IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH : KOLKATA

[Before Hon'ble Sri N.V.Vasudevan, JM & Dr.Arjun Lal Saini, AM]

I.T.A No. 574/Kol/2014

Assessment Year : 2010-11

HITT Holland Institute of Traffic Technology B.V., Kolkata [PAN : AABCH 5694 R] (Appellant)	-vs.-	D.D.I.T. (Intl.T)-1, Kolkata. (Respondent)

For the Appellant : Shri S.K.Agarwal, AR
For the Respondent : Shri.G.Mallikarjuna, CIT(DR)

Date of Hearing : 02.02.2017.
Date of Pronouncement : 08.02.2017.

ORDER

Per N.V.Vasudevan, JM

This is an appeal by the Assessee against the order of D.D.I.T.(IT)-1, Kolkata (also referred to as AO) passed u/s 143(3) of the Act r.w. s. 153(1) and section 144C(13) of the Income Tax Act, 1961 (Act) relating to A.Y.2010-11.

2. The Assessee is a subsidiary of HITT N.V. It is a company incorporated as per the laws of Netherland operating in the international market for safety, security and efficiency of nautical and air traffic. It operates in the specialized markets for traffic control, navigation and port management systems. The assessee had entered into contracts with Oil and Natural Gas Corporation of India ("ONGC"), Director General of Lighthouse and Lightships ("DGLL") and Airports Authority of India ("AAI") for rendering services and supply of equipments. The Assessee received payments in respect of performance of services and supply of equipment under the following contracts in India:

• Supply, installation, testing and commissioning of Advances Surface Movement Guidance Control System (‚ASMGCS') at Chennai, Mumbai and Kolkata airports by Airport Authority of India ('AAI') (Airport Authority of India (Mumbai, Chennai and Kolkata airport)

• Supply, installation, testing and commissioning of Air Traffic Control system at the Delhi airport by AAI (Airport Authority of India (Delhi airport)

• Establishment of Yes se I Traffic Service system in the Gulf of Kuchchh (GOK contract)

• Contract to provide annual maintenance of the Y ATMS system installed by ONGC (ONGC AVTMS - Annual Maintenance Contract)

• Contract to provide interface between the VATMS network and the naval network to enable down load of data by navy from the Y ATMS (ONGC V ATMS - Extra Work)

3. The nature of activities undertaken by the Assessee and receipts from the said activities during the subject year for each project was as follows:

HITT Holland Institute of Traffic Technology BV		
AY 2010-11		
Details of Income Revenue from various Projects		
Activity	Revenue (EUR)	Revenue (INR)
AAI (Mumbai, Kolkata and Chennai) Project		
Offshore Supply of Hardware	118,986	7,095,135
Training	20,000	11,926,000
Total	**318,986**	**19,021,135**
AAI(Delhi) Project		
Offshore Supply of Hardware	34,010	2,028,016
Onshore supply of Software	85,500	5,098,365
Onshore Supply of Services	154,655	9,222,093
Total	274,165	16,348,474
GOK Project		
Offshore Supply of hardware	907,813	40,551,986
Offshore Supply of Services	55,937	2,498,689
Total	863,749	43,050,675
ONGC (AMC)Project		
Offshore supply of Services	10,000	596,300

Onshore Supply of Services	182,174	10,863,038
Total	192,174	11,459,338
ONGC (Extra Work)Project		
Offshore Supply of Services	54,419	3,244,976
GRAND TOTAL	1,803,493	93,124,598

Note : The revenue have been earned by the Assessee in foreign currency – USD for GOK project and Euro for other projects. Such profits have been converted to INR as per the mechanism prescribed under Rule 115 of the Income tax Rules, 1962 ('Rules') using an exchange rate Euro = INR 59.63 and USD= INR 44.67 being the TT Buying rate of such currencies on the last day of financial year 2009-10.

4. The Assessee recognized income from contracts in India the following sums:

HITT Holland Institute of Traffic Technology BV				
AY 2010-11				
Profitability Statement for Various Projects in India				
Activity	Revenue	Cost	Profits	Profits(INR)
AAI (Mumbai, Kolkata and Chennai)Project				
Offshore Supply of Hardware	118,986	118,986	0	0
Training	200,000	191,400	8,600	512,818
Total	318,986	310,386	8,600	512,818
AAI (Delhi)Project				
Offshore Supply of Hardware	34,010	3,920	30,090	1,794,267
Onshore Supply of Software	85,500	59,592	25,908	1,544,894
Onshore Supply of Services	154,655	69,706	84,949	5,065,524
Total	**274,165**	**133,218**	**140,947**	**8,404,685**
GOK Project				
Offshore Supply of Hardware	907,813	907,813	0	0
Offshore Supply of Services	55,937	53,531	2,405	107,444

Total	**963,749**	**961,344**	**2,405**	**107,444**
ONGC (AMC)Project				
Offshore Supply of Services	10,000	9,570	430	25,641
Onshore Supply of Services	182,174	182,174	0	0
Total	**192,174**	**191,744**	**430**	**25,641**
ONGC (Extra Work)Project				
Offshore Supply of Services	54,419	10,116	44,303	2,641,759
GRAND TOTAL	**1,803,493**	**1,606,808**	**196,685**	**11,692,346**

Note : The profits earned by the Assessee are in foreign currency – USD for GOK Project and Euro for other projects. Such profits have been converted to INR as per the mechanism prescribed under Rule 115 of the Income tax Rules, 1962 ('Rules ') using an exchange rate Euro = INR 59.63 and USD = INR 44.67.

5. The assessee had established a Project Office ('PO') in India in the year 2005 for the GOK Project, However, it has not performed any activity in relation to any of its contracts in India from the said PO. The project office has only been used to collect money and pay certain expenses on behalf of the Assessee through its bank account. Therefore, no part of the contract execution has been carried out through the PO in India. Therefore the Assessee did not have a Permanent Establishment (PE) in India. This has been accepted by the DRP in its directions dated 23.12.2013 at page-21 para-7.

6. Under section 4 of the Act, the charge to tax is on the total income of every person. Section 5 of the Act explains the scope of total income of every person. Section 5(2) lays down the scope of total income of every person who is a non-resident. Any income received or deemed to be received in India and any income which accrues or arises in India or is deemed to have, accrued and arisen in India shall be included in his total

income. Section 9 of the Act lays down as to when income shall be deemed to have accrued or arisen in India. Section 90 of the Act provides that Central Government may enter into an agreement with the Government of any country outside India for avoidance of Double Taxation of income under the Act and under the corresponding law in force in that country. Section 90(2) provides that where such agreement exists with any country outside India, then in relation to an assessee to whom such agreement applies, the provisions of the Act, shall apply only to the extent they are more beneficial to that assessee. India and Netherlands have entered into an Agreement for Avoidance of Double Taxation (DTAA) with effect from 21-1-1989 and therefore the taxability of any income that accrues or arises in India to the assessee who is non-resident in India and a tax resident of Netherlands will have to be determined in accordance with the said DTAA. As to when a non-resident would be considered as having a PE in the other country is generally decided on the basis of the facts in each case, the criteria being the extent to which the Non-Resident has set a firm foot in the soil of the other country. If a non-resident is considered as having a Permanent Establishment (PE) in the other country then income attributable to the PE will be taxed in the other country. As to whether the income attributable to the PE alone has to be taxed in the other country or any other income which accrues to the Non-Resident in the other country having no connection with the PE, can also be brought to tax in the other country, is also laid down in the various clauses of the DTAA between countries. Available Model Conventions differ in this regard. Some provide for taxing profits/income only to the extent that they are attributable to the PE, which is referred to as "No force of Attraction" principle. Some provide for taxing income/profits from direct transactions effected by the non-resident, provided the transactions are of the same or similar kind as that effected through the PE, which is referred to as "Limited Force of Attraction" principle. Some provide for taxing profits/income from all transactions whether they are attributable to PE or not or whether they are of the same kind of transactions carried on by the PE or not, which is referred to as "Full Force of Attraction" principle. As to

which principle is applicable in a given case depends on the clauses of the convention between two countries. Article 7(1) of the DTAA between India and Netherlands provides for taxing profits of the enterprise in the other state only to the extent they are attributable to the PE in the other state, adopting "No Force of Attraction" principle. With the above broad principles in mind we will now consider the facts of the present case and the rival contentions on behalf of the assessee and the revenue on the various grounds of appeal raised by the Assessee before us.

7. For the subject year, the assessee filed its return of income for the subject AY declaring income of INR 1,19,26,000 pertaining to training income received from AAI(Mumbai, Chennai and Kolkata Airport) Project as 'Fees for technical services', taxable on a 'gross' basis at the rate of 10 percent as per the provisions of Article 12(2) of the India-Netherlands Double Taxation Avoidance Agreement (' DTAA'). The assessee's return was selected for regular assessment under section 143(2) of the Act and the draft assessment order was forwarded by the Learned AO, proposing to assessee income at INR 2,62,99,484.25 vide draft assessment order dated 30 March, 2013. The difference between the returned income and the assessed income is due to the following reasons:

• The learned AO has alleged that Assessee has a functional Permanent Establishment ('PE') in India for the AAI projects, which has been involved in the execution of the project in India

• Further, the learned AO has alleged that Assessee has an 'Installation PE' in India as per the provisions of Article 5(3) of the India-Netherlands DTAA, on account of existence of the GOK and ONGC projects for a period exceeding 6 months

The learned AO by applying various ad-hoc attribution methods, attributed income to the PE in India as follows :-

Project	**Amount (INR)**
AAI(Mumbai, Chennai & Kolkata airports)	6,103,903
AAI (Delhi Airport)	7,519,082
Gulf of Kaach (GOK) Contract	4,305,071.25
ONGC VARMS – Annual Maintenance Contract	5,729,669
ONGC VATMS – Extra Work Contract	2,641,759
TOTAL	2,62,99,484.25

8. The Assessee filed objections to the aforesaid additions proposed by the AO in his draft order of assessment before the Disputes Resolution Panel (DRP) u/s.144C of the Income Tax Act, 1961 (Act). The DRP accepted some of the contentions put forth by the Assessee but substantially sustained the order of the AO. The AO incorporated the directions of the DRP in his fair order of assessment. Aggrieved by the said order the Assessee has preferred the present appeal.

9. Before we deal with the various grounds of appeal of the Assessee, it has to be clarified that the various grounds of appeal have been raised by the Assessee in respect of determination of income in respect of each of the project set out in paragraph-3 of this order from which the Assessee derived income during the previous year. We deem it convenient to decide the issues raised by the Assessee in the same order in which grounds of appeal have been raised by the Assessee before us.

10. Ground "A" raised by the Assessee reads as follows:

A. Airports Authority of India (Mumbai, Chennai and Kolkata Airport) Project:

1. The Deputy Director oflncome-tax (International Taxation)-l(l), Kolkata (hereinafter referred to as 'the Ld.AO') has erred in proposing and the Hon'ble Dispute Resolution Panel, Kolkata (hereinafter referred to as the 'Hon 'ble DRP') has further erred in confirming that all the revenue from separate and distinct transactions, being part of a single and composite contract should be offered to tax in India since such contract is indivisible for tax purposes.

11. The Assessee was awarded a contract by Airports Authority of India (AAI) for Supply, Installation, Testing & Commissioning (SITC) of Advance Surface Movement Guidance Control System (ASMGC) at Chennai, Mumbai and Kolkata Airports. The Purchase order of AAI was dated 15.4.2008. Annexure-I to the said purchase order gives the details of items to the supplied. Clause-1 of the said purchase order reads thus:

> "1. PRICE:
> The items in the Annexure-I and Annexure IA will be supplied at a total cost of Euro 45,77,726 (Euros Four Million Five Hundred Sevety Seven Thousand Seven Hundred Twenty Six only) and Rs.1,09,33,569 (Ten Million Nine Hundred Thirty Three Thousand Five Hundred Sixty Nine only). The Price is FOB, Netherlands and is firm and fixed."

Annexure-I referred to in the purchase order is given as **Annexure-1** to this order. It can be seen from Annexure-1 that the contract consist of supply of equipments besides training charges. The Assessee in its return of income offered to tax the training income received from AAI(Mumbai, Chennai and Kolkata Airport) Project during the previous year as 'Fees for technical services', taxable on a 'gross' basis at the rate of 10 percent as per the provisions of Article 12(2) of the India-Netherlands Double Taxation Avoidance Agreement (' DTAA'). The AO however held that the Assessee had a Project Office for execution of GOK Project that constituted PE of the Assessee in India. Sec.44DA provides that income by way of royalty or fees for technical services received from Government or an Indian concern in pursuance of an agreement made by a non-resident (not being a company) or a foreign company with Government or the Indian concern after the 31st day of March, 2003, where such non-resident (not being a company) or a foreign company carries on business in India through a permanent establishment

situated therein, or performs professional services from a fixed place of profession situated therein, and the right, property or contract in respect of which the royalties or fees for technical services are paid is effectively connected with such permanent establishment or fixed place of profession, as the case may be, shall be computed under the head "Profits and gains of business or profession" in accordance with the provisions of this Act. Invoking the aforesaid provisions the AO attributed 50% of the receipts from providing services as income chargeable to tax in India as per Sec.44DA of the Act.

12. Before DRP the Assessee submitted that the assesse had setup a Project Office (PO) in India in 2005 for the purpose of execution of the GOK Project. However, the PO never became operational and there were no employees or business activity carried out by the PO during the year. In any case, the PO was not in respect of the project with AAI. It was argued that the AO was not correct in treating the aforesaid defunct PO as the PE of the assessee in India. The DRP in their directions held that the PO was not involved in the business activity related to the said project and hence, no part of the profits can be attributed to the PO. The Revenue has accepted the above directions of the DRP. In view of the above, the above ground has no impact on income. The learned counsel for the Assessee therefore prayed that the relevant ground may be treated as infructuous. Ground A is accordingly dismissed as infructuous.

13. Ground “B” raised by the Assessee relates to Airport Authority of India (Delhi Airport) Project. The Assessee was awarded a turnkey contract for supply, installation, testing and commissioning ('SITC') of Air Traffic Control ('ATC') at the Delhi airport by Airports Authority of India (‘AAI’) in the year 2008. The copy of the purchase order for supply, installation, testing and commission (SITC) of Air Traffic Control (ATC) systems at New Delhi Airport dated 4.12.2008 is placed at page 242 to 250 of the Assessee’s paper book. The operative portion of the purchase order reads thus:

"Airports Authority of India (AAI), hereinafter referred to as Purchaser is pleased to place a purchase order on M/S.HITT Holland Institute of Traffic Technology B.V., Netherlands, hereinafter referred to as supplier, for supply, installation, testing & commissioning (SITC) of ATC System at New Delhi Airport as per details in Annexure-I

1. PRICE:
   The items in Annexure-I will be supplied at a total cost of Euros 2,74,165 (Euros Two Hundred Seventy Four Thousand One Hundred Sixty Five). The prices in Euros is Ex-works, New Delhi is firm and fixed."

Annexure-I to the purchase order is given as **Annexure-2** to this order. During the previous year the Assessee received Euros 2,74,165 or Rs.1,63,48,474 for supply of hardware and other services. The invoice raised by the Assessee on AAI dated 11.12.2008 in this regard is at page-251 of the paper book and the description and break up of the sum of Euro 274165 is as follows:

Description	Qty	Amount	VAT%	Net Amount
SITC of ATC System at New Delhi Airport				
1.1 Hardware Cost	1.00	35,800		35,800
1.2 Software and Licenses	1.00	90,000		90,000
1.3 Project Management Services, Installation Testing and Commissioning and training	1.00	162795		162795
1.5 Discount 5%		-14430		-14430
				274165

The AO found that the invoice dated 11.12.2008 did not pertain to the previous year relevant to AY 2010-11. The Assessee clarified that it follows cash system and therefore declared receipts in the return of income on receipt basis. The AO thereafter proceeded to examine the question whether the income comprised in the receipt can be brought to tax. It was the stand of the Assessee that the receipt in question was attributable to off-shore supply of equipment which cannot be brought to tax. It was further submitted that the Assessee's PE in India had nothing to do with the aforesaid contract and that in terms of Article 7(1) of the DTAA between India and Netherlands

only profits attributable to the PE can be brought to tax. It was argued that since the supply of equipments was off-shore, there was no accrual of income in India. It was also the plea of the Assessee that it is not correct to look at all revenues arising from separate and distinct transactions, as part of a composite contract and that these contracts were divisible and independent contract for different activities.

14. The AO however held that since the Assessee had a PE in India the revenue from off shore supply of equipment was also liable to be taxed. Applying Sec.44DA of the Act, the AO brought to tax rupee equivalent of 50% of euro 240155 (Euro 274165 minus Euro 34010 being receipts towards offshore supply of hardware) to tax.

15. The DRP accepted the contention of the Assessee that the PE of the Assessee in India had nothing to do with the contract in question and that the action of the AO in treating the receipts as business income was not correct. The DRP nevertheless directed that AO to treat the payment made for supply of software and its license viz., (Rupee equivalent of Euro 85,500) as payment towards royalty u/s.9(1)(vi) of the Act. The DRP also held that all revenues arising from separate and distinct transactions, are part of a composite contract and that these contracts were indivisible and dependent contract for different activities. It can be seen from Annexure-2 to this order which is part of the purchase order of AAI that the Assessee had to install, test, commission and train persons to use the machine. The consideration attributable to the said activity was a sum of Euro 1,62,795(gross) (Net) Euro1,54,655. The DRP held that this sum was in the nature of "Fees for Technical Services" (FTS) rendered and was taxable in the hands of the Assessee in India. Aggrieved by the order of the DRP, the Assessee has raised Gr.B before the Tribunal. Gr.No.B-1 & B-2 relate to the grievance of the Assessee in bringing to tax Euro 85500 as royalty and Gr.B-3 relates to the grievance of the Assessee in brining to tax Euro 162795 as "Fees for Technical Services".

B. Airport Authority of India (Delhi Airport) Project:

Ground 1

The Ld.AO has erred in proposing and the Hon'ble DRP has further erred in confirming that all the revenue from separate and distinct transactions, being part of a single and composite contract should be offered to tax in India since such contract is indivisible for tax purposes.

Ground 2

The Ld.AO has erred in proposing and the Hon'ble DRP has further erred in confirming that the income earned from on-shore supply of software and licenses is in the nature of 'royalty' as per the provisions of Article 12(4) of the India-Netherlands Double Taxation Avoidance Agreement ('DTAA').

16. The legal issue involved is whether the software supplied by the Assessee along with the equipment (i .e. in the nature of embedded software) is taxable as 'royalty' under the provisions of Article 12(4) of the India-Netherlands DTAA or not. The first aspect to be decided is whether the software and licenses were part of the hardware or not. In this regard, we have perused the relevant material on record. A perusal of Annexure-2 to this order which is annexure-I to the purchase order dated 4.12.2008 by AAI, shows that the supply is of ATC System and are part and parcel of the equipment. Though “Software and Licenses” is shown as a separate item, it cannot operate independently and had to be regarded as part of the Hardware. It has been the plea of the Assessee that the software was supplied for the mere purpose of operating the equipment supplied under the Project. The Ld. DRP also in its directions (at page 116 of the paper-book) has also observed that the appellant "has granted software and licenses to use the software for the purpose of operating the equipment supplied". These circumstances clearly go to show that the software and licenses were part of the hardware and imbedded therein. The AO or the DRP have not in their orders given any finding that the software and licenses are independent of the hardware as no specific plea in this regard was put forth by the Assessee before them. We however hold, in the

given facts and circumstances of the case and the overall evidence on record, that the software and licenses are part of the hardware supplied by the Assessee.

17. It is the plea of the learned counsel for the Assessee that Software dedicated to Hardware equipment supplied is not 'Royalty'. In this regard it was submitted that embedded software supplied along with equipment merely facilitates its operation/ functioning and there is no independent existence/ use of such loaded software. The software so supplied is an integral part of the equipment supplied and hence, amounts of sale of hardware, not taxable as 'royalty'. In this regard, the learned counsel for the Assessee placed reliance on the certain judicial pronouncements. Our attention was drawn to the decision of the Hon'ble Delhi High Court in the case of DIT v. Ericsson AB (2012) 343 ITR 470 (Delhi HC) wherein it was held that if software supply is an integral part of the equipment system and such software loaded on the hardware doesn't have any independent existence, it is not permissible for the Revenue to assess sale of hardware and sale of software separately. The relevant extracts have been reproduced below:

> *"55 …….We have to keep in mind what was sold by the assessee to the Indian customers was a GSM which consisted both of the hardware as well as the software, therefore, the Tribunal is right in holding that it was not permissible for the Revenue to assess the same under two different articles. The software that was loaded on the hardware did not have any independent existence. The software supply is an integral part of the GSM mobile telephone system and is used by the cellular operator for providing the cellular services to its customers. There could not be any independent use of such software.*
>
> *61. We thus hold that payment received by the assessee was towards the title and GSM ·system of which software was an inseparable part incapable of independent use and it was a contra for supply of goods. Therefore, no part of the payment therefore can be classified as payment towards royalty. "*

18. Our attention was also drawn to a decision of the Hon'ble Mumbai ITAT in the case of Galatea Limited (2016) 46 ITR(T) 690 (Mumbai ITAT), wherein following the

decisions in the case of DIT v. Ericsson A.B. (supra), DIT v. Nokia Networks O.Y. (2013) 358 ITR 259 (Delhi HC), Bharati Airtel Ltd. v. Commissioner of Customs 2012 (286) ELT 270 (Bang ITAT) and CIT v. Alcatel Lucent Canada (2015) 372 lTR 476 (Delhi HC) it was held that software was required for the effective functioning of the machine, and the amount bifurcated towards the cost of software cannot be treated as 'Royalty'. The relevant extract has been given below:

> "It has already been established on the basis of facts before us that the transaction involved in this case was that of sale of diamond scanning machine. The customer had no interest in the software except to the extent of effective functioning of the machine. Thus, in view of the judgments discussed above, it has to be treated as transaction of sale of machine in the hands of the assessee and the amount bifurcated for software cannot be treated differently as consideration in the nature of "Royalty" as envisaged under section 9(l)(vi) of the Act and since the assessee has no P.E. in India, as per admitted facts on record, the amount of profit arising on receipt of sale consideration of machine would not be liable to be taxed in its hands in India."

19. Similar views have been propounded in the following judicial pronouncements:

DIT v. Nokia Networks O.Y. (2013) 358 ITR 259 (Delhi HC)

CIT v. Alcatel Lucent Canada (2015) 372 ITR 476 (Delhi HC)

DOIT vs Reliance Industries Ltd. (20 J 6) 69 taxmann.com 3 11 (Mumbai ITAT)

Motorola Inc. v/s DCIT (2005) 95 ITD 269 (Delhi SB)

ADIT vs Siemens Aktiengesellschaft (2013) 19 ITR(T) 336 (Mumbai ITAT)

20. The learned DR relied on the directions of the DRP. We have considered the rival contentions. In the light of the judicial pronouncements referred to above, we are of the view that the sale of equipment and its accessories with software imbedded in the equipments cannot be taxed in the hands of the assessee as business income as the Asssessee does not have a PE in India to which the profits can be said to be attributable. In the circumstances, the revenue cannot bifurcate the consideration towards software

and license embedded in the equipment from the combined sale value of the equipment and accessories and seek to bring to tax the amount bifurcated for software as in the nature of "Royalty" as envisaged under section 9(l)(vi) of the Act.

21. In view of the above conclusion, we do not wish to go into the other arguments raised by the learned counsel for the Assessee that what was transferred by the Assessee as software embedded in the equipment will not amount to transfer of 'copyright' but only transfer of a 'copyrighted article'. In this regard the submission was:

• As per Article 12(4) of the India-Netherlands DTAA, the term 'royalties', inter-alia, mean payments of any kind received as a consideration for the use of, or right to use any copyright of literary, artistic or scientific work including cinematograph films, any patent, trade mark, design or model plan, secret formula or process, or for information concerning industrial, commercial or scientific experience.

• In various judicial precedents, it has been that the consideration for transfer of software without any rights such as commercial exploitation of the software, right to reproduce the software, translate the software, adapt the software in any manner, sell the software etc. is for a copyrighted article' and not a 'copyright' since the intellectual property right to the software is not transferred. Such a consideration is for purchase of goods and is not 'royalty'. These judicial pronouncement have been given below:

CIT vs Dynamic Vertical Software India Pvt. Ltd. (2011) 332 ITR 222 (Delhi HC);
DIT v. Nokia Networks O.Y. (2013) 358 ITR 259 (Delhi HC)
Dassault Systems (2010) 322 ITR 125 (AAR);
Geoquest Systems B.V. (20 I 0) 327 ITR 00I (AAR):
Motorola Inc. v/s DCIT (2005) 95 ITD 269 (Delhi SB)
TII Team Telecom International (P) Ltd. (2011) 12 ITR(T) 688 (Mumbai ITAT)
DIT vs lnfrasoft Ltd. (2013) 264 CTR 329 (Delhi HC)
Financial Software and Systems Pvt. Ltd. vs DCIT (2014) 47 Taxmann.com 410 (Chennai ITAT)

DDIT vs Solid Works Corporation (2010) 152 TTJ 570 (Mumbai ITAT)
Aspect Software Inc., (2015) 155 ITD 409 (Delhi ITAT)
CIT v. Alcatel Lucent Canada (2015) 372 ITR 476 (Delhi HC)

• In the present case, the software was supplied for the mere purpose of operating the equipment supplied under the Project. The Ld. DRP also in its directions (at page 116 of the paperbook) has also observed that the Assessee "has granted software and licenses to use the software for the purpose of operating the equipment supplied".

• Accordingly, it cannot be held that the consideration received by the Assessee for supply of such software/ licenses for the mere purpose of operating the equipment is for a 'copyright' in such software. Accordingly, such consideration is for the purchase of a 'copyrighted article' and hence not taxable as 'royalty'

22. It was further submitted that Explanation 4 to Section 9(1) (vi) of the Act introduced with retrospective effect from 1 April 1976 cannot be read into India-Netherlands DTAA

• The Finance Act, 2012, has inserted Explanation 4 to section 9(1)(vi) of the Act, with retrospective effect from 01 April 1976, clarifying that the transfer of all or any rights in respect of any right, property or information includes and has always included transfer of all or any right for use or right to use computer software. Based on this amendment, the Hon 'ble DRP has held that the amount of consideration for supply of software in the present case also amounts to 'royalty'.

• In this regard, reliance was placed on the following judicial pronouncements wherein courts have held that the amendments into the domestic provisions by way of a unilateral amendment cannot be read to interpret the provisions of the bilateral DTAAs entered into by two sovereign countries. Some of these judgments are given below:

DDIT vs Reliance Industries Ltd. (2016) 69 taxmann.com 311 (Mumbai IT AT)
DIT v. Skies Satellite B.V. 2016 382 ITR I 14 (Delhi HC)

DIT v/s Infrasoft Ltd. (2013) 264 CTR 329 (Delhi HC)
DIT v. Nokia Network O.Y. (2013) 358 ITR 259 (Delhi HC)
CIT . Siemens Aktiongesellschaft (2009) 310 ITR 320 (Bombay HC)
B4U International Holdings Ltd vs DCIT (2012) 18 ITR(T) 62 (Mumbai ITA T)
Sanofi Pastuer Holding vs. GOI (2013) 354 ITR 316 (AP HC)

23. In view of the above, it was submitted that in case of supply of equipment along with related software, the consideration amount for the software cannot be taxed as 'Royalty' in terms of Article 12 of the India-Netherlands DTAA. As we have already stated since we have come to the conclusion that the software in question was embedded in the equipment that was supplied, it cannot be regarded as giving any independent right to use software and therefore cannot be treated as royalty, we do not wish to go into these arguments and leave the argument open without adjudication.

24. Ground B-3

The Ld.AO has erred in proposing and Hon'ble DRP has further erred in confirming that the entire income earned from on-shore provision of services (pertaining to tuning of radar and its integration and commissioning with the systems of the airport) is in the nature of training income, despite the fact that very limited time was spent on training (one half day training) and;

The Ld.AO has erred in proposing and Hon'ble DRP has further erred in confirming that such income is in the nature of 'fees for technical services' ('FTS') under Article 12(5) of the India Netherlands DTAA since such services 'make available' technical knowledge, skills etc. to the customer.

25. We have already seen that the Assessee as part of the supply of equipments to ATC System Project, AAI New Delhi Airport Project, provided project management services, installation, testing and commissioning services etc. to AAI. This included tuning of the radar and its integration and commissioning with the systems of Delhi airport (purchase order at PB page 242-250 and Invoice dated 11 December 2008 at PB Page 251). From the invoice (which has been extracted in the earlier part of this order), it can be seen that the net consideration for these services is EUR 154,655 (equivalent to INR 9,222,093)

which has been assumed as FTS in the assessment order. It was the plea of the Assessee that the AO has wrongly assumed the entire consideration amount towards training of employees for assessing it as FTS. From the purchase order, it would be clear that the consideration amount is for various other services and training of employees is only for ½ day, which is only to familiarize the customer with the use/ operation of the equipment supplied under this project. The legal issue at hand is whether the consideration received for provisions of such services is taxable as FTS under the provisions of India- Netherlands DTAA or not.

26. In this regard the submission of the learned counsel for the Assessee was that under Article 12(5) of the India-Netherlands DTAA, FTS is taxable in the other country only when the FTS "make available" technical knowledge, experience, skill, know-how or process. Article 12(5)(b) of the India-Netherlands DTAA defines the term 'fees for technical services' as follows:

> 'fees for technical services" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services:
> (a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 4 of this Article is received; or
> (b) make available technical knowledge, experience, skill, know-how or processes, or consist of the development and transfer of a technical plan or technical design."

It was submitted that based on the Most Favored Nation (MFN) clause in the India-Netherlands DT AA, the meaning of the term 'make available' for interpreting the India-Netherlands DTAA may be taken from its meaning given in the India-Singapore DTAA (which is signed after the India-Netherlands DTAA). As per Article 12 of the India Singapore DTAA, the term 'make available' has been explained as follows:

> "(b) make available technical knowledge, experience, skill, know-how or processes, which enables the person acquiring the services to apply the technology contained therein"

It was submitted that the above interpretation of term 'make available has also been adopted in the Memorandum of understanding to the India-US DTAA.

27. It was further submitted that the phrase 'make available' in the context of FTS is no longer res integra. There is a plethora of judgments of various Indian courts which have dealt with meaning of the term 'make available' and held that services are said to be made available only when the person acquiring the service is enabled to apply the technology embedded in the services provided to him independently. A few such decisions have been given in below:

CIT vs De Beers India Minerals (P) Ltd. (2012) 346 ITR 467 (Karnataka HC)
Raymond Ltd. (2003) 86 ITD 791 (Mumbai ITAT)
- Intertek Testing Services India (2008) 307 ITR 418 (AAR)
C.E.S.C Ltd vs. DCIT (2003) 275 ITR 15 (Kolkata IT AT)
Guy Carpenter & Co. Ltd. (2012) 346 ITR 504 (Delhi HC)
Andaman Sea Food (P.) Ltd. (2012) 18 ITR(T) 509 (Kolkata ITAT)
- Income-tax Officer, Ward 12 (2), Kolkata v . Right Florists (P.) Ltd. (20]3) 25 ITR(T) 639 (Kolkata ITA T)
B4U International Holdings Ltd. (2012) 18 ITR(T) 62 (Mumbai JT AT)
Ernst and Young (P) Ltd. in re (2010) 323 ITR 184 (AAR)
Mahindra and Mahindra Ltd. vs. DCJT (2009) 313 ITR 263 (IT A T Mumbai -SB)]
Worley Parsons Services (P) Ltd., In re (2009) 313 ITR 74 (AAR)
ACJT vs Viceroy Hotels Ltd.(20 12) 18 ITR(T) 282 (ITAT Hyd)
R.R. Donnelley India Outsource Private Limited (2011) 335 ITR 122 (AAR)
ADIT v. WNS Global Service Private Ltd. (2011) 45 SOT 119 (Mumbai ITAT)

28. In the context of installation, testing and commissioning services, the Hon'ble Jabalpur ITAT in the case of Birla Corporation Limited vs. ACIT (2015) 153 ITD 679 (Jabalpur ITAT) has held that installation, commissioning or assembly activities do not involve transfer of technology and are hence not taxable as FTS. The relevant extract of the judgment has been reproduced below:

"By no stretch of logic, installation or assembly activities even involve transfer of technology in the sense that recipient of these services can perform such services on his own without recourse to the service provider, nor has it been the case of/he authorities below. For this short reason alone, the installation, commissioning or assembly activities cannot constitute fees for technical services, or fees for included services- as these are termed in Indo US tax treaty."

29. It was submitted that project management. Installation, testing and commissioning services rendered by the Assessee cannot be said to enrich the personnel of AAI with such knowledge that they can perform such services in the future on their own. Therefore, such activities in relation to installation, testing and commissioning etc. cannot 'make available' any technical knowledge, skills etc. to AAI and therefore, the consideration received by the appellant for such services is not in the nature of FTS as per Article 12 of the India-Netherlands DTAA. Further, income in respect of such services cannot be taxed even as business income, in the absence of a PE of the appellant in India, as per the provisions of Article 7 of India-Netherlands DTAA.

30. It was also submitted that the AO has assumed that the entire consideration for supply of services such as project management, installation, and commissioning etc. is on account of training services and hence, taxable as FTS. In this regard it was pointed out that the training envisaged (1/2 day training) under the project was not a main component of the services provided and was provided merely to familiarize/ acquaint the customer for the operation of the equipment. The same can also be seen from the nature of the training as appearing in the purchase order - one hands on Training session (1/2 day) on site (Page 249 of the paperbook). It was submitted that such training provided did not involve provision of any technical knowledge/ know-how to the customer but was provided only to familiarize them with the equipment and hence, it cannot be said that any technical services were made available to the customer. In this regard, reliance was placed on the decision in the case of ACIT vs PCI Ltd. (2011) 46

SOT 183 (Delhi ITAT), wherein the ITAT held that training services pertaining to training of employees of customers to explain the buyers salient features of products imported by assessee and to impart training to customers to use equipment is not taxable as FTS since such payment could not have been made for availing technical services and that the technology was never made available to the assessee. Reference was also made to the following other decisions laying down identical proposition United Helicharters (P) Ltd. (2013) 60 SOT 58 (Mumbai ITAT) Lloyds Register Industrial Services (India) (P.) Ltd. (2010) 36 SOT 293 (Mumbai ITAT).

31. The learned DR relied on the Directions of the DRP. After considering the rival contentions, we are of the view that the action of the DRP in directing the treat the sum of Euro 154655 as FTS cannot be sustained. A perusal of the invoice in this regard together with the purchase order clearly shows that what the Assessee did was installation, testing and commission and training. The training was half-day training and was intended to familiarize the Assessee with the operation of the equipment. In the light of the India-Netherlands DTAA Article 12(5)(b) and in the light of the various judicial pronouncements referred to in the earlier paragraphs on this issue, it cannot be said that the services rendered "make available" technical knowledge, experience, skill, know-how or process etc. It cannot be said that the sum in question was in the nature of FTS chargeable to tax under the Treaty. We therefore allow Gr.B-3 raised by the Assessee.

32. The next dispute is with reference to the Gulf of Kuchch (GOK) Project. Grd.C raised by the Assessee in the grounds of appeal deal with the grievance of the Assessee in respect of assessment of income from this project. The Government of India (Ministry of Shipping, Directorate General of Lighthouses and lightships) intended (GOK), Gujarat. For this project an agreement dated 16.3.2005 was entered into between DGLL and a consortium lead by M/S.Telecommunications Consultants India

Ltd. (TCIL). The Assessee was also part of the said consortium besides another entity M/s.M.L.Dalmiya & Co. Ltd. This consortium was awarded a turnkey contract for establishment of Yessel Traffic Service ('YTS') in the Gulf of Kuchch ('GOK') by Director General of Lighthouse and Lightships ('DGLL') in 2005. (Agreement between DGLL and consortium at PB page 252-255 and consortium agreement is at PB page 256-280). The responsibilities of each of the members of the consortium are set oout in annexure to the consortium agreement. Supply, installation, testing and commission of integrated Automatic identification System Base Stations equipments with Associated software is the primary responsibility of the Assessee. In the terms of the consortium agreement, TCIL raised purchase order dated 24.6.2005 on the Assessee for offshore supply of equipment and offshore provision of services (Purchase orders are at PB page 286-296). By an Agreement dated 27.8.2008, TCIL sold the equipments to the DGLL when the equipments were on the high sea. The Assessee had also set up a project office ('PO') in India for the execution of this project in the year 2005. However, the PO never became operational and was not involved in any activity pertaining to this project. Income from offshore supply of equipment by the Assessee to the consortium is the subject matter of dispute in the Grounds of appeal “C” raised by the Assessee.

> “Ground 1
> The Ld.AO has erred in proposing and Hon'ble DRP has further erred in confirming that the appellant has an Installation Permanent Establishment ('PE') in India as per Article 5(3) of the India Netherlands DTAA, considering the fact that the project has been in existence in India for a period of more than six months.
>
> Ground 2
> The Ld. AO has erred in proposing and Hon'ble DRP has further erred in confirming that the sale of equipment under this project has not been concluded at the off shore level but has been concluded in India, since the goods were 'accepted' by the customer in India.
>
> Ground 3

The Ld.AO has erred in proposing and Hon'ble DRP has further erred in confirming an ad-hoc attribution amounting to INR 4,305,071.25 (being 10% of the total income earned during the year) to the alleged Installation PE of the appellant in India."

33. During the previous year, the Assessee had undertaken off-shore supply of equipment and offshore provision of services under this project. The Ld. AO in the draft assessment order had alleged that the PO of the Assessee is a Fixed Place PE of the appellant in India and that the appellant also had an 'Installation PE' in India as per Article 5(3) of the India-Netherlands DTAA. However, the Hon 'ble DRP Panel held that since no business activity has been carried out by the defunct PO, the same cannot be treated as a PE of the Assessee. However, the allegation of constitution of an 'Installation PE' was still upheld by the Hon'ble DRP. After holding that the Assessee has an 'Installation PE' in India, the Ld. AO has attributed the following amount of profits to the alleged 'Installation PE' of the Assessee in India, which have been included in the assessed income: (Copy of the invoice enclosed at PB page 285)

S.No.	nature	Revenue (EURO)	Revenue (in INR)	Profits attributed @ 10% (in INR)
I	Off-shore supply of equipment	907,813	40,551,986	4,055,198
2	Off-shore provision of services	55,937	2,498,689	249,869
TOTAL		963,749	43,050,675	4,305,067

Further, while passing the assessment order, the Ld. AO has observed that as per Sale of Goods Act, 1932 ('SOG Act'), sale is concluded at the time of its acceptance and that' Acceptance' does not mean mere receipt of goods but means checking the goods to ascertain whether they are as per the contract and the buyer has been given reasonable opportunity of examining them. Further, the DRP has held that testing of equipment happens in India and in case of any failure while doing the testing, the Assessee bears

the risk to take back the equipment and replace it with a new equipment and therefore, the sale got concluded in India.

34. The learned counsel for the Assessee submitted before us that the conclusions of the Revenue that the there was an Installation PE of the Assessee in existence during the previous year and that the supply of equipments was attributable to such PE and therefore the income from supply of equipments is chargeable to tax in India under the India-Netherlands DTAA is unsustainable. It was contended that the AO has not appreciated the facts of the case and the correct legal position that during the subject year no installation activity has been carried out for the GOK project. Under this project, the Assessee has only undertaken off shore supply of equipment and off shore services performed on the equipment in Netherlands in the subject year. The said services consisted of sizing of equipment, embedding the software in it and testing of the equipment in Netherlands. Therefore, since no installation work was carried on by the appellant during the subject year, the question of constitution of an 'Installation PE' does not arise. In this regard, he placed reliance on the following judicial precedents in which it has been held that in the absence of installation activity, the assessee could not be said to have an 'Installation PE' in India:

Andhra Pradesh High Court in Commissioner v . Visakhapatnam Port Trust (1983) 144 ITR 146 (AP HC)
Uhde Gmbh V. Deputy Commissioner Of Income-Tax (1997) 57 TTJ 447 (Mumbai IT AT)
Deputy Commissioner of Income-tax v. CIT Alcatel (1993) 47 ITD 275 (Delhi ITAT)

In light of the above submissions, it was argued that it cannot be concluded that 'Installation PE' in terms of Article 5(3) of the India Netherlands DTAA got created since no installation activity has been carried out by the Assessee in India in the subject year.

35. The learned DR relied on the directions of the DRP contained in para 3.1.4 & 3.1.5 of the DRP's directions wherein it has been observed as follows on this aspect:

> "3.1.4 On the issue of Installation PE being constituted, the project in which the Assessee company has been involved through a contractual agreement with DGLL and consortium agreement with TCIL and MDL was basically an installation project which is squarely covered under Article 5(3) of the India-Netherlands DTAA. The Assessee's claim that no installation activity has happened during the subject assessment year cannot be accepted as the project has to be seen in a holistic way. In the project undertaken, based on the consortium agreement, the assessee company plays a major role and contributes significantly in the composite work and the project has continued for more than 12 months.
>
> 3.15. In view of the above facts, this panel has found that the proposed order of the Assessing Officer in creating an Installation PE for the Assessee company in the said project is correct."

36. We have given a very careful consideration to the rival submissions. From a readin of the Directions of the DRP it is clear that the DRP considered the PO of the Assessee established for the GOK project as not constituting a PE within the meaning of Article 5(1) of the India-Netherlands DTAA. The basic rule in Article 5(1) of India-Netherlands DTAA requires a "fixed place of business" for constitution of a PE. That has been found to be not in existence by the DRP. For constituting Installation PE within the meaning of Article 5(3) of the India-Netherlands DTAA the test of duration of time for which the activities are carried out in India becomes relevant. In the present case the question is computation of the duration of time. The supply of equipments that have to be installed by the consortium could be said to be a direct preparation for coming into existence of an Installation PE. The DRP has not given any specific reason for coming to the conclusion that there existed an installation PE of the Assessee in India except to observe that the project has to be seen in a holistic way. Even if one were to look at the project in a holistic way, the question still remains open whether the supply of equipments by itself would constitute an installation PE. The starting point of time would be when actual installation starts. The DRP's direction clearly holds the

view that no installation activity happened during the relevant previous year. The decisions cited on behalf of the Assessee hold the view that unless installation activities commence an installation PE cannot be said to have been constituted. There are no provisions in the treaty providing for circumstances such as the present one when it can be said that an installation PE has come into existence. There are no circumstances brought out to show that the parties resorted to treaty abuse. In the given circumstances, we are unable to uphold the findings of the DRP that there existed an Installation PE of the Assessee and profit arising out of off-shore supply of equipments are attributable to the installation PE and therefore taxable in India as business profits. Since the Assessee did not have a PE in India, such profits cannot be brought to tax in India. We hold and decide the issue accordingly.

37. In view of the above conclusion on Gr.C 1, the other grounds Gr.C2 to 6 do not require any consideration. The learned counsel has in support of Gr.C-2 to 6 submitted that the off shore sale of equipment was on CIF basis to TCIL and TCIL further sold it to DGLL on high sea sales basis wherein the title in the goods passed outside India and the payment in respect of the same also was received outside India. Accordingly, income from such off-shore supply of equipment was not offered to tax in India by the appellant since the same did not accrue/ arise in India. It was the plea of the Assessee that the purchase order raised by TCIL on the Assessee clearly states that sale of equipment by the Assessee is on "high seas sales" basis. It gives reference to the high seas sale agreement between TCIL and DGLL which would need to be executed before the ship delivering the equipment reaches the frontiers of India. A copy of these documents are enclosed at Page 281 to 291 of the paper-book. It was claimed that the AO has completely disregarded the documents furnished by the Assessee proving that the equipment was supplied at the off-shore level. The learned counsel for the Assessee placed reliance on several judicial pronouncement in support of his claim that income from off-shore supply of equipment cannot be taxed in India. In particular strong reliance was placed on the decision of the Hon’ble Supreme Court in the case of

Ishikawajima Harima Heavy Industries Limited vs. DIT (2007) 288 ITR 408 (SC). The learned DR however placed reliance on a retrospective amendment to the Act by which the decision of the Hon'ble Supreme Court in the case of Ishikawajima (supra) was superseded. As already stated, we do not wish to deal with these contentions as even assuming other aspects in favour of the revenue, the taxability of income cannot arise in the absence of existence of a PE of the Assessee in India during the relevant previous year.

38. The next issue that arises for consideration in this appeal is the taxation of income arising out of Assessee's AMC contract with ONGC for supply, installation, testing and commissioning of Vessel and Air Traffic Management System (VATMS). The grievance of the Assessee are projected in Gr. "D" raised by the Assessee before the Tribunal.

39. In the year 2006, the Assessee was awarded a contract by ONGC for supply, installation, testing and commissioning of Vessel and Air Traffic Management System (VATMS) system along with the provision of maintenance services. This contract envisaged a warranty period of 1 year after handing over of the project site and provision of annual maintenance services (AMC services) for 6 year post such warranty period. The main contract including supply, installation, testing and commissioning of the V ATMS system (including 1 year warranty period) was completed on 1st October 2008. Thereafter, the Assessee started providing maintenance services in relation to the VATMS equipment/ system for a total period of 6 years beginning 1st October 2008 i.e. after the project was handed over to the customer. (PB page 323 contains the AMC Schedule). Accordingly, during the relevant previous year relevant to AY 2010-11, the Assessee provided AMC services for the VATMS equipment installed by it in earlier years. These maintenance services were performed both off-shore, remotely from the Netherlands and on-shore in India. The on-shore services were subcontracted to a local independent contractor viz. Elcome Marine Service Private Limited ("Elcome") and included regular maintenance activities such as visiting the sites for cleaning, checks,

local fault repair etc. In general, these were all activities of a service nature. It is the plea of the Assessee that it did not perform any installation activity during the subject year and only maintenance services were undertaken (through a contractor in India). The copy of relevant invoices of this project is at 300 to 303 of the paperbook. It was also the plea of the Assessee that during the previous year, the presence of its personnel in India was merely for a period of 54 days, the purpose of which was mainly for discussions with customers about the status of the project, hurdles faced etc. Such personnel did not utilize any fixed place during their visit to India and largely stayed at hotels, visited offices of the customers etc.

40. The revenue brought to tax the AMC fee received as business profits attributable to an installation PE in terms of Article 5(3) of India-Netherlands DTAA. According to the revenue, the ONGC project was in existence for a period of more than six months and therefore constituted an Installation PE of the Assessee in India. The revenue further relied on the fact that a sub-contractor had carried out AMC work in India on behalf of the Assessee and therefore the Assessee had a virtual presence in India for execution of the project. Aggrieved by the order of the AO, the Assessee has raised Gr."D" before the Tribunal.

41. The Assessee has raised Gr.D-1 & 2 challenging the finding of the DRP that there existed an installation PE of the Assessee during the relevant Previous year. These grounds read as follows:

> Ground 0.1
> The Ld.AO has erred in proposing and Hon'ble DRP has further erred in confirming that the appellant has an 'Installation Permanent Establishment' ('PE') in India as per Article 5(3) of the India Netherlands DTAA as the project has been in existence for a period of more than six months.
>
> Ground 2
> The Ld.AO has erred in holding that the Indian sub-contractor could be virtually considered the presence of the appellant in India.

42. The learned counsel for the Assessee submitted that as per Article 5(3) of the India-Netherlands DTAA, the term 'Permanent Establishment' includes a building site or construction, installation or assembly project constitutes a permanent establishment only where such site or project continues for a period of more than six months. It was submitted that the AO has concluded that since the ONGC project i.e. the project for supply, installation, testing and commissioning of VATMS system (along with the provision of AMC services) has been continuing since the year 2006, the specified threshold of six months as mentioned in Article 5(3) of the India Netherlands DTAA has clearly been exceeded. It was his submission that the AO has not appreciated the facts of the case that the installation activity in the project in question was completed in October 2007 and no installation activity has been carried out by the Assessee (or any contractor) in India during the subject year. The Assessee has only provided maintenance services during the subject year on equipment which was handed over to ONGC in 2008. The ONGC in its letter dated 1 October 2008 has specifically confirmed that the system/ equipment was installed/ completed on 1 October 2007 and had therefore requested the Assessee for commencing the maintenance services thereafter. It was pointed out that these maintenance services included visiting the sites for cleaning, checks, local fault repair etc., by the local contractor and limited remote assistance by the Assessee from the Netherlands. Accordingly, such maintenance services cannot be considered as 'installation activity' leading to creation of an 'Installation PE' of the appellant in India under Article 5(3) of the India-Netherlands DTAA. It was therefore submitted that in view of the above stated facts, since the essential condition of carrying out' Installation activity' is not fulfilled in the case of the appellant, it cannot be held that the Assessee has an 'Installation PE' in lndia during the subject year. The learned counsel for the Assessee placed reliance on the following judicial precedents in which it has been held that in the absence of installation activity, the Assessee could not be said to have an 'Installation PE' in India:

Andhra Pradesh High Court in Commissioner v. Visakhapatnam Pori Trust (1983) 144 ITR 146 (AP HC)
UHDE GMBH V. DEPUTY COMMISSIO ER OF INCOME-TAX [1997] 57 TTJ 447 (Mumbai ITAT)
Deputy Commissioner of Income-tax v. CIT Alcatel [1993] 47 ITD 275 (Delhi ITAT)

43. It was further submitted that Maintenance Services performed post completion of installation cannot lead to 'Installation PE'. It was reiterated that formal acceptance of the VATMS system for the ONGC Project was done in October 2007 and the one year warranty period of the VATMS system has also expired. During the subject year, the Assessee has only provided maintenance services after expiry of the warranty period of the VATMS system. Hence, such AMC services which are provided much after the delivery/ acceptance of the VATMS system by the customer cannot be considered as part of 'installation activity' leading to creation of an Installation PE of the appellant in India under Article 5(3) of the India-Netherlands DTAA. In this regard, the learned counsel for the Assessee drew ouor attention to the OECD model commentary and available judicial guidance, an 'Installation PE' ceases to exist when the work at a site of a project/ site/ equipment is completed or the same is formally accepted and handed over to the customer. Therefore, once the project site/ equipment is accepted and handed over to the customer, any services (including maintenance services etc.) provided post such acceptance cannot be regarded as part of 'Installation activity' leading to creation of an Installation PE. The learned counsel for the Assessee also placed reliance on the judgment of the Hon'ble AAR in the case of Airports Authority of India (2008) 299 ITR 102 (AAR), wherein the AAR observed that an earlier 'Installation PE' could not have any bearing on the contract for repairs and maintenance work to be carried out post completion of such installation. It was pointed out that the above position has also been confirmed by International tax commentator Klaus Vogel in his commentary "Klaus Vogel on Double Taxation Conventions" wherein he has opined that repairs and maintenance services performed after the formal acceptance of the installation work by

the customer shall not be included in the minimum threshold for constitution of an 'Installation PE'. The relevant extract of the commentary is given below:

> *"Repair and Maintenance work performed after such formal acceptance or taking delivery is not sufficiently connected with the original-building or installation works and is therefore not counted when determining the minimum period. Whether if constitutes a permanent establishment is a matter to be decided separately from the works accomplished prior 10 acceptance or taking delivery "*

44. It was therefore contended that maintenance activities cannot be considered a part of the "Installation activity" of the Assessee in India. It was also submitted that there was no fixed place PE of the Assessee in India through which it carried on business and therefore the revenue cannot take recourse to Article 5(1) of the India-Netherlands DTAA. It was reiterated that the employees of the Assessee were present in India merely for a period of 54 days during the subject year, that too for discussions with customers about the status of the projects, hurdles faced etc. Hence, it cannot be said that the Assessee has a fixed place PE in India for this Project. It was therefore contended that the Assessee does not have any PE in India for the subject year.

45. On the question of the role of sub-contractor in India and the allegation of the revenue that there was virtual presence of the Assessee in India through the sub-contractor, it was submitted by the learned counsel that these allegations cannot be the basis to hold that the Assessee had an 'Installation PE' in India since no installation activity was carried out by the Assessee in India during the subject year. It was submitted that even assuming that the entire maintenance activity was performed by Elcome (an independent local contractor), it cannot be said that the business of appellant was carried out in India, so as to constitute its PE in India. In this regard the argument of the learned counsel for the Assessee was that the business of the foreign enterprise was not carried out in India and as per Article 5(1) of the India-Netherlands DTAA, the term 'Permanent Establishment' means:

> *"a fixed place of business through which the business of the enterprise is wholly or partly carried on.*

It was argued that on a plain reading of the opening paragraph of Article 5, the 'enterprise- referred to in Article 5(1) of the India Netherlands DTAA has to be the foreign enterprise and the PE should be in relation to such foreign enterprise. Therefore, it would not be correct to hold that the fixed place of business of a contractor (an Indian enterprise) i.e. his own premises or even the project site, should be considered as the PE of the foreign enterprise in India. It was reiterated that all the on-shore work performed as part of this contract was sub-contracted to Elcome, a local independent contractor. The Assessee provided only limited technical support to the contractor remotely from the Netherlands. Further, Elcome did not setup any office etc. at the project site. The learned counsel placed reliance on the decision of the Hon'ble Delhi High Court in the case of National Petroleum Construction Company (Infra) wherein it has been held as follows:

> *"The activities at site carried on by any contractor through a sub-contractor would not count towards the duration of the contractor's PE, as in that case, the construction site or project cannot be construed as a fixed place of business of the contractor and would fail one of the essential tests of paragraph 1 of Article 5 of the DTAA. "*

46. It was argued that Article 5(1) and 5(3) of the India-Netherlands DTAA are to be read harmoniously. It was submitted that the conditions specified under Installation PE [Article 5(3)] cannot be viewed as a water-tight compartment without taking color from other clauses of PE, such as Fixed place PE [Article 5(1)]. The two clauses, providing for Installation PE and Fixed Place PE, should be read harmoniously, as part of the same concept. In relation to a building site and construction/ installation project, the foreign enterprise should conduct or carry on business through such construction/ installation site in India to constitute a PE in India. In support of the above submission the following judicial pronouncements were brought to our notice wherein it was held that there has to be a harmonious construction of Article 5(1) and Article 5(2)/ Article 5(3) of the DTAAs:

National Petroleum Construction Company vs. ADIT (2016) 238 Taxman 40 (Delhi HC)
Pintsch Bamag (2009) (318 ITR 190) (AAR)
Cal Drive Marine Construction (Mauritius) Ltd (2009) 315 ITR 334 (AAR) BKI/HAM VOF vs. ACIT (200 I) 70 TTJ 480 (Delhi IT AT)
Fugro Engineers B.Y. v. Assistant Commissioner of Income tax (OS D), Range-I, Dehradun (2008) 26 SOT 78 (Delhi ITAT)

It was submitted that since the Assessee was not involved in any activity at the project site in India, it does not satisfy the 'business test' as prescribed in Article 5(1) of the India Netherlands DTAA and therefore it cannot be said to have an Installation PE in India, even if it is assumed that the installation activity has been carried out in India beyond the threshold prescribed in the India-Netherlands DTAA. Time spent by sub-contractor not to be included when "entire work" carried out by such subcontractor. Reference in this regard was made to the OECD commentary on 'Taxation of Income and Capital' of Article 5(3) at Para 19 states the following with regard to sub-contracting in case of installation projects (Page 100):

> "If an enterprise (general contractor) which has undertaken the performance of a comprehensive project subcontracts parts of such a project to other enterprises (subcontractors), the period spent by a subcontractor working on the building site must be considered as being time spent by the general contractor on the building project. "

It was argued that the commentary clearly states that only when a general contractor has undertaken a comprehensive project and he subcontracts parts of the project to other sub-contractors, the period of the sub-contractors must be considered for determining the PE of the general contractor. It was reiterated that in the present case, the Assessee has sub-contracted the entire on-shore maintenance work for this project to Elcorne and was not involved in any activity itself in India. Therefore, the time spent by the Indian contractor cannot be considered as time spent by the appellant in India to crate its PE in India.

47. The learned DR relied on the directions of the DRP in this regard. We have given a very careful consideration to the rival submissions. Our conclusions in para-36 with regard to existence of an installation PE in respect of GOK Project will equally apply to this project also. Admittedly, no installation activity was carried out during the previous year and therefore the question of an installation PE of the Assessee existing during the previous year does not arise for consideration at all. We are in complete agreement with the contentions put forth by the learned counsel for the Assessee on this aspect. Accordingly, we hold that since the VATMS equipment was already accepted and handed over to the customer in the year 2007 and no installation activity was carried out in India during the subject year, it cannot be held that the Assessee had an 'Installation PE' in India in the subject year. As far as the conclusion of the revenue that the independent contractor of the Assessee in India created a virtual presence of the Assessee in India so as to create an installation PE, given that the entire onshore maintenance contract has been performed by an independent local contractor in India, it cannot be said that the business of the Assessee has been carried out by the presence of the local contractor in India, so as to create its PE in India. The examination of whether a PE exists needs to be determined based on the activities of the foreign enterprise in India. Since no activities have been carried out by the Assessee in India with respect of such maintenance activity, it is unreasonable to conclude that the business of the Assessee was carried out in India through such subcontractor, to constitute its PE in India. We therefore hold that receipts in the form of AMC fees from ONGC on VATMS cannot be brought to tax in India as business income. In view of the above conclusion, the question of what quantum of income has to be attributed to the PE in India that is agitated in Gr.No.D-3 & 4 do not require any consideration.

48. The next issue that arises for consideration in this appeal is the taxation of income arising out of Extra Work Contract performed by the Assessee in respect of contract with ONGC for supply, installation, testing and commissioning of Vessel and Air

Traffic Management System (VATMS). The grievance of the Assessee are projected in Gr. "E" raised by the Assessee before the Tribunal.

49. We have already seen while deciding the Gr."D" that the Assessee installed VATMS system (completed in October 2007) for ONGC. ONGC wanted provide an interface between the VATMS network equipment and the naval network so as to enable the down load of data from the VATMS system by the Indian Navy. As part of this ONGC Extra work contract, the Assessee undertook only off-shore provision of services in relation for providing such interface. For this purpose, the software developed by the Assessee was installed/ embedded and integrated on the VATMS equipment by Elcome with the remote assistance of the Assessee from the Netherlands, and the Assessee had during the subject year received consideration for provision of such remote off-shore assistance in relation to providing such interface. The revenue held that the receipt was in the nature of "Royalty" chargeable to tax. The revenue further concluded that since there was an installation PE and the receipt of royalty was attributable to the PE, the same has to be taxed as business income. Since no details were furnished by the Assessee, the revenue invoked Sec.44DA of the Act and brought to tax 50% of the receipts in question. Aggrieved by the action of the revenue, the Assessee has raised Gr."E" 1 & 2 before the Tribunal which reads thus:

> "Ground 1
> The Ld.AO has erred in holding and Hon'ble DRP has further erred in confirming that income from off-shore provision of services is in the nature of 'royalty' as per Article 12 of the India Netherlands DTAA, effectively connected to the alleged PE of the appellant in India."

50. The learned counsel for the Assessee submitted that the DRP was not right in considering the receipt in question as royalty. In this regard it was submitted that during the previous year the Assessee had only undertaken off-shore provision of services under the project. Such services were in relation to interface of the VATMS system with the naval network. Accordingly, no software was supplied by the Assessee during the subject year (such software was supplied by the Assessee in earlier years) and only

services in relation to the integration of the software have been provided during the subject year. It was submitted that even otherwise, the software supplied would be in the nature of 'embedded software'. The same can also be seen from the proposal made to Elcome in relation to the project which states that "This software shall be installed on one of the Display processors running at MOC" (Copy enclosed 358 to 361 of the paper book). It was submitted that software installed/ embedded in the equipment merely facilitates its functioning and there is no independent existence/ use of such loaded software. By supplying such software, the appellant has not provided the codes/ program language underlying such software to the customer. The customer was handed over the equipment as a whole and did not have any knowledge of the codes/ language in the software. Therefore, such payments for software installed on the equipment are not in the nature of 'royalty 'income as per the provisions of Article 12(4) of the India Netherlands DTAA. The reasons for the same have been enumerated in detail in Ground "B" of the submissions relating to the Airports Authority of India (Delhi Airport) project. It was submitted that the payment for provision of such off-shore services in relation to provision of the interface cannot be classified as FTS since such services do not 'make available' any technical knowledge, skills etc. to the customer in India. The learned counsel for the Assessee reiterated submissions made with respect to the concept of 'Make Available' in context of FTS in case of the AAI (Delhi) Project and submitted that the said arguments are squarely applicable to this ground also. Accordingly, for the sake of brevity and to avoid repetition, we are not reproducing those submissions. Further, based on the submissions made in Ground No."D" 1 and 2 of the ONGC Annual Maintenance Contract, the learned counsel for the Assessee submitted that the Assessee does not have a PE in India. Therefore, in the absence of any PE in India, from such off-shore provision of services for providing interface – is not taxable in India as per Article 5(3) of the India- Netherlands DTAA.

51. The learned DR relied on the order of the DRP. We have given a careful consideration to the rival submissions. As rightly contended by the learned counsel for

the Assessee, the contentions raised by the Assessee and the reasoning of the DRP on this issue is similar to the issue decided in Gr."B" -2. The conclusions given therein in para-16 to 20 will be equally applicable to this ground also. To avoid repetition and lengthen the order, we do not wish to reproduce the same. Suffice it to say that the sale of equipment and its accessories with software imbedded in the equipments cannot be taxed in the hands of the assessee as business income as the Asssessee does not have a PE in India to which the profits can be said to be attributable. In the circumstances, the revenue cannot bifurcate the consideration towards software and license embedded in the equipment from the combined sale value of the equipment and accessories and seek to bring to tax the amount bifurcated for software as in the nature of "Royalty" as envisaged under section 9(l)(vi) of the Act. For the reasons given in para 41 to 47 of this order, we hold that there was no installation PE in existence in so far as the ONGC VATMS AMC project is concerned. Therefore the receipts in question cannot be brought to tax India. We hold and direct accordingly. In view of the above conclusion, the grievance projected by the Assessee in Gr.E-2 does not require any consideration.

52. Ground F 0.1 raised by the Assessee reads thus:

> The Ld.AO has erred in levying interest under section 234A and section 234B of the Act despite the directions of the Hon'ble DRP to not to do so.

53. The learned counsel for the Assessee submitted that pursuant to filing of a rectification application under section 154 of the Act, the Ld. AO has deleted the levy of interest under section 234A and 234B of the Act as directed by the Hon'ble DRP. Accordingly, relief on this ground has already been given and hence, the same may not be relevant for adjudication in the appeals. Hence the ground of appeal is dismissed as infructuous.

54. In Ground F- 2, the Assessee has projected its grievance regarding the action of the AO has in not granting due credit of taxes deducted at source amounting to INR 986,285 to the Assessee. It was submitted that the Assessee had claimed credit of taxes deducted at source ('TDS ') of INR 2,852,660 in its income tax return for the subject

year. However, while passing the assessment order, the Ld. AO has allowed credit of TDS only to the extent of INR 1,866,375. Hence, there is a short credit amounting to 1NR 986,285 on the apparent ground that the same is not appearing in the online tax credit statement i.e. Form 26AS of the appellant for the subject year. The amount of TDS credit short granted of INR 986,285 represents the tax deducted by a Government Company, a customer of the Assessee. The same is not being reflected in the Form 26AS of the Assessee since ONGC did not have the PAN of the Assessee in its records while filing the TDS returns. It was submitted that the details of such TDS credit along with copy of TDS Certificates in Form 16A in support of its claim of the TDS credit were submitted vide submission dated 16 November 2012 and 28 January 2014 to the Ld. AO. Copy of the TDS Certificates is also enclosed on page no. 362 to 364 of the paper book. It is the plea of the learned counsel for the Assessee that even if the amount of TDS credit is not being reflected in the Form 26AS, Form 16A (TDS Certificates) is used by a deductor are conclusive evidence of TDS being deducted and therefore, the credit of the same shall be appropriately granted to the deductee on the basis of such TDS certificates. The fault on the part of deductor shall not burdensome the deductee from claiming TDS credit due to the fact that once deductor deposited TDS with the government and issues TDS certificates showing such claim of TDS, deductee shall be eligible for claiming TDS credit on the basis of TDS certificates, even though no TDS claim appears in Form No. 26AS. The learned counsel has in this regard brought to our notice Instruction No. 5 dated July 8,2013 issued by the Central Board of Direct Taxes ("CBDT"), wherein it has directed the assessing officers that whenever an assessee approaches them with requisite details and particulars in the form of TDS certificate as an evidence against any mismatched TDS amount, the said officer shall, after due verification, allow the credit of the same to the assessee. The learned counsel for the Assessee also placed reliance on judicial pronouncements wherein it has been held that even if the amount of TDS is not being reflected in the Form 26AS, the credit of the same shall be allowed the assessee on the basis of the TDS Certificates available.

Rakesh Kumar Gupta Vs Union of India (2014) 365 ITR 143 (Allahabad HC)
Court On Its Own Motion Vs. CIT (2013) 352 ITR 273 (Delhi HC)
Sum it Devendra Rajani vs. ACIT (2014) 369 ITR 673 (Gujarat HC)
ACIT vs. Orn Prakash Gattani (2000) 242 ITR 638 (Guwahati HC)
Yashpal Sahwney (2007) 293 ITR 539 (Bombay HC)

55. After considering the submissions of the learned counsel for the Assessee, we are of the view that it would be just and appropriate to direct the AO to consider the TDS certificate produced by the Assessee and after verification allow credit for prepaid taxes without insisting on the TDS being reflected in Form 26AS. The ground is treated as allowed.

56. In the result, appeal of the Assessee is partly allowed.

Order pronounced in the Court on 08.02.2017.

Sd/-	Sd/-
[Dr.Arjun Lal Saini]	[N.V.Vasudevan]
Accountant Member	Judicial Member

Dated : 08.02.2017.
[RG PS]

Copy of the order forwarded to:
1. HITT Holland Institute of Traffic Technology B.V., Laan van Malkenschoten 40, 7333 NP Apeldoom, The Netherlands.
2. D.D.I.T. (International Taxation)-1 (1), Kolkata
3. CIT(A)- . CIT-
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Asstt.Registrar, ITAT, Kolkata Benches