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Summary – The Delhi ITAT in a recent case of Black Duck Software Inc., (the Assessee) held that where assessee, a US based company, granted a non-exclusive, non-transferable software license to Indian customer for a specific time period, since copyright in said software programme was retained by assessee, payment received by it was not liable to tax in India as royalty

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- The assessee-company was incorporated under the laws of USA. It was provider of products and services for automating the management, compliance and secure use of open source software in multi source development at enterprise scale. During the year under consideration, the assessee had sold software under a 'Master License and Subscription Agreement' with two entities in India, namely, (a) Infosys Limited; and (b) Robert Bosch Engineering.
- In course of assessment, the Assessing Officer concluded that receipts of assessee pertaining to licensing of software were taxable as royalty under section 9(1)(vi). Thereafter, he proceeded to hold that even under the treaty, the payment received by the assessee was in the nature of royalty within the terms of article 12(3) of India-USA DTAA.
- The DRP upheld the order of Assessing Officer.
- On appeal:

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- The sole issue involved in this appeal is, whether the payment received by the assessee from supply of software, is taxable in India as royalty in India or not; either under section 9(1)(vi); or under article 12(3) of India-USA DTAA; or both. Before deciding the issue, at the outset it is quite clear that the revenue has not taken any stand that if it is not taxed as royalty, then can it be taxed as business income in India and if it is business income then whether there is any PE of assessee in India. This is inferred from the fact that there is no rebuttal of assessee's contention that it does not have any permanent establishment in India, therefore, receipts from sale of software will not be taxed as business income in terms of article 7 of India-USA DTAA. At the outset, it is an admitted fact that the assessee-company is tax resident of USA and has sought shelter under India-USA DTAA, therefore, receipts in question has to be seen from the angle, whether such receipts can be held to be taxable, especially as royalty in terms and scope of para (3) of article 12.
- From a perusal of the scope of master license agreement, it is quite apparent that the assessee provided to its customers a non-exclusive; non-transferable license within the applicable subscription period. The clause dealing with license restriction clearly envisages that it is not a perpetual license and customer has no right to retain or use the programme after termination of

applicable subscription period for any reason. The customers were not permitted any access or use of the programmes for any users other than the user's license paid for by the customer. Though the customer is entitled to make reasonable number of copies of the programme for inactive back up; disaster recovery; failover or archival purposes, however, it has no right to rent; lease; assign; transfer; sub-license; display or otherwise distribute or make the programme available to any third party. The customer is further prohibited to modify; disassemble; decompile or otherwise reverse engineer the programme nor can permit any third party to do so. In other words, the assessee has all the rights not only on the copyright in the software, but also debars its customers in several ways as highlighted above.

- Thus, the payment, which has been received by the assessee, is purely for copyrighted software product as against payment for giving any right to use any copyright in the software. The customers have a very limited right to access copyright software for its own business purpose and does not acquire any kind of right to exploit the copyright in the software. These facts are uncontroverted in the impugned order. Now on these facts, whether such action of granting of license to customers can be reckoned as 'royalty' within the scope of article 12(3) of the India-USA DTAA.
- The main emphasis is on use of or the right to use of any copyright of a literary; artistic; or scientific work, which indicates that an exclusive right to use any copyright in an article (which is in the nature of literary; artistic; or scientific work) has to be given. Since the copyright has not been defined or explained in the treaty, therefore, meaning assigned of the copyright under the domestic law, *i.e.* Copyright Act, 1957 can be referred for understanding the true purport and meaning of copyright.
- The definition of 'copyright' in section 14 is an exhaustive definition and it refers to bundle of rights. In respect of computer programming, which is relevant for the issue under consideration, the copyright mainly consists of rights as given in clause (b), that is, to do any of the act specified in clause (a) from (i) to (vii) as reproduced above. Thus, to fall within the realm and ambit of right to use copyright the computer software programme, various rights therein must be given and if the said rights are not given then, there is no copyright in the computer programme or software. Here in this case none of these conditions or such rights are flowing from the *Master License and Subscription Agreement* to the customers, *albeit* the agreement illustrates lot of restrictive covenants and gives very limited right to the customers for self-use at enterprise level.
- Section 52 of the Copyright Act also makes it amply clear that private use including research or to utilize a computer programme for the purposes for which it was supplied or make back-up copies is purely for the temporary protection against loss; destruction or damage in order to utilize the computer programme for the purpose for which it was supplied. This doesn't enlarges the scope so as to reckon it as giving any copyright. Hence under the Copyright Act, no use or right to use of copyright has been given by the assessee to its customers in terms of its licensing agreement.
- The issue whether consideration received for granting of license to use copyrighted software for licensee's own business and whether can it be brought to tax as 'royalty' under article 12(3) of India-USA DTAA, is no longer *resintegra*.

- The revenue had tried to canvass a point that in the Supplement Agreement there is a stipulation of unlimited number of users and unlimited size of managed code base; and also access has been granted to all companies within Robert Bosch group. It has also referred to corresponding managed code base as given in the *Master License and Subscription Agreement*. The managed code base has been defined in the agreement as code base owned or controlled by the customer, *i.e.*, input into a programme by customer and managed using that programme over the course of the applicable subscription period. Since the software is to be run at an enterprise level, managed code base size has to be kept unlimited but within the organization and is not meant to the outsiders.
- It has been clarified by the assessee that software sold by the assessee is used as antivirus by the customers for entire organization and access to such software is IP based and is given to the server installed at the customer's place, so that it can be used by the customer and all its employees. It is not the case of the revenue also that software is being commercially exploited by the customers *albeit* it has to be used only for private use within the organization. The other reference of the meaning of 'Supplement' as highlighted by the revenue, it is seen that 'supplement' means an order form, in the form and format furnished by Black Duck, indicating Customer's desire to license a Programme or acquire services, pursuant to the terms of this agreement. This very clause enumerates that supplement is an order form in a standard format issued to its customers. It is a standard format which is used by the assessee to serve its customers. The customer may have entered into an agreement with various Robert Bosch entities but the 'Supplement' which was referred to by revenue is only for the software sold to Robert Bosch engineering India. The Customer's name in the Supplement is shown as Robert Bosch engineering India and the software sold is 'Black Duck Protex' and access is given on one server of Robert Bosch India only.
- This only means that an IP access is given to the Robert Bosch India at an enterprise level. All the employees in India can only use the antivirus software from the said server. If such an access to unlimited users, *i.e.*, employees within the origination is not provided, then the secure software programme would be redundant and would not serve the purpose. The table on the Supplement form clearly enunciates that the supplement would be applicable for a limited subscription period. Location of servers is mentioned, like India, Germany, United States, and Singapore. It was clarified by the assessee that the standard format of the order form is used but a different agreement is entered within such entities in various locations. But as the table enunciates, the software is sold to be run only on one server in India.
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Thus, the reference made by the revenue to these clauses and also supplement will not change the basic fact that what has been sold by the assessee is purely a copyrighted software given for use of the customers without transferring any kind of right to use and with lot of restrictions as given in the agreement. Thus, the assessee rightly pointed out that supplementary agreement does not enlarge the scope of the main license agreement but only envisages providing access to all the persons within the enterprise.

- Thus, in view of the discussion made above, it is held that the payment received by the assessee does not fall within the ambit of 'royalty' under article 12(3) of India-USA DTAA and hence, the same cannot be taxed under the terms of India USA Treaty. If the receipts cannot be taxed under the treaty as royalty, then it cannot be taxed under the domestic law under section 9(1)(vi).
- In the result, appeal of the assessee is allowed.

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- The main emphasis is on use of or the right to use of any copyright of a literary; artistic; or scientific work, which indicates that an exclusive right to use any copyright in an article (which is in the nature of literary; artistic; or scientific work) has to be given. Since the copyright has not been defined or explained in the treaty, therefore, meaning assigned of the copyright under the domestic law, *i.e.* Copyright Act, 1957 can be referred for understanding the true purport and meaning of copyright.
- The definition of 'copyright' in section 14 is an exhaustive definition and it refers to bundle of rights. In respect of computer programming, which is relevant for the issue under consideration, the copyright mainly consists of rights as given in clause (b), that is, to do any of the act specified in clause (a) from (i) to (vii) as reproduced above. Thus, to fall within the realm and ambit of right to use copyright the computer software programme, various rights therein must be given and if the said rights are not given then, there is no copyright in the computer programme or software. Here in this case none of these conditions or such rights are flowing from the *Master License and Subscription Agreement* to the customers, *albeit* the agreement illustrates lot of restrictive covenants and gives very limited right to the customers for self-use at enterprise level.
- Section 52 of the Copyright Act also makes it amply clear that private use including research or to utilize a computer programme for the purposes for which it was supplied or make back-up copies is purely for the temporary protection against loss; destruction or damage in order to utilize the computer programme for the purpose for which it was supplied. This doesn't enlarges the scope so as to reckon it as giving any copyright. Hence under the Copyright Act, no use or right to use of copyright has been given by the assessee to its customers in terms of its licensing agreement.
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- Thus, in view of the discussion made above, it is held that the payment received by the assessee does not fall within the ambit of 'royalty' under article 12(3) of India-USA DTAA and hence, the same cannot be taxed under the terms of India USA Treaty. If the receipts cannot be taxed under the treaty as royalty, then it cannot be taxed under the domestic law under section 9(1)(vi).
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Thus, the reference made by the revenue to these clauses and also supplement will not change the basic fact that what has been sold by the assessee is purely a copyrighted software given for use of the customers without transferring any kind of right to use and with lot of restrictions as given in the agreement. Thus, the assessee rightly pointed out that supplementary agreement does not enlarge the scope of the main license agreement but only envisages providing access to all the persons within the enterprise.

- Thus, in view of the discussion made above, it is held that the payment received by the assessee does not fall within the ambit of 'royalty' under article 12(3) of India-USA DTAA and hence, the same cannot be taxed under the terms of India USA Treaty. If the receipts cannot be taxed under the treaty as royalty, then it cannot be taxed under the domestic law under section 9(1)(vi).
- In the result, appeal of the assessee is allowed.

Sum paid to NR for grant of software license for specific period couldn't be held as royalty

Summary – The Delhi ITAT in a recent case of Black Duck Software Inc., (the Assessee) held that where assessee, a US based company, granted a non-exclusive, non-transferable software license to Indian customer for a specific time period, since copyright in said software programme was retained by assessee, payment received by it was not liable to tax in India as royalty

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- The assessee-company was incorporated under the laws of USA. It was provider of products and services for automating the management, compliance and secure use of open source software in multi source development at enterprise scale. During the year under consideration, the assessee had sold software under a 'Master License and Subscription Agreement' with two entities in India, namely, (a) Infosys Limited; and (b) Robert Bosch Engineering.
- In course of assessment, the Assessing Officer concluded that receipts of assessee pertaining to licensing of software were taxable as royalty under section 9(1)(vi). Thereafter, he proceeded to hold that even under the treaty, the payment received by the assessee was in the nature of royalty within the terms of article 12(3) of India-USA DTAA.
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- The sole issue involved in this appeal is, whether the payment received by the assessee from supply of software, is taxable in India as royalty in India or not; either under section 9(1)(vi); or under article 12(3) of India-USA DTAA; or both. Before deciding the issue, at the outset it is quite clear that the revenue has not taken any stand that if it is not taxed as royalty, then can it be taxed as business income in India and if it is business income then whether there is any PE of assessee in India. This is inferred from the fact that there is no rebuttal of assessee's contention that it does not have any permanent establishment in India, therefore, receipts from sale of software will not be taxed as business income in terms of article 7 of India-USA DTAA. At the outset, it is an admitted fact that the assessee-company is tax resident of USA and has sought shelter under India-USA DTAA, therefore, receipts in question has to be seen from the angle, whether such receipts can be held to be taxable, especially as royalty in terms and scope of para (3) of article 12.
- From a perusal of the scope of master license agreement, it is quite apparent that the assessee provided to its customers a non-exclusive; non-transferable license within the applicable subscription period. The clause dealing with license restriction clearly envisages that it is not a perpetual license and customer has no right to retain or use the programme after termination of

applicable subscription period for any reason. The customers were not permitted any access or use of the programmes for any users other than the user's license paid for by the customer. Though the customer is entitled to make reasonable number of copies of the programme for inactive back up; disaster recovery; failover or archival purposes, however, it has no right to rent; lease; assign; transfer; sub-license; display or otherwise distribute or make the programme available to any third party. The customer is further prohibited to modify; disassemble; decompile or otherwise reverse engineer the programme nor can permit any third party to do so. In other words, the assessee has all the rights not only on the copyright in the software, but also debars its customers in several ways as highlighted above.

- Thus, the payment, which has been received by the assessee, is purely for copyrighted software product as against payment for giving any right to use any copyright in the software. The customers have a very limited right to access copyright software for its own business purpose and does not acquire any kind of right to exploit the copyright in the software. These facts are uncontroverted in the impugned order. Now on these facts, whether such action of granting of license to customers can be reckoned as 'royalty' within the scope of article 12(3) of the India-USA DTAA.
- The main emphasis is on use of or the right to use of any copyright of a literary; artistic; or scientific work, which indicates that an exclusive right to use any copyright in an article (which is in the nature of literary; artistic; or scientific work) has to be given. Since the copyright has not been defined or explained in the treaty, therefore, meaning assigned of the copyright under the domestic law, *i.e.* Copyright Act, 1957 can be referred for understanding the true purport and meaning of copyright.
- The definition of 'copyright' in section 14 is an exhaustive definition and it refers to bundle of rights. In respect of computer programming, which is relevant for the issue under consideration, the copyright mainly consists of rights as given in clause (b), that is, to do any of the act specified in clause (a) from (i) to (vii) as reproduced above. Thus, to fall within the realm and ambit of right to use copyright the computer software programme, various rights therein must be given and if the said rights are not given then, there is no copyright in the computer programme or software. Here in this case none of these conditions or such rights are flowing from the *Master License and Subscription Agreement* to the customers, *albeit* the agreement illustrates lot of restrictive covenants and gives very limited right to the customers for self-use at enterprise level.
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- The main emphasis is on use of or the right to use of any copyright of a literary; artistic; or scientific work, which indicates that an exclusive right to use any copyright in an article (which is in the nature of literary; artistic; or scientific work) has to be given. Since the copyright has not been defined or explained in the treaty, therefore, meaning assigned of the copyright under the domestic law, *i.e.* Copyright Act, 1957 can be referred for understanding the true purport and meaning of copyright.
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Summary – The Delhi ITAT in a recent case of Black Duck Software Inc., (the Assessee) held that where assessee, a US based company, granted a non-exclusive, non-transferable software license to Indian customer for a specific time period, since copyright in said software programme was retained by assessee, payment received by it was not liable to tax in India as royalty

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- The assessee-company was incorporated under the laws of USA. It was provider of products and services for automating the management, compliance and secure use of open source software in multi source development at enterprise scale. During the year under consideration, the assessee had sold software under a 'Master License and Subscription Agreement' with two entities in India, namely, (a) Infosys Limited; and (b) Robert Bosch Engineering.
- In course of assessment, the Assessing Officer concluded that receipts of assessee pertaining to licensing of software were taxable as royalty under section 9(1)(vi). Thereafter, he proceeded to hold that even under the treaty, the payment received by the assessee was in the nature of royalty within the terms of article 12(3) of India-USA DTAA.
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- The sole issue involved in this appeal is, whether the payment received by the assessee from supply of software, is taxable in India as royalty in India or not; either under section 9(1)(vi); or under article 12(3) of India-USA DTAA; or both. Before deciding the issue, at the outset it is quite clear that the revenue has not taken any stand that if it is not taxed as royalty, then can it be taxed as business income in India and if it is business income then whether there is any PE of assessee in India. This is inferred from the fact that there is no rebuttal of assessee's contention that it does not have any permanent establishment in India, therefore, receipts from sale of software will not be taxed as business income in terms of article 7 of India-USA DTAA. At the outset, it is an admitted fact that the assessee-company is tax resident of USA and has sought shelter under India-USA DTAA, therefore, receipts in question has to be seen from the angle, whether such receipts can be held to be taxable, especially as royalty in terms and scope of para (3) of article 12.
- From a perusal of the scope of master license agreement, it is quite apparent that the assessee provided to its customers a non-exclusive; non-transferable license within the applicable subscription period. The clause dealing with license restriction clearly envisages that it is not a perpetual license and customer has no right to retain or use the programme after termination of

applicable subscription period for any reason. The customers were not permitted any access or use of the programmes for any users other than the user's license paid for by the customer. Though the customer is entitled to make reasonable number of copies of the programme for inactive back up; disaster recovery; failover or archival purposes, however, it has no right to rent; lease; assign; transfer; sub-license; display or otherwise distribute or make the programme available to any third party. The customer is further prohibited to modify; disassemble; decompile or otherwise reverse engineer the programme nor can permit any third party to do so. In other words, the assessee has all the rights not only on the copyright in the software, but also debars its customers in several ways as highlighted above.

- Thus, the payment, which has been received by the assessee, is purely for copyrighted software product as against payment for giving any right to use any copyright in the software. The customers have a very limited right to access copyright software for its own business purpose and does not acquire any kind of right to exploit the copyright in the software. These facts are uncontroverted in the impugned order. Now on these facts, whether such action of granting of license to customers can be reckoned as 'royalty' within the scope of article 12(3) of the India-USA DTAA.
- The main emphasis is on use of or the right to use of any copyright of a literary; artistic; or scientific work, which indicates that an exclusive right to use any copyright in an article (which is in the nature of literary; artistic; or scientific work) has to be given. Since the copyright has not been defined or explained in the treaty, therefore, meaning assigned of the copyright under the domestic law, *i.e.* Copyright Act, 1957 can be referred for understanding the true purport and meaning of copyright.
- The definition of 'copyright' in section 14 is an exhaustive definition and it refers to bundle of rights. In respect of computer programming, which is relevant for the issue under consideration, the copyright mainly consists of rights as given in clause (b), that is, to do any of the act specified in clause (a) from (i) to (vii) as reproduced above. Thus, to fall within the realm and ambit of right to use copyright the computer software programme, various rights therein must be given and if the said rights are not given then, there is no copyright in the computer programme or software. Here in this case none of these conditions or such rights are flowing from the *Master License and Subscription Agreement* to the customers, *albeit* the agreement illustrates lot of restrictive covenants and gives very limited right to the customers for self-use at enterprise level.
- Section 52 of the Copyright Act also makes it amply clear that private use including research or to utilize a computer programme for the purposes for which it was supplied or make back-up copies is purely for the temporary protection against loss; destruction or damage in order to utilize the computer programme for the purpose for which it was supplied. This doesn't enlarges the scope so as to reckon it as giving any copyright. Hence under the Copyright Act, no use or right to use of copyright has been given by the assessee to its customers in terms of its licensing agreement.
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- The revenue had tried to canvass a point that in the Supplement Agreement there is a stipulation of unlimited number of users and unlimited size of managed code base; and also access has been granted to all companies within Robert Bosch group. It has also referred to corresponding managed code base as given in the *Master License and Subscription Agreement*. The managed code base has been defined in the agreement as code base owned or controlled by the customer, *i.e.*, input into a programme by customer and managed using that programme over the course of the applicable subscription period. Since the software is to be run at an enterprise level, managed code base size has to be kept unlimited but within the organization and is not meant to the outsiders.
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Thus, the reference made by the revenue to these clauses and also supplement will not change the basic fact that what has been sold by the assessee is purely a copyrighted software given for use of the customers without transferring any kind of right to use and with lot of restrictions as given in the agreement. Thus, the assessee rightly pointed out that supplementary agreement does not enlarge the scope of the main license agreement but only envisages providing access to all the persons within the enterprise.

- Thus, in view of the discussion made above, it is held that the payment received by the assessee does not fall within the ambit of 'royalty' under article 12(3) of India-USA DTAA and hence, the same cannot be taxed under the terms of India USA Treaty. If the receipts cannot be taxed under the treaty as royalty, then it cannot be taxed under the domestic law under section 9(1)(vi).
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- Section 52 of the Copyright Act also makes it amply clear that private use including research or to utilize a computer programme for the purposes for which it was supplied or make back-up copies is purely for the temporary protection against loss; destruction or damage in order to utilize the computer programme for the purpose for which it was supplied. This doesn't enlarges the scope so as to reckon it as giving any copyright. Hence under the Copyright Act, no use or right to use of copyright has been given by the assessee to its customers in terms of its licensing agreement.
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- The revenue had tried to canvass a point that in the Supplement Agreement there is a stipulation of unlimited number of users and unlimited size of managed code base; and also access has been granted to all companies within Robert Bosch group. It has also referred to corresponding managed code base as given in the *Master License and Subscription Agreement*. The managed code base has been defined in the agreement as code base owned or controlled by the customer, *i.e.*, input into a programme by customer and managed using that programme over the course of the applicable subscription period. Since the software is to be run at an enterprise level, managed code base size has to be kept unlimited but within the organization and is not meant to the outsiders.
- It has been clarified by the assessee that software sold by the assessee is used as antivirus by the customers for entire organization and access to such software is IP based and is given to the server installed at the customer's place, so that it can be used by the customer and all its employees. It is not the case of the revenue also that software is being commercially exploited by the customers *albeit* it has to be used only for private use within the organization. The other reference of the meaning of 'Supplement' as highlighted by the revenue, it is seen that 'supplement' means an order form, in the form and format furnished by Black Duck, indicating Customer's desire to license a Programme or acquire services, pursuant to the terms of this agreement. This very clause enumerates that supplement is an order form in a standard format issued to its customers. It is a standard format which is used by the assessee to serve its customers. The customer may have entered into an agreement with various Robert Bosch entities but the 'Supplement' which was referred to by revenue is only for the software sold to Robert Bosch engineering India. The Customer's name in the Supplement is shown as Robert Bosch engineering India and the software sold is 'Black Duck Protex' and access is given on one server of Robert Bosch India only.
- This only means that an IP access is given to the Robert Bosch India at an enterprise level. All the employees in India can only use the antivirus software from the said server. If such an access to unlimited users, *i.e.*, employees within the origination is not provided, then the secure software programme would be redundant and would not serve the purpose. The table on the Supplement form clearly enunciates that the supplement would be applicable for a limited subscription period. Location of servers is mentioned, like India, Germany, United States, and Singapore. It was clarified by the assessee that the standard format of the order form is used but a different agreement is entered within such entities in various locations. But as the table enunciates, the software is sold to be run only on one server in India.
- Hence, the argument of the revenue that access is granted to all servers is not correct. Software is sold to be used only on one server in India and not in other jurisdictions. Further, assessee clarified that the licensing agreement uses the word 'applicable supplement' which suggests that supplement would be different for different customers depending upon various customers. Though the order form is standard, but they may be different in supplement agreement so as to number of users, manage code, size base for different customers. It is only with a view to provide flexibility to customers, the clause subscription to overnight the Master Licensing agreement have been inserted.

Thus, the reference made by the revenue to these clauses and also supplement will not change the basic fact that what has been sold by the assessee is purely a copyrighted software given for use of the customers without transferring any kind of right to use and with lot of restrictions as given in the agreement. Thus, the assessee rightly pointed out that supplementary agreement does not enlarge the scope of the main license agreement but only envisages providing access to all the persons within the enterprise.

- Thus, in view of the discussion made above, it is held that the payment received by the assessee does not fall within the ambit of 'royalty' under article 12(3) of India-USA DTAA and hence, the same cannot be taxed under the terms of India USA Treaty. If the receipts cannot be taxed under the treaty as royalty, then it cannot be taxed under the domestic law under section 9(1)(vi).
- In the result, appeal of the assessee is allowed.

Sum paid to NR for grant of software license for specific period couldn't be held as royalty

Summary – The Delhi ITAT in a recent case of Black Duck Software Inc., (the Assessee) held that where assessee, a US based company, granted a non-exclusive, non-transferable software license to Indian customer for a specific time period, since copyright in said software programme was retained by assessee, payment received by it was not liable to tax in India as royalty

Facts

- The assessee-company was incorporated under the laws of USA. It was provider of products and services for automating the management, compliance and secure use of open source software in multi source development at enterprise scale. During the year under consideration, the assessee had sold software under a 'Master License and Subscription Agreement' with two entities in India, namely, (a) Infosys Limited; and (b) Robert Bosch Engineering.
- In course of assessment, the Assessing Officer concluded that receipts of assessee pertaining to licensing of software were taxable as royalty under section 9(1)(vi). Thereafter, he proceeded to hold that even under the treaty, the payment received by the assessee was in the nature of royalty within the terms of article 12(3) of India-USA DTAA.
- The DRP upheld the order of Assessing Officer.
- On appeal:

Held

- The sole issue involved in this appeal is, whether the payment received by the assessee from supply of software, is taxable in India as royalty in India or not; either under section 9(1)(vi); or under article 12(3) of India-USA DTAA; or both. Before deciding the issue, at the outset it is quite clear that the revenue has not taken any stand that if it is not taxed as royalty, then can it be taxed as business income in India and if it is business income then whether there is any PE of assessee in India. This is inferred from the fact that there is no rebuttal of assessee's contention that it does not have any permanent establishment in India, therefore, receipts from sale of software will not be taxed as business income in terms of article 7 of India-USA DTAA. At the outset, it is an admitted fact that the assessee-company is tax resident of USA and has sought shelter under India-USA DTAA, therefore, receipts in question has to be seen from the angle, whether such receipts can be held to be taxable, especially as royalty in terms and scope of para (3) of article 12.
- From a perusal of the scope of master license agreement, it is quite apparent that the assessee provided to its customers a non-exclusive; non-transferable license within the applicable subscription period. The clause dealing with license restriction clearly envisages that it is not a perpetual license and customer has no right to retain or use the programme after termination of

applicable subscription period for any reason. The customers were not permitted any access or use of the programmes for any users other than the user's license paid for by the customer. Though the customer is entitled to make reasonable number of copies of the programme for inactive back up; disaster recovery; failover or archival purposes, however, it has no right to rent; lease; assign; transfer; sub-license; display or otherwise distribute or make the programme available to any third party. The customer is further prohibited to modify; disassemble; decompile or otherwise reverse engineer the programme nor can permit any third party to do so. In other words, the assessee has all the rights not only on the copyright in the software, but also debars its customers in several ways as highlighted above.

- Thus, the payment, which has been received by the assessee, is purely for copyrighted software product as against payment for giving any right to use any copyright in the software. The customers have a very limited right to access copyright software for its own business purpose and does not acquire any kind of right to exploit the copyright in the software. These facts are uncontroverted in the impugned order. Now on these facts, whether such action of granting of license to customers can be reckoned as 'royalty' within the scope of article 12(3) of the India-USA DTAA.
- The main emphasis is on use of or the right to use of any copyright of a literary; artistic; or scientific work, which indicates that an exclusive right to use any copyright in an article (which is in the nature of literary; artistic; or scientific work) has to be given. Since the copyright has not been defined or explained in the treaty, therefore, meaning assigned of the copyright under the domestic law, *i.e.* Copyright Act, 1957 can be referred for understanding the true purport and meaning of copyright.
- The definition of 'copyright' in section 14 is an exhaustive definition and it refers to bundle of rights. In respect of computer programming, which is relevant for the issue under consideration, the copyright mainly consists of rights as given in clause (b), that is, to do any of the act specified in clause (a) from (i) to (vii) as reproduced above. Thus, to fall within the realm and ambit of right to use copyright the computer software programme, various rights therein must be given and if the said rights are not given then, there is no copyright in the computer programme or software. Here in this case none of these conditions or such rights are flowing from the *Master License and Subscription Agreement* to the customers, *albeit* the agreement illustrates lot of restrictive covenants and gives very limited right to the customers for self-use at enterprise level.
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- Thus, in view of the discussion made above, it is held that the payment received by the assessee does not fall within the ambit of 'royalty' under article 12(3) of India-USA DTAA and hence, the same cannot be taxed under the terms of India USA Treaty. If the receipts cannot be taxed under the treaty as royalty, then it cannot be taxed under the domestic law under section 9(1)(vi).
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- Thus, the payment, which has been received by the assessee, is purely for copyrighted software product as against payment for giving any right to use any copyright in the software. The customers have a very limited right to access copyright software for its own business purpose and does not acquire any kind of right to exploit the copyright in the software. These facts are uncontroverted in the impugned order. Now on these facts, whether such action of granting of license to customers can be reckoned as 'royalty' within the scope of article 12(3) of the India-USA DTAA.
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