

**BEFORE THE AUTHORITY FOR ADVANCE RULINGS (INCOME
TAX) NEW DELHI**

20th Day of July, 2015

A.A.R. No 985 of 2010

PRESENT

Justice Mr V.S. Sirpurkar (Chairman)

Mr. A.K. Tewary, Member (Revenue)

Name & address of the applicant SkillSoft Ireland Limited,
Belfield Office Park, Clonskeagh,
Dublin 4, Ireland

Present for the applicant Shri Nageshwar Rao, Advocate
Shri Pankaj Agarwal, C.A
Shri Aniket D. Agrawal, Advocate

Present for the Department Shri K.V. Arvind, Standing
Counsel

Smt Sukhvinder Khanna, CIT-

DR(AAR)
Shri Sachin Dhanial, DCIT-DR(AAR)

RULING

(by A. K. Tewary)

The applicant is a Private Limited Company incorporated under the laws of Ireland. It is engaged in the business of providing on demand e-learning course offerings, online information resources, flexible learning technologies and performance support solutions (SkillSoft products).

The applicant has entered into a Reseller Agreement dated 9th February, 2009 with SkillSoft Software Services India Private Limited (SkillSoft India) appointing it as a Reseller. SkillSoft India buys the SkillSoft products from the applicant on a principal-to- principal basis and sells the same to Indian end users/customers in its own name. According to the applicant by using software and techniques, it has developed copy righted products on several topics which were electronically stored on its server outside India.

2. The applicant has raised the following questions for ruling from this authority:-

- (a) *Whether based on the facts and circumstances of the case, the payments received by SkillSoft Ireland Limited (“the Applicant”) would be characterized as ‘fees for technical services’ (“FTS”) under Article 12(3)(b) of the Agreement between the Government of the Republic of India and the Government of Ireland for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income(“India-Ireland Treaty”)?*
- (b) *Where the answer to Question 1 is in the negative, whether based on the facts and circumstances of the case, the payments received by the Applicant would be characterized as ‘royalty’ under Article 12(3)(a) of the India-Ireland Treaty?*
- (c) *Whether based on the facts and circumstances of the case a Permanent Establishment (“PE”) is created for the Applicant in India under the provisions of Article 5 of the India-Ireland Treaty?*
- (d) *Where the answer to Question 1,2 and 3 are in the negative, whether the payments received by the Applicant for the*

SkillSoft Products would be subject to withholding tax in accordance with the provisions of section 195 of the Act?

3. In the application (Annexure III) the applicant has given a brief description of the key e-learning platforms offered to Indian customers as under:-

- SkillPort – The SkillPort platform allows companies to provide valuable learning assets to employees through several modes including video, audio and interactive formats. SkillPort supports a spectrum of learning content in areas of software development, web designing, desktop skills, finance and accounting.

SkillPort enables users to perform on-demand, integrated searches across the full library of resources on SkillPort, and be directed to the specific book page, course topic or other tool needed for instant and relevant answers.

- SkillChoice – It is an e-learning platform that provides access to a robust collection of online courses and simulations, full text books by leading publishers and practice exams for professional certification.

- SkillSoft KnowledgeCentre – It is a pre-packaged, user-friendly learning portal that allows learners instant access to trusted, targeted content. Each Knowledge Centre includes material specifically chosen to help learners build knowledge around a topic as quickly and efficiently as possible. To

illustrate, Microsoft Office 2007 Knowledge Centre provides learning content on Microsoft Office 2007 (Word, Excel, Outlook, Power Point and Vista).

- SkillSims – SkillSims enhances the SkillSoft interactive courseware experience by immersing learners in rich media, task-based, multi-path simulations to provide realistic practice in the subjects being taught.

4. The applicant has further explained that its products consist of two components namely the course content and the software through which the course content is delivered to the end-customer. Its e-learning platforms are not instructor driven and there is no element of human interaction in the learning programmes. The interaction is restricted to software enabled virtual interaction through text, images and graphics that are utilized to enhance the learning experience.

5. The applicant has entered into a Reseller Agreement with SkillSoft India. Under the Reseller Agreement SkillSoft India is a distributor and has the right to license, market, promote, demonstrate and distribute SkillSoft Products by providing online access to SkillSoft Products in the Territory (i.e. India). The SkillSoft products purchased by SkillSoft India from the applicant are licensed to Indian end users/customer under the Master License Agreement between SkillSoft India and Indian end-users. SkillSoft India grants to the Indian end-users a non-exclusive, non-transferable license to use and to allow the applicable authorized audience to access and use the SkillSoft Products. This agreement is primarily in the nature of a software/conduct licensing agreement

whereby the Indian end-users/customers are permitted to access the e-learning platform and the educational content.

6. In the application the applicant has mentioned that the payments for SkillSoft Products are not for services that are managerial or consultancy or technical in nature but instead for a product. According to the applicant the end line software platform should be regarded as software and not services. As regards the second component comprising education content, the applicant has submitted that such content provided through the e-learning software platform is similar to the content of books/learning manuals rather than any services. According to the applicant the payment for provision of access to the SkillSoft Product is not FTS under Article 12(3)(b) of the India-Ireland Treaty. As regards the question relating to royalty the applicant submitted that the grant of right to the Indian end-users to access the educational content should not be construed as granting a copyright.

7. During the course of hearing the counsel representing the revenue Shri K V Arvind did not argue that the payments made to the applicant by SkillSoft India were to be classified as FTS or as business income in India. He also did not argue that the applicant had a PE in India. His only emphasis was that the payment made in the course of transactions should be classified as royalty. Therefore, the arguments of both sides during the course of hearing centered on the issue of royalty, i.e., whether the payments made by the SkillSoft India to the applicant on account of sale of SkillSoft Products would result in royalty income in the hands of the applicant. Accordingly, in the following paragraphs we

will focus on the submissions made by both the applicant and the Revenue on the issue of Royalty.

8. In order to argue his case that the payments made are not royalty, the applicant's counsel has mainly relied upon the following case laws:-

- (I) FactSet Research Systems Inc.(2009-TIOL-18-18ARA-IT (III)
- (II) Dassault Systems KK., (AAR No.821/2009)
- (III) Dun and Bradstreet Information Services Private Limited (333 ITR 95) (2011)
- (IV) Linde AG, Linde Engineering Division and anr. Vs DDIT (2014) 361 ITR 001
- (V) DIT vs Infrasoftware Ltd (2013) 264 ITR 329.
- (VI) Sun Engineering Works Pvt Ltd., (1992) 198 ITR 297 (SC)

9. The applicant's argument is that SkillSoft Products are similar to a book, i.e., the customer pays for a copyrighted article and not for the copyright in the article. Since payments for books are not regarded as royalty, it was argued that payments for the educational course offerings like SkillSoft Products, being akin to such books, should not be regarded as royalty under the India-Ireland Treaty. The applicant's counsel mainly emphasized the facts that no right in the copyright was transferred to the SkillSoft India or to the Indian end-users. He also made a distinction between copyright and copyrighted article and stated that payment received was in respect of copyrighted article. He further argued that Indian end-users were granted only non-exclusive and non-transferable license and therefore it was not covered under the definition of copyright. The applicant's counsel also tried to explain that SkillSoft products may

also be considered to be in the nature of “information technology enabled services” (ITES) and for this purpose he cited notification dated 18th September, 2013 issued by Central Board of Direct Taxes in respect of “Safe Harbour Rules”. It may be relevant here to point out that these rules are applicable only to the person who has exercised a valid option for application of safe Harbour Rules. In this case the applicant has not exercised such option and is not covered under these rules. In order to support his argument that no right in the Copyright as defined under section 14 of the copyright Act, 1957 has been granted for the use by the Indian end-user or SkillSoft India, reliance was placed on the ruling of this authority in the case of FactSet Research Systems Inc.(supra) saying that the facts are similar to that of the applicant. In this case it was held that

“The grant of license is only to authorize the licensee to have access to the copyrighted database rather than granting any rights in or over the copyright as such. The consideration paid is for a facility made available to the licensee.”

“The data was compiled in a standard digital format. The information collected and made available to the customer was available in public domain. It was held that there was no use or right to use any copyright or literary or scientific work or any patent trade-mark, or imparting of information concerning commercial experience, and therefore, the payment did not fall under the category of ‘royalty’.

10. The applicant's counsel emphasized that the ruling in the case of FactSet is binding in nature and pointed out that even though the decision of the Authority in one case is not binding in another case, but since the decision related to the same information business reports and no fault in the decision was pointed out, there is no reason to interfere with such a decision. For this purpose he relied upon the Hon'ble Bombay High Court in the case of DIT (International Taxation) vs Dun and BradStreet Information Services Private Limited (supra) and Linde AG, Linde Engineering Division and anr. vs DDIT (supra)(Hon'ble Delhi High Court).

11. The applicant's counsel also relied on the OECD Commentary in the context of distributor arrangement:

“Arrangements between a software copyright holder and a distribution intermediary frequently will grant to the distribution intermediary the right to distribute copies of the program without the right to reproduce that program. In these transactions, the rights acquired in relation to the copyright are limited to those necessary for the commercial intermediary to distribute copies of the software program. In such transactions, Distributors are paying only for the acquisition of the software copies and not to exploit any right in the software copyrights. Thus, in a transaction where a Distributor makes payments to acquire and distribute software copies (without the right to reproduce the software), the rights in relation to these acts of distribution should be disregarded in analyzing the character of the transaction for tax purposes. Payments in these types of transactions would be dealt with as business profits in accordance with Article 7. This would be the case regardless of whether the copies being distributed are

delivered on tangible media or are distributed electronically (without the Distributor having the right to reproduce the software), or whether the software is subject to minor customization for the purposes of its installation.”

12. Relying further on the decision in the case on the Dassult Systems (supra), wherein it was held that even though 3 parties were involved, the arrangement does not result in a royalty, the applicant’s counsel cited the observations of Hon’ble Supreme Court in the case of Sun Engineering Works Pvt. Ltd. (supra), as under:-

“A decision of this court takes its colour from the questions involved in the case in which it is rendered and, while applying the decision to a later case, the courts must carefully try to ascertain the true principle laid down by the decision of this court and not to pick out words or sentences from the judgement, divorced from the context of the questions under consideration by this court, to support their reasoning. In Madhav Rao Jivaji Rao Sindia Najadir vs Union of India (1971) 3 SCR 9, AIR 1971 SC 530, this court cautioned (at page 578 of AIR 1971 SC).

“It is not proper to regard a word, a clause or a sentence occurring in a judgment of the Supreme Court, divorced from its context, as containing full exposition of the law on a question when the question did not even fall to be answered in that judgment.”...”

13. Without prejudice to the above mentioned contentions the applicant has further cited the cases of DIT vs Ericsson Radio System

A.B. (2012) 343 ITR 470 DIT vs Nokia Networks OY (2012) 358 ITR 259 (Del) and DIT vs Infrasoftware Ltd (2013) 264 ITR 329 (supra). He relied extensively on the decision of Hon'ble Delhi High Court in the case of Infrasoftware Limited wherein it was held that 'there is a clear distinction between royalty paid on transfer of copyright rights and consideration for transfer of copyrighted articles. Right to use a copyrighted article or product with an owner retaining his copyright is not the same thing as transferring or assigning the rights in relation to the copy right.'

14. The Revenue has contended that the payments received by the applicant from SkillSoft India amount to royalty under the India-Ireland Treaty. For this purpose they have relied on the following case laws:-

- (1) CIT vs Samsung Electronics Co Ltd & Ors. 345 ITR 494 (Kar)
- (2) CIT vs Synopsis International Old Ltd. 212 TAXMAN 454 (Kar)
- (3) Verizon Communications Singapore PTE Ltd vs ITO 361 ITR 575 (Mad)
- (4) GVK Industries Ltd & Anr Vs Ito & Anr (Civil Appeal No.7796/1997)
- (5) CIT vs CGI Information Systems & Management Consultants (P) Ltd 226 TAX MAN 319 (Kar)
- (6) CIT VS Wipro Ltd. 203 Taxman 621 (Kar)
- (7) Citrix Systems Asia Pacific Pvt. Ltd., In Re 343 ITR 1 (AAR)

15. The counsel for the Revenue brought our attention to clause to 2.1 of the reseller agreement between the applicant and SkillSoft India as under:-

Appointment Subject to the terms and conditions of this Agreement, Principal hereby grants to Reseller, and Reseller hereby accepts, a personal, non-transferable, non-exclusive right and license to the Products:

- (a) To license, market, promote, demonstrate and distribute Products by providing online access to Customers in the Territory (Products in CD/HDD supplied to customers in the territory, if any, shall be incidental to online access and provided to customers free of cost);*
- (b) To provide maintenance, support, and professional services in connection with the Products; and*
- (c) To perform all obligations of Reseller, and honor all rights granted, to its customers, relating to the Products under all agreements and commitments existing on or before the Effective Date and all Customer Agreements following the Effective Date, including, but not limited to, right or obligations relating to the renewal of subscription based licenses, the support and maintenance of Products.*

Subject to the restrictions stated in this Agreement and any Order Form issued under this Agreement, SkillSoft

grants to Customer and Customer accepts, a non-exclusive, non-transferable license (without the right to sublicense) for the License Term set forth in the applicable Order Form, to use and to allow the applicable Authorized Audience to access and use the SkillSoft Products(s) set forth therein for internal training purposes only.

16. The counsel for the Revenue further brought our attention to the Master License Agreement (MLA) between the Indian customer and SkillSoft India. He particularly pointed out clause 2.1 of this agreement as under:-

Subject to the restrictions stated in this Agreement and any Order Form issued under this Agreement, SkillSoft grants to Customer and Customer accepts, a non-exclusive, non-transferable license (without the right to sub-license) for the License Term set forth in the applicable Order Form, to use and to allow the applicable Authorized Audience to access and use the SkillSoft Products(s) set forth therein for internal training purposes only.

17. According to the counsel of the Revenue the present application is covered under Article 12(3)(a) of the India-Ireland Treaty which is as under:-

Under Article 12(3)(a) of the India –Ireland Treaty, “royalties” have been defined to mean – “payments of any kind received as a consideration for the use of, or right to use, any copyright of

literary, artistic or scientific work including cinematograph film 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.”

18. As regards reliance of the applicant on the decision of the authority in the case of FactSet Research Systems, the counsel of the Revenue submitted that the facts are not similar to the facts of the present case because FactSet entered into a master client license agreement directly with its customers whereas in the present case there is an intermediary through which such agreement is entered into. Moreover, in the case of FactSet the question related to subscription fee in respect of which the authority has ruled that such subscription fee is not taxable in India as royalty.

19. The Revenue’s counsel relied heavily on the decision of the Hon’ble Karnataka High Court in the case of CIT vs Synopsis International Old Limited (supra). The following paragraphs of this judgement are relevant for the purpose of our discussion:-

“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 superseding 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 superseding 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 licensed 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 override the provisions of the Income-tax Act. In the DTAA for the term 'royalty' means payments of any kind received as a consideration for the use of 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 license. 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 (v) of sub-section (1) of section 9 and is liable to tax. Therefore, we do not see any substance in the said contention.

40 A license 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 license does not, in law, confer a right. It only prevents that from being unlawful which, but for the license, 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 license, would involve an infringement of the copyright of licensor. A license 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. Licenses may be exclusive, or non-exclusive. Non-exclusive license is not defined in the Act. The term 'exclusive license' is defined in section 2, clause (j). It confers on the licensee and persons authorized 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 license 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 license in writing signed by him or by his duly authorized 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 reassign, while a license is personal and not assignable without the grantor's consent. An exclusive licensee have 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, which without it, would have been unlawful.

43. *A license 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 license. The answer is, briefly, that in some cases the license will be a permission to use confidential information, and in virtually in all cases it will be 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 license will be akin to a license of confidential information or know-how. The owner or licensor of a copyright, has a right to grant permission to use the software or a computer programme, in respect of which they have a copyright, without transferring the right in copyright. It is one of the rights of a copyright, owner or licensor. Without such right, being transferred, the end-user has no right to use the software or computer programme.*

45. *As is clear from the description of the agreement it is an end-user software license agreement. Clause 2.1 deals with grant of rights. It provides, Software License Synopsys hereby grants licensee a non-exclusive, non-transferable license, without right of sub-license 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 license it does not take away the software out of the definition of the copyright. The word licensed software has been defined. Similarly, the words design, design technique is also defined. The word documentation is also*

defined and it is not a 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 license 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 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 tax on the income of a non-resident, if it has accrued or arisen in India and one such income from royalty.

20. As regards the terms of the agreement with the end user it was pointed out by the Revenue that the clauses related to the license (2.1) and SkillSoft Product being the property of the applicant (2.2), warranty (5.1) and products (1.3) are similar in the case of the applicant as well as in the case of Synopsis International Old Limited. It was also pointed out that in the case of the applicant it is a 3 Tier transaction involving 3 parties and 2 agreements whereas in the case of Infracsoft and FactSet India (relied upon by the applicant) 2 parties are involved with one agreement only.

21. The counsel for the Revenue further cited the case of Citirx where this authority has held that the payment received by the applicant or the distributor for sale of its software product is in the nature of royalty within the meaning of section 9(1)(vi) of the IT Act as well as article 12 of the DTAA. It was contended that the facts of the present case are similar to the facts in the case of Citirx (3 Tier transaction involving 3 parties and 2 agreements) which are as under:-

“The applicant is a company incorporated in Australia. It claims to be one of the leading providers of software services which help in virtualization, networking and application delivery. It also offers a range of application collaboration, firewall, networking and streaming solutions. The applicant has entered into an agreement

with independent Indian distributors for the distribution and sale of its software and hardware products in India. In the year 2006, the applicant entered into a distribution agreement with Ingram Micro India Ltd. (hereinafter referred to as “Ingram”), and independent Indian company engaged in the business of distribution of computer software and hardware. Under the agreement, Ingram was appointed as a non-exclusive distributor of the products of the applicant in India. Some of the key products distributed under the agreement are Citrix XenApp, Citrix Access Gateway and Citrix Netscaler. According to the applicant, under the agreement, the software products are purchased by the distributor from the applicant and sold by the distributor. With respect to the hardware products, the applicant shifted the products directly to the distributor which in turn supplied these products to resellers and end-user customers. But, for the software product, Citrix XenApp, while sale and collection is made through the distributor, no physical delivery of the product is made to the distributor. On the basis of the demand of the customers for Citrix XenApp, the distributor places orders of purchase with the applicant and makes payments for the same to the applicant. The applicant then directly transmits a “key” to the end-user customer who is required to download the XenApp software. On receipt of the key, the end-user customer downloads the software from the server of the applicant. The distributor Ingram owns the responsibility for collection of the price for the product from its customers. In addition to the distribution of hardware products and Citrix XenApp under the distribution agreement, Ingram also facilitates the execution of the Citrix Subscription Advantage Programme between the applicant and its customers. The programme is

offered by the applicant in the form of a package of support services during the period of the programme. The support activities include product version updates, the subscription advantage news and updates and secure portal access. Ingram facilitates execution of the subscription programme in the same manner as the case of software products. All transactions between Ingram and the applicant are on a principal to principal basis. Ingram effects direct sales to the customers at its discretion and earns a profit on every sale based on a percentage of the sale price.”

22. We have carefully gone through the facts of the case, extensive arguments put forward by both counsels and several case laws cited by them. It is necessary in this case to first understand the facts clearly. In the application the applicant has given the description of its business. A SkillSoft Product consist of two components. The first is course content and the second is the software through which the course is delivered to the end customer. The applicant enters into a Reseller Agreement with the SkillSoft India for sale of SkillSoft Products. SkillSoft India buys the SkillSoft Product from the applicant and sells the same to the Indian end-users under the master license agreement, which is primarily in the nature of a software/content license agreement whereby the Indian end-users are permitted to access the e-learning platforms and the educational content. SkillSoft India provides to the end-users the access code/web-link by which they could access the SkillSoft Products. It is seen that the facts of the Citrix Systems Asia Pacific Private Limited are also similar. In the case of Citrix also under the first agreement the software products are purchased by the distributor from the applicant

and sold by the distributor to the end-users who are provided a 'key' to access the software from the server of the applicant. In Citrix also Ingram (distributor) was appointed as a non-exclusive distributor for Citrix products. All transactions between Citrix and the distributor are on a principal to principal basis as in the case of SkillSoft. The facts in the case of FactSet are not similar to the facts in the present case and are clearly distinguishable and the applicant's counsel's reliance on this case is misplaced. Moreover, the ruling in the case of FactSet was delivered in June 2009 whereas the ruling in the case of Citrix was announced in February 2012, after duly considering the case of FactSet and Dassult in detail. The authority also considered the decision of the Karnataka High Court in the case of the Samsung Electronics Private Limited and the decision of the Delhi High Court in the case of the Director of IT vs Ericsson A.B., 2012 (246 ITR 422) before giving the ruling in the case of Citrix. After considering all these cases the authority ruled that the payments received by the applicant from the distributor for sale of the software product are in the nature of royalty both within the meaning of section 9(1)(vi) of the IT Act and within the meaning of Article 12 of the DTAA. The following paragraphs of the ruling are relevant:-

30. Article 12 of the India-Australia DTAC defines royalties to mean payment made as consideration for the use of or the right to use any copyright, patent, design or model, plan, secret formula or process, trademark or other like property or right. In Union of India vs Azadi Bachao Andolan (2003) 184 CTR (SC) 450 : (2003) 263 ITR 706 (SC) the Supreme Court has spoken as to how a treaty is to be interpreted. It is a contract between sovereign States and varying

considerations go into making it. It is a matter of bargain between the two countries involving adjustments and compromises. According to Bennion on Statutory Interpretation 'the words in a treaty have to be given meaning not strictly according to rules of interpretation of statutes, but the meaning of the diplomat rather than a lawyer'. So, when the convention speaks of royalty, and defines it, it must be understood as it is commonly understood. There is much to be said for the argument on behalf of the Revenue, that we should not feel ourselves constrained by the definition of copyright in s.14 of the Copyright Act, a definition that explicitly states that it is for the purposes of that Act, especially when construing the tax convention.

31. The article speaks of the use of or the right to use of any copyright. Use of a copyright takes place when the copyright is used. This is distinct from the right to use a copyright. The two expressions are used disjunctively and the expression used is 'or'. The context does not warrant the reading of 'or' as 'and'. If so, the consideration received for permitting another to use a copyright is also royalty.

32. Considerable arguments are raised on the so-called distinction between a copyright and copyrighted articles. What is a copyrighted article? It is nothing but an article which incorporates the copyright of the owner, the assignee, the exclusive licensee or the licensee. So, when a copyrighted article is permitted or licensed to be used for a fee, the permission involves not only the physical or

electronic manifestation of a programme, but also the use of or the right to use the copyright embedded therein. That apart, the Copyright Act or the IT Act or the IT Act or the DTAC does not use the expression 'copyrighted article', which could have been used if the intention was as claimed by the applicant. In the circumstances, the distinction sought to be made appears to be illusory.

23. The applicant's counsel tried hard to say that the ruling in the case of FactSet is binding on us and relied on the decisions in the cases of Dun and BradStreet, Linde AG and Sun Engineering. In all these cases the emphasis was that where facts are similar then only the ruling becomes binding. In fact in the cases of Dun and BradStreet the same information business reports were involved and so it was considered to be binding. The Argument of the applicant's counsel that the rulings given in the FactSet is binding does not hold ground because facts are not similar and the ruling in the case of Citrix was given after careful consideration of the earlier rulings given in the case of FactSet.

24. Based on the arguments of the applicant's counsel, the following the following issues arise which are relevant to answer the questions raised by the applicant:-

- (i) Whether computer programme and computer database (software) are covered under Article 12(3)(a) of DTAA for the purpose of Royalty?

- (ii) Whether there is any distinction between copyright and copyrighted articles for the purpose of royalty in this case?

- (iii) Whether grant of non-exclusive, non-transferable rights would be akin to transfer of rights in the copyright or copyrighted article?

25. Software as 'literary work'

As regards coverage of computer programme and computer data base within the ambit of 'literary work' in Article 12(3)(a) of DTAA, this authority in the case of FactSet held that the computer data base falls within the scope of literary work. Admittedly SkillSoft Products are software as mentioned by the applicant in Annexure III of the application. The issue was settled by the Authority in the case of FactSet (relied upon by the applicant) that 'By an inclusive definition in section 2(o) of Copyright Act, computer programmes and computer databases are included within the ambit of literary work.' There is no need to further discuss this aspect. The applicant's counsel has further tried to say that such software shall be covered under ITES. However, this is a fallacious argument because the notification dated 18th September, 2013 issued by CBDT defining ITEA does not apply to the applicant. This notification is only meant for such eligible assesses who have exercised a valid option for application of Safe Harbor Rules. The analogy drawn by the applicant's counsel to the on-line banking facility provided by a bank or to an e-library (book) is also not at all appropriate. As mentioned earlier, SkillSoft Products consist of the software through which the course content is delivered to the end-customer who gains

access to a especially designed software for understanding the content. We have also gone through a demo of the website of the applicant and could see that they were marketing several copyrighted software containing simulation exercises and such software simulations were especially designed by them. Such especially designed software are not available in public domain. It is clearly mentioned by them that these products are 'licensed by the Applicant to SkillSoft India under the Agreement and further sub-licensed/distributed to end customers in India under the Customer Agreement.' It is not correct to say that the applicant's case is completely different from the facts of a case surrounding software. The fact is that software and computer databases created by the applicant are included within the ambit of 'literary work' and therefore covered under Article 12(3)(a).

26. Copyright vs Copyrighted Article

The applicant's counsel further tried to make a distinction between a copyrighted article and a copyright and said that the payment received by the applicant is only in respect of a copyrighted article and no rights in the copyright are granted to the Indian end-users. We noticed that this authority had examined the same issue in the case of Citrix and had concluded that such distinction is illusory. The observations of the authority are as under:-

"32. Considerable arguments are raised on the so-called distinction between copyright and copyrighted articles. What is a copyrighted article? It is nothing but an article which incorporates the copyright of the owner, the assignee, the exclusive licensee or the licensee. So, when a

copyrighted article is permitted or licensed to be used for a fee, the permission involves not only the physical or electronic manifestation of a programme, but also the use of or the right to use the copyright embedded therein. That apart, the Copyright Act or the IT Act or the IT Act or the DTAC does not use the expression 'copyrighted article', which could have been used if the intention was as claimed by the applicant. In the circumstances, the distinction sought to be made appears to be illusory."

We respectfully agree with the ruling.

27. Grant of non-exclusive, non-transferable rights in the license

It is the applicant's main argument that it does not involve provision of the right to use in copyright of a literary, realistic or scientific work, in patent, trademark, design or model plan etc. The applicant's counsel argued that the grant of right to Indian end-users to access the educational content should not be construed as granting a copy right. It is purely a question of fact on the basis of which it can be decided whether the nature of license granted by the applicant would result in royalty or not. We find that similar issue was involved in the case of Citrix as well as Synopsis. The Hon'ble High Court in the case of Synopsis had examined clause 2.1 of the agreement entered into between the parties which dealt with grant of rights. It was provided therein that Synopsis granted licensee offering a non-exclusive, non-transferable license, without right of sub-license, of use the software and design technologies only in the quality authorized by a licensee in accordance with the documentation in the use area. In the present case

also the reseller agreement grants to customer a non-exclusive, non-transferrable license (without the right to sub-license). The Hon'ble High Court had mentioned categorically that merely because the words non-exclusive and non-transferrable is used in the said license it does not take away the software out of definition of copyright. It was further held that 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 license 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. It was further held that it is not necessary that there should be a transfer of exclusive right in the copyright. In this case also similar words have been used in the reseller agreement as well as Master License Agreement. Therefore, irrespective of use of the words like non-exclusive and non-transferable in these two agreements, there is definitely transfer of certain rights of which the applicant is the owner.

28. As regards definition of royalty under DTAA, it was held by the Hon'ble Karnataka High Court in the case of Synopsis that under the DTAA to constitute royalty there need not be any transfer or any rights in respect of any copy rights and it is sufficient if consideration is received for use of or the use to any copyright. Therefore if the definition of royalty in the DTAA is taken into consideration it is not necessary that there should be a transfer of any exclusive right. In terms of the DTAA the consideration paid for the use or right to use the said confidential information in form of computer programme software itself constitutes royalty. We respectfully agree with the findings of Hon'ble Karnataka High Court in the case of Synopsis.

29. In view of the above, the answer to the questions raised by the applicant are given in favour of Revenue as under:-

(a) The payment received by the applicant cannot be characterized as fees for technical services under Article 12(3)(b) of the DTAA.

(b) The payment received by the applicant are in the nature of royalty under article 12(3)(a) of the DTAA.

(c) No permanent establishment is created for the applicant in India under the provision of Article 5 of the DTAA.

(d) In view of the affirmative answer to the question (b) above, the payment received by the applicant would be subject to withholding tax in accordance with the provisions of the section 195 of the IT Act.

(VS Sirpurkar)
Chairman

(A.K. Tewary)
Member