

12

IN THE HIGH COURT OF KARNATAKA AT BANGALORE

DATED THIS THE 3RD DAY OF AUGUST, 2010

PRESENT

THE HON'BLE MR. JUSTICE N. KUMAR

AND

THE HON'BLE MRS. JUSTICE B.V.NAGARATHNA

I.T.A. Nos.11 TO 15/2008 & 17/2008

BETWEEN:

1. THE COMMISSIONER OF
INCOME-TAX,
C.R.BUILDING,
QUEENS ROAD,
BANGALORE.
2. THE ASSISTANT COMMISSIONER
OF INCOME-TAX,
(INTERNATIONAL TAXATION),
CIRCLE-19(1),
C.R.BUILDING,
QUEENS ROAD,
BANGALORE.

...APPELLANTS
(COMMON IN ALL THE
APPEALS)

(BY SRI E. R. INDRAKUMAR, Sr. COUNSEL FOR
SRI E.SANNATHI INDRAKUMAR, ADVOCATE)

AND:

M/s. SYNOPSIS INTERNATIONAL
OLD LTD.,

W

C/O.SYNOPSYS (INDIA) PVT. LTD.,
 RMZ INFINITY, TOWER A,
 4TH & 5TH FLOOR,
 MUNICIPAL NO.3,
 OLD MADRAS ROAD,
 BENNIGANAHALLI,
 BANGALORE - 560 016.

...RESPONDENT
 (COMMON IN ALL THE
 APPEALS)

(BY SRI K.P.KUMAR, Sr. COUNSEL FOR
 M/s. KING & PARTRIDGE, ADVOCATE)

ITA NO. 11/2008 IS FILED U/S.260-A OF I.T.ACT, 1961 ARISING OUT OF ORDER DATED 10/8/2007 PASSED IN ITA NO.840/BNG/2007, FOR THE ASSESSENT YEAR 2002-2003, PRAYING TO i) FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW STATED THEREIN, ii) ALLOW THE APPEAL AND SET ASIDE THE ORDER PASSED BY THE ITAT BANGALORE, IN ITA NO.840/BNG/2007, DATED 10/8/2007 CONFIRMING THE ORDERS OF THE APPELLATE COMMISSIONER AND CONFIRM THE ORDER PASSED BY THE ASSISTANT COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION) CIRCLE-19(1), BANGALORE.

ITA NO.12/2008 IS FILED U/S.260-A OF I.T.ACT, 1961 ARISING OUT OF ORDER DATED 10/8/2007 PASSED IN ITA NO.839/BNG/2007, FOR THE ASSESSENT YEAR 2001-2002, PRAYING TO i) FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW STATED THEREIN, ii) ALLOW THE APPEAL AND SET ASIDE THE ORDER PASSED BY THE ITAT BANGALORE, IN ITA NO.839/BNG/2007, DATED 10/8/2007 CONFIRMING THE ORDERS OF THE APPELLATE COMMISSIONER AND CONFIRM THE ORDER PASSED BY THE ASSISTANT COMMISSIONER OF INCOME

TAX (INTERNATIONAL TAXATION) CIRCLE-19(1),
BANGALORE.

ITA NO.13/2008 IS FILED U/S.260-A OF I.T.ACT, 1961 ARISING OUT OF ORDER DATED 10/8/2007 PASSED IN ITA NO.43/BNG/2007, FOR THE ASSESSENT YEAR 2003-2004, PRAYING TO i) FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW STATED THEREIN, ii) ALLOW THE APPEAL AND SET ASIDE THE ORDER PASSED BY THE ITAT BANGALORE, IN ITA NO.43/BNG/2007, DATED 10/8/2007 CONFIRMING THE ORDERS OF THE APPELLATE COMMISSIONER AND CONFIRM THE ORDER PASSED BY THE ASSISTANT COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION) CIRCLE-19(1), BANGALORE.

ITA NO.14/2008 IS FILED U/S.260-A OF I.T.ACT, 1961 ARISING OUT OF ORDER DATED 10/8/2007 PASSED IN ITA NO.41/BNG/2007, FOR THE ASSESSENT YEAR 2001-2002, PRAYING TO i) FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW STATED THEREIN, ii) ALLOW THE APPEAL AND SET ASIDE THE ORDER PASSED BY THE ITAT BANGALORE, IN ITA NO.41/BNG/2007, DATED 10/8/2007 CONFIRMING THE ORDERS OF THE APPELLATE COMMISSIONER AND CONFIRM THE ORDER PASSED BY THE ASSISTANT COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION) CIRCLE-19(1), BANGALORE.

ITA NO.15/2008 IS FILED U/S.260-A OF I.T.ACT, 1961 ARISING OUT OF ORDER DATED 10/8/2007 PASSED IN ITA NO.841/BNG/2007, FOR THE ASSESSENT YEAR 2003-2004, PRAYING TO i) FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW STATED THEREIN, ii) ALLOW THE APPEAL AND SET ASIDE THE ORDER PASSED BY THE

ITAT BANGALORE, IN ITA NO.841/BNG/2007, DATED 10/8/2007 CONFIRMING THE ORDERS OF THE APPELLATE COMMISSIONER AND CONFIRM THE ORDER PASSED BY THE ASSISTANT COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION) CIRCLE-19(1), BANGALORE.

ITA NO.17/2008 IS FILED U/S.260-A OF I.T.ACT, 1961 ARISING OUT OF ORDER DATED 10/8/2007 PASSED IN ITA NO.42/BNG/2007, FOR THE ASSESMENT YEAR 2002-2003, PRAYING TO i) FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW STATED THEREIN, ii) ALLOW THE APPEAL AND SET ASIDE THE ORDER PASSED BY THE ITAT BANGALORE, IN ITA NO.42/BNG/2007, DATED 10/8/2007 CONFIRMING THE ORDERS OF THE APPELLATE COMMISSIONER AND CONFIRM THE ORDER PASSED BY THE ASSISTANT COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION) CIRCLE-19(1), BANGALORE.

THESE ITAs COMING ON FOR HEARING THIS DAY, **N.KUMAR J.**, DELIVERED THE FOLLOWING:

J U D G M E N T

These six appeals arise out of a common order passed by the Tribunal allowing the appeals by holding that the fees received by the assessee cannot be treated as royalty as defined under Section 9(1)(vi) of the Income Tax Act, 1961 (for short hereinafter referred to as the 'Act'). Aggrieved by the same, the revenue is in appeal.

2. Three appeals were filed in respect of the assessment year 2001-02, 2002-03 and 2003-04. In all the three appeals, application for stay was filed, which were also given separate numbers. At the stage of hearing on the I.As on the premise that the question involved in these appeals are already covered by the decision of the Tribunal, the three appeals were allowed and consequently, the applications of stay were dismissed. It is that composite order, which is the subject matter before us.

3. Synopsis U.S., is the owner of the copy right. It has granted a license to Synopsys International Limited, Ireland, the assessee. The technical license agreement is for a consideration to enable the assessee to use and commercially exploit the intellectual property in the Electronic Design Automation (for short 'EDA') Tool and Software in certain geographies.

4. Synopsis U.S. specially requires the assessee to enter into End User Software License Agreement (for short 'EULA') with customers to protect Synopsis U.S. property

rights in the production upon documentation and intellectual property and in no event, less than a reasonable standard of care. It is for that reason that the 'EULA' between the assessee and the Indian customer has elaborate and restrictive clause, primarily with the object of protecting the owner's rights in the products, documentation and the intellectual property in the software. In terms of the aforesaid license, the assessee in turn, has entered into 'EULA' with various customers. A reading of the aforesaid agreement shows that the Indian customer has purchased a licensed product i.e., Electronic Design Automation (for short 'EDA') tool/ Software, from the assessee for his use as a tool on application software. The 'EDA' Tools support the design and production of Integrated Circuits (I.Cs). An I.C. is a component which functions inside an electronic gadget (for example, mobile phone). ICs are manufactured by the semiconductor industry through a process called fabrication. As fabrication process is an extensive process, IC manufacturers, meticulously follow a design flow process before the fabrication of I.C is taken up. 'EDA' tools are used in this design flow process. Design flow is a procedure which contains several sub-procedures.

5. The assessee has received US \$ 9,98,098/-, 33,53,252/- and 20,97,003/- respectively, for the three assessment years i.e., 2001-02; 2002-03; 2003-4 from its Indian customers. The assessing Officer treated these receipts as royalty as defined in Section 9(1)(vi) of the Act and therefore, according to him the assessee is liable to pay tax in India. However, the assessee has neither filed return of income nor paid tax on its income. As the income of the assessee escaped assessment, notice under Section 147 of the Act was issued after recording reasons for the same. The assessee filed its returns for all the three years, declaring NIL income but applied refund of Rs.1,07,97,031/- for the assessment year 2001-02, likewise for other assessment years also. However, the Assessing Officer held that the assessee is liable to pay tax under Section 9(1)(vi) of the Act at 20% on gross basis for the first two assessment years and 10% for the third assessment year. He also levied interest under Section 234-A, 234-B and 234-C of the Act.

6. Aggrieved by these three orders, the assessee preferred appeals before the Commissioner of Income Tax

(Appeals)-IV, Bangalore. The Appellate Authority held that the assessee transferred such rights to its Indian customers which implies what is transferred is not the universal rights of use but in the terms of the assessee, non-exclusive, non transferable rights to use. Had it been the use of copy of a copyrighted article, there would not have been the necessity of making an agreement of license for which the appellant has also received sums. Actually, what was transferred through the license agreement was the use of software owned by it. This is evident from the agreement itself. The software given in use to Indian customers was named in the agreement as "Synopsis Software". Had this software been itself got through license from other companies, the name of the software would have borne the name of that company from which it was received. So, the words in ownership clause of the agreement i.e., "licensors own..." has been only used as a matter of precaution and of no avail whereas the ownership lies with the respondent. What is transferred through the agreement is a license to use the Synopsis Software i.e., a copyright owned by the appellant itself and not the copy of a copyrighted article. Hence, the receipt squarely falls under the definition of Royalty and therefore,

taxable in India. However, the interest levied was set aside with a direction to the Assessing Officer to compute the interest after determining the income. Accordingly, he allowed the appeals in part. Aggrieved by the said order, the assessee preferred appeals before the Tribunal. The Tribunal held that the assessee was allowed to license to use the software. According to the assessee, it is a goods and by way of license agreement, the software only was allowed to use. In other words 'a copyrighted article was transferred and no transfer was made in respect of copyright. In similar circumstances in the case of *Samsung Electronics Company Limited -Vs. - ITO (94 ITD 91) (Bang)* and also in case of *Motorola Inc. -Vs.- DCIT (2005 Vol. 95 ITD 269) Delhi (SB)*, it was decided in favour of the assessee, holding that such transactions cannot be treated as payment of royalty. Therefore, the Tribunal was of the view that the case before them was covered by the aforesaid decisions relied on by the assessee. Accordingly, the Tribunal held that the fees received by the assessee cannot be treated as a royalty as defined under Section 9(1)(vi) of the Act and therefore, the appeals were allowed and the order of assessments and the order of the Commissioner of Appeals were set aside.

Consequently, the applications filed for stay in all the three appeals were dismissed as having become infructuous. Aggrieved by the said orders, the present appeals are filed.

7. Learned Senior Counsel Sri E.R.Inder Kumar appearing for the revenue contended that the terms of the 'EULA' read as a whole, makes it abundantly clear that the assessee has transferred several rights which the assessee acquired under the Technical License Agreement ('TLA'). The right in the copyright as such is not transferred. For the first two years i.e., 2001-02 and 2002-03 there was no double taxation avoidance agreement between India and Ireland, which came into force only from 1/4/2002 and therefore, the consideration paid by the Indian customers to the assessee is royalty as defined under Explanation-2 to Sub-section 1(vi) of Section 9 of the Act. The assessee has transferred some portion of his interest/right in the 'TLA' in favour of the Indian customers to the end-users and therefore, the Assessing Authority as well as the first appellate Court were justified in levying the tax. The judgments relied on by the Tribunal in the first place has no application to the facts of this case and more so, the

question which arises for consideration in these appeals were not decided in the said two appeals. It is not a question as to whether is it a transfer of a right in the copyright or transfer of a right in the copyrighted article as decided in those cases and therefore, he submits that the order passed by the appellate authority is liable to be set aside and the assessment is to be upheld.

8. Per contra, Sri K.P.Kumar, learned Senior Counsel appearing for the assessee contended that the transaction entered into between the assessee - Indian customer do not fall within the mischief of the definition of royalty as contained in Explanation 2 to Clause (vi) of Section 9 (1) of the Act. The said provision applies to a case of transfer of all or any other rights in the copyright. In the instant case, admittedly, the copyright is not transferred. What is transferred is only the use of the copyrighted article. The said article is available on the shelf and anybody can purchase the same and as long as any right in the copyright as such is not transferred, the consideration paid for such copyrighted article would not constitute royalty as defined under the Act. He relied upon the judgment of the special

Bench in the case of Motorola. He also relied on the order passed by the advance ruling authority, in the case of *Dassault Systems K.K., In Re Authority For Advance Rulings* reported in (2010) 229 CTR 105 (AAR) and submitted the question which arise for consideration in these appeals are squarely covered by the aforesaid order. Therefore, he submits that the order passed by the Tribunal is valid and legal and do not call for any interference.

9. In the light of the aforesaid facts and the rival contentions, the point that arises for consideration in this appeals are:-

Whether the consideration paid by the Indian customers or end-users, to the assessee for transfer of the right to use the software/computer programme is in respect of the copyright and falls within the mischief of 'Royalty' as defined under Sub-clause (v) to Explanation 2 to Clause (vi) of Section 9(1) of the Act?

10. It is not in dispute that the Synopsys Inc. has entered into the design, manufacture, distribution and marketing of certain 'EDA' tools and software and to provide

all services related thereto. The said company holds all right, title and interest, as a licensee to the intellectual property including the copyrights. The assessee is a subsidiary of the aforesaid company. Synopsys Corporation has granted a non exclusive license in the territory which is geographical, as described in the said agreement to use and commercially exploit the intellectual property, manufacture, market, distribute, sub-license and maintain the products and provide all services to customers during the term of 'TLA' under an agreement dated 31/10/1999, for a period of one year to be continued thereafter, after mutual agreement, as per the discretion of the Synopsys Inc. In pursuance of the rights acquired under the said agreement, the assessee has entered into 'EULA' with various Indian customers. One such agreement is dated 30/5/2002 entered into with M/s.Athena Semiconductors Private Limited, Bangalore.

11. In pursuance of the aforesaid agreement, the assessee has granted the Indian customers a non-exclusive, non-transferable license, without right of sub-license, to use the licensed software and design techniques only in the quantity authorised by the licensee, in

accordance with the documentation and in the use area with a right to licensee to make a reasonable opportunity of copies of the licensed software for backup and storage or archival purposes only. For grant of such license for use of the software, for a period of 20 years, the Indian customers have paid consideration in lumpsum. The said agreement is for a period of 20 years. It is on receipt of the said consideration, the assessee has not paid tax under Section 9 of the Act, on the ground that the said consideration is not 'Royalty' as defined under Section 9 of the Act. In support of their contention that it is not a 'Royalty', which is liable to tax, they rely principally on two judgments. First in the case of *Motorola Inc. vs. Deputy Commissioner of Income-tax, Non-Resident Circle* [2005] 95 ITD 269 (Delhi) (SB). The question which was referred to the Special Bench was as under:-

"Whether, on the facts and in the circumstances, the revenues earned by the appellant from supply of equipment and software to Indian Telecom Operators were taxable in India?"



After referring to the arguments of the learned counsel and referring to the tax provisions of the Income-tax Act, the Special Bench of the Tribunal was of the view that "the crux of the issue is "whether the payment is for a copyright or for a copyrighted article". If it is for copyright, it should be classified as royalty both under the Income-tax Act and under the DTAA and it would be taxable in the hands of the assessee on that basis. If the payment is really for a copyrighted article, then it only represents the purchase price of the article and, therefore, cannot be considered as royalty either under the Act or under the DTAA. This issue really is the key to the entire controversy and they proceeded to address the issue. After noticing the definition of copyright as given in the copyright Act, 1957 in Section 14 of the said Act and referring to the various clauses in the agreement entered into between the parties and after referring to the various judgments relied on, on behalf of the parties, it was held that the payment by the cellular operator is not for any copyright in the software but is only for the software, as such, as a copyrighted article. It follows that the payment cannot be considered as royalty within the meaning of Explanation 2 below section 9(1) of the

Act. Further, they held that the software supplied was a copyrighted article and not a copyright and the payment received by the assessee in respect of the software cannot be considered as 'Royalty' either under the Act or DTAA.

12. Similar question arose for consideration before the Authority for Advance Rulings in case of *Dassault Systems K.K., In Re*, reported in (2010) 229 CTR 105 (AAR) in Para.8 of the said order, the question for consideration is formulated in the following manner:-

"The first and foremost question is whether the payments received by the applicant from the VARs represent consideration for the use of, or the right to use, any copyright of literary/scientific work. Going by the language of the Act, the question is whether there is transfer of all or any rights in respect of the copyright of literary or scientific work."

13. After referring to the facts of that particular case and the law on the point, it is observed as under at para 17 and 17.1:-

“17. Can it be said that the one time payment based on standard price minus discount paid by VAR to the applicant is in the nature of royalty? It depends on the question whether any rights that the applicant granted to the licensee/end-user include the right of using the copyright. Alternatively, going by the language of IT Act, the question is whether any right in respect of copyright has been transferred. It is here the distinction between the use of copyrighted article and the use of copyright has been stressed. The copyright which is a species of intellectual property rights belongs to the owner or its assignee if any. The ownership thereof carries with it a bundle of rights which are by and large directed towards commercial exploitation of this intangible property right. Those rights attached to copyright are enumerated in s.14 of the Copyright Act, 1957. If any of these rights are parted with in favour of another so that the other person can enjoy that right in the same manner in which the owner can, it can then be said that those specific rights concerning the use of copyright have been conferred on him.

X X X

17.1) Passing on a right to use and facilitating the use of a product for which the owner has a

copyright is not the same thing as transferring or assigning rights in relation to the copyright. The enjoyment of some or all the rights which the copyright owner has, is necessary to trigger the royalty definition. Viewed from this angle, a non-exclusive and non-transferable licence enabling the use of a copyrighted product cannot be construed as an authority to enjoy any or all the enumerated rights ingrained in a copyright. Where the purpose of the licence or the transaction is only to establish access to the copyrighted product for internal business purpose, it would not be legally correct to state that the copyright itself has been transferred to any extent. It does not make any difference even if the computer programme passed on to the user is a highly specialized one. The parting of intellectual property rights inherent in and attached to the software product in favour of the licensee/customer is what is contemplated by the definition clause in the Act as well as the treaty. As observed earlier, those rights are incorporated in s.14. Merely authorizing or enabling a customer to have the benefit of data or instructions contained therein without any further right to deal with them independently does not, in our view, amount to transfer of rights in relation to copyright or conferment of the right of using the copyright. However, where, for example, the

owner of copyright over a literary work grants an exclusive license to make out copies and distribute them within a specified territory, the grantee will practically step into the shoes of the owner/grantor and he enjoys the copyright to the extent of its grant to the exclusion of others. As the right attached to copyright is conveyed to such licensee, he has the authority to commercially deal with it. In case of infringement of copyright, he can maintain a suit to prevent it. Different considerations will arise if the grant is non-exclusive that too confined to the user purely for in-house or internal purpose."

14. Ultimately, it was ruled that payment was received by the VARs ("third party resellers") on account of supplies of software products to the end-customers (from whom the licence fee is collected and appropriated by VAR) does not result in income in the nature of royalty to the applicants.

15. It was contended relying on these two judgments that under the 'EULA' no right in the copyright as such is transferred. As such, the consideration paid in the aforesaid

agreement is not a 'Royalty' and no tax is leviable under Section 9 of the Act.

16. Reliance is also placed on the judgment of the Authority for Advance Rulings (Income Tax), New Delhi, in the case of **FACTSET RESEARCH SYSTEMS INC., vs DIRECTOR OF INCOME TAX** in AAR No. 787/2008 where the applicant sought advance ruling on the following questions:-

1. Whether on the facts and circumstances of the case, FactSet Research Systems Inc. ('FactSet' or 'the applicant') will not be taxable in India under the Income-tax Act, 1961, with respect to the subscription fees?
2. Whether, on the facts and circumstances of the case, the applicant will not be taxable under the Double Taxation Avoidance Agreement entered into between the Government of India and the Government of United States of America with respect to the subscription fees?

3. Whether, on the facts and circumstances of the case, if the applicant is not taxable in India for the subscription fees, its customers in India will be required to withhold taxes under Section 195 of the Act on subscription fees paid to the applicant?
4. Assuming that the applicant has no other taxable income in India, whether, on the facts and circumstances of the case, the applicant will be absolved from filing a tax return in India, under the provisions of Section 139 of the Act with respect to the subscription fees?

17. While considering the said question, at para 3 it was held as under : -

"3. Broadly, the contention of the applicant is that no tax liable to be paid on the subscription fees received from the customers in India as it does not constitute 'royalty' or 'fees for technical services' either under the provisions of the Income Tax Act, 1961 or the DTAA (Treaty) between India and USA. Moreover, as the applicant does not have permanent establishment (PE) in India, the

subscription fees cannot be taxed as business income in view of Article 7 of India-USA Treaty”.

18. After referring to the various clauses in the agreement between the parties it was held as under : -

“9. Now, coming to the grips of the first question bearing on the definition of ‘royalty’, as noticed earlier, the applicant’s data base is a source of information on various commercial and financial matters of Companies and similar entries. What the appellant does is to collect and collate the said information/data which is available in public domain and put them all in one place in a proper format so that the customer (licensee) can have easy and quick access to this publicly available information. The applicant has to bestow its effort, experience and expertise to present the information/data in a focused manner so as facilitate easy and convenient reference to the user. For this purpose, the applicant is called upon to do collation, analysis, indexing and noting wherever necessary. These value additions are the product of the applicant’s efforts and skills and they are outside the public domain. In that sense, the data base is the intellectual property of the applicant and copyright attaches to it; but, the question is whether in making this centralized data available

to the customer-licensee for a consideration, can it be said that any rights which the applicant has as a holder of copyright in database are being parted in favour of the customer? The answer, in our view, must be in the negative. No proprietary right and no exclusive right which the applicant has, has been made over to the customer. The copyright or the proprietary rights over the 'literary work' remains intact with the applicant notwithstanding the fact that the right to view and make use of the data for internal purposes of the customer is conferred. Several restrictions are placed on the licensee so as to ensure that licensee cannot venture on a business of his own by distributing the data downloaded by it or providing access to others (vide clause 2.a & 2.c of the Agreement). The licensee has not been given the exclusive right to reproduce or adapt the work or to distribute the contents of data-base to others. The grant of license is only to authorize the licensee to have access to the copyrighted database rather than granting any right in or over the copyright as such. The consideration paid is for a facility made available to the licensee. The license, it must be noted is a non-exclusive license. The term 'exclusive license' confers on the licensee and persons authorized by him, to the exclusive of all other persons, including the owner of the copyright, any right comprised in the

copyright in a work'. The expression 'granting of license' placed within brackets takes colour from the preceding expression 'transfer of all or any rights'. It is not used in the wider sense of granting a mere permission to do a certain thing nor does the grant of licence denude the owner of copyrights all or any or his rights. A license granting some rights and entitlements attached to the copyright so as to enable the licensee to commercially exploit the limited rights conferred on him is what is contemplated by the expression 'granting of license' in clause (v) of Explanation 2."

9.1 The expression 'exclusive right' in the opening part of Section 14 is very important and it qualifies all the components of clause(a). The applicant is not conferred with the exclusive right to reproduce the work (including the storing of it in electronic medium), as contemplated by sub clause (i) of Section 14(a). The exclusive right remains with the applicant being the owner of the copyright and by permitting the customer to store and use the data in the computer for its internal business purpose, nothing is done to confer the exclusive right to the customer. Such access is provided to any person who subscribes, subject to limitations. The copyright of the applicant has not been assigned or otherwise transferred so as to

enable the subscriber to have certain exclusive rights over the applicant's work In SBI vs. Collector of Customs, Bombay", the Supreme Court held that "Countrywide use of the software and reproduction of software are two different things and licence fee for countrywide use cannot be considered as the charges for the right to reproduce the imported goods." That was also a case in which the property in the software remained with the supplier-a foreign company and the licence fee was payable by SBI for using the software in a limited way at its own centers for a limited period.

19. From the aforesaid judgments it is clear, a distinction has been made between a transfer of a right in a copyright and transfer of a right in a copyrighted article. In view of the language employed in sub-clause (v) to Explanation 2, the question is not whether what is transferred is a right in a copyright or a copyrighted article. The real question is whether the consideration paid to the owner or a licensor of a copyright, for permission to use the software/computer programme is a consideration for transfer of any right in respect of a copyright and falls within

the mischief of the definition of 'Royalty'. This is clear from the wordings in Section 9 of the Act, which reads as under:-

“(1) The following incomes shall be deemed to accrue or arise in India:-

(vi) income by way of royalty payable by-

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

*.....
[Provided further that nothing contained in this clause shall apply in relation to so much of the income by way of royalty as consists of lump sum payment made by a person, who is a resident, for the transfer of all or any rights (including the granting of a licence) in respect of computer software supplied by a non-resident manufacturer along with a computer or computer-based equipment under any scheme approved under the Policy on Computer Software Export, Software Development and Training, 1986 of the Government of India]*

Explanation 2 – For the purposes of this clause, “royalty” means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head “Capital gains”) for –

- (v) the transfer of all or any rights (including the granting of a licence) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, but not including consideration for the sale, distribution or exhibition of cinematographic films; or
- (vi) the rendering of any services in connection with the activities referred to in sub-clause (i) to [(iv), (iva) and (v)].

Explanation 3. For the purposes of this clause, ‘computer software’ means any computer programme recorded on any disc, tape, perforated media or other information storage device and includes any such

programme or any customized electronic data]

.....

[Explanation :- For the removal of doubts, it is hereby declared that for the purposes of this section, income of a non-resident shall be deemed to accrue or arise in India under clause (v) or clause (vi) or clause (vii) of sub-section (1) and shall be included in the total income of the non-resident, whether or not,-

- (i) the non-resident has a residence or place of business or business connection in India; or*
- (ii) the non-resident has rendered services in India.*

20. Income by way of 'Royalty' is liable to tax. The second proviso to Clause (vi) makes it clear that any lump sum payment made by a resident for the transfer of all or any rights including granting of a licence in respect of computer software supplied by a non-resident manufacturer along with a computer or computer based equipment under any scheme approved under the Policy on Computer Software Export, Software Developments and Training, 1986 of the Govt. of India, would not constitute 'Royalty'. For the

purpose of the said Section, the computer software supplied by a non-resident to a resident falls within the definition of 'Royalty'. If the case falls under the proviso, it is out of the definition of the 'Royalty'. Therefore, it is clear that the consideration paid for supply of a software by a non-resident to a resident is a software unless it falls within the section proviso.

21. Therefore, any computer software sold on the shelf falls under the second proviso and the consideration paid thereon falls within the mischief of 'Royalty' as defined in the said proviso. It is in this background, we have to look into Clause (v) of Explanation 2. Under Explanation 2, for the purpose of clause (v), 'Royalty' means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head "Capital gains"). In other words, one of the tests to be applied is whether the consideration paid would fall within the definition of capital gains. If the consideration paid do not fall within the definition of capital gains and do not fall within the second proviso, then the said

consideration would be 'Royalty' for the purpose of this clause, as defined in Explanation 2.

22. Similarly, Clause (v) deals with copyright, literary, artistic or scientific work and the consideration for the transaction of all or any rights (including granting of licence) in respect of any copyright, literary, artistic or scientific work as 'Royalty'. Similarly, what is excluded from the definition of 'Royalty' are consideration for the sale, distribution or exhibition of cinematographic films. Whereas, it expressly states the rendering of any services in connection with the activities referred to in sub-clauses (i) to (iv), (iva) and (v) also constitutes 'Royalty'. For the purpose of this provision, any rights includes granting of a licence, it should be in respect of any copyright. It is not a right in copyright. Therefore, the words "in respect of" assumes importance for the proper understanding of what the legislature meant in defining 'Royalty' as they have done in Explanation 2. The argument is that it is only the consideration paid for transfer of a right in the copyright, which would constitute 'Royalty' and any consideration paid for the transfer of a copyrighted article do not involve any

transfer or right and therefore, it is outside the scope of 'Royalty' as appeared in Explanation 2. The said argument is based on the aforesaid two decisions referred to supra. In the entire discussions in the aforesaid two cases, the words used in Clause 5 namely, "in respect of", is not noticed and not discussed. It is well settled law that the legislature is deemed not to waste its words or to say anything in vain. A construction which attributes redundancy to the legislature is not acceptable except for compelling reasons. The Courts always presume that the legislature inserted every word thereof for a purpose and the legislative intention in that every word of the statute should have effect. The intention of the legislature is primarily to be gathered from the words used. The words of a statute are first understood in their natural, ordinary or popular sense and phrases and sentences are construed according to their grammatical meaning, unless that leads to some absurdity or unless there is some thing in the context, or in the object of the statute to suggest the contrary. The right way is to take the words as the legislature has given them, and to take the meaning which the words given naturally imply, unless where the construction of those words is, either by the

preamble or by the context of the words in question controlled or altered. In this context it is necessary to know the meaning of the words "in respect of" used in the aforesaid provision. In fact this phrase has been the subject matter of interpretation by the Apex Court as well as the High Court.

23. The Apex Court in the case of **SHAHDARA (DELHI) SAHARANPUR LIGHT RAILWAY COMPANY LTD., v. UPPER DOAB SUGAR MILLS LTD., AND ANOTHER**, reported in **AIR 1960, PAGE 695**, held as under:-

"We do not propose, however, to rest our decision on this narrow question of haulage from the station platform to point A, as in our view, the assumption made above as regards the definition of terminals in S.3(14) is not justified. The definition as has already been stated is in these words. "Terminals" includes "charges in respect of stations, sidings, wharves, depots, warehouses, cranes and other similar matters, and of any service rendered thereat". Thus two classes of charges are included in the definition. The first is "charges in respect of stations, sidings, wharves, deposits, warehouses, cranes and other similar

matters." The second is "charges in respect of any services rendered thereat". Whether or not therefore any services have been rendered "thereat" that is, at the stations sidings, wharves, depots, warehouses, cranes and other similar matters the other class of terminals in respect of these stations, sidings, wharves, depots, warehouses, cranes and similar other matters remain. A further question thus arises as regards the interpretation of the phrase "in respect of". Does it mean charges for the mere provision and maintenance of stations, sidings, depots, wharves, warehouses, cranes and other similar matters are the terminals or does it contemplate charges only for use of sidings, stations, wharves, depots, warehouses, cranes and other similar matters? The words "in respect of" are wide enough to permit charges being made as terminals so long as any of these things, viz., stations, sidings, wharves, depots, warehouses, cranes and other similar matters have been provided and are being maintained. The question is whether the import of this generality of language should be cut down for any reason. It is well settled that a limited interpretation has to be made on words used by the legislature in spite of the generality of the languages used where the literal interpretation in the general sense would be so unreasonable

or absurd that the legislature should be presumed not to have intended the same. Is there any such reason for cutting down the result of the generality of the language used present here? The answer in our opinion must be in the negative. It is true that in many cases stations, sidings, wharves, depots warehouses, cranes and other similar things will be used and it is arguable that in using the words "in respect of" the legislature had such user in mind. It is well to notice however that the legislature must have been equally aware that whereas in some cases accommodation provided by stations will be used, in some cases sidings will be used, in other wharves, in others warehouses and in other cases cranes, and in certain cases several of these may be used, in most cases there will be no use of all of these. From the practical point of view it is impossible to regulate terminals charges separately in respect of user of each of these several things mentioned. When therefore the legislature authorised the Central Government to fix terminals as defined in S.3(14), the intention must have been that the terminals leviable would not depend on how many of these things would be used. It is also worth noticing that the user of a depot, warehouse and cranes would necessarily mean some service rendered "threat". If terminals did

not include charges in respect of the provisions of depots, warehouses, cranes unless these were used, there would be no need of including these in the first portion as they would be covered by the second part of the definition viz., "of any services rendered thereat". Far from being there any reason to cut down, the consequence of the generality of language used viz., "in respect of", there is thus good ground for thinking that the legislature used this language deliberately to cut across the difficulty of distinguishing in a particular case as to which of these things had been used or whether any of them had been used at all. Innumerable people carry goods over the Railways and many of them, for the purpose of the carriage make use of the stations, sidings, wharves, depots, warehouses, cranes and other similar matters, while many do not. Though at first sight it might seem unreasonable that those who had not used would have to pay the same charge as those who had made use of these, it is obvious that the interminable disputes that would arise between the Railway Administration and the Railway users, if the fact of user of stations, sidings and other things mentioned had to determine the amount payable, would be unhelpful not only to the Railway Administration but also to the using public. The

sensible, way was therefore to make a charge leviable for the mere provision of these things irrespective of whether any use was made thereof. That was the reason why such wide words "in respect of" was used. We are therefore of opinion that the words "in respect of" used in S.3(14) mean for the provision of and not "for the user of".

24. The High Court of Bombay in the case of **ANUSUYA VITHAL AND OTHERS, V. J.H. MEHTA, ADDL. AUTHORITY UNDER PAYMENT OF WAGES ACT, BOMBAY AND ANOTHER**, reported in **AIR 1960 (BOMBAY) PAGE 201** held as under:-

"4. Another requirement of a payment to fall within the term "wages" is that it must be "in respect of employment or work done in such employment." The expression "in respect of" means "attributable to" [see *Asher v. Seaford Court Estates Ltd.* [1950 A.C. 508, 526] or, if it is given a wider meaning, "relating to or with reference to" [see *Tolaram Relumal v. State of Bombay* (1955) 1 SCR 158 at P.165: (AIR 1954 466 at p.499). The payment must, therefore, be attributable to employment, that is, engagement in work, or to work done. During the period of lay-off, the employer is not in a position to

provide work and the employee cannot insist on work being provided or wages being paid to him. The employee is also not under any duty to work for his master or even to present himself for work. He has to present himself for work if he desires to claim compensation (see S. 25E of the Industrial Disputes Act). But he has an option in the matter. If he remains absent, he will not be entitled to compensation, but he will not lose the right, which he possesses under the standing orders, of reinstatement when the normal working is resumed. The employer cannot insist on his attendance and there is also no obligation upon him to provide work or to pay wages even if the worker presents himself for work. In order to escape liability for compensation, the employer may provide the worker with alternative employment, but the worker is not bound to accept it. If he does not accept it, he will not be entitled to claim lay-off compensation, but he will not lose his right of reinstatement when the lay-off ends. The compensation for lay-off is, therefore, paid in respect of a period when no work is done and when in fact there is no liability on the employer to provide work and on the employee to do work. It is not paid as additional remuneration for work done previously. It cannot, therefore, be said to be attributable to the employment of a

worker or to the work done by him. It is made payable in order to mitigate or reduce the hardship caused by reason of unemployment or temporary loss of employment. Consequently, it cannot be said to be a payment "in respect of employment or work done in such employment."

25. The High Court Patna in the case of **COMMISSIONER OF INCOME TAX, BIHAR AND ORISSA, PATNA VS. CHUNNILAL RAMESHWAR LAL**, reported in **AIR 1968 PATNA PAGE 364** held as under:-


"It is well known that the expression "in respect of" is of wider connotation than the word "in" or "on". Hence, a class of municipal tax, though not a tax on the premises or buildings, may nevertheless be a tax in respect of the premises or building used for the business. Hence, the payment of the impugned amount of Rs. 125 as professional tax under Section 150A read with Section 82(1)(ff) of the Municipal Act is in substance a municipal tax in respect of the business premises, and is covered by Clause (ix) of Sub-section (2) of Section 10 of the Income-tax Act. The assessee is entitled to get allowance for the same under Section 10(1) of the Indian Income-tax Act, 1922. The Appellate Tribunal was right in giving allowance to the

assessee for a sum of Rs. 125 paid by him under the Bihar and Orissa Municipal Act, 1922."

26. The Apex Court in the case of **UNION OF INDIA AND ANOTHER V. VIJAY CHAND JAIN**, reported in **AIR 1977 SC PAGE 1302** held as under:-

"4. The contravention alleged is of section 4(1) which prohibits, inter alia sale of any foreign exchange. Foreign exchange as defined in section 2(d) means foreign currency. Under section 23(1B) any currency, security, gold or silver, or goods or any other money or property "in respect of which" the contravention has taken place is liable to be confiscated to the Central Government. The currency confiscated in this case was Indian currency. The question is whether the Indian currency constituting the sale proceeds of foreign exchange seized from the respondent was currency in respect of which the contravention had taken place. The words "in respect of" admit of a wide connotation; Lord Greene M.R. in *Cunard's Trustees v. Inland Revenue Commissioners*, (1946) 174 LT 133 calls them colourless words. This Court in *S.S. Light Railway Co., Ltd., v. Upper Doab Sugar Mills Ltd.*, (1960) 2 SCR 926=(AIR 1960 SC 695) construing these words

in section 3(14) of the Indian Railways Act, 1890 has held that they are very wide. It seems to us that in the context of section 23(1B) "in respect of" has been used in the sense of being 'connected with' and we have no difficulty in holding that the currency in respect of which there has been contravention covers the sale proceeds of foreign currency, sale of which is prohibited under section 4(1). The intention of the legislature is clear from the explanation to sub-section (1B) of section 23 which provides that "for the purposes of the sub-section property in respect of which contravention has taken place shall include deposits in a bank where such property is converted into such deposits." If for this sub-section any property in respect of which a contravention has taken place includes deposits into which the property may be converted and can be reached even where the deposits are in a bank, it is not reasonable to think that the sale proceeds in Indian currency of any foreign exchange would be outside the scope of section 23(1B) and therefore not liable to be confiscated. In our opinion the High Court was wrong in quashing the order of confiscation which we consider valid and lawful."



27. The words "**in respect of**" denotes the intention of the Parliament to give a broader meaning. The words "in respect of" admit of a wide connotation, than the word "in" or "on". The expression "in respect of" "means attributable to". If it is given a wider meaning "relating to or with reference to", it has been used in the sense of being 'connected with'. Whether it is a fiscal legislation or any legislation for that matter, the golden rule of interpretation equally applies to all of them. i.e, the words in a statute should be given its literal meaning. In respect of fiscal legislation those words should be strictly construed. If those words are capable of two meanings that meaning which is beneficial to an assessee should be given. However, when the meaning of the words used are clear, unambiguous, merely because it is a fiscal legislation, the meaning cannot be narrowed down and it cannot be interpreted so as to give benefit to the assessee only. Then it would be re-writing the Section, under the guise of interpreting a fiscal legislation, which is totally impermissible in law. When the legislature has advisedly used the words 'in respect of', the intention is clear and manifest. The said phrase being capable of a broader meaning, the same is used in the Section to bring within the

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tax net all the incomes from the transfer of all or any of the rights in respect of a copyright. In a taxing statute provisions enacted to prevent tax evasion are to be given a liberal construction to effectuate the purpose of suppressing tax evasion, although provisions imposing a charge are construed strictly there being no apriori liability to pay a tax and the purpose of charging section being only to levy a charge on persons and activities brought within its clear terms. Therefore, the specific words used in a taxing statute, charging tax cannot be ignored. It is not the consideration for transfer of all or any of the rights in the copyright. Without transferring a right in the copyright it is possible to receive consideration for the use of the intellectual property for which the owner possess a copyright. Ultimately, the consideration paid is for the usefulness of the material object in respect of which there exists a copyright. Therefore, the intention was not to exclude the consideration paid for the use of such material object which is popularly called as copyrighted article. Even in respect of a copyrighted article the same is transferred, no doubt the right in the copyright is not transferred, but a right in respect of a copyright contained in the copyrighted article is transferred.

Therefore, the Parliament thought it fit to use the phrase 'in respect of' as contra distinct from the word 'in copyright'. The meaning is clear, intention is clear, there is no ambiguity. Therefore, there is no scope for interpretation of this expressed term in as much as in the context in which it is used in the provision. Any other interpretation would lead to the aforesaid provision becoming otiose.

28. The classic treatise of Copinger and Skone James on Copyright (1999 Edn.) gives the meaning of Copyright as under :-

"Copyright gives the owner of the copyright in a work of any description the exclusive right to authorize or prohibit the exploitation of the copyright work by third parties. This includes the right to copy the work itself and also to use the work in other ways protected under the law". (p.26) Copyright is often described as a negative right. This idea is conveyed by copinger in the following words. "Copyright, however, does not essentially mean a right to do something, but rather a right to restrict others from doing certain acts, and, when copyright is referred to as 'an exclusive right,' the emphasis is on the word 'exclusive'.

The expression 'copyright' is not defined in the Income tax Act. It must be understood in accordance with the law governing copyright in India viz., Copyright Act, 1957. In *State of Madras vs. Ganon Dunkrely & Co.*, the Supreme Court held that the expression 'sale of goods' in Entry 48 of List II (VII Schedule) of the Govt. of India Act is a nomen juris and shall be construed in its legal sense. The legal sense can only be what it has in the law relating to sale of goods and therefore the said expression shall bear the same meaning as it has in Indian Sale of Goods Act. When the term is not defined in the taxation law (I.T. Act), the definition in the law governing the subject-matter can be adopted, if there is no basic difference between the statutory definition and the ordinary legal concept.

29. The Copy Right Act, also do not define the word copy right in the definition Section 2. However, Section 14 gives the meaning of "copy right". This Section was substituted for the previous one by the Copyright (amendment) Act of 1994. Section 14 in so far as it is relevant is extracted hereunder:

14. For the purposes of this Act "copyright" means the exclusive right subject to the provisions of this Act, to do or authorize the doing of any of the following acts in respect of a work or any substantial part thereof, namely:

- (a) in the case of literary, dramatic or musical work, not being a computer programme –
 - (i) to reproduce the work in any material form including the storing of it in any medium by electronics means;
 - (ii) to issue copies of the work to the public not being copies already in circulation;
 - (iii) to perform the work in public, or communicate it to the public.
 - (iv) to make any cinematograph film or sound recording in respect of work;
 - (v) to make any translation of the work;
 - (vi) to make any adaptation of the work;
 - (vii) to do, in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in sub-clause (i) to (vi)

30. The object of a definition is to avoid the necessity of frequent repetitions in describing all the subject-

matter to which the word or expression so defined is intended to apply. The Legislature has power to define a word even artificially. So the definition of a word in the definition section may either be restrictive of its ordinary meaning or it may be extensive of the same. When a word is defined to 'mean' such and such, the definition is prima facie restrictive and exhaustive, whereas the word defined is declared to 'include' such and such, the definition is prima facie extensive. Although it is normally presumed that the Legislature will be specially precise and careful in its choice of language in a definition section, at times the language used in such a section itself requires interpretation. A definition is not to be read in isolation. It must be read in the context of the phrase which it defines, realising that the function of a definition is to give precision and certainty to a word or phrase which would otherwise be vague and uncertain but not to contradict it or supplant it altogether. An interpretation clause is not meant to prevent the word receiving its ordinary, popular and natural sense whenever that would be properly applicable but to enable the word as used in the Act when there is nothing in the context or the subject matter to the contrary to be applied to some things

to which it would not ordinarily be applicable. Even when the definition clause uses words of very wide connotation a line may have to be drawn so as to exclude categories obviously not intended to be included.

31. When a word has been defined in the interpretation clause, *prima facie* that definition governs whenever that word is used in the body of the statute. If Parliament in a statutory enactment defines its terms whether by enlarging or by restricting the ordinary meaning of a word or expression, it must intended that, in the absence of a clear indication to the contrary, those terms as defined shall govern what is proposed, authorised or done under or by reference to that enactment. But, where the context makes the definition given in the interpretation clause inapplicable, a defined word when used in the body of the statute may have to be given a meaning different from that contained in the interpretation clause. All definitions given in an interpretation clause are therefore normally enacted subject to the qualification "unless there is anything repugnant in the subject or context, or unless the context otherwise requires". Even in the absence of an express

qualification to that effect such a qualifications is always implied. However, it is incumbent on those who contend that the definition given in the interpretation clause does not apply to a particular section to show that the context in fact so requires.

32. In this background, it is pertinent to note the opening words of Section 14. It expressly state that “for the purposes of this Act”. The intention of the parliament in expressing the meaning of the word in that manner and not defining the said term in the definition Section cannot be lost sight of. Further, the legislature has chosen to employ the word ‘means’ in defining the meaning of the word ‘copyright’ which again makes the intention very clear that the said meaning to the word ‘copyright’ is restrictive and exhaustive. Then the further words, ‘exclusive right subject to the provisions of this Act’ further imposes a rider on the meaning of the word ‘copyright’. Though the word used is “exclusive right”, in Section 30 of the Act, the Parliament has provided what are the rights which the owners of a copyright may part with. It expressly states the owner of the copyright in any existing work may grant any interest in the right by

licence in writing signed by him or by his duly authorised agent. Therefore, when it comes to the question of granting licence it need not necessarily be the exclusive right, it may be any interest in the right. Therefore, when the word 'copyright' has not been defined in the definition Section of the Act and the meaning of the word 'copyright' is to be found in Section 14 of the Act, it is only for the purposes of the Act. Even though under Section 14 copyright means the exclusive right, that is also subject to the provisions of the Act. The intention of the legislature is unambiguous, clear. The meaning of the word 'copyright' cannot be read in isolation. It must be understood in the context of the aforesaid restrictions, limitations imposed by the Parliament by express words. Therefore, it would not be proper to assign the same meaning as found in Section 14 to the word 'copyright' when it is used in another enactment. The interpretation clause is not meant to prevent the word receiving its ordinary, popular and natural sense whenever that would be properly applicable, but to enable the word as used in the Act, when there is nothing in the context or the subject matter to the contrary to be applied to some things to which it would not ordinarily be applicable. Therefore,

while understanding the meaning of the word 'royalty' used in the Income Tax Act as defined in Explanation (2) to Section 9(1) of the Income Tax Act the meaning assigned to the word 'copyright' cannot be literally super imposed in that provision. It has to be understood in the context in which it is used as well as it has to be understood in the ordinary, popular and natural sense in which it is understood. Moreover the Copyright Act is concerned with protection of an intellectual property right which is vested in the owner of the copyright and prevention of its infringement. That is why while defining the meaning of the word 'copyright' it is defined as meaning 'exclusive right' to reproduce the work in any material form including the storing of it in any medium by electronic means or to issue copies of the work to the public not being copies already in circulation or to sell or give on commercial rental or other than for sale or for commercial rental any copy of the computer programme. The reproduction which is sought to be prohibited by the Act but for which the owner of the copyright could be put to an enormous loss. The said definition does not deal with the ordinary meaning of the word 'copyright' which includes the right to use the work. It is a negative right. It is not a right

to do something but rather a right to restrict others from doing certain acts. It is in this context the word 'exclusive' has to be understood. When in the Act itself after using the word exclusive right in Section 14, when it comes to the question of licence of a copyright, it need not necessarily be an exclusive right, but any interest in the right, the word exclusive has to be restricted firstly to the Act itself and secondly to situations which fall outside the scope of Section 30 of the Act. Therefore, the expression 'copyright' used in the Act cannot be the same as used in the Income Tax Act. In the Income Tax Act when the legislature advisedly used the word 'in respect of a copyright' it cannot be construed as a right in the copyright and assign the meaning assigned in the Copyright Act to the second explanation. The language in Explanation (2) explicitly makes it clear for the purpose of clause (vi) of sub-section (1) of Section 9 royalty means consideration for transfer of all or any rights including the granting of a licence in respect of any copyright, literary, artistic or scientific work. Therefore, the word exclusive right used in Section 14 of the Act do not fit into the meaning of the word 'royalty' in explanation 2 because royalty means the consideration for the transfer of all or any

rights including the granting of a licence which is certainly not an exclusive right or transfer of all rights in the copyright or literary work. Payments made for the acquisition of partial rights in the copyright without the transfer fully alienating the copyright rights will represent a royalty where the consideration is for granting of rights to use the programme in a manner that would, without such license, constitute an infringement of copyright. In these circumstances, the payments are for the right to use the copyright in the program i.e., to exploit the rights that would otherwise be the sole prerogative of the copyright holder. Therefore, to constitute royalty under the Income Tax Act it is not necessary that there should be transfer of exclusive right in copyright. It is sufficient if there is transfer of any interest in the right and also a licence and consideration paid for grant of a licence constitutes royalty for the purpose of the said clause in the Income Tax Act. It is in this background, the discussion whether the payment is for a copyright or for a copyright article would be totally irrelevant. The crux of the issue is whether any consideration is paid for any right or for granting of licence in respect of a copyright. The word 'in respect of' gives a

broader meaning. It has been used in the sense of being connected with. When the legislature has advisedly used the words 'in respect of', the intention is clear and manifest. The said phrase being capable of a broader meaning, the same is used in the Section to bring within the tax net all the incomes from the transfer of all or any of the rights in respect of the copyright.

33. In the IT Act, computer software is defined in Explan. 3 to s. 9(1)(vi) to mean any computer programme recorded on any disk, tape, perforated media or other information storage devices and includes any such programme or any customized electronic data. Though this definition holds good for the purposes of second proviso to s.9(1)(vi), the ordinary meaning and understanding of computer software is no different. Computer programme as such is not defined under the I.T. Act. However, Computer programme is defined in the Copyright Act as follows:

“Computer programme means a set of instructions expressed in words, codes, schemes or in any other form, including a machine readable medium, capable of causing a

computer to perform a particular task or achieve a particular result".

34. It is also worth mentioning that some routines may be written in assembly code, essentially a set of memories for object code which another program translates directly into that code. This is normally done when the programmer needs to drive the hardware directly, or where speed is required, as it gives very precise control over the program's operation. Once all sections are complete, they are fitted together to produce a complete version in source code, i.e., in human-readable form that gives the user as little information as possible about the details of the program (thus reducing the danger of copying), the source code is used as input for another program, the compiler. This compiles the program into object code, a machine-readable form which will have linked to it the standard pieces of code for the program to run as a stand-alone or executable file. This version will be run to test it, and any errors which are discovered will be fixed in the source code and the whole recompiled. The final process is to produce the documentation which the user will need to operate the

program. The completed product is the package of object code version and documentation. A complex piece of software may well consist of a number of programs which are called by a master program as different functions are required. Some writers distinguish between programs (the specific executable code modules) and software (the complete set of programs plus documentation). 'Software' is thus used interchangeably for both of these unless the context otherwise makes clear

35. The copyright subsists in a computer program. It is not only unauthorised reproduction but also the storage of a program in a computer constitutes copyright infringement. Copying a literary work (such as a computer program) includes storing the work in any medium by electronic means. Copying includes the making of copies which are transient or some other use of the work. Since in virtually every case the operation of a program in a computer involves the copying of the program within the computer, this will constitute reproduction. Whenever an object program is run on a computer, it is thereby copied; and whenever a source program is compiled in a computer, it is

thereby copied or adapted. A software licence can, therefore, be legitimately considered to be a copyright licence. A major difficulty arising out of the licence clause for users is that it will almost invariably restrict the licensee from transferring the software to any third party. This may result in difficulties if, for example, the licensee wishes to transfer his computer operations to a facilities management company: the transfer will require the consent of the licensor and will provide an opportunity for the charging of an additional fee. Licences have upto now normally prohibited any copying of the program, except as necessary for use. This had the consequence that the user could not make back-up copies of the program for security purposes, although some licenses specifically conferred a limited right to make back-up copies.

36. Ultimately, what the end user, who pays the consideration requires is, the benefit of the user of the intellectual property, whether for his personal use or for commercial use. Merely because the end user is not permitted to make commercial use of a copyrighted article by means of re-production of copyrighted article, it would not take the case out of the provision. The user may be for

personal use or for commercial use. The essence of the copyright is the usefulness of intellectual property embedded in such copyright. One of the ways of exploiting a copyright is by re-production for commercial use. But, that is not the only use to which a copyright could be made use of. It could be used for their personal use and that is the reason why consideration is stipulated even for such personal use. Though the rights that are transferred in such a transaction may be limited as compared to transfer of a copyright for commercial use. In particular, a software or a computer programme is such a sophisticated goods that it may be sold of the shelf, it may be sold looking into the needs of the customer, it may be even prepared keeping the requirement of end user in mind. In all these cases copyright as such is not transferred. It is not necessary for the end user also. The end user wants permission to have the benefit of such intellectual property in carrying on his business which is a commercial venture. It facilitates his business. It is for that he pays consideration. Without such transfer or permission, the end user cannot use the said intellectual property. If he does it amounts to infringement. Therefore, the right to use the intellectual property in respect of which the owner or the

licensor possess a copyright is also a right in respect of a copyright, though not in the copyright itself. Therefore, the words used in the provision that transfer of all or any of the rights includes the right to grant license in respect of copyright includes such right to use the intellectual property in respect of which the owner or the licensor possess copyright. It falls within the mischief of the word 'royalty' as defined under Section 9(1)(vi) of the Act.

37. It is submitted during the assessment years 2000-01 and 2001-02, there was no Double Taxation Avoidance Agreement/convention between the Government of the Republic of India and the Government of Ireland and therefore, the said transaction for the said years are governed by the provisions of the Income Tax Act. However, DTAA was entered into on 11.1.2002 within two countries desiring to conclude a convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains and with a view to promoting economic co-operation between the two countries. This convention shall apply to persons who are residents of one or both of the contracting states. Article 2 dealt with

taxes covered and one such tax has covered in India is the Income Tax Act. Article 3 is the general definitions. Article 4 states about the residents. What is a permanent establishment is defined in Article 5. Article 6 deals with income from immovable property, Article 7 deals with Business profits, Article 8 deals with shipping and air transport, Article 9 deals with associated enterprises. Dividends are covered under Article 10, whereas interest is covered under Article 11 and Article 12 deals with royalties and fees for technical services. The relevant portion reads as under:

- 1) *Royalties or fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.*
- 2) *However, such royalties or fees for technical services may also be taxed in the Contracting State in which they arise, and according to the laws of that State, but if the recipient is the beneficial owner of the royalties or fees for technical services, the tax so charged shall not exceed 10 per cent of the gross amount of the royalties or fees for technical services.*
- 3) (a) *The term "royalties" as used in this article means payments of any kind received as a consideration for*

the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films or films or tapes for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process or for the use of or the right to use industrial, commercial or scientific equipment, other than an aircraft, or for information concerning industrial, commercial or scientific experience;

(b) The term "fees for technical services" means payment of any kind in consideration for the rendering of any managerial, technical or consultancy services including the provision of services by technical or other personnel but does not include payments for services mentioned in articles 14 and 15 of this Convention.

- 4) The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the royalties or fees for technical services, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties or fees for technical services arise through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the right or property in respect of which the royalties or fees for technical services are paid is effectively connected with such

permanent establishment or fixed base. In such case the provisions of article 7 or article 14, as the case may be, shall apply.

5) Royalties or fees for technical services shall be deemed to arise in a Contracting State when the payer is that State itself, a political sub-division, a local authority or a resident of that State. Where however, the person paying the royalties or fees for technical services, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the liability to pay the royalties or fees for technical services was incurred, and such royalties or fees for technical services shall be deemed to arise in the State in which the permanent establishment or fixed base is situated.

6) Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the royalties or fees for technical services, having regard to the use, right or information for which they are paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this article shall apply only to the last mentioned amount. In such case the excess part of the payments shall remain taxable according to the laws

of each Contracting State, due regard being had to the other provisions of this Convention.

38. It was contended that once India is a party to this agreement, the definition of the royalties contained in Article 12 would have the effect of superceding the definition of royalty in the Income Tax Act. If the case of the assessee do not fall within the term "royalty" as per the definition under Article 12 of the agreement. As the agreement is superceding the definition of term "royalty" under the Act, the consideration paid to him is not liable to be taxed in India. It is submitted that as the Article which is licenced in this case and the consideration paid to the same does not fall within the definition of royalty, under Article 12 the assessee is not liable to pay tax.

39. It is no doubt true the provisions of the DTAA over-rides the provisions of the Income Tax Act. In the DTAA the term 'royalty' means payments of any kind received as a consideration for the use or the right to use any copyright of literary, artistic or scientific work whereas in the Income Tax Act, royalty means consideration for the transfer of all or any rights including the granting of a licence. Therefore, under

the DTAA to constitute royalty there need not be any transfer of or any rights in respect of any copyright. It is sufficient if consideration is received for use of or the right to use any copyright. Therefore, if the definition of royalty in the DTAA is taken into consideration it is not necessary there should be a transfer of any exclusive right. A mere right to use or the use of a copyright falls within the mischief of Explanation (2) to clause (vi) of sub-section (1) of Section 9 and is liable to tax. Therefore, we do not see any substance in the said contention.

WHAT IS A LICENSE?

40. A licence is a grant of authority to do a particular thing. It enables a person to do lawfully what he could not otherwise lawfully do. A licence does not, in law, confer a right. It only prevents that from being unlawful which, but for the licence, would be unlawful. It amounts to a consent or permission by an owner of copyright that another person should do an act which, but for that licence, would involve an infringement of the copyright of licensor. A licence gives no more than the right to do the thing actually

licensed to be done. It transfers an interest to a limited extent, whereby the licensee acquires an equitable right only in the copyrighted article.

41. Licences may be exclusive, or non-exclusive. Non-exclusive licence is not defined in the Act. The term 'exclusive licence' is defined in section 2, clause (j). It confers on the licensee and persons authorised by him, to the exclusion of all other persons, including the owner of the copyright, any right comprised in the copyright in a work. A non-exclusive licence is the grant of authority to do a particular thing with no right of exclusion whatsoever. It never conveys, by itself, an interest in property. It merely enables a person to do that which he could not otherwise do, except unlawfully.

42. The owner of the copyright in any existing work may grant any interest in the right by licence in writing signed by him or by his duly authorised agent. Copyright is different from the material object which is the subject of the copyright. So, a transfer of the material object does not necessarily involve a transfer of the copyright. The copyright

in a book, picture or other work is disconnected and distinct from the general property in the material book, picture or other object. Hence, the sale or other transfer of the material object does not, of itself, constitute a transfer of the copyright therein. An assignment carries with it the whole interest in the thing assigned, including the right of re-assign, while a licence is personal and not assignable without the grantor's consent. An exclusive licence is a leave to do a thing, and a contract not to give leave to anybody else to do the same thing. It confers no interest, or property in the thing but only makes an action lawful, which, without it, would have been unlawful.

43. A licence is a permission to do something that would otherwise be unlawful. The question arises, therefore, as to what legal permission is granted by a software licence. The answer is, briefly, that in some cases the licence will be a permission to use confidential information, and in virtually in all cases it will be a permission to copy a copyright work. If the software has been kept secret by the producer, or only supplied on conditions of confidentiality and has not been published too widely, then the software licence will be akin

to a licence of confidential information or know-how. The owner or licensor of a copy right, has a right to grant permission to use the software or a computer programme, in respect of which they have a copy right, without transferring the right in copy right. It is one of the rights of a copy right owner or licensor. Without such right being transferred, the end user has no right to use the software or computer programme. If he uses it, it amounts to infringement of copy right. For transfer of such right if consideration is paid, it is not a consideration for transfer of a copy right but for use of intellectual property embedded in the copy right, and therefore it is for transfer of one of those rights of the owner of the copy right. It is not a right in copy right but it is in respect of a copy right. When a copy righted article is sold also, the end user gets the right to use the intellectual property embedded in the copy right and not a right in the copy right as such. Therefore the mode adopted or the terminology given is not decisive to decide the nature of transfer. Ultimately, it is the substance which has to be looked into.

44. Therefore, it is necessary to look into the terms of the agreement entered into between the parties, as it would be purely question of fact to be decided on the basis of the intention of the parties as could be gathered from the written words used in the agreement. The relevant terms in the agreement between the parties is as under:-

"END USER SOFTWARE LICENSE AGREEMENT

Between

SYNOPSYS INTERNATIONAL LIMITED

Unit 1, Blanchardstown Corporate Park

Blanchardstown, Dublin 15

Ireland

And

ATHENA SEMICONDUCTORS PRIVATE LIMITED

No.1081, 12th Main Indiranagar

Bangalore – 560 038, India

1.3 "confidential information" means

- (i) *the Licensed Product, in objet and source code form, and any related technology, idea, algorithm or information contained therein, including without limitation Design Techniques, and any trade secrets related to any of the foregoing.*



- (ii) Synopsys's proprietary knowledge database product SolvNet;
- (iii) Designs;
- (iv) either party's product plans, costs, prices and names; non-published financial information; marketing plans; business opportunities; personnel; research; development or know-how;
- (v) any information designated by the disclosing party as confidential in writing or, if disclosed orally, designated as confidential at the time of disclosure and deduced to writing and designated as confidential in writing within thirty (30) days; and
- (vi) the terms and conditions of this Agreement; provided, however the "Confidential Information" will not include information that:
 - (a) is or becomes generally known or available by publication, commercial use or otherwise through no fault to the receiving party;
 - (b) is known and has been reduced to tangible form by the receiving party at the time of

disclosure and is not subject to restriction;

- (c) is independently developed by the receiving party without use of the disclosing party's Confidential Information;
- (d) is lawfully obtained from a third party who has the right to make such disclosure or;
- (e) is released for publication by the disclosing party in writing

1.4 "Design" means the representation of an electronic circuit or device(s), derived or created by License through the use of the Licensed Product in their various formats including, but not limited to, equations, truth tables, schematic diagrams, textual descriptions, hardware description languages and netlists.

1.5 "Design Techniques" means the Synopsys-supplied data circuit and logic elements, libraries, algorithms, search strategies, rule based and technical information incorporated in the Licensed Product and employed in the process of creating Designs.

1.7 "Documentation" means any user manuals, reference manuals, release, application and


methodology notes, written utility programs and other materials in any form provided for use with the Licensed Product.

1.8 "End User(s)" means the authorized person(s) who access and use the client.

1.13 "Intellectual Property Rights" means all patents, patent rights, copyrights, (including copyright in computer software), design rights, database rights, semi-conductor topography rights, trade secrets, service marks, maskworks and trademarks, whether or not registered or capable of registration, and any applications for any of the foregoing, in all countries in the world.

1.15 "License Key" means a document (in physical or electronic format) provided by Synopsys to Licensee which reflects the applicable Licensee purchase order and lists: (i) the Licensed Product, including version number and quantity, licensed to Licensee; (ii) the Key server(s); and (iii) the codes which Licensee must input to initialize use of the Key Server(s).

1.16 "Licensed Product(s)" means collectively Design Ware and the Licensed Software.



1.17 "Licensed Software" means the Synopsys computer software program(s), exclusive of Design Ware, which are licensed by Licensee in object code form and identified in the applicable License Key, including any Bug Fix Release and Minor Enhancement Releases provided by Synopsys pursuant to the terms of the Support Agreement and this Agreement and any Software Upgrade which may be licensed by Synopsys to Licensee.

1.18 "Minor Enhancement Release" means an embodiment of the Licensed Product that delivers minor improvement, incremental features or enhancements of existing features, and/or functionality to the Licensed Product.

1.19 "Software Upgrade" means an embodiment of the Licensed Product that delivers substantial performance improvements, architectural changes or new features and/or functionality to the Licensed Product for which Synopsys may charge a separate license fee.

1.20 "Use Area" means the Key Server(s), Client(s) and End User(s) all located within the same five (5) mile radius.

Grant of rights

2.1 Software License Synopsys hereby grants Licensee a nonexclusive, nontransferable license, without right of sublicense, of use the Licensed Software and Design Techniques only:

- i) in the quantity authorized by a License Key;
- ii) in accordance with the Documentation; and
- iii) in the Use area. Licensee may make a reasonable number of copies of the licensed Software for backup and/or archival purposes only.

2.1.1 Term of License The term of the license granted herein shall be continuous until non-renewal of the Support Agreement, (unless the license is sooner terminated in accordance with Section 8 of this Agreement), whereupon Licensee shall be granted a twenty-(20) year key to use the Licensed Software at the last supported level, provided that if Licensee and Synopsys have agreed that Licensee may obtain time-based licenses for the Licensed Products, as indicated in the applicable quote, purchase order and/or License Key, the term of the license shall be as set forth in the applicable Licensee key.



2.2 Design Ware License If Licensee has purchased a license to Design Ware, Synopsys hereby grants Licensee the following nonexclusive, nontransferable rights to Design Ware, with no right to sublicense (except as provided below):

- (i) licensee may use Design Ware in the quantity authorized by the Design Ware License Key, in accordance with the Documentation, in the Use Area;*
- (ii) licensee may Implementation IP into Licensee's Designs to create Integrated Designs;*
- (iii) licensee may make, have made, use and distribute products that are physical implementations of the Integrated Designs; and*
- (iv) if Licensee has purchased from Synopsys the right to use certain Implementation IP in support of Licensee's development of Integrated Designs.*

Licensee may make a reasonable number of copies of Design Ware for backup and/or archival purposes only.

2.3 Documentation License Synopsys hereby grants Licensee a nonexclusive, non-transferable license, without right of sublicense, to use the Documentation and to make a reasonable number of copies of the Documentation solely for its own internal business purposes to support Licensee's use of the Licensed Product.

2.4 Evaluation License In the event Licensee obtains evaluation copies (which excludes any copy of the Licensed Products issued pursuant to Licensee's purchase order) of the Licensed Product, the terms and conditions of this Agreement shall govern, except as follows:

- (i) Licensee may use such Licensed Product only for internal, non-production evaluation for the purpose of deciding whether to purchase a license for such Licensed Product from Synopsys;
- (ii) the term of the Evaluation License will be as specified in the applicable License key; and
- (iii) Section 9 is amended such that the Licensed Products is provided "AS IS"

2.7 Proprietary Notices. Licensee must reproduce and include the copyright notice and any other notices that appear on the original copy of the Licensed Product and Documentation on any copies may thereof by Licensee in any media.

2.8 License Restrictions. Licensee acknowledges that the scope of the licenses granted hereunder do not permit Licensee (and Licensee shall not allow any third party to:

- (i) save as expressly permitted by and in accordance with the provisions of Regulation 6(2), 6(3) and 7 of the EC (Legal Protection of Computer Programs) Regulations 1993, copy, adapt, decompile, disassemble, reverse engineer or attempt to reconstruct, identify or discover any source code, underlying ideas, underlying user interface techniques or algorithms of the Licensed product by any means whatever, or disclose any of the foregoing;
- (ii) distribute, lease, lend, use for timesharing, service bureau, and/or application service provider purposes the Licensed Product;

- (iii) use the Licensed Product for the benefit of third parties, or allow third parties to use the Licensed Product;
- (iv) modify, incorporate into or with other software, or create a derivative work of any part of the Licensed Product;
- (v) disclose the results of any benchmarking of the Licensed Product (whether or not obtained with Synopsys' assistance) to third parties;
- (vi) use the Licensed Product to develop or enhance any product that competes with a Licensed product; or
- (vii) employ the Licensed product in, or in the development of, life critical applications or in any other application where failure of the Licensed Product or any results from the use thereof can reasonably be expected to result in personal injury.

3. Ownership

3.1 Synopsys Ownership. Synopsys and/or its licensors own and shall retain all rights, title and interest in and to the Licensed Product, Design Techniques and Documentation, including all Intellectual Property Rights embodied therein, and

Licensee shall have no rights with respect thereto other than the rights expressly set forth in this Agreement. Risk in the media only, passes upon Synopsys' delivery of the Licensed product to a common carrier, or for international shipments, delivery to the foreign port of entry. Title, in the media only, passes to the Licensee on payment of the license fees. Third party proprietary information may have been used in the development of certain Licensed Products, and any third party licensors of such products may enforce their rights under this Section as third party beneficiaries. Such third parties are listed in the applicable Documentation.

3.2 Licensee Designs. Licensee shall retain all right, title and interest in and to Designs, Integrated Designs and all copies and portions thereof, subject to Synopsys' underlying rights in any Design Ware incorporated in such Designs and Integrated Designs.

5. DELIVERY TERMS

5.1 Purchase Order. In order to obtain products and services from Synopsys, Licensee must first submit a purchase

order. As part of a purchase order, Licensee must identify the Licensed product it wishes to License, the identity (by machine ID number) of the Key server(s) and the location of such Key Server(s). All purchase orders are subject to acceptance by Synopsys, in its sole discretion. Licensee's receipt and use of all Licensed Product and Documentation shall be governed by:

- (i) the terms and conditions of this Agreements; and
- (ii) any Agreement Supplement(s) which are executed by both parties. Nothing contained in any purchase order, purchase order acknowledgment, or invoice shall in any way modify such terms or add any additional terms or conditions; provided, however, that such standard variable terms as price, quantity, delivery data, shipping instructions and the like, as well as tax exempt status, if applicable shall be specified on each purchase order or acknowledgment.

Licensee's purchase order will include the licensee fee and payment terms as set forth in the applicable Synopsys quotation. Licensee agrees to pay Synopsys the license fees, plus applicable taxes as set forth below, in accordance with the payment terms specified in the applicable Synopsys quotation and/or invoice.

5.3 Delivery. Upon the acceptance of an order by Synopsys and the satisfaction of all Synopsys prerequisites prior to delivery, Synopsys shall deliver to Licensee, at Synopsys expense, the Licensed Product, License Key and/or Documentation, as appropriate.

6. Support Services

Support services shall be provided by Synopsys under the terms and conditions set forth herein and of the Support Agreement.

7. CONFIDENTIALITY

Each party will protect the other's Confidential Information from unauthorised dissemination and use with the same degree of care that each such party uses to protect its own like information. Neither

party will use the other's Confidential Information for purposes other than those necessary to directly further the purposes of this Agreement. Neither party will disclose to third parties the other's Confidential Information without the prior written consent of the other party.

8. TERMINATION OF LICENSE

8.1 Termination. Either party has the right to terminate this Agreement if the other party breaches or is in default of any obligation hereunder, which default is incapable of cure or which, being capable of cure, has not been cured with fifteen (15) business days after receipt of written notice from the non-defaulting party or within such additional cure period as the non-defaulting party may authorize, except that the Licensed Product's failure to substantially conform to the specifications in the Licensed Produce Documentation shall not be deemed a default under this Section 8.1 but shall be subject to the exclusive remedies provided in Section 9.1.

8.3 Effect of Termination. Upon termination, Licensee shall immediately

cease all use of the Licensed Product (other than Design Ware incorporated into Designs prior to termination, for which Licensee's license shall continue according to its terms), Design Techniques and Documentation and return or destroy all such copies and all portions of the Licensed Product (other than Design Ware incorporated into Designs prior to termination) and so certify in writing in Synopsys Termination will not relieve Licensee or Synopsys from any liability arising from any breach of this Agreement. Neither party will be liable to the other for damages of any sort solely as a result of terminating this Agreement in accordance with its terms, and termination of this Agreement will be without prejudice to any other right or remedy of either party. The provisions of sections 3, 7, 8.2, 8.3, 11, 12 and 13 shall survive any termination or expiration of this Agreement.

10. PATENT AND COPYRIGHT INFRINGEMENT

10.1 Indemnity. Synopsys agrees, at its own expense, to defend or, at its option, to settle, any claim or action brought against Licensee to the extent it is based on a claim

that the Licensed Software as sued within the scope of this Agreement infringes or violates any United States or European patent, copyright, trademark, trade secret or other proprietary right of a third party, and Synopsys will indemnify and hold Licensee harmless from and against any damages, costs and fees reasonably incurred (including reasonable attorneys' fees) that are attributable to such claim or action and which are assessed against Licensee in a final judgment. Licensee agrees that Synopsys shall be release from the foregoing obligation unless licensee provides Synopsys with:

- (i) prompt written notification of the claim or action;
- (ii) sole control and authority over the defense or settlement thereof; and
- (iii) all available information, assistance and authority to settle and/or defend any such claim or action.

13.3 Assignment. This Agreement may not be assigned by Licensee without the prior written consent of Synopsys.




13.6 Independent Contractors. The relationship of Synopsys and licensee established by this Agreement is that of independent contractors, and nothing contained in this Agreement shall be construed (i) to give either party the power to direct or control the day-to-day activities of the other or (ii) to constitute the parties as partners, joint ventures, co-owners or otherwise as participants in a joint a common undertaking.

13.9. Injunctive relief. The parties agree that a material breach of this Agreement adversely affecting Synopsys' Intellectual Property Rights in the Licensed Product, Design Techniques or Documentation would cause irreparable injury to Synopsys for which monetary damages would not be an adequate remedy and Synopsys shall be entitled to equitable relief in addition to any remedies it may have hereunder or at law."

45. As is clear from the description of the agreement it is an end user software licence agreement. Clause 2.1 deals with grant of rights. It provides, Software License Synopsys hereby grants licensee a nonexclusive,

nontransferable license, without right of sub-licence of use the licensed software and design techniques only in the quantity authorized by a licensee in accordance with the documentation in the use area. Licensee may make a reasonable number of copies of the licensed software for backup and/or archival purposes only. Merely because the words non-exclusive and non-transferable is used in the said licence it does not take away the software out of the definition of the copyright. The word licenced software has been defined. Similarly, the words design, design technique is also defined. The word documentation is also defined and it is not in dispute what is granted is a license. Even if it is not transfer of exclusive right in the copyright, the right to use the confidential information embedded in the software in terms of the aforesaid licence makes it abundantly clear that there is transfer of certain rights which the owner of copyright possess in the said computer software/programme in respect of the copyright owned. In terms of the DTAA the consideration paid for the use or right to use the said confidential information in the form of computer programme software itself constitutes royalty and attracts tax. It is not necessary that there should be a transfer of exclusive right



in the copyright as contended by the assessee. The consideration paid is for rights in respect of the copyright and for the user of the confidential information embedded in the software/computer programme. Therefore, it falls within the mischief of Explanation (2) of clause (vi) of sub-section (1) of Section 9 of the Act and there is a liability to pay the tax.

46. If there was any doubt regarding the taxability of this income, the parliament by Finance Act, 2010 has substituted the explanation to Section 9 which gives a clear intention of the legislature insofar as the liability of tax under this provision is concerned. A perusal of the said explanation makes it clear that as there was a doubt earlier, they want to remove the doubts by introducing this explanation. By the explanation they have declared that for the purpose of Section 9 which deals with income deemed to accrue or arise in India, under clauses (v), (vi) and (vii) of sub-section(1), such income shall be included in the total income of the non-resident, whether or not (i)the non-resident has a residence or place of business or business connection in India, (ii) the non-resident has rendered

services in India. Therefore, the object is to levy tax on the income of a non-resident, if it has accrued or arisen in India and one such income is the income from royalty.

In the result, we pass the following :-

ORDER

- (a) All the appeals are allowed.
- (b) Impugned orders passed by the Income Tax Appellate Tribunal, Bangalore Bench, is hereby set aside.
- (c) The order passed by the Commissioner of Income Tax (Appeals) affirming the order passed by the Assistant Commissioner of Income Tax, Circle 19(1), Bangalore, with modification is restored.
- (d) No costs.

Sd/-
JUDGE

Sd/-
JUDGE