer need to demonstrate inter-alia:*

*(i) the basis and the reasons for considering that the **main purpose of the identified arrangement is to obtain tax benefit**; and*

(ii) the tax benefit arising out of the arrangement [refer Rule 10UA and 10 UB of the Income-tax Rules, 1962 ('Rules')].

The Appellant Company has discharged its onus that the transaction of cross-charge has not resulted in any tax benefit to the Appellant Company but on the contrary has resulted in higher taxes in India against which nothing has been brought on record by the Ld ADIT.

(ix) *In view of above, the Appellant Company submits that there was no ulterior motive for the Appellant Company to record a false cross-charge and the Ld. ADIT failed to bring on record anything to the contrary.*

(x) *Further, the Appellant Company wishes to submit that since the said reimbursements were on cost to cost basis, without any income in the hands of ATI Canada, the same is not liable to tax in India under section 195 of the Act and hence the Appellant Company cannot be considered to be an assessee in default for not deducting TDS on such reimbursements.*

1. ***Reimbursement of software licenses:***

(i) ***The Ld. ADIT in its Remand Report dated 30 December 2013 has accepted the genuineness of the cross-charge towards software licenses*** *however has stated that only 50% of the said cross-charge is appropriate.* ***Once the genuineness of the cross-charge is accepted, the Ld. ADIT has no jurisdiction under section 201(1) of the Act to question the quantum/appropriateness of the cross-charge.*** *Once the cross-charges are held as genuine i.e. once it is established that the Appellant Company has received software licenses (or services) from ATI Canada, the*

*limited jurisdiction that the Ld. ADIT has is to determine the default in TDS on the same, if any. There are a plethora of decisions wherein it has been held that the tax authorities cannot step into the shoes of a businessman to determine whether an expense should or should not have been incurred and even otherwise, the action of the Ld. ADIT tantamount to assuming jurisdiction under section 143(3) of the Act, which is against the provisions of law. Further, the Ld. ADIT has not provided any justification/logic to arrive at the ad-hoc figure of 50%. There are innumerable decisions wherein ad-hoc disallowances has been held as not sustainable under law. In this regard, the Appellant Company would like to submit that it had made a detailed submission as to why the said reimbursement cannot be taxes under "**Royalty**" vide its submission dated 18 June 2012 made before Ld ADIT.*

(xi) Without prejudice to the above, the Appellant Company further wishes to submit as under:

- *With regard to the 50% payment which has been considered as appropriate/reasonable charges towards software licenses, the payments towards the same being cost to cost reimbursement, the same does not constitute any income in the hands of ATI Canada and accordingly the question of application of section 195 of the Act and consequent TDS on the same does not arise. If the same is considered towards payment of software licenses, then the same being only for right to use copyrighted article [**the Ld. ADIT in his Remand report in para 4.2 stated that the payment was for copyrighted software and not for copyright**] and not copyright, the same would be outside the scope of royalty as per Article 12 of the Tax treaty. Detailed submission in this regard has already been filed before your Honour vide its Memorandum of written submission.*
- *Further, if at all the reimbursement of software expenses is subject to TDS, it can only be at the rate of 10% as applicable for the said AYs 2007-08 and 2008-09 as per section 115A of the Act, since the tax rate under the Act being more beneficial than the Tax treaty rate.*
- *With regard to the balance 50% payment, the Ld. ADIT has acknowledged the genuineness of the payment that it was towards software licenses (i.e. in other words the Appellant Company indeed received software licenses from ATI Canada) and has only questioned the reasonability of such payments. Once it is established that the payments were for software licenses, the same cannot be brought to tax under Article 21(3) of the India-Canada treaty. Whether, the recipient of services should have incurred or not incurred a particular expense (i.e. availed or not availed a particular service), the same cannot be a determining factor for classifying the nature of income in the hands of recipient.*

Our submissions against Ground No. 7:

(i) The Ld. ADIT in his Order has alleged that the entire arrangement of the Appellant Company with ATI Canada was with a motive to divert cash/income from the Appellant Company to ATI Canada in the disguise of cross-charge/reimbursements and there was no actual services/software received by the Appellant Company towards the cross-charge i.e. in other words a colorable device in the form of a cross charge to remit cash/income to ATI Canada. The Ld. ADIT in his Order stated that since the Appellant did not convene any Board Meeting to declare dividend and since there was no approval taken from RBI to distribute any dividend, the said remittances cannot be considered as dividend.

(ii) In this regard, ***the Ld. ADIT failed to appreciate that dividend as understood under the Companies Act, 1956 is not the same as is understood/defined under the Act.*** *Dividend is defined under section 2(22) of the Act. As per section 2(22)(a) of the Act, any distribution of accumulated profits of the Company which entails the release of the assets of the Company to its shareholders would be considered as dividend. The Ld. ADIT has alleged that there has been diversion of income (i.e. profits)/cash (i.e. assets) of the Appellant to ATI Canada (i.e. the shareholder of the Appellant Company). Thus, going by the allegation, the said remittances by the Appellant to ATI Canada can only be classified as dividend.*

(iii) Hence, it is submitted before your Honors, ***without prejudice to the submissions made against ground nos. 1 to 6 above****, that even if hypothetically the allegations of the Ld. ADIT is considered true, considering that ATI Canada is the shareholder of the Appellant Company, the said remittances made by the Appellant Company can only be categorized as dividends under section 2(22)(a) of the Act, which is exempt under section 10(34) of the Act in the hands of the ATI Canada and thereby the Appellant Company was not under any obligation to deduct tax at source under section 195 of the Act. Hence, the said order passed under section 201(1) of the Act by the Ld. ADIT treating the Appellant Company as an assessee in default is unjustified, illegal, against to the facts and circumstances of the case and hence it is prayed before your Honour to set aside the Order of the Ld. ADIT and thus provide due justice to the Appellant Company."*

16. After considering the submissions made by the assessee and the material available on record including the remand report filed by the Assessing Officer and the counter comments offered by the assessee thereon, the learned CIT(A) proceeded to decide the issues involved in the appeals of the assessee. As regards the nature of the amount claimed to be remitted by the assessee to ATI Technologies, Canada on account of reimbursement of engineering charges paid to Soctronics Technologies P. Ltd., the learned CIT(A) held that factual evidence gathered by the Assessing Officer and the lacunae in the maintenance of records/accounts by the assessee were sufficient to show that the real beneficiary of the services rendered by Soctronics Technologies P. Ltd. was ATI Technologies, Canada and not the assessee company. He also held that the unusual structuring of the transactions in question supported his conclusion. In this regard, he noted that there was failure on the part of the assessee to explain as to why its parent company had to enter into a contract for its benefit with Soctronics

Technologies P. Ltd., which was against the norms of independent corporate functioning and the usual practice followed in the software industry. According to him, there was also a failure on the part of the assessee to establish any business purpose for the existence of contract between its parent company and Soctronics Technologies P. Ltd. without any reference to the assessee company. He noted that although the assessee company had subsequently entered into a contract directly with Soctronics Technologies P. Ltd. from assessment year 2010-11 without the involvement of its parent company ATI Technologies, Canada, no explanation was offered as to why such agreement could not have been entered into by the assessee company for earlier years to show that it was the real beneficiary of the services provided by Soctronics Technologies P. Ltd.

17. As regards the reliance placed by the assessee on the order of the Commissioner of Service Tax, wherein a finding was given that the services provided by Soctronics Technologies P. Ltd. to ATI Technologies, Canada were actually availed by the assessee company, the learned CIT(A) held that the Commissioner of Service Tax while passing the said order did not have the benefit of the outcome of the investigation made by the Assessing Officer, which clearly revealed the true character of the transaction. He held that even going by the finding recorded by the Commissioner of Service Tax, the payments made by the assessee to its parent company for engineering services were in the nature of fee for 'included services' and there was a statutory obligation on the assessee to deduct tax at source from such payments as per S.195 of the Act. He held that the claim of the assessee that it was the actual beneficiary of the services provided by the Soctronics Technologies P. Ltd., in any case, was untenable as established by

the Assessing Officer by making extensive investigations, which revealed that the assessee company was never in control of the deliverables provided by Soctronics Technologies P. Ltd. and Soctronics Technologies P. Ltd. was always guided by the terms of works issued by the ATI Technologies, Canada, as clearly observed even by the Commissioner of Service Tax in para 6.2 of his order. He therefore, agreed with the conclusion of the Assessing Officer that the amounts claimed to be remitted by the assessee company to ATI Technologies, Canada as reimbursement of expenditure incurred for the services received from Soctronics Technologies P. Ltd. was in the nature of fresh cash/income received by ATI Technologies, Canada and the same was chargeable to tax in India in the hands of ATI Technologies, Canada as 'income from other sources' arising in India, being payment of gratuitous nature. The learned CIT(A) accordingly upheld the action of the Assessing Officer in treating the assessee as in default for its failure to deduct tax at source from the said remittances under S.201(1) alongwith interest payable thereon under S.201(1A).

18. As regards the amount claimed to be remitted by the assessee to ATI Technologies, Canada on account of reimbursement of software licences, the learned CIT(A) found that although this claim of the assessee was not accepted by the Assessing Officer in his order passed under S.201(1), in the absence of the required supporting details and evidence, fresh evidence filed by the assessee during the course of appellate proceedings before him in the form of e-mails, correspondence between ATI Technologies, Canada and the assessee company, copies of invoices for purchase of software licences by ATI Technologies, Canada, etc. was relevant to support the claim of the assessee. In the remand report, the Assessing Officer also

accepted the genuineness of the expenditure incurred by ATI Technologies, Canada on purchase of software licences for the benefit of entire group as well as effective use of such licenses by the assessee. He however, noted that the evidence produced by the assessee on this issue was not sufficient to support and substantiate the claim of the assessee fully. The Assessing Officer accordingly proposed in his remand report that the claim of the assessee on this issue to the extent of 50% may be accepted as genuine, being cross charges paid to ATI Technologies, Canada on account of software licence expenses. He accordingly proposed that 50% of the amount claimed to be remitted by the assessee on account of software expenses can be accepted and treating the same as in the nature of royalty, the balance amount of 50% may be treated as income from other sources, as originally held in the order passed under S.201(1). The learned CIT(A) accepted this proposal of the Assessing Officer and overruling the objections raised by the assessee in this regard, he held that 50% of the amount remitted by the assessee company to ATI Technologies, Canada on account of software expenses is in the nature of royalty chargeable to tax in India in the hands of ATI Technologies, Canada under the head 'other sources' under S.9(1)(vi) of the Income Tax Act,1961, as well as Article 12 of India Canada DTAA at the rate of 10%.

19. As regards the balance amount of 50%, he held hat it was the excess payment made by the assessee company to its parent company and the same, therefore, was chargeable to tax in India in the hands of ATI Technologies, Canada as per Article 12(8) of India Canada DTAA as rightly held by the Assessing Officer .

20. Aggrieved by the order of the learned CIT(A), the assessee has preferred these appeals before the Tribunal on the following grounds-

"1. That on the facts and in the circumstances of the case and in law, the order of the Hon'ble Commissioner of Income-tax(Appeals) V (hereinafter referred to as 'CIT(A)') dated 31 January 2014 under seciton250 of the Income Tax Act,1961 ('the act) is bad in law and is in violation of the principles of natural justice.

2. That on the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) erred in confirming the order of learned Assistant Director of Income-tax (International Taxation)-I, Hyderabad.(hereinafter referred to as 'Ld. ADIT') treating the Appellant Company as an 'assessee in default' under section 201(1)/201(1A) of the Act for non-deduction of tax at source in respect of reimbursement of Engineering service expense and Software license expenses to ATI Technologies inc. Canada ('ATI Canada') on cost to cost basis and hence is liable to be set aside.

3. That on the facts and in the circumstance of the case and in law, the Ld. ADIT erred and the Hon'ble CIT(A) further erred in concluding that the Appellant Company was not the beneficiary of the Engineering services provided by M/s Soctronics India Private Limited ('Soctronics') under the arrangement with ATI Canada and have further erred in holding that the cross charge of Engineering expenses incurred by ATI Canada on behalf of the Appellant and reimbursement of the same to the ATI Canada represents free cash/income chargeable to tax in the hands of ATI

Canada in India as 'Others income under Article 21 of the Double Taxation Avoidance Agreement ('DTAA' or the 'Tax Treaty') entered into between India and Canada.

4. *That on the facts and in the circumstances of the case and in law, the Ld. ADIT erred and the Hon'ble CIT(A) further erred in holding that the reimbursement of Engineering services to ATI Canada was a colourable device to repatriate cash/profits outside India without appreciating the fact that the Appellant being a captive service provider to ATI Technologies, Canada under cost plus pricing model, the reimbursement, on the contrary, resulted in net cash flow/ additional profits in the hands of the Appellant Company.*

5. *That on the facts and circumstances of the case and in law, the Ld. ADIT erred and the Hon'ble CIT(A) further erred in not discharging the onus of proving the ulterior motive or tax benefit arising to the Appellant Company on account out of reimbursement of Engineering services to ATI Canada while alleging that the said reimbursement was a colorable device to repatriate profits/cash to ATI Canada.*

6. *That on the facts and circumstances of the case and in law, the Ld. ADIT erred and the Ld. CIT(A) further erred in not relying on the categorical findings of the Hon'ble Commissioner of Customs, Central Excise and Service Tax, vide his order dated 23 July 2012 that the Engineering Services provided by Soctronics under the arrangement with ATI Canada was for the benefit of the Appellant Company.*

7. That on the facts and in the circumstances of the case, the Ld. ADIT erred and the Hon'ble CIT(A) further erred in not appreciating the fact that the statements made by the officials of Scotronics based on which the impugned order under section 201(1)/(1A) of the Act was passed, were in fact interested parties to the outcome of the said order and hence their statements could not be relied upon.

8. That on the facts and in the circumstances of the case, the Ld. ADIT erred and the Hon'ble CIT(A) further erred in not taking full cognizance of the additonal evidence produced by the Appellant Company during the remand proceedings which clearly established the contradictions in the statements made by the directors/employees of Soctronics.

9. That on the facts and in the circumstances of the case, the Ld. ADIT erred and the Hon'ble CIT(A) further erred in not appreciating the fact that appreciating the fact that the reimbursement of Engineering service expenses was on cost to cost basis and as per the settled judicial precedents, in case of cost to cost reimbursement, there is no obligation to deduct tax at source under section 195 of the Act.

*10. **Without prejudice to grounds 3 to 9 above,** that on the facts and in the circumstances of the case, the Ld. ADIT erred and the Hon'ble CIT(A) further erred in not appreciating the fact that the real beneficiary of the payments made by the Appellant to ATI Canada towards cross charge of Engineering services was Scotronics and thus the provisions of section 194J of the Act read with section191 of the Act should only come into operation.*

11. That on the facts and in the circumstances of the case and in law, the Ld. ADIT erred and the Hon'ble CIT(A) further erred in holding that 50% of the reimbursement towards software licensee by the Appellant Company to ATI Canada was taxable in the hands of ATI Canada in India as 'Royalty' under Article 12 of the DTAA.

12. That on the facts and in the circumstances of the case, the Ld. ADIT erred and the Hon'ble CIT(A) further erred in concluding that the balance fifty percent of cross chares made towards 'Software licenses' as not reasonable.

13. That on the facts and in the circumstances of the case, the Ld. ADIT erred and the Hon'ble CIT(A) further erred in questioning the commercial/business expediency of software expenses in proceedings under section 201(1) of the Act.

14. That on the facts and in the circumstances of the case, the Ld. ADIT erred and the Hon'ble CIT(A) further erred in holding the alleged l50% unreasonable payment towards software licenses as income chargeable to tax in India in the hands of ATI Canada as 'Other Income' as per Article 21 of the DTAA.

15. That on the facts and in the circumstances of the case, the Ld. ADIT erred and the Hon'ble CIT(A) further erred in not appreciating the fact that the reimbursement of Software license expenses was on cost to cost basis and as per the settled judicial precedents in case of cost to cost reimbursements there is no obligation to deduct tax at source under section 195 of the Act.

16. That on the facts and in the circumstances of the case, the Ld. ADIT erred in computing interest while passing order under section 201(1)/201(1A) of the Act.

*17. **Without prejudice to above ground No.s 1 to 16 above,** the Ld. ADIT erred and the Hon'ble CIT(A) further erred in not appreciating the fact that ATI Canada being the shareholder of the Appellant, the reimbursement towards Engineering services and 50% of the software licenses alleged to be unreasonable can at the most be categorized as dividend income under section 2(22)(a) of the Act in the hands of ATI Canada."*

21. As regards Grounds No.1 and 2, the learned counsel for the assessee submitted that they are general in nature, requiring no specific adjudication.

22. The common issue involved in grounds No.3 to 9 relates to the determination of the exact nature of the amount claimed to be remitted by the assessee to ATI Technologies, Canada on account of reimbursement of engineering expenses incurred on services rendered by Soctronics Technologies P. Ltd. and the obligation of the assessee to deduct tax at source form the said remittance, depending upon the chargeability of the said amount in the hands of the ATI Technologies, Canada in India.

23. The learned counsel for the assessee submitted that while rejecting the claim of the assessee that the amount in question was actually paid to parent company towards reimbursement of expenses incurred on services availed from Soctronics Technologies P. Ltd. and holding the same to be extra

profit or cash paid gratuitously by the assessee to its parent company without there being any services availed by it, the Assessing Officer as well as the CIT(A) completely ignored the business model of the assessee company. He explained that the assessee company is engaged by the ATI Technologies, Canada to run chip designing and software development services in connection with the development of consumer technologies as per the master service agreement and since the assessee company did not have complete skill set to render the full set of services to its parent company as agreed, the latter engaged Soctronics Technologies P. Ltd. to provide the requisite portion of services on its behalf to the assessee company. He invited our attention to the tripartite agreement dated 1st April, 2005 entered into between the ATI Technologies, Canada, the assessee company and ATI Technologies, Barbodos placed at pages 1086 to 1094 of the paper-book and submitted that as per the said agreement, which was entered into in furtherance with the Master Transfer Pricing Agreement, services contracted by one party from a third party were meant for the benefit of all other members of the ATI Technologies Group. As required by the bench, he also filed a copy of the Master Transfer Pricing Agreement entered into between all ATI Technologies Group companies which was not filed before the authorities below and pointed out from the said agreement that the services contracted by one party form third party were available for the benefit of one or more members of the ATI Group. He contended that as per the arrangement between the group companies, skill resources availed from Soctronics India Private Limited were made available by its parent company to the assessee company and the parent company in turn raised debit notes on the assessee company as a back to back cost recharge without any mark up.

24. The learned counsel for the assessee pointed out that the assessee company was operating on a cost plus model and accordingly raised invoices on ATI Technologies, Canada on cost plus mark up of 12 to 14%. He submitted that this cost also included the amount charged by ATI Technologies, Canada to the assessee company and the assessee company thus got back whatever amount was reimbursed to ATI Technologies, Canada alongwith a mark up of 12 to 14%. He contended that the basic premise of the allegation made by the Assessing Officer and the learned CIT(A) that the remittance claimed to be made by the assessee company to ATI Technologies, Canada on account of reimbursement of expenses was actually a ploy to divert/repatriate cash/profit outside India was totally unfounded.

25. The learned counsel for the assessee invited our attention to the copy of the order passed by the Commissioner of Service Tax wherein service tax liability was levied after having found that the assessee company was the beneficiary of the engineering services provided by Soctronics Technologies P. Ltd.. He submitted that this finding of the Commissioner of Service Tax has not been rebutted even by the Assessing Officer and the CIT(A) and on the other hand, they have observed in their respective orders that going by the order of the Commissioner of Service Tax, the payment/ reimbursement by the assessee company to ATI Technologies, Canada clearly represented 'fees for included services' . He reiterated that the Assessing Officer and the learned CIT(A) have also failed to appreciate the fact that going by the cost plus model followed by the assessee company for raising the invoices on its parent company, there was neither any diversion of income from the assessee company nor any fresh cash/income in

the hands of ATI Technologies, Canada on account of cross charges. He contended that there was in fact more income by way of cash inflow to the assessee company as a result of payment of such cross charges, as the same was included in the cost invoiced by the assessee company to ATI Technologies, Canada alongwith mark up. He contended that the ATI Technologies, Canada thus actually lost more money by way of mark up charged by the assessee on cost incurred, which was inclusive of cross charges paid by the assessee to ATI Technologies, Canada.

26. The learned counsel for the assessee invited our attention to paragraph 6.2 of the order of the Commissioner of Service Tax at page 1112 of the paper-book, and pointed out that a clear cut finding was recorded therein that as per the agreement between the Soctronics Technologies P. Ltd. and ATI Technologies, Canada, Soctronics Technologies P. Ltd. was required to provide requisite engineers to the assessee company, so that it could accomplish the tasks of research, development, etc. to ATI Technologies, Canada as per the master service agreement. He specifically pointed out that this finding was recorded by the Commissioner of Service Tax on the basis of the due search and verification of records by the service tax authorities and the same should have been given proper and due consideration by the Assessing Officer as well as the learned CIT(A), for arriving at a correct conclusion. He submitted that they, however, have relied on the statements of the promoters and employees of Soctronics Technologies P. Ltd. overlooking the fact that Soctronics Technologies P. Ltd. was an interested party, as it was claiming deduction under S.10A of the Act, claiming the services rendered to ATI Technologies, Canada as export sales. He contended that the said statements given by the interested parties to protect their

claim of deduction under S.10A cannot be relied upon and even the contradictions in their statements have been clearly pointed out by the assessee in the written submissions filed before the authorities below on 30th August and 20th October 2013 (copies at pages 491 to 499 and 586 to 589 of the paper-book).

27. The learned counsel for the assessee contended that the assessee company thus was indeed a beneficiary of engineering services rendered by Soctronics Technologies P. Ltd. for which ATI Technologies, Canada initially made the payment and later on cross charged to the assessee on cost to cost basis. He contended that there was no outflow of cash/profits from the assessee company to ATI Technologies, Canada, as alleged by the authorities below and there being no ulterior tax motive for the assessee company to record false cross charges, the authorities below were not justified in treating the amount of cross charges paid by the assessee to ATI Technologies, Canada as extra cash/profit, which was chargeable to tax in India, as income from other sources. He contended that all the facts of the case, evidence brought on record by the assessee and the order of the Commissioner of Service Tax are sufficient to show that the amount in question was paid by the assessee to ATI Technologies, Canada on account of services rendered by Soctronics Technologies P. Ltd. for the benefit of the assessee company and the same was not in the nature of any gratuitous payments made to its parent company, which is chargeable to tax in India as income from other sources, as held by the authorities below.

28. The learned counsel for the assessee submitted that the cross-charges made by the assessee company towards engineering services being in the nature of pure reimbursement at

cost without any income element embedded in it, the same falls outside the purview of S.195 of the Act. He contended that S.195 casts an obligation on any person, who is responsible to pay to a non-resident, any sum chargeable under the provisions of the Act, to deduct tax at the rates in force. Relying on the various judicial pronouncements, he contended that since the amount in question paid by the assessee company to ATI Technologies, Canada was on account of reimbursement of actual expenses incurred on cost to cost basis, without there being any element of profit, the same was not chargeable to tax in India in the hands of ATI Technologies, Canada and there was no requirement of deduction of tax at source, as per the provisions of S.195. He contended that the assessee consequently cannot be treated as an assessee in default under S.201/201(1A) for non-deduction of tax at source from the said payment.

29. The Learned Departmental Representative, on the other hand, submitted that the claim of the assessee company of having availed the services of Soctronics India Private Limited through its parent company in Canada was not supported by any agreement either between the assessee company and Soctronics India Private Limited or between the assessee company and its parent company. He submitted that even the enquiries and investigations made by the Assessing Officer clearly revealed that the beneficiary of services rendered by Soctronics India Private Limited was ATI Technologies, Canada and not the assessee company. He submitted that there is no evidence whatsoever brought on record by the assessee to show that it was the beneficiary of the services rendered by Soctronics India Private Limited for which payment was initially made by ATI Technologies, Canada and the same is claimed to be subsequently reimbursed by it. He contended that even the so

called Master Transfer Pricing Agreement now submitted by the learned counsel for the assessee for the first time before the Tribunal is very vague and general and do not establish the case of the assessee that it was the beneficiary of services rendered by Soctronics India Private Limited. He submitted that examination conducted by the Assessing Officer clearly established that the services availed from Soctronics India Private Limited were placed in the repository maintained with ATI Technologies, Canada and the same were available to all the group companies. He contended that in these facts and circumstances, the stand of the assessee cannot be accepted that the entire cost of services rendered by Soctronics India Private Limited was borne by it and the same was fully reimbursed to ATI Technologies, Canada.

30. As regards the order of the Commissioner of Service Tax relied upon by the learned counsel for the assessee in support of its case, the Learned Departmental Representative submitted that the finding given therein is relevant only to the extent of services rendered by ATI Technologies, Canada to the assessee company for the purpose of levy of service tax. He contended that the finding given by the Commissioner of Service Tax that the services rendered were availed by ATI Technologies, Canada from Soctronics India Private Limited, however, was not relevant or germane to the issue involved in the context of service tax liability and the same therefore, cannot be taken cognizance of, to decide the issue involved in the present context in the income tax proceedings. He contended that the sole beneficiary of the services rendered by the Soctronics India Private Limited thus was found to be ATI Technologies, Canada by the Assessing Officer and in the absence of any evidence to show that the assessee company also availed the benefit of the said services form ATI Technologies,

Canada, the amount claimed to be remitted as the reimbursement of cost of the services was nothing but the payment of extra profit made by the assessee to the ATI Technologies, Canada which was chargeable to tax in the hands of the said company in India as income from other sources.

31. We have considered the rival contentions and also perused the relevant material on record. The main issue involved in these appeals is whether the assessee company can be treated as an assessee in default under S.201(1) for its failure to deduct tax at source from the amounts remitted to ATI Technologies, Canada on account of engineering services and software applications/licences. This will depend upon the taxability of the said amounts in the hands of the ATI Technologies, Canada, in India, as the obligation/liability of the assessee to deduct tax at source from these amounts will depend upon as to whether the said amounts are chargeable to tax in India in the hands of ATI Technologies, Canada as per the specific provisions contained in S.195. In order to determine the taxability of the said amount in the hands or ATI Technologies, Canada in India as per the domestic law as well as India-Canada DTAA, it is necessary to ascertain the exact nature of the amounts keeping in view the relevant facts of the case as well as material placed on record before us. The assessee in this case has raised various grounds to dispute its liability to deduct tax at source and has also raised certain alternative contentions in support of its case. We therefore, now proceed to decide the issues involved in the appeals with reference to the specific grounds raised by the assessee.

32. The common issue which is raised in ground Nos.3 to 9 of the assessee's appeals relates to its claim that the amount

remitted on account of engineering services to ATI Technologies, Canada was nothing but reimbursement of actual expenses incurred by the said parent company and there being no element of profit involved therein, it was not chargeable to tax in India in the hands of ATI Technologies, Canada and there was no question of deduction of tax at source. The stand taken by the assessee in this regard is that the relevant engineering services were availed by ATI Technologies, Canada on its behalf from Soctronics India Private Limited and the amount paid for such services to Soctronics India Private Limited by ATI Technologies, Canada was simply reimbursed by the assessee company on actual cost basis. Although this stand of the assessee was supported by the debit invoices raised on it by ATI Technologies, Canada, the Assessing Officer as well as the learned CIT(A) declined to accept the same firstly on the basis that there was no agreement either between the ATI Technologies, Canada and Soctronics India Private Limited or between ATI Technologies, Canada and the assessee company and secondly on the basis of statements given by the directors and employees of Soctronics India Private Limited, which, according to the revenue authorities, revealed that the beneficiary of the services rendered by Soctronics India Private Limited was ATI Technologies, Canada alone and not the assessee company.

33. In so far as the first objection raised by the Revenue authorities is concerned, there is no dispute that there was no agreement entered into either between the assessee company and Soctronics India Private Limited or between the ATI Technologies, Canada, and the assessee company, which was produced to support the case of the assessee However, the agreement between the ATI Technologies, Canada and its group companies called Master Service Agreement was produced by the assessee,

which was sufficient to show that the assessee company was engaged by ATI Technologies, Canada to render chip designing and software development services in connection with the development of consumer technology and since the assessee company did not have the complete skill set to render such services, the ATI Technologies, Canada was to provide the requisite portion of services to the assessee through other concerns. In furtherance of the Master Service Agreement, the Master Transfer Pricing Agreement was also entered into between the assessee company and ATI Technologies, Canada which clearly provided that services contracted by one party from a third party were also meant for the benefit of other members of ATI group including the assessee company. In our opinion, these agreements are sufficient to show the business model followed by the entire group, whereby parent company, i.e. ATI Technologies, Canada was entrusting specific jobs to its subsidiaries and the services or skill set required for the execution of the said job not available with the subsidiaries were procured from the third parties and the same were made available to the subsidiary company. It therefore, cannot be said that the claim of the assessee of having availed the benefit of services rendered by Soctronics India Private Limited through ATI Technologies, Canada is not supported by any documentary evidence in the form of agreements except the debit invoices raised by ATI Technologies, Canada on the assessee company.

34. As regards the heavy reliance placed by the Assessing Officer on the statements of the Directors and employees of Soctronics India Private Limited to come to the conclusion that the beneficiary of the services rendered by the said Indian concern was only ATI Technologies, Canada, it is pertinent to note that the amount received by the said concern from ATI Technologies,

Canada for the services rendered was claimed to be export sales eligible for deduction under S.10A of the Act, and keeping in view this vital aspect, we are inclined to accept the contention of the learned counsel for the assessee that the said party, in order to protect their own interests, did not reveal the involvement of the assessee company and emphasised that the beneficiary of the services rendered by them was only the ATI Technologies, Canada. M/s. Soctronics India Private Limited thus was clearly an interested party and the statements made by the Board of Directors and the employees to protect their own interest and to ensure that their claim for deduction under S.10A is not adversely affected, cannot be relied upon to conclusively hold that the beneficiary of services rendered by them was ATI Technologies, Canada only. In our opinion, the claim of the assessee of having availed the benefit of services rendered by Soctronics India Private Limited to ATI Technologies, Canada needs to be considered on the basis of the other facts of the case, which are relevant in this context as well as other documentary evidence available on record.

35. As already noted above, the claim of the assessee of having remitted the amount in question to ATI Technologies, Canada for the services availed by the said company from Soctronics India Private Limited , which was duly supported by debit invoices raised by the said company, was rejected by the authorities below and it was held by them that the said amount was paid by the assessee to ATI Technologies, Canada as extra profit/cash, without there being any services provided by the said company for some extra consideration, such as tax benefit. As submitted by the learned counsel for the assessee in this regard, the assessee company however, was following a cost plus model and the amount in question claimed to be paid by it to ATI

Technologies, Canada for engineering services forming part of its cost was duly recovered from ATI Technologies, Canada alongwith mark up. Keeping in view this factual position, which has not been disputed by the learned Departmental Representative, we are unable to visualize as to how any benefit could accrue to ATI Technologies, Canada by payment of the amount in question, even if it is assumed for the sake of argument that it was nothing but payment of extra profit/cash by the assessee company, without there being provision of any services, as alleged by the Revenue authorities. As rightly contended by the learned counsel for the assessee, ATI Technologies, Canada was actually a loser as a result of this arrangement in as much as the amount in question received by it was not only paid back to the assessee company, but the same was paid back with mark up.

36. It is observed that the exact nature of this arrangement or transaction was also examined by the service tax authorities to ascertain the liability on account of service tax and the matter went up to the Commissioner of Service Tax, who passed an order dated 23.7.2012 deciding this issue. A copy of the said order is placed at pages 1110 to 1145 of the assessee's paper-book and a perusal of the same shows that a finding was recorded by him in paragraph No.6, on verification of the documents recovered during the search operation and the record/information submitted by the assessee that the ATI Group had a Master Transfer Pricing Agreement among themselves to provide the R&D services and as per clause 4 of the said agreement, a supplying member of the ATI Group was to make a charge for the services rendered or provided by it to another member of the ATI group at 'cost plus' with profit component. It was also noted in paragraph No.6.2, on verification of the documents, that ATI has a Contractor Service Agreement

with Soctronics India Private Limited (earlier known as GD Micro Systems) for providing required number of engineers to accomplish the tasks relating to research and development to the assessee company. The tasks accomplished by the said engineers were also identified as pertaining to design, verification, model building, chip qualification debugging activities of Application Integrated Circuits, etc., for which payments were stated to be made in foreign currency by ATI Technologies, Canada. It was further observed in paragraph 6.3 by the Commissioner of Service Tax that these services rendered by the vendors and procured by ATI Technologies, Canada were provided to the assessee company for utilsing the same in rendering software development and research services. In our opinion, these clear cut findings recorded by the Commissioner of Service Tax were sufficient to show that the benefit of services rendered by Soctronics India Private Limited and procured by ATI Technologies, Canada was availed by the assessee company, and the amount in question was paid by the assessee company to ATI Technologies, Canada for such services.

37. It is observed that the Assessing Officer, however, brushed aside the findings recorded by Commissioner of Service Tax and relevant evidence in the form of order of the Commissioner of Service Tax on the ground that there was delay on the part of the assessee to submit the said order passed on 23.7.2012 and by the time it was filed, he had already completed his investigations, which, according to him, revealed that the beneficiary of the services rendered by Soctronics India Private Limited was only ATI Technologies, Canada and not the assessee company. As already held by us, the main evidence collected by the Assessing Officer during the course of such investigation in the form of statements of Directors and employees of Soctronics India Private Limited, was

not a reliable evidence to conclusively establish the case of the Assessing Officer. Moreover, the findings recorded by the commissioner of Service Tax were not specifically disputed either by the Assessing Officer or the learned CIT(A). On the other hand, they observed in their respective orders that going by the findings given by the Commissioner of Service Tax in his order, the services availed by the assessee company from ATI Technologies, Canada through Soctronics India Private Limited were in the nature of technical services and accordingly, the amount paid for such services by the assessee company was chargeable to tax in the hands of ATI Technologies, Canada in India as *'fees for included services'* as per domestic law as well as India Canada DATA.

38. There is one more interesting aspect relating to this issue. As submitted by the learned counsel for the assessee, Soctronics India Private Limited has entered into a direct agreement with the assessee company from assessment year 2010-11 onwards to provide similar services as rendered in the earlier years including the years under consideration as per the agreement entered into with ATI Technologies, Canada. As further submitted by him, the genuineness of the services rendered as per the said agreement to assessee company by Soctronics India Private Limited for assessment year 2010-11 and onwards is not disputed by the dept. It seems that from assessment year 2010-11 onwards, Soctronics India Private Limited was no more eligible for the benefit of deduction available under S.10A and accordingly, they agreed to enter into a direct agreement with the assessee company. Be that as it may, this subsequent development clearly supports the case of the assessee that the services rendered by Soctronics India Private Limited and procured by the ATI Technologies, Canada were meant

for the benefit of the assessee company also and the amount in question was paid to ATI Technologies, Canada for such services.

39. Having held that the amount in question was paid by the assessee company to ATI Technologies, Canada for the benefit it derived in the form of services procured from Soctronics India Private Limited and provided to it by ATI Technologies, Canada, and it is not a case of any payment of extra profit/cash by the assessee company to ATI Technologies, Canada as alleged by the authorities below, the next issue that arises for our consideration is whether it was a case of a mere reimbursement of actual expenses incurred by the ATI Technologies, Canada on cost basis without any profit element involved therein as claimed by the assessee. In this regard, it is pertinent to note that the services were rendered by Soctronics India Private Limited to ATI Technologies, Canada as per the Contractor Service Agreement executed on 20th March, 2006 (a copy of the said agreement is placed at pages 1098 to 1109 of the assessee's paper book). As stipulated in the preamble of the said agreement, Soctronics India Private Limited was retained by ATI Technologies, Canada as contractor to provide certain services as detailed in the schedule of services attached to the agreement. Clause 2 of the said agreement specified that in rendering the services to ATI Technologies, Canada, Soctronics India Private Limited may develop scientific, technical and/or business innovations. It further specified in sub-clause (b) of clause 2.1 that the contractor, i.e. Soctronics India Private Limited agrees that all innovations and contract work product resulting from the provision of such services will be the sole and exclusive property of ATI Technologies, Canada and the contractor assigns to ATI Technologies, Canada all the rights in innovations and such work products and in all related patents, patent applications, copy rights

mask work rights , trade arks, trade secrets, rights of priority and other proprietary rights.

40. It may also be relevant to note here that even as per the Master Transfer Pricing Agreement executed among the ATI group companies, service contracted from third parties procured by ATI Technologies, Canada were available for the benefit of other group companies, including the assessee company. Having regard to all these facts of the case including especially the fact that the proprietary right of any of the inventions, and contract work products resulting from the provision of services by Soctronics India Private Limited were retained by ATI Technologies, Canada, we are unable to accept the stand of the assessee that it was the only beneficiary of the services rendered by Soctronics India Private Limited through ATI Technologies, Canada and that it was a case of pure reimbursement of actual expenses incurred by ATI Technologies, Canada on cost basis, without there being any profit element involved therein. In our opinion, ATI Technologies, Canada was also substantially benefitted from the services rendered by Soctronics India Private Limited by retaining the proprietary rights and what was provided by them to the assessee was only a part of the benefit of such services for consideration which was inclusive of profit. It was thus not a case of gratuitous payment made by the assessee company to ATI Technologies, Canada as alleged by the revenue authorities, nor the case of reimbursement of actual expense *on cost basis simplicitor* without any element of profit as claimed by the assessee.

41. Having held that the amount in question was remitted by the assessee company to ATI Technologies, Canada for certain benefits received by it in the form of services procured by ATI

Technologies, Canada from Soctronics India Private Limited and provided to the assessee company, and it was not a case of either gratuitous payment made by the assessee or mere reimbursement of expenditure incurred by the ATI Technologies, Canada, the question that now arises for our consideration is what exactly is the nature of this payment. As already noted by us, almost similar view, as taken by us on this issue, has been taken by the Commissioner of Service Tax vide his order dated 23.7.2012. In their respective orders, the Assessing Officer as well as the learned CIT(A) have observed that if one were to go by the conclusion of the Commissioner of Service Tax, the amount in question paid by the assessee to ATI Technologies, Canada for services procured from Soctronics India Private Limited and made available to the assessee company will be in the nature of *'fee for included services'* which is chargeable to tax in the hands of ATI Technologies, Canada as per the domestic law as well as India Canada DTAA. At the time of hearing before us, when this position was confronted to the learned counsel for the assessee, he has also agreed that if the case of the assessee for reimbursement of actual cost to ATI Technologies, Canada, without any profit element is not found acceptable by the Tribunal, the amount in question is liable to be treated as "fee for included services", which is chargeable to tax in India in the hands of ATI Technologies, Canada as per the domestic law and India Canada DTAA. It accordingly follows that the assessee company was liable to deduct tax at source from this amount as per the provisions of S.195, and having failed do so, it has to be treated as an assessee in default under S201(1) to the extent of tax payable by ATI Technologies, Canada in India on the mount in question which is in the nature of "fee for included services". We accordingly modify the order of the learned CIT(A) on this issue and sustain the order of the Assessing Officer in treating

the assessee as in default under S201(1) to the extent of tax payable by ATI Technologies, Canada in India on the amount in question which is chargeable as *'fee for included services'* alongwith interest payable thereon under S.201(1A). Grounds No.3 to 9 of the assessee's appeals are accordingly disposed of.

42. The issue raised in ground No.10 relates to the assessee's claim for the applicability of the provisions of S.194J of the Act to the amount claimed to be paid to Soctronics India Private Limited for the services availed through its parent company ATI Technologies, Canada.

43. The learned counsel for the assessee submitted that the real beneficiary of the services provided by the Soctronics India Private Limited for which the amount in question was paid was the assessee company and not its parent company, i.e. ATI Technologies, Canada. He contended that it was thus a case of payments made by the assessee company through its parent company for the services availed from Soctronics India Private Limited, another Indian concern and the same, therefore, was covered under the provisions of S.194J and not S.195. He also contended that it is, therefore, necessary that the taxability of the amount in question is to be examined in the hands of Soctronics India Private Limited, who is the ultimate recipient of the payments made by the assessee for the services availed through its parent company, and , if at all, tax is required to be deducted at source form the said payments, the same could be only under S.194J of the Act. Relying on the provisions of S.191 of the Act, he contended that the assessee company as per the said provision can be considered as in default under S.201(1) of the Act, only if the relevant taxes due on the amount in question cannot be directly

recovered from the deductee, i.e. Soctronics India Private Limited. He contended that as per the information of the assessee company, the amount in question received by Soctronics India Private Limited from ATI Technologies, Canada has already been included in its income declared in the returns for the relevant years and there being no assessed taxes which are due from Soctronics India Private Limited, the assessee company cannot be considered as in default as per the provisions of S.191 of the Act. In support of this contention, he relied on the decision of the Apex Court in the case of Hindustan Coca-Cola Beverages Pvt. Ltd. V/s. CIT (293 ITR 226).

44. The learned Departmental Representative, on the other hand, relied on the orders of the authorities below in support of the Revenue's case on this issue.

45. After considering the rival submissions and perusing the relevant material on record, we are unable to accept the stand of the assessee on this issue. As already held by us, the amount in question was remitted by the assessee company to its parent company in Canada for the services procured by the said company from Soctronics India Private Limited and provided to the assessee for which the assessee company was charged with profit. Keeping in view this finding recorded by us, we do not find merit in the issue raised by the assessee in ground No.10 and accordingly dismiss the same.

46. Insofar as the amount claimed to be remitted by the assessee to ATI Technologies, Canada on account of its share of cost of software licences/applications is concerned, the assessee has raised mainly three issues. The first issue as raised in ground No.11 is that the amount paid to ATI Technologies, Canada for

software licences/applications is not in the nature of royalty as what the assessee got was only the use or right to use copy righted article and not the use or right to use the copy right. The second issue as raised by the assessee in ground Nos.12 to 14 is that the authorities below are not justified in treating only 50% of the amount remitted to ATI Technologies, Canada towards software licenses applications as reasonable and treating the balance 50% as excessive or unreasonable, which is chargeable to tax in the hands of ATI Technologies, Canada as other income. The third issue that is raised by the assessee in ground No.15 is that the amount in question being cross charged by ATI Technologies, Canada on account of share of software applications/lincences allocated to the assessee on cost to cost basis, without any element of profit embedded therein, the same is not chargeable to tax in the hands of ATI Technologies, Canada and there is no question of deduction of tax at source from the said amount.

47. As regards the issue raised in ground No.11 relating to the treatment given by the learned CIT(A) to the 50% of the amount reimbursed by the assessee company to ATI Technologies, Canada towards software licence fee as 'royalty' chargeable to tax in India as per Article 12 of the India Canada DTAA, the learned counsel for the assessee submitted that the cross charges made towards reimbursement of software licences by the assessee company to ATI Technologies, Canada were on cost to cost basis and there being no income element embedded therein, the same cannot constitute income in the hands of the ATI Technologies, Canada. Without prejudice to this contention and as an alternative, he contended that the payments made by the assessee to ATI Technologies, Canada for software licences were only towards right to use copy righted article. He explained that ATI Technologies,

Canada only procured software licences from third parties for the group as a whole and later cross charged the same to different groups and entities including the assessee company for such usage of licences by each of the group entities. He contended that ATI Technologies, Canada thus did not have any copy right to such licences and it, therefore, was not in a position to charge for the use of copy right. He contended that the payment made by the assessee company to ATI Technologies, Canada towards cross charges for software licences thus cannot be considered as royalty both under the provisions of the Act as well as India Canada DTAA. He invited our attention to the definition of the term 'royalty' as given in Article 12(3) of the India Canada DTAA and submitted that the said definition covers within its ambit only the payments for use or right to use copy right and does not cover use or right to use the copy righted article.

48. The learned counsel for the assessee contended that the assessee in the present case at the most can be considered to have mere user right in the copy righted software and not the right of use of copy right. Relying on the decision of the coordinate bench of this Tribunal in the case of ADIT(International Taxation) V/s. M/s. Batronics India Ltd. (ITA No.918/Hyd/2010), he contended that payment in respect of rights which enable the effective operation of the programme by the user, should be dealt with as business income in accordance with Article 7 of the DTAA. He contended that the payments made by the assessee, even if the same are sought to be for use of a copy righted software, cannot be considered as royalty under India Canada DATAA and the same will constitute business profit of ATI Technologies, Canada as per Article 7 of the DTAA He contended that since there was no permanent establishment of ATI Technologies, Canada in India during the

relevant years, the business profit was not taxable in the hands of the said company in India, and consequently, there was no obligation on the assessee company to deduct tax at source from the payments made to the said company, which constituted its business income. He clarified that although the definition of the term 'royalty' under the domestic Act has been enlarged by the retrospective amendment, the said amendment has no application in the assessee's case, in the absence of any change in the definition of 'Royalty' given in India Canada DTAA. He contended that a person who did not deduct tax based on the law as existed at the time of transaction, in any case, cannot be expected to deduct tax based on the law amended retrospectively. He also contended that the law cannot possibly compel a person to do something which is impossible to perform.

49. As regards the common issue involved in ground No.s 12 to 14 relating to the action of the learned CIT(A) in accepting only 50% of the cross charges made towards software licenses as reasonable and treating the balance 50% as excessive and unreasonable, which is liable to be taxed in the hands of ATI Technologies, Canada as other income in India, the learned counsel for the assessee invited our attention to the year-wise details of software licences procured and cross charges made to ATI Technologies, Canada placed at pages 875 to 925 of the paper-book. He contended that these details alognwith sample copies of the software licence agreements entered into by ATI Technologies, Canada on its behalf and on behalf of the entire group as a whole were sufficient to establish the genuineness of the cross charges paid by the assessee towards software license. He contended that relying on the details and documents filed by the assessee as additional evidence before the learned CIT(A), the Assessing Officer

also accepted in the remand report that the cross charges for the software licence made by the parent company to the assessee company were justified and even the learned CIT(A) concurred with the said finding. He contended that when the genuineness of the cross chares paid by the assessee to its parent company on account of software licences was accepted by the Assessing Officer as well as the learned CIT(A), there was no justification to still hold 50% of such charges as unreasonable and excessive, especially during the course of proceedings under S.201(1) of the Act, where the scope is only to determine the TDS implications. He contended that untenability of this action becomes evident also in the light of the fact that the assessee company was working on cost plus method and as the cross charges paid were subsequently recovered alongwith mark up from the parent company, it clearly shows that there was no reason or ulterior motive for ATI Technologies, Canada to cross charge more than the reasonable amount towards software licences. He contended that even the reliance placed by the learned CIT(A) on Article 12(8) of India Canada DTAA to hold the alleged excess payment of royalty as income from other sources is misplaced, as the OECD Commentary on model tax convention has clearly clarified that Article 12(8) permits only the adjustment of the amount of royalty and not the reclassification of royalty in such a manner as to give it a different character. He contended that the alleged excess amount of royalty therefore, cannot be re-characterised as income from other sources and at best it can only be subjected to withholding tax as royalty as per the domestic law in terms of S.115A of the Act at the rate of 10%.

50. As regards the issue raised in ground No.15 relating to the assessee's claim that the reimbursement of software licence expenses being on cost to cost basis, without any element of profit

and consequently there being no income chargeable to tax in the hands of ATI Technologies, Canada in India, there can be no question of deduction of tax at source under S.195, the learned counsel for the assessee reiterated before us the submissions made by him while arguing the similar issue involved in grounds No.3 to 9 in respect of payment claimed to be made on account of engineering services availed through ATI Technologies, Canada from Soctronics India Private Limited.

51. The Learned Departmental Representative, on the other hand, submitted that there was no basis of allocation of such expense given or explained by the assessee. He contended that in the absence of basis of allocation as well as copies of all the relevant agreements to show purchase of software licences by ATI Technologies, Canada, the genuineness of the amount claimed to be remitted by the assessee on account of its share of cost incurred by ATI Technologies, Canada on purchase of software licenses was rightly doubted by the Assessing Officer as well as the learned CIT(A) to the extent of 50%. He also contended that the nature of software provided by ATI Technologies, Canada and the scope of use of such software by the assessee company cannot be ascertained in the absence of any agreement between the assessee and the ATI Technologies, Canada which is necessary to evaluate the argument of the learned counsel for the assessee that it was a case of use or right to use of copy righted article and not of the copy right as such. He contended that if it is a case of cost initially paid by the ATI Technologies, Canada for purchase software and reimbursement of the same subsequently by the assessee company as claimed, it clearly amounts to purchase of the software by the assessee company, which generally involves use or right to use the copy right as well.

52. As regards the contention of the learned counsel for the assessee that there is no justification in the action of the authorities below in accepting its claim for software expenses only to the extent of 50% and treating the balance 50% as extra payment chargeable to tax as income from other sources and that such recharacterisation is not permissible, the Learned Departmental Representative contended that the entire amount was claimed to be remitted by the assessee on account of reimbursement or payment of its share of cost of software expenses, without making any classification. According to him, it was therefore, open for the Revenue authorities to decide the nature of such payment and it is not a case of recharacterisation or reclassification of income, as alleged by the learned counsel for the assessee.

53. As regards the contention of the learned counsel for the assessee that the entire amount in question paid to ATI Technologies, Canada having been included in the cost and the same having been recovered subsequently from ATI Technologies, Canada alongwith mark up, there is no case of any tax planning or tax avoidance as alleged by the authorities below, the Learned Departmental Representative submitted that by making this entire arrangement, Soctronics India Private Limited got full benefit of deduction available under S.10A and this vital aspect needs to be taken into consideration while deciding the aspect of the tax benefit or tax avoidance managed by the entire group as a whole.

54. We have heard the arguments of both the sides and also perused the relevant material on record. As regards the claim of the assessee that the amount in question is cross charged by ATI Technologies, Canada on account of software applications/licences

on cost to cost basis, we find from the details and documents submitted by the assessee that there is nothing to support and substantiate the stand of the assessee. These details are placed at pages 875 to 925 of the assessee's paper-book and a perusal of the same shows that even the basis of cost claimed to be allocated by ATI Technologies, Canada to the assessee company is not given anywhere. Two agreements for purchase of software licences by ATI Technologies, Canada are filed by the assessee, which merely show the terms and conditions on which some of the software licenses were acquired by ATI Technologies, Canada. It is however, not clear as to on what terms, the software licences acquired by ATI Technologies, Canada were made available for the use of other group companies, including the assessee company. In the absence of these details as well as the basis of allocation of cost of software applications/licences, we find it difficult to accept the contention of the assessee that the amount in question paid by it to ATI Technologies, Canada towards its share of software applications/licences on cost to cost basis, without involvement of any element of profit, so as to say that the amount so remitted is not chargeable to tax in the hands of ATI Technologies, Canada in India, being merely in the nature of reimbursement of actual expenses incurred by the said company, without any profit element. We therefore, dismiss ground no.15 of the assessee's appeal.

55. As regards the issue involved in ground Nos.12 to14 relating to the action of the authorities below in treating only 50% of the amount claimed to be remitted by the assessee to ATI Technologies, Canada on account of cost of software licences/applications as reasonable, it is observed that the entire claim of the assessee on this issue was initially disallowed by the

Assessing Officer in the order passed under S.201(1)/201(1A) and the full amount was treated by him as extra profit or cash paid by the assessee to ATI Technologies, Canada in the absence of relevant details and documents filed by the assessee. During the course of appellate proceedings before the learned CIT(A), the assessee, however, filed such details and documents and on verification of the same, the Assessing Officer found the claim of the assessee on this issue to be genuine, but accepted the amount paid by the assessee to ATI Technologies, Canada only to the extent of 50% as reasonable, with which the learned CIT(A) also agreed. In our opinion, when the relevant details were filed by the assessee showing the amounts paid to ATI Technologies, Canada for use of specific software licences and some of the software licence agreements were also filed by the assessee showing the purchase of software licenses by ATI Technologies, Canada, as sample copies, there was no reason for the authorities below to accept only 50% of the claim of the assessee of having paid the amount in question for use of software licenses as reasonable and treating the balance 50% as payment of extra profit or cash by the assessee company to ATI Technologies, Canada. As rightly submitted by the learned counsel for the assessee, when the genuineness of the assessee's claim of having paid the amount in question to ATI Technologies, Canada for use of software licenses was accepted by the Assessing Officer as well as the learned CIT(A), there was no reason for them to accept only 50% of the amount paid as reasonable and treating the balance amount as unreasonable or excessive and that too without giving any basis to do so.

56. As already noted by us, the entire amount in question claimed to be paid by the assessee to ATI Technologies, Canada for

use of software licences was included in its cost and the same was subsequently recovered from ATI Technologies, Canada, alongwith mark up, which clearly shows that there was no ulterior motive on the part of the assessee to pay any extra profit or cash to ATI Technologies, Canada in the guise of software application cost, as alleged by the Assessing Officer. Having regard to all these facts and circumstances of the case, we are of the view that the authorities below are not justified in treating 50% of the software licence cost paid by the assessee company to ATI Technologies, Canada as excessive and unreasonable and reversing their decision on this issue, we accept the claim of the assessee of having paid the entire amount in question to ATI Technologies, Canada for use of software licences/applications. Grounds No.12 to 14 of the assessee's appeal are accordingly allowed.

57. Having held that the amount in question paid by the assessee to ATI Technologies, Canada was not merely reimbursement of software licence expenses allocated by the ATI Technologies, Canada on cost to cost basis and that the same entirely represented the amount remitted by the assessee to ATI Technologies, Canada for use of software license/application, the next issue that arises for consideration, as raised by the assessee in ground no.11, is whether the amount is in the nature of royalty chargeable to tax in the hands of ATI Technologies, Canada in India. In this regard, the learned counsel for the assessee has raised a contention before us that the amount in question having been paid by the assessee to ATI Technologies, Canada for use or right to use a copy righted article and not the use or right to use the copy right in the relevant software, the same is not in the nature of royalty as per Article 12 of the India-Canada DTAA. In this regard, it is observed that the amount in question was paid by the

assessee to the ATI Technologies, Canada during the previous years relevant to assessment years 2007-08 and 2008-09 for use of total 16 software licenses/applications. A perusal of the documents filed by the assessee in this regard shows that only two agreements are placed on record by the assessee for purchase of software licenses by ATI Technologies, Canada as sample agreements. The agreements for purchase of other 14 software licences by ATI Technologies, Canada thus are not filed by the assessee. There is also nothing either in the remand report of the Assessing Officer or in the impugned order of the learned CIT(A) to show that the terms of the two agreements filed, have been examined by them to find out the exact rights acquired by the ATI Technologies, Canada, in the case those two software licenses. It is also not clear from the details and documents placed on record by the assessee as to what are the rights in the software licences that have been transferred by ATI Technologies, Canada to the assessee company. In the absence of these details and due to lack of proper examination/verification by the authorities below, we are of the view that it is not possible to ascertain the claim of the assessee that the amount in question was paid by it to ATI Technologies, Canada only for use or right to use a copy righted article, i.e. software and not for the use or right to use the copy right in the said software, and it was thus not in the nature of royalty within the meaning of Article 12 of the India-Canada DTAA. In this view of the matter, we consider it just and proper to restore this issue to the file of the Assessing Officer for deciding the same afresh after verifying/examining all the relevant agreements and other documentary evidence in accordance with law. Needless to observe that the Assessing Officer shall afford sufficient opportunity of being heard to the assessee who will be at liberty to place on record before the Assessing Officer fresh documentary evidence, as may

be required to support its claim on this issue. Ground No.11 of the assessee's appeal is accordingly treated as allowed for statistical purposes.

58. The issue raised in ground No.16 relating to the wrong quantification of interest by the Assessing Officer under S.201(1) has not been pressed by the learned counsel for the assessee at the time of hearing before us. The said ground is accordingly dismissed.

59. As regards the alternative claim as raised in ground No.17 to treat the 50% of the cross charges paid to ATI Technologies, Canada on account of software license, held as unreasonable and excessive, to be dividend income under S.2(22)(a) of the Act, the learned counsel for the assessee submitted that even if such alleged unreasonable or excessive payment is considered to constitute fresh cash or income paid by the assessee company to ATI Technologies, Canada, the same may be treated as dividend paid to ATI Technologies, Canada, which is the 100% share holder of the assessee company. He invited our attention to S.2(22)(a) of the Act and contended that there being sufficient accumulated profit available with the assessee company at the relevant points of time, the release of the fresh cash by the assessee company to ATI Technologies, Canada as alleged by the learned CIT(A) may be classified as dividend under S.2(22)(a) of the Act.

60. The learned Departmental Representative, on the other hand, supported the orders of the Revenue authorities on this issue.

61. We have heard the arguments of both the sides and also perused the relevant material on record. In view of our

decision rendered on grounds no.12 to 14 treating the entire amount paid by the assessee on account of software licences to ATI Technologies, Canada as reasonable, the alternative claim of the assessee, as raised in ground No.17 to treat 50% of the cross charges paid by ATI Technologies, Canada on account of software licences as dividend under S.2(22)(a), has become infructuous. This ground is accordingly rejected.

62. In the result, all the four appeals are partly allowed.

Order pronounced in the court on 22nd October, 2014

Sd/-	Sd/-
(Saktijit Dey)	**(P.M.Jagtap)**
Judicial Member	**Accountant Member**

Dt/- 22nd October, 2014

Copy forwarded to:

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3. Commissioner of Income-tax(Appeals) V, Hyderabad
4. Addl. Director of Income-tax (International Taxation), Hyderabad
5. Departmental Representative, ITAT, Hyderabad.

B.V.S