

**IN THE INCOME TAX APPELLATE TRIBUNAL
'C' BENCH : BANGALORE**

**BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER**

IT(IT)A Nos. 336, 338 & 339/Bang/2023
Assessment Years : 2009-10, 2011-12 & 2012-13

M/s. Al Telekom Austria Aktiengesellschaft, HB3, ACC Taxes Telekom, Austria Building, Lassallestrasse, 9, Leopoldstadt, Wien 1020, Austria. ZIP Code – 1020. PAN: AAQCA6492D	Vs.	The Deputy Commissioner of Income Tax, (International Taxation), Circle – 2(2), Bangalore.
APPELLANT		RESPONDENT

Assessee by	:	Shri Siddhesh Chaugule, Advocate & Shri Khyati Khatri, Advocate
Revenue by	:	Shri Sathyasai Rath, CIT (DR)

Date of Hearing	:	10-08-2023
Date of Pronouncement	:	25-08-2023

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present appeals arises out of the orders passed by the Ld.CIT(A)-12, Bangalore dated 28.02.2022 for A.Y. 2009-10, dated 16.03.2023 for A.Y. 2011-12 and dated 21.03.2023 for A.Y. 2012-13.

2. It is submitted that, the issues raised by the assessee in all the three appeals are common and on identical facts. It is submitted that the observations of the Ld.CIT(A) as well as the Ld.AO are identical and similar for all the years under consideration. Accordingly, all the appeals are being disposed of by way of common order.

For the sake of convenience, grounds raised by the assessee for A.Y. 2009-10 are reproduced as under:

"Al Telekom Austria Aktiengesellschaft ('the Appellant' or 'Al- Telekom') craves leave to prefer appeal against order dated 28 February 2023 passed by the Commissioner of Income-tax (Appeals) -- 12, Bangalore (hereinafter referred to as the 'learned CIT(A)') under Section 250 of the Income-tax Act, 1961 ('the Act') and in respect of assessment order dated 26 December 2017 (received on 5 January 2018) passed by the Deputy Commissioner of Income Tax (International Taxation) - Circle 2(1), Bangalore [hereinafter referred to as the 'learned AO'] under section 147 read with section 144 of the Act, on the grounds as set out herein.

The following grounds are independent of, and without prejudice to, one another:

1. General

1.1. On the facts, and in the circumstances of the case, and in law, the learned CIT(A) has erred in upholding the action of learned AO in determining the total income of the Appellant at Rs. 4,49,80,244 by making adjustment in respect of which specific ground has been raised.

1.2. On the facts, and in the circumstances of the case, and in law, the learned AO has erred in raising a demand of Rs. 1,70,47,510 (Rs. 89,51,069 as per order under section 154 of the Act) on the Appellant.

1.3. On the facts, and in the circumstances of the case, and in law, the learned CIT(A) has erred in erroneously recording the date of order as 28.02.2022 instead of the correct date i.e. 28.02.2023.

2. Non - Compliance under section 144C of the Act during assessment proceedings

2.1. On the facts, and in the circumstances of the case, and in law, the learned CIT(A) has erred in upholding the

action of the learned AO of not issuing draft assessment order under section 144C(1) of the Act inspite of the appellant being an 'eligible assessee' as per the mandate of section 144C(15) of the Act. Accordingly, the entire reassessment is null and void and deserves to be quashed.

3. Assumption of Jurisdiction under section 147 and 148 of the Act

3.1. On the facts, and in the circumstances of the case, and in the law, the learned CIT(A) has erred in upholding the action of learned AO in assuming jurisdiction to reassess under section 147 of the Act by issuing notices under section 148 of the Act without specifying the sanction/approval from higher authorities as mandated under section 151 of the Act.

3.2. On the facts, and in the circumstances of the case, and in the law, the learned CIT(A) has erred in upholding the action of learned AO in assuming jurisdiction when the entire copy of reasons recorded for reopening were not provided within 6 years from the end of relevant Assessment Year. Accordingly, the reassessment proceedings are bad in law and ought to be quashed.

3.3. On the facts, and in the circumstances of the case, and in law, the learned CIT(A) ought to have held the order passed by the learned AO under 147 read with section 144 of the Act as illegal, null and void and ought to be quashed.

4. Taxability of Voice Interconnect Services as Royalty

4.1. On the facts, and in the circumstances of the case, and in law, the learned CIT(A) has erred in upholding the action of learned AO in treating the payments received by the Appellant for provision of Voice Interconnect Services as royalty under section 9(1)(vi) of the Act.

4.2. On the facts, and in the circumstances of the case, and in law, the learned CIT(A) has erred in upholding the action of learned AO in treating the payments received by the Appellant for provision of Voice Interconnect Services as royalty under India-Austria Tax Treaty.

4.3. On the facts, and in the circumstances of the case, and in law, the learned CIT(A) and the learned AO have erred in treating the Voice Interconnect Services as taxable in India.

5. Levy of interest under section 234A of the Act

5.1. On the facts, and in the circumstances of the case, and in law, the learned CIT(A) has erred in upholding the

action of the learned AO in levying interest under section 234A of the Act.

5.2. On the facts, and in the circumstances of the case, and in law, the learned CIT(A) has erred in upholding the action of learned AO in levying interest under section 234A for a period beyond two years where it is not possible for the appellant to file a valid return beyond the due date prescribed under section 139 of the Act.

6. Levy of Interest under section 234B and 234C of the Act

6.1. On the facts, and in the circumstances of the case, and in law, the learned CIT(A) has erred in upholding the action of learned AO in levying interest under section 234B and 234C of the Act, without considering the fact that the Appellant being a non-resident is not required to pay advance tax as its entire income is subject to tax withholding under the Act.

6.2. On the facts, and in the circumstances of the case, and in law, the learned CIT(A) has erred in not considering the rectification order wherein the interest under section 234B and 234C of the Act has been deleted by the learned AO.

7. Initiation of penalty proceedings under section 271(1)(b) and 271(1)(c) of the Act

7.1. On the facts, and in the circumstances of the case, and in law, the learned CIT(A) has erred in dismissing the ground of penalty initiation by holding that the ground of appeal is premature.

7.2. On the facts, and in the circumstances of the case, and in law, the learned CIT(A) has erred in erroneously mentioning section under section 271B instead of 271(1)(b) of the Act.

7.3. On the facts, and in the circumstances of the case, and in law, the learned CIT(A) has erred in upholding the action of the learned AO for initiating the penalty proceedings under section 271(1)(b) and 271(1)(c) of the Act, when no such penalty is leviable.

The Appellant reserves the right to add, amend, alter or vary all or any of the above grounds of appeal as they or their representative may think fit.”

2. Brief facts of the case are as under:

The assessee company M/s. A1 Telekom Austria TA AG is a non-resident telecommunications operator and is engaged in the business of telecommunication services, interconnect services,

internet services etc. and a tax resident of Austria. Proceedings u/ s 201 were initiated in the case of M/s Vodafone South Limited (VSL), which was earlier known as Vodafone Essar South Limited (VESL), for the F.Ys.2007-08 to 2011-12 in respect of non-deduction of tax at source on payments made to Non-resident Telecom Operators (NTOs) for provision of bandwidth capacity and for provision of interconnect services. The said charges were considered as Royalty/FTS both as per the Act and the respective DTAAAs.

2.1 During the course of the section 201 proceedings, it was found that VSL had paid certain amounts for assessment years under consideration to the present assessee towards interconnect utility charges. The assessee had neither paid taxes on the sums received by it from VSL nor had the payer made the TDS. No return of income was filed by the assessee for A.Ys. 2009-10, 2011-12 & 2012-13. The Ld.AO formed the belief that the sum received by the assessee for years under consideration was chargeable to tax, and escaped assessment. He therefore issued a notice u/s 148 of the Act to the assessee.

2.2 The assessee did not respond to the aforesaid notice u/s 148 nor to the notices u/s 129 r.w.s 142(1). Subsequently, a show-cause letter was issued by the Ld.AO, whereby the assessee was asked to show cause as to why the sum received by it from VSL during relevant assessment years under consideration towards 'interconnect charges' should not be taxed in its hands, as per the provisions of the Act and the relevant DTAA.

2.3 The assessee did not respond to the show-cause letter for A.Y. 2009-10. Since the assessee had not responded to any of

the notices/ letters issued to it, the AO concluded the assessment ex-parte by bringing to tax the amount received by assessee as Inter-connect utility charges as FTS/Royalty.

In respect of A.Ys. 2011-12 and 2012-13, the assessee had responded to the statutory notices and necessary communications as required u/s. 144C of the Ld.AO to pass the final assessment order.

Aggrieved by the impugned assessment orders, the assessee filed appeals before the Ld.CIT(A), for the relevant assessment years under consideration.

Before the Ld.CIT(A), assessee filed written submissions, reiterating the submissions made in the rejoinder (supra). I have given careful consideration to the assessee's submissions. The case laws relied upon by the assessee in support of the contention that the interconnect charges do not fall within the ambit of FTS owing to the absence of human intervention in the process, are also applicable to the facts of the assessee's case. These include the decision of the *Hon'ble Karnataka High Court in the case of CIT vs Vodafone South Limited (2016) 72 taxmann.com 347 (Karnataka)*. In view of the same, it is held that the interconnect charges cannot be brought to tax as FTS.

The Ld.CIT(A) then proceeded on analysing whether the transaction between assessee and the Indian customers would fall as royalty as per the provisions of section 9(1)(vi) of the act and also under DTAA.

6.5.4 However, the process of providing interconnect services, when examined in the light of the provisions of section 9(1)(vi) of the Act and the India-Austria treaty, would fall within the definition of 'process', the payment for which constitutes royalty. In order for interconnection to complete the ILD calls, the network operator must have access to the processes of the other network

operator offering the interconnect services. The term 'process' has been defined in Explanation 6 to section 9(1)(vi) of the Act as follows:

Explanation 6.—For the removal of doubts, it is hereby clarified that the expression "process" includes and shall be deemed to have always included transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal), cable, optic fibre or by any other similar technology, whether or not such process is secret;

Explanation 5 to section 9(1)(vi) has also clarified that the definition of royalty would also cover payments for the use of any right, property or information, whether or not such right, property or information is located in India.

6.5.6 In addition to being taxable under the Act, the payment received by the appellant from VSL would also fall within the definition of 'royalty' as given in Article 12 of the India-Austria DTAA, reproduced below:

ARTICLE 12 ROYALTIES AND FEES FOR TECHNICAL SERVICES

1. Royalties and 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 beneficial owner of the royalties and fees for technical services is a resident of the other Contracting State, the tax so charged shall not exceed 10 per cent of the gross amount of the royalties and fees for technical services.
3. 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 used 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, or for information concerning industrial, commercial or scientific experience.
4. The term "fees for technical services" as used in this Article means payments of any amount to any person other than payments to an employee of a person making payments, in consideration for the services of a managerial, technical or consultancy nature, including the provision of services of technical or other personnel.
5. 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.

6. Royalties or fees for technical services shall be deemed to arise in a Contracting State when the payer is 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 are borne by such permanent establishment or, fixed base, then 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.

7. 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 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.

The process of interconnection has been described in detail by the AO in the remand report (supra). A reading of the above Article favours the interpretation that the interconnect services provided by the appellant to VSL falls within the definition of 'process' as given in paragraph 3 of Article 12 of the treaty.

5.6.7 The issue of whether interconnect charges constitute royalty in the hands of the foreign telecom operator has been extensively discussed in the order of the Bangalore ITAT in the case of Vodafone South Limited for the assessment years 2008-09 to 2012-13, which period includes the assessment year involved in the present appeal. In the aforesaid decision, *Vodafone South Limited vs DDIT (International Taxation) Circle (1)/1 Bangalore 53 taxmann.com 441*, the Hon'ble ITAT, after an extensive technical discussion on what constitutes interconnect charges and its taxability had concluded that the interconnect charges paid by VSL to NTOs like the appellant would constitute royalty for accessing the process of the NTOs. The headnotes of the aforesaid decision are extracted below:

Whether IUC payments qualify as a royalty under clauses a(i) and (iii) of Explanation 2 appended to section 9(1)(vi) read with Explanation 5 & 6.

- The first fold of submissions of the assessee was that there should be a transfer of any right in process by the NTOs in favour of the assessee, only then it would be construed that consideration was paid for acquisition of any process contemplated in the definition of royalty; and that it was not given any control over part of satellite/transponder. So far as this contention is concerned, it appears that section 9(1)(vi) *Explanation 2*, sub-clause (iii), along with *Explanation 5* and 6, nowhere reveals that there should be a transfer. The transfer inherently would also embarrass the possession or control, otherwise it will be half way transfer. No such concept is being suggested either in the definition of royalty under the DTAA or under *Explanation 2* to section 9(1)(vi). It would indicate that in the era of technological advancement, how activity could happen in such a manner where even without having physical possession or control by an assessee directly, he can complete its business activity and process its mechanism merely by getting the access to that process. In that background, conditions for use or right to use would be satisfied even without having a direct control or a physical possession on the activity. Thus, after *Explanation 5* to section 9(1)(vi) it is not necessary that payer should have direct control or physical possession over the right, property or information. [Para 39]
- The next defense put forth by the assessee is that the use or right to use of the process so acquired by the assessee should be a secret process and if it is not secret process, then consideration paid by the assessee would not fall within the ambit of royalty. The Indian Govt., when entered into DTAA, never agreed that it should be a secret process. The intention was that secret formula is a different connotation than "process" which is an independent activity in itself. It is the interpretation provided by the Courts who have made it as a secret process, in order to explain the stand of one of the party to the agreement that its intention was always not to construe the 'process' as secret 'process', *Explanation 6* has been appended with retrospective effect. This Explanation only clarifies the position. After incorporation of *Explanation 5* and 6, there are series of decisions which have distinguished the position of law prior to incorporation of these Explanations.
- One of the contention of the assessee was that retrospective amendment in the Income-tax Act cannot override the provisions of the DTAA and if an assessee is being governed under the DTAA, then such retrospective amendment cannot affect the rights of the assessee. According to it insertion of *Explanation 5 & 6* to section 9(1)(vi) enhance the scope of expression 'royalty' *vis-à-vis* one provided under the DTAA and, thus, the restricted meaning given to the royalty in the DTAA ought to be applied on the payments made by the assessee in the instant case. So far as this contention is concerned, *Explanation 5* and 6 of section 9(1)(vi) do not bring in new concept of chargeability. The consideration paid for use or right to use of process was already chargeable to tax as royalty. The Indian Courts over a period of time have interpreted the meaning of process in such a way which was contrary to the intention of the Indian Govt. when it entered into DTAA. These Explanations are only clarificatory in nature explaining the position of one of the party to the DTAA about the construction of the meaning of expression 'process'. Therefore, there is no force in the contention of the assessee. [Para 40]
- In view of above discussion, consideration paid by the assessee as IUC charges for

alleged inter connect service falls within the ambit of process royalty and element of income was involved. Therefore, the assessee was bound to deduct the TDS on such payment. [Para 42]

Whether consideration paid for capacity transfer can be termed as a 'Royalty' within the meaning of section 9(1)(vi) read with Explanation (2), (5) and (6).

- For the same reason, as given for IUC payments, consideration paid for capacity transfer falls within ambit of royalty under section 9(1)(vi). [Para 43]

Liability under section 195

- The payee was interested for its consideration, net of taxes. The payee has nothing to do with regard to the tax liability on the process given to the assessee for its use or right to use. In case the suppliers, *i.e.*, NTOs were to be made to pay for any of the taxes, then the customer, namely, assessee would pay back USD equivalent to such taxes to the supplier within 30 days after. The supplier would sent a reimbursement claim or an invoice to the customer. It has also been provided that in case of Double Tax Treaty which would provide for a reduced tax rate or tax exemption, the supplier will, upon request from the customer, provide all documentation provided for application of the Treaty. This clause of the agreement suggest, if tax Treaty is applicable which exempt the payment from levy of any taxes or applicability of reduced tax rates, then upon the request of assessee, the supplier would provide all necessary documents contemplating for application of the Treaty on the date of payment. Whether assessee has collected these documents, what was the basis for the assessee to form a belief that consideration paid by it to the NTOs would be covered by the DTAA, no material has been placed on the record by the assessee. It has been pleaded that it has complied with the details under rule 37BB, but those are the schedule proforma required by the IT Rules. Along with those proformas, the assessee has not annexed correspondence with the NTOs or any material indicating that payees are opting for applicability of the DTAA and the payments made to them are either exempt under the DTAA or a reduced rate of tax would be applicable. These materials were to be seen on the date of payment when the accounts of the payee were credited. Had the assessee contacted with the supplier, it could have approached the Assessing Officer under section 195(2) or the payee could approach under section 195(3). The enquiry contemplated under section 195(1) does not contemplate a wider scope equivalent to the one available in the regular assessment proceedings. In the present case, payee has no concern about the withholding of taxes that is the reason they have not opted for applying the DTAA to these payments at the time when payments were made by the assessee. Thus, the assessee failed to demonstrate with sufficient material as to how it harboured a belief that taxes are not to be deducted at source while making the payments. In the enquiry thereafter the Assessing Officer has demonstrated with a reasonable degree that payments involved an element of income under section 9(1)(vi) *Explanation (2), (5) and (6).* [Para 44]

The above decision was rendered in the case of the payer, VSL, and it has unequivocally held that the payment for interconnect charges would amount to

royalty under the provisions of the Act as well as the DTAA. Following the above decision, it is held that the payment received by the appellant from VSL towards interconnect charges would be taxable as royalty under the provisions of the Act as well as the treaty.

The Ld.CIT(A) thus held the payment received by assessee for interconnect charges for the years under consideration would amount to be royalty under the provisions of the act as well as DTAA.

Aggrieved by the observations of the Ld.CIT(A), assessee is in appeal before this *Tribunal*.

At the outset, the Ld.AR submitted that **Ground no. 1** is general in nature and therefore do not require adjudication.

The Ld.AR also submitted that **Ground nos. 2 & 3** raised for A.Ys. 2009-10, 2011-12 and 2012-13 are legal issues which are not pressed by assessee as it has a good case on merit. The Ld.AR submitted that on merits, the decision of *Hon'ble Karnataka High Court* in a group of cases between *M/s. Vodafone Idea Ltd. (Formerly known as M/s. Vodafone Mobile Services Ltd. vs. DDIT(IT) & Ors. in ITA Nos. 160-164/2015 & ITA Nos. 64-66/2020* for A.Ys. 2008-09 to 2015-16 vide order dated 14.07.2023 had decided the issue in favour of assessee.

It is submitted that in all the years under consideration, the payment has been received by the assessee from Vodafone South Ltd. and for A.Ys. 2011-12 to 2012-13, assessee has received payments from Bharti Airtel Ltd. towards the IUC. It is further submitted that entire reassessment proceedings was initiated by the Ld.AO based on the proceedings u/s. 201 of the act in case of *M/s. Vodafone South Ltd.* The Ld.AR thus effectively argued

Ground no. 4 for A.Y. 2009-10 and **Ground nos. 3-4** for A.Ys. 2011-12 and 2012-13 that reads as under:

A.Y. 2009-10:

“4. *Taxability of Voice Interconnect Services as Royalty*
4.1. *On the facts, and in the circumstances of the case, and in law, the learned CIT(A) has erred in upholding the action of learned AO in treating the payments received by the Appellant for provision of Voice Interconnect Services as royalty under section 9(1)(vi) of the Act.*
4.2. *On the facts, and in the circumstances of the case, and in law, the learned CIT(A) has erred in upholding the action of learned AO in treating the payments received by the Appellant for provision of Voice Interconnect Services as royalty under India-Austria Tax Treaty.*
4.3. *On the facts, and in the circumstances of the case, and in law, the learned CIT(A) and the learned AO have erred in treating the Voice Interconnect Services as taxable in India.”*

Ground nos. 3-4 (A.Ys. 2011-12 & 2012-13)

3.1 The Ld.AR submitted that DTAA will prevail over the Income-Tax Act as held by *Hon'ble Karnataka High Court* and it is further submitted that *Explanation 5 and 6* do not override the DTAA between India and Austria. Hence, the subject payment received from Vodafone and Bharti Airtel is not taxable as 'royalty' as per DTAA. It is submitted that *Hon'ble Karnataka High Court* in the case of *Vodafone* reversed the ITAT judgment on this point. The substantial questions of law 2,3 and 4 in the judgment of *Vodafone* by *Hon'ble Karnataka High Court* has answered the question regarding the IUC charges not amounting to 'royalty'.

3.2 Without prejudice to the above, the Ld.AR also submitted that there is No "use of process" or any "use of equipment". Hence, the entire assumption of "process royalty" / "equipment royalty" does not arise in the case of the assessee.

3.3 The Ld.AR submitted that the provision apparently reads "secret formula or process", and hence the process has to be a "secret process" as held by *Hon'ble Delhi Tribunal* in the case of *Bharti Airtel Limited* [2016] 67 taxmann.com 223 (Delhi ITAT).

3.4 Further, it is submitted that the decision of the *Hon'ble Madras High Court* in the case of *Verizon Communications* was been dissented by the *Hon'ble Delhi High Court* in the case of *New Skies* and *Hon'ble Bombay High Court* in the case of *Neo Sports*. It is also submitted that when there exists two conflicting judgments - the one favouring the assessee should prevail as observed in case of *J&P Coats* by the *Coordinate Bench of this Tribunal*.

3.5 Reliance is placed on the following decisions that are referred to hereinabove:

1. *Bharat Sanchar Nigam Ltd.* [2017] 87 taxmann.com 152 (Delhi - Trib.)
2. *Pan AmSat International Systems Inc.* [2006] 9 SOT 100 (DELHI ITAT)
3. *Asia Satellite Telecommunications Co Ltd* [2011] 197 Taxman 263 (Delhi)
4. *New Skies Satellite BV* [2016] 68 Taxmann.com 8 (Delhi)
5. *Neo Sport Broadcast (P.) Ltd.* [2019] 107 Taxmann.com 17 (Bombay)
6. *Viacom18 Media (P.) Ltd.* [2022] 134 taxmann.com 243 (Mumbai -Trib.) - Para 9 page 656 of PB which has followed Bom HC decision in Neo Sports as opposed to earlier ITAT adverse view in own case
7. *J & P Coats Ltd.* No. 11/Bang/2014, ITA 382 & 1493/Bang/2015, 2135/Bang/2016 and 1365-1367/Bang/2019
8. *Engineering Analysis Centre of Excellence (P.) Ltd.* [2021] 125 taxmann.com 42 (SC)

3.6 It is submitted that in respect of the treatment of the interconnectivity utility charges as 'Royalty', has been considered

in a recent decision by *Hon'ble Karnataka High Court* in a group of cases between *M/s. Vodafone Idea Ltd. (Formerly known as M/s. Vodafone Mobile Services Ltd. vs. DDIT(IT) & Ors. in ITA Nos. 160-164/2015 & ITA Nos. 64-66/2020* for A.Ys. 2008-09 to 2015-16 vide order dated 14.07.2023.

3.7 He thus submitted that the issues pertaining to the present appeals regarding taxing the interconnectivity utility charges (IUC) received by the assessee as Royalty in India stands squarely covered in favour of assessee.

4. On the contrary, the Ld.DR relying on the orders passed by the authorities below vehemently argued the observations as recorded by the revenue in their orders.

5. We have perused the submissions advanced by both sides in the light of records placed before us.

5.1 We note that the revenue characterised the payments received by assessee towards interconnectivity utility charges as Royalty since the payment is made to “use the process” or “an equipment”.

5.2 It is an admitted fact that various service providers in India entered into agreement with assessee for international carriage and connectivity services against which an interconnectivity charges are received by the assessee. We refer to the term “*Process*” occurs under clause (i), (ii) and (iii) to Explanation 2 to Section 9(vi). It reads as under:—

'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—

- (i) the transfer of all or any rights (including the granting of a licence) in respect of a patent, invention, model, design, secret formula or process or trade mark or similar property;
- (ii) the imparting of any information concerning the working of, or the use of, a patent, invention, model, design, secret formula or process or trade mark or similar property;
- (iii) the use of any patent, invention, model, design, secret formula or process or trade mark or similar property;

5.2.1 The term "process" used under Explanation 2 to section 9(1)(vi) in the definition of 'royalty' does not imply any 'process' which is publicly available. The term "process" occurring under clauses (i), (ii) and (iii) of Explanation 2 to section 9(1)(vi) means a "process" which is an item of intellectual property. Clause (iii) of the said Explanation reads as follows:

"(iii) the use of any patent, invention, model, design, secret formula or process or trade mark or similar property"

Clauses (i) & (ii) of the said explanation also use identical terms.

5.2.2 The words which surround the word 'process' in clauses (i) to (iii) of Explanation 2 to section 9(1)(vi), refer to various species of intellectual properties such as patent, invention, model, design, formula, trade mark etc. The expression 'similar property' used at the end of the list, further fortifies the stand that the terms 'patent, invention, model, design, secret formula or process or trade mark' are to be understood as belonging to the same class of properties viz. intellectual property.

5.2.3 We also note that 'Intellectual property' as understood in common parlance means, Knowledge, creative ideas, or expressions of human mind that have commercial value and are protectable under copyright, patent, service mark, trademark, or trade secret laws from imitation, infringement, and dilution. Intellectual property includes brand names, discoveries,

formulas, inventions, knowledge, registered designs, software, and works of artistic, literary, or musical nature.

5.2.4 We refer to the commentary in Prof.Klaus Vogel's Commentary on Double Taxation Convention, wherein, the term 'Royalty' is defined as under:

"Paragraph 2 contains definition of the term 'royalties'. These relate, in general, to rights or property constituting different forms of literary and artistic property, the elements of intellectual property specified in the text and information concerning industrial, commercial or scientific experience. The definition applies to payments for the use of, or the entitlement to use, rights of the kind mentioned, whether or not they have been, or are required, registered in a public register. The definition covers both payments made under a license and compensation which a person would be obliged to pay for fraudulently copying or infringing the right."

5.2.5 Thus the word "process" thus must also refer to specie of intellectual property, applying the rule of, *ejusdem generis* or *noscitur a sociis*, as held by Hon'ble Supreme Court in case of *CIT vs. Bharti Cellular* reported in (2011) 330 ITR 239.

5.2.6 We refer to the decision of Hon'ble Madras High Court in case of *CIT vs. Neyveli Lignite Corp. Ltd.* reported in (2000) 243 ITR 459 wherein Hon'ble High Court observed as under:

"10. The term 'royalty' normally connotes the payment made to a person who has exclusive right over a thing for allowing another to make use of that thing which may be either physical or intellectual property or thing. The exclusivity of the right in relation to the thing for which royalty is paid should be with the grantor of that right. Mere passing of information concerning the design of machine which is tailor-made to meet the requirement of a buyer does not by itself amount to transfer of any right of exclusive user, so as to render the payment made therefor being regarded as royalty".

5.2.7 It is an admitted fact that there is no transfer of any intellectual property rights or any exclusive rights that has been

granted by the assessee to the service recipients for using such intellectual property. Therefore *Explanation 2* to section 9(1)(vi) cannot be invoked.

5.2.8 Further we note that by Finance Act, 2012, *Explanation 5 & 6* were added with retrospective effect from 1.6.1976 which reads as under:—

"Explanation 5: For the removal of doubts, it is hereby clarified that the royalty includes and has always included consideration in respect of any right, property or information, whether or not -

(a) The possession or control of such right, property or information is with the payer;

(b) Such right, property or information is used directly by the payer;

(c) The location of such right, property or information is in India.

Explanation 6: For the removal of doubts, it is hereby clarified that the expression "process" includes and shall be deemed to have always included transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal), cable, optic fibre or by any other similar technology, whether or not such process is secret."

5.2.9 By insertion of *Explanation 5 & 6*, meaning of word 'Process' has been widened. As per these explanations, the word 'Process' need not be 'secret', and situs of control & possession of right, property or information has been rendered to be irrelevant. However, in our opinion, all these changes in the Act, do not affect the definition of 'Royalty' as per DTAA. The word employed in DTAA is 'use or right to use', in contradistinction to, "transfer of all or any rights" or 'use of', in the domestic law. As per *Explanation 5 & 6*, the word 'process' includes and shall be deemed to included, transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal), cable, optic fibre or by any other similar technology, whether or not such process is secret. However, the *Explanation* does not do

away with the requirement of successful exclusivity of such right in respect of such process being with the person claiming 'royalty' for granting its usage to a third party.

5.2.10 We may also refer to the following decisions of AAR wherein meaning of the phrase “use” or “right to use” has been explained.

The meaning attached to phrase “use” or “right to use” has been explained in following decisions:

- *Decision of Authority For Advance Ruling(hereinafter referred to as AAR), in case of Cable & Wireless Networks India(P.)Ltd., In re, reported in (2009) 182 Taxman 76*
- *Decision of AAR in case of ISRO Satellite Centre reported in [2008\) 307 ITR 59](#)*
- *Decision of AAR in case of Dell International Services (India) P. Ltd.In.re. reported in (2008) 172 Taxman 418.*

5.2.11 The above decisions, lay down that, in order to satisfy 'use or right to use', the control and possession of right, property or information should be with payer.

5.2.12 In the decision of *Authority For Advance Ruling, in case of Cable & Wireless Networks India(P.)Ltd., In re(supra)*, a similar issue was considered wherein Cable & Wireless Networks India(P.)Ltd was a company incorporated in India part of Cable & Wireless Group of companies. Cable & Wireless Networks India(P.)Ltd., was engaged in providing international long distance and domestic long distance telecommunication services in India. As per the agreement Cable & Wireless Networks India(P.)Ltd., would provide the Indian leg of service of using its own network and equipments and network of other domestic operators. Similarly, the international leg of services would be provided by the UK group company using its international

infrastructure and equipments. The Cable & Wireless Networks India(P.)Ltd., sought for advance ruling in respect of nature of payments made by Cable & Wireless Networks India(P.)Ltd., to the UK Group company, whether the payment is taxable as 'royalty' or 'FTS' under section 9(1)(vi)/(vii). The AAR relied on following decisions:

- *Decision of Hon'ble Supreme Court in case of BSNL vs. UOI reported in (2006) 3 STT 245*
- *Decision of AAR in case of Dell International Services India Ltd. In.re reported in (supra)*
- *Decision of Hon'ble Madras High Court in case of CIT vs. Neyveli Lignite Corpn. Ltd. reported in (2000) 243 ITR 459*
- *Decision of coordinate bench of this Tribunal in case of WIPRO Ltd. Vs. ITO reported in (2003) 86 ITD 407.*

5.2.13 The AAR relying on its view in case of *Dell International Services India Ltd. In.*, held as under:

12.5 *It seems to us that the two expressions 'use' and 'right to use' are employed to bring within the net of taxation the consideration paid not merely for the usage of equipment in praesenti but also for the right given to make use of the equipment at future point of time. There may not be actual use of equipment in prasenti but under a contract the right is derived to use the equipment in future. In both the situations, the royalty clause is invokable. The learned senior counsel for the applicant sought to contend, relying on the decision of Andhra Pradesh High Court in the case of *Rashtriya Ispat Nigam Ltd. v. CTO* [1990] 77 STC 182 which was affirmed by the Supreme Court, that mere custody or possession of equipment without effective control can only result in use of the equipment whereas a right to use the equipment implies control over the equipment. We do not think that such distinction has any legal basis. In the case of *Rashtriya Ispat Nigam Ltd.* (supra), what fell for consideration was the expression "transfer of right to use any goods" occurring in a sales-tax enactment. Obviously, where there is a transfer, all the possessory rights including control over the goods delivered will pass on to the transferee. It was in that context, emphasis was laid on 'control'. The Supreme Court affirmed the conclusion of the High Court that the effective control of machinery even while the machinery was in use of the contractor remained with RIN Ltd.*

which lent the machinery. The distinction between physical use of machinery (which was with the contractor) and control of the machinery was highlighted. The ratio of that decision cannot be pressed into service to conclude that the right of usage of equipment does not carry with it the right of control and direction whereas the phrase 'right to use' implies the existence of such control. Even in a case where the customer is authorized to use the equipment of which he is put in possession, it cannot be said that such right is bereft of the element of control. We may clarify here that notwithstanding the above submission, it is the case of applicant that, it has neither possession nor control of any equipment of BTA.

12.6 The other case cited by the learned counsel for applicant to explain the meaning of expressions 'use' and 'right to use' is that of *BSNL v. UOI* (2006) 3 STT 245 (SC). Even that case turned on the interpretation of the words "transfer of right to use the goods" in the context of sales-tax Acts and the expanded definition of sale contained in clause (29A) of section 366 of the Constitution. The question arose whether a transaction of providing mobile phone service or telephone connection amounted to sale of goods in the special sense of transfer of right to use the goods. It was answered in the negative. The underlying basis of the decision is that there was no delivery of goods and the subscriber to a telephone service could not have intended to purchase or obtain any right to use electro-magnetic waves. At the most, the concept of sale in any subscriber's mind would be limited to the handset that might have been purchased at the time of getting the telephone connection. It was clarified that a telephone service is nothing but a service and there was no sale element apart from the obvious one relating to the handset, if any. This judgment, in our view, does not have much of bearing on the issue that arises in the present application. However, it is worthy of note that the conclusion was reached on the application of the well-known test of dominant intention of the parties and the essence of the transaction.

The word 'use' - what it means:

12.7 Let us now explore the meaning of the key word 'use'. The expression 'use' has a variety of meanings and is often employed in a very wide sense, but the particular meaning appropriate to the context should be chosen. In *S.M. Ram Lal & Co. v. Secretary to Government of Punjab* [1998] 5 SCC 574, the Supreme Court noted that 'in its ordinary meaning', "the word 'use' as a noun, is the act of employing a thing; putting into action or service, employing for or applying to a given purpose". In the New Shorter Oxford Dictionary, more or less the same meaning is given. The

very first meaning noted there is: "the action of using something; the fact or state of being used; application or conversion to some purpose". Another meaning given is "Make use of (a thing), especially for a particular end or purpose; utilize, turn to account... cause (an implement, instrument etc.) to work especially for a particular purpose; manipulate, operate". The various shades of meanings given in the decided cases in America are referred to in *Words and Phrases, Permanent Edition Vol. 43A*. Some of them are quoted below :

"The word 'use' means to make use of; convert to one's service; to avail oneself of; to employ". (*Miller v. Franklin County*)

"The word 'use' means the purpose served, a purpose, object or end for useful or advantageous nature". (*Brown v. Kennedy*)

"Use' means to employ for any purpose, to employ for attainment of some purpose or end, to convert to one's service or to put to one's use or benefit. (*Beach v. Liningston*)

"Use', as a noun, is synonymous with benefit and employment and as a verb has meaning to employ for any purpose, to employ for attainment of some purpose or end, to avail one's self, to convert to one's service or to put to one's use or benefit". (*Esfeld Trucking Inc. v. Metropolitan Insurance Co.*)

12.8 The word 'use' in relation to equipment occurring in clause (iva) is not to be understood in the broad sense of availing of the benefit of an equipment. The context and collocation of the two expressions 'use' and 'right to use' followed by the words "equipment" suggests that there must be some positive act of utilization, application or employment of equipment for the desired purpose. If an advantage is taken from sophisticated equipment installed and provided by another, it is difficult to say that the recipient/customer uses the equipment as such. The customer merely makes use of the facility, though he does not himself use the equipment.

13. It is the contention of the revenue that dedicated private circuits have been provided by BTA through its network for the use of the applicant. The utilization of bandwidth upto the requisite capacity is assured on account of this. The electronic circuits being 'equipment' are made available for constant use by the applicant for transmission of data. The access line is installed for the benefit of the applicant. Therefore, the consideration paid is towards rent for circuits and the physical components that go into the system. It is further contended that rendition of service by way of maintenance and fault repairs is only incidental to the dominant object of renting the automated telecommunication network.

13.1 There is no doubt that the entire network consisting of under-sea cables, domestic access lines and the BT equipment - whichever is kept at the connecting point, is for providing a service to facilitate the transmission of voice and data across the globe. One of the many circuits forming part of the network is devoted and earmarked to the applicant. Part of the bandwidth capacity is utilised by the applicant. From that, it does not follow that the entire equipment and components constituting the network is rented out to the applicant or that the consideration in the form of monthly charges is intended for the use of equipment owned and installed by BTA. The questions to be asked and answered are: Does the availment of service involve user of equipment belonging to BT or its agent by the applicant? Is the applicant required to do some positive act in relation to the equipment such as operation and control of the same in order to utilize the service or facility? Does the applicant deal with any BT equipment for adapting it to its use? Unless the answer is 'yes', the payment made by the applicant to BTA cannot be brought within the royalty clause (iva). In our view, the answer cannot be in the affirmative. Assuming that circuit is equipment, it cannot be said that the applicant uses that equipment in any real sense. By availing of the facility provided by BTA through its network/circuits, there is no usage of equipment by the applicant except in a very loose sense such as using a road bridge or a telephone connection. The user of BT's equipment as such would not have figured in the minds of parties. As stated earlier, the expression 'use' occurring in the relevant provision does not simply mean taking advantage of something or utilizing a facility provided by another through its own network. What is contemplated by the word 'use' in clause (iva) is that the customer comes face to face with the equipment, operates it or controls its functioning in some manner, but, if it does nothing to or with the equipment (in this case, it is circuit, according to the revenue) and does not exercise any possessory rights in relation thereto, it only makes use of the facility created by the service provider who is the owner of entire network and related equipment. There is no scope to invoke clause (iva) in such a case because the element of service predominates.

13.2 Usage of equipment connotes that the grantee of right has possession and control over the equipment and the equipment is virtually at his disposal. But, there is nothing in any part of the agreement which could lead to a reasonable inference that the possession or control or both has been given to the applicant under the terms of the agreement in the course of offering the facility. The applicant is not concerned with the infrastructure or

the access line installed by BTA or its agent or the components embedded in it. The operation, control and maintenance of the so-called equipment, solely rests with BTA or its agent being the domestic service provider. The applicant does not in any sense possess nor does it have access to the equipment belonging to BTA. No right to modify or deal with the equipment vests with the applicant. In sum and substance, it is a case of BTA utilizing its own network and providing a service that enables the applicant to transmit voice and data through the media of telecom bandwidth. The predominant features and underlying object of the entire agreement unerringly emphasize the concept of service. The consideration paid is relatable to the upkeep and maintenance of specific facility offered to the applicant through the BTA's network and infrastructure so that the required bandwidth is always available to the applicant. The fact that the international circuit as well as the access line is not meant to offer the facility to the applicant alone but it enures to the benefit of various other customers is another pointer that the applicant cannot be said to be the user of equipment or the grantee of any right to use it. May be, a fraction of the equipment in visible form may find its place at the applicant's premises for the purpose of establishing connectivity or otherwise. But, it cannot be inferred from this fact alone that the bulk of consideration paid is for the use of that item of equipment.

13.3 *In cases where the customers make use of standard facility like telephone connection offered by the service provider, it does not admit of any doubt that the customer does not use the network or equipment of the service provider. But, where the service provider, for the purpose of affording the facility, has provided special infrastructure/network such as a dedicated circuit (as in the instant case), controversies may arise as to the nature of payment received by the service provider because it may not stand on the same footing as standard facility. However, even where an earmarked circuit is provided for offering the facility, unless there is material to establish that the circuit/equipment could be accessed and put to use by the customer by means of positive acts, it does not fall under the category of 'royalty' in clause (iva) of Explanation 2.*

We also refer to the commentary relied by the Ld.Counsel form *Prof. Klaus Vogel's Commentary on Double Taxation Convention*, wherein 'Secret formulae or process' is defined as under:

Secret formulae or processes: This covers Know-how in the narrower sense of the term viz., all business, secrets of a commercial or industrial nature. In most of the countries, they enjoy at least relative protection or are capable of being protected. That is why Article 12(2) very properly use, in connection with such formulae, etc., the criterion 'right to use', which is pertinent to them (letting) as it is in the case of absolute proprietary rights. As a rule, the 'right to use' already come into existence in these instance by authorized information(legitimate disclosure of secrets) . It may be restricted in the point of time in respect of the period following the expiry of the license. On the difference between a product with relatively simple technology, and a business secret.

We note that, in case of *DCIT v. PanAmSat International Systems Inc.*, reported in (2006) 9 SOT 100 , Hon'ble Delhi High Court distinguished the decision of *Asia Satellite Telecommunication Co. Ltd. v. Dy. CITT* reported in (2003) 85 ITD 478 and held as under:—

19. The question that first comes up for consideration is whether section 9(1)(vi) of the Income-tax Act, read with the Explanation 2 below thereto, is applicable. This also involves the subsidiary question whether the issue is covered by the order of the Delhi Bench of the Tribunal in the case of *Asia Satellite Telecommunication Co. Ltd. (supra)* which is also a case of a non-resident company based in Hongkong which owned a transponder and allowed it to be used by broadcasters. Both issues are interlinked in the sense that in the above order the Tribunal has held in the context of the provisions of clause (iii) of Explanation 2 below section 9(1)(vi), that a "process" is involved when the signals that are uplinked through the earth stations to the transponder get converted into different frequencies and fit for being down-linked via earth stations over the footprint area. It was therefore held that the payment was for the use of a "process" and hence royalty within the meaning of the aforesaid clause. The clause reads as follows :

"(iii) the use of any patent, invention, model, design, secret formula or process or trademark or similar property;"

*It was not disputed before us on behalf of the assessee that the nature of the activity carried on by it is the same as in the case of *Asia Satellite Telecommunication Co. Ltd. (supra)*. If that is so, we have to hold, respectfully following the order of the co-ordinate*

Bench, that there is a "process" involved in the activity carried on by the assessee before us. In Asia Satellite Telecommunication Co. Ltd.'s case (supra) it was further held that the word "secret" appearing in clause (iii) above qualifies only the word "formula" but not the word "process" and therefore even if the process involved in the operation of the transponder is in the public domain and no longer a secret known only to a few, the payment for the process would still be taxable as royalty. The reason or logic given in paragraph 6.18 of the order by the Tribunal to hold that the word "secret" does not qualify the word "process" is that "there is no comma after the use of the word 'secret' till the end of clause (iii) and if the intention has been to apply the word 'secret' before the word 'process' also, then a comma would have been used after the word 'formula'" and further that the word "secret" cannot also be applied to the word "trademark" because once registered there is nothing secret about the trademark and the impossibility of reading the word "secret" before the word "trademark" further strengthens the view that the word "secret" cannot be read before the word "process" also. This naturally takes us to the question whether there is anything in article 12.3(a) of the DTAA between India and USA which militates against such a view. It must be remembered that India had no DTAA with Hongkong and hence the view taken by the Tribunal (supra) with regard to the clause (iii) of Explanation 2 below section 9(1)(vi) would apply if we were to also interpret the same provision. But article 12.3(a) is worded as below :

"The term 'royalties' as used in this article means :

(a)payments of any kind received as consideration for the use of, or the right to use, any copyright of a literary, artistic, or scientific work, including cinematograph films or work on film, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trademark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience, including gains derived from the alienation of any such right or property which are contingent on the productivity, use or disposition thereof; and"

In Asia Satellite Telecommunication Co. Ltd.'s case (supra) the Tribunal pointed out, while repelling the argument that the word "secret" also qualifies the word "process" appearing in clause (iii) of Explanation 2, that there is no comma after the word "secret" till the end of the clause and had the intention been to qualify the word "process" also with the word "secret" there would have been a comma after the word "process" (by mistake mentioned in the order

as "formula"). The Tribunal was thus prepared, with respect, to accept the argument that both the words "formula" and "process" can be said to be qualified by the word "secret" had the clause been drafted as under :

"the use of any patent, invention, model, design, secret formula or process, or trademark or similar property"

What the Tribunal has pointed out stands fulfilled in article 12.3(a) of the treaty with USA. From the article quoted above, it may be seen that there is a comma after the words "secret formula or process" which indicates that both the words "formula" and "process" are qualified by the word "secret". The requirement thus under the treaty is that both the formula and the process, for which the payment is made, should be a secret formula or a secret process in order that the consideration may be characterised as royalty. We do agree with the argument of the Special Counsel for the Department, on the strength of the several authorities cited by him, that normally punctuation by itself cannot control the interpretation of a statutory provision and in fact the learned counsel for the assessee did not seriously dispute the proposition. However, the punctuation the use of the comma coupled with the setting and words surrounding the words under consideration, do persuade us to hold that under the treaty even the process should be a secret process so that the payment therefore, if any, may be assessed in India as royalty. The Tribunal in Asia Satellite Telecommunication Co. Ltd.'s case (supra) have recognized that all the items referred to in clause (iii) of Explanation 2 such as patent, invention, model, formula and process etc. are intellectual properties. Similarly, the words which surround the words "secret formula or process," in article 12.3(a) of the treaty refer to various species of intellectual properties such as patent, trademark, design or model, plan, etc. Thus the words "secret formula or process" must also refer to a specie of intellectual property applying the rule of ejusdem generis or noscitur a socii.

20. That takes us to a consideration of the question whether the process carried on by the assessee is a secret process. On this question, we have weighed the elaborate arguments advanced by both the sides carefully and hold that so far as the transponder technology is concerned there appears to be no "secret technology", known only to a few. There is evidence adduced before us to show that the technology is even available in the form of published literature/book from which a person interested in it can obtain knowledge relating thereto. There is no evidence led from the side of the Department to show that the transponder technology is secret, known only to a few, and is either protected by law or is capable of

being protected by law. This aspect of the matter was not required to be considered by the Tribunal in the case of Asia Satellite Telecommunication Co. Ltd. (*supra*) because the view taken by the Tribunal was that there was no requirement in clause (iii) of Explanation 2 below section 9(1)(vi) of the Act that the process involved, for which the payment is being made, should be a secret process. But in the view we have taken on the language employed by article 12.3(a) of the treaty coupled with the punctuation and the setting and surrounding words, the payment would be considered as royalty only if it is made for the use of a secret process. Since there is nothing secret about the process involved in the operation of a transponder, the payment for the use of the process assuming it to be so does not amount to royalty.

5.2.14 Similar issue came up before *Hon'ble Delhi Tribunal* in case of *Bharti Airtel vs. ITO (TDS)* reported in (2016) 67 taxmann.com 223. The issue considered therein was in respect of payment towards call interconnectivity charged for call transmission on foreign network. The *Tribunal* therein, on applying ratios pronounced in the above referred decisions, held it not as 'Royalty'.

Therefore in our opinion, the Payments made by the assessee in lieu of services provides by the assessee cannot fall within the ambit of 'Royalty' under section 9(1)(vi) Explanation 5 &6.

5.2.15 We also note that the *Explanations 5 and 6 to section 9(1)(vi)* are not found in the definition of "Royalty" under India-Austria DTAA. The definition of "Royalty" under the DTAA is much more narrower in its scope and coverage, than the definition of "Royalty" contained in section 9(1)(vi) r.w. Explanations 2,5 and 6 of the act.

5.2.16 On perusal of the agreement between the assessee and the end users placed at pages 35 to 80 of paper book Vol. 1, it is noted that the installation and operation of sophisticated equipments are with the view to earn income by allowing the

users to avail the benefits of such equipments or facility and does not tantamount to granting the use or the right to use the equipment or process so as to be considered as royalty within the definition of “royalty” as contained in clause 3 of Article 13 of India-Austria DTAA.

5.2.17 We also note that in the present facts of the case, at no point of time, any possession or physical custody, control or management over any equipment is received by the end users / customers. It is also noted that the process involved in providing the services to the end users / customers is not “secret” but a standard commercial process followed by the industry players. Therefore the said process also cannot be classified as a “secret process”, as is required by the definition of “royalty” mentioned in clause 3 of Article 13 of India-Austria DTAA.

We are therefore of the opinion that the receipt of IUC charges cannot be taxed as Royalty under Article 13 in India of India-Austria DTAA.

5.2.18 The above observations are supported by the view expressed by *Hon'ble Karnataka High Court* in case of *Vodafone Idea Ltd. (supra)*. *Hon'ble High Court* in the group of cases had considered following questions of law which are as under:

“1. Whether the Income-Tax Appellate Tribunal (ITAT) was correct in holding that the application of the Double Taxation Avoidance Agreement (DTAA) cannot be considered in proceedings under Section 201 of the Act and that it is not open to the payer to take benefit of the DTAA when he is making payment to a non-resident?

2. Whether the ITAT was correct in holding that amendment to provisions of royalty under Section 9(1)(vi) by inserting Explanation 5 and 6 under the Income-tax Act (hereinafter referred to as the 'Act') will also result in amendment of the DTAAS?

3. Whether ITAT was correct in holding that payments made to non-resident telecom operators for providing interconnect services and transfer of capacity in foreign countries is chargeable to tax as royalty in view of the inclusion of the terms "right" & "process" in the clarificatory Explanation 2, 5 and 6 of Section 9(1)(vi) of the Act, and consequently, appellant was bound to deduct tax at source thereon under Section 195 of the Act?

4. Whether the income tax authorities in India have jurisdiction to bring to tax income arising from extra-territorial source, that is outside India, in respect of business carried on by foreign companies outside India just because Indian residents use and pay for the facilities provided by these foreign companies contrary to the Constitution of India, International Law and Treaties and law declared by the Apex Court?

5. Whether the first respondent was correct in holding that for the current assessment year the withholding tax liability should be levied at a higher rate at 20% in accordance with section 206AA of the Act?

6. Whether the Hon'ble Tribunal was right in repelling the contention of the Appellant to the effect that, as a deductor, it cannot be held liable for non-reduction of tax at source for payments made for the Assessment Year 2008-09 to Assessment Year 2012-13 on the basis of a subsequent amendment to Section 9(1)(vi) whereby Explanation 5 and 6 were introduced?"

Hon'ble High Court for considering the above questions had looked into the agreement between Vodafone Idea Ltd. and the various service providers from whom Vodafone Idea Ltd. had received the IUC services. *Hon'ble High Court* also considered the various decisions by other *High Courts* referred to hereinabove vis-a-vis the arguments advanced by the Ld. Counsel.

5.2.19 In case of *Vodafone Idea Ltd. (supra)*, *Hon'ble Court* also observed that the equipments and submarine cables are situated overseas and that Vodafone Idea Ltd. had availed certain services from the non-resident telecom operators and that such

agreements would not create a permanent establishment of such non-resident telecom operators in India. Thereafter *Hon'ble High Court* after verifying the facts of the case having regards to the decision of *Hon'ble Supreme Court* in case of *Engineering Analysis Centre of Excellence Pvt. Ltd. vs. CIT* reported in (2021) 432 ITR 471 observed and held as under:

“12. We have carefully considered the rival contentions and perused the records.

13. Undisputed fact of the case are, Assessee is an ILD license holder and responsible for providing connectivity to calls originating/terminating outside India. Assessee has entered into an agreement with NTOs for international carriage and connectivity services. According to the assessee, payment made to NTOs is towards inter-connectivity charges.

14. Assessee has also entered into a CTA with a Belgium entity Belgacom. Belgacom had certain arrangement with the Omantel for utilisation of bandwidth. Omantel transferred certain portion of its capacity to Belgacom and Belgacom had in turn transferred a portion of its capacity to the assessee.

15. Admittedly the equipments and the submarine cables are situated overseas. To provide ILD calls, assessee had availed certain services from NTOs. It is also not in dispute that Belgacom, a Belgium entity with whom assessee has entered into an agreement does not have any ‘permanent establishment’ in India.

16. Shri. Pardiwala contended that the payments made by assessee cannot be treated as either Royalty or FTS34 or business profits as no part of the activity was carried out in India. Revenue's reply to his contention is that, the income belongs to the payee. If, in the opinion of assessee, tax was not deductible, he ought to have approached the AO for the nil deduction certificate. It is also the further case of the Revenue that the agreement between assessee and the payee did not specify that income was not taxable.

17. The first question is whether the ITAT was correct in holding that DTAA cannot be considered under Section 201

of the Act. It was argued by Shri. Percy Pardiwala that this issue is covered by the decision in GE Technolgy. We may record that a DTAA is a sovereign document between two countries. In GE Technology, the Apex Court has held as follows:

“7. ...While deciding the scope of Section 195(2) it is important to note that the tax which is required to be deducted at source is deductible only out of the chargeable sum. This is the underlying principle of Section 195. Hence, apart from Section 9(1), Sections 4, 5, 9, 90, 91 as well as the provisions of DTAA are also relevant, while applying tax deduction at source provisions.”

(Emphasis supplied)

18. The above passage has been noted and extracted in Engineering Analysis. Thus it is clear that an assessee is entitled to take the benefit under a DTAA between two countries. Hence, the ITAT's view that DTAA cannot be considered in proceedings under Section 201 of the Act is tenable.

19. The second question for consideration is whether the ITAT was correct in holding that the amendment to provisions of Section 9(1)(vi) inserting the Explanations will result in amendment of DTAA. The answer to this question must be in the negative because in Engineering Analysis, the Apex Court has held that Explanation 4 to Section 9(1)(vi) of the Act is not clarificatory of the position as on 01.06.1976 and in fact expands that position to include what is stated therein vide Finance Act, 2012.

20. The Explanation 5 and 6 to Section 9(1)(vi) of the Act has been inserted with effect from 01.06.1976. This aspect has also been considered in Engineering Analysis holding that the question has been answered by two Latin Maxims, *lex no cogit ad impossibilia* i.e. the law does not demand the impossible, and *impotentia excusat legem* i.e. when there is disability that makes it impossible to obey the law, the alleged disobedience of law is excused and it is held in Engineering Analysis as follows:

“85. It is thus clear that the “person” mentioned in section 195 of the income Tax Act cannot be expected to do the impossible, namely, to apply the expanded definition of “royalty” inserted by explanation 4 to section 9(1)(vi) of the Income Tax Act, for the assessment

years in question, at a time when such explanation was not actually and factually in the statute.”

“100. Also, any ruling on the more expansive language contained in the explanations to section 9(1)(vi) of the Income Tax Act would have to be ignored if it is wider and less beneficial to the assessee than the definition contained in the DTAA, as per section 90(2) of the Income Tax Act read with explanation 4 thereof, and Article 3(2) of the DTAA.....”

21. *The third question is, whether the payments made to NTOS for providing interconnect services and transfer of capacity in foreign countries is chargeable to tax as royalty. It was argued by Shri. Pardiwala, that for subsequent years in assessee’s own case, the ITAT has held that tax is not deductible when payment is made to non-resident telecom operator. This factual aspect is not refuted. Thus the Revenue has reviewed its earlier stand for the subsequent assessment years placing reliance on Viacom etc35, rendered by the ITAT. In that view of the matter this question also needs to be answered against the Revenue.*

22. *The fourth question is whether the Income Tax Authorities have jurisdiction to bring to tax income arising from extra-territorial source. Admittedly, the NTOs have no presence in India. Assessee’s contract is with Belgacom, a Belgium entity which had made certain arrangement with Omantel for utilisation of bandwidth. In substance, Belgacom has permitted utilisation of a portion of the bandwidth which it has acquired from Omantel. It is also not in dispute that the facilities are situated outside India and the agreement is with a Belgium entity which does not have any presence in India. Therefore, the Tax authorities in India shall have no jurisdiction to bring to tax the income arising from extra-territorial source.*

23. *The fifth question is whether the Revenue is right in holding that withholding tax liability should be levied at a higher rate. It was contended by Shri. Pardiwala that this issue is covered in assessee’s favour in CIT Vs. M/s. Wipro36 and the same is not disputed. Hence, this question also needs to be answered against the Revenue.*

24. *The sixth question is whether assessee can be held liable for non-reduction of tax at source for payments made for the A.Ys. on the basis of amendment to Section 9(1)(vi)*

of the Act. This aspect has been considered by us while answering question No.2. It is held in Engineering Analysis that an assessee is not obliged to do the impossible. Admittedly, the A.Y.s under consideration are 2008-09 to 2012-13 and the Explanation has been inserted by Finance Act, 2012. In addition, we have also held that assessee is entitled for the benefits under DTAA."

5.2.20 Respectfully following the above view, in case of *Vodafone Idea Ltd. (supra)*, and the discussions hereinabove, we hold that payments received by assessee towards interconnectivity utility charges from Indian customers / end users cannot be considered as Royalty to be brought to tax in India under section 9(1)(vi) of the Act and also as per DTAA.

5.2.21 The payment received by the non-resident assessee amounts to be the business profits of the assessee which is taxable in the resident country and is not taxable in India under Article 5 of the DTAA as there is no case of permanent establishment of the assessee that has been made out by the revenue in India. Even *Hon'ble High Court* has in para 25, held that the non-resident service providers do not have any presence in India.

Accordingly, ground nos. 3 and 4 for A.Ys. 2010-11 and 2011-12 and further ground nos. 3, 6 for A.Y. 2012-13 stands allowed in favour of assessee.

6. The Ld.AR submitted that assessee do not wish to press the legal issue raised in **Ground nos. 1 and 2** for A.Ys. 2010-11 and 2011-12.

Accordingly, the same is dismissed as not pressed.

7. **Ground no. 5** is in respect of interest computed u/s. 234A, B and C are consequential in nature to the main issue on merits and accordingly need not be adjudicated.

8. **Ground no.1** for A.Y. 2012-13 and ground nos. 6-8 for A.Y. 2010-11 and 2011-12 are general in nature and therefore do not require adjudication.

In the result, all the three appeals filed by the assessee stands partly allowed as indicated hereinabove.

Order pronounced in the open court on 25th August, 2023.

Sd/-
(CHANDRA POOJARI)
Accountant Member

Sd/-
(BEENA PILLAI)
Judicial Member

Bangalore,
Dated, the 25th August, 2023.
/MS /

Copy to:

1. Appellant	2. Respondent
3. CIT	4. DR, ITAT, Bangalore
5. Guard file	

By order

Assistant Registrar,
ITAT, Bangalore