IN THE INCOME TAX APPELLATE TRIBUNAL "I" BENCH, MUMBAI

BEFORE SHRI PRASHANT MAHARISHI, AM
AND
SHRI SANDEEP SINGH KARHAIL, JM

ITA NO	A Y
1067/Mum/2021	2020-21
1087 to 1097/M/2021 & 1127 to 1138 / M/2021	2019-20
1098, 1099, 1162, & 1100 to 1117/M/2021, & 1118 to 1120/Mum/2021 & 1121 to 1126/Mum/2021	2018-19
1151 to 1153/Mum/2021 1154 to 1161/M/2021	2017-18

The Asst. Commissioner of Income Tax (Intl. Taxation), 4(3)(1) Room No. 1613, 16th Floor, Air India Building, Nariman Point, Mumbai-400 021	Vs.	M/s Viacom 18 Media Pvt. ltd. Zion Bizworld, Subhash Road-A, Near Garware Office, Ville Parle East, Mumbai-400 057
(Appellant)		**(Respondent)**
PAN No. AAACM9146M		

Assessee by	:	Shri Nimesh Vora, AR
Revenue by	:	Shri Milind S. Chavan, SR DR

Date of hearing:	31.01.2022 & 3/02/2022
Date of pronouncement :	24.02.2022

O R D E R

PER BENCH

01. This is the bunch of 65 appeals heard in two batches on 31/1/2022 and 3/2/2022 involving identical issue, filed by the Asst Commissioner Of Income Tax (International Taxation) circle – 4 (3) (1) Mumbai.

02. Issue involved is that whether the tax is required to be deducted u/s 195 of the income tax act on payment made for transponder charges constituting royalty u/s 9 (1) (vi) of the act or Under the relevant double taxation avoidance agreement.

03. The facts are common in all these appeals. Assessee is engaged in the business of marketing advertisement time for different television channels, and distribution of these channels. The assessee has made payment for transponder service fees to three entities namely (1) intelsat Corporation, USA, (2) Intelsat global sales and marketing, UK and (3) MEAST satellite system, Malaysia. Assessee applied for an order u/s 195 (2) for Nil withholding tax certificates for payment of transponder services fees payable to the service providers.

04. The learned assessing officer rejected it holding that these payments are chargeable to tax as royalty on the basis of the order of coordinate bench in the case of the assessee wherein the case of Intelsat it was held that the payments are royalty on the basis of explanation to Section 9 (1) (vi) of the act. Subsequently on the basis of the decision of the honourable Delhi High Court Asia satellite communication Co Ltd (2011) 332 ITR 340, it was held that

the income of Intelsat is not taxable in India and these payments are not subject to tax deduction at source.

05. On appeal before the learned CIT – A, he considered article 12 of India US Double Taxation Avoidance Agreement, article 13 of India United Kingdom Double Taxation Avoidance Agreement and article 12 of India Malaysia Double Taxation Avoidance Agreement considering the payment of 'royalties', held that the definition of 'royalty' in all the three treaties is similar where the words used are "secret formula or process", whereas the assessing officer imported the definition of 'process' from explanation to Section 9 (1) (vi) of the act. Thereafter, considering the decision of the honourable Bombay High Court in case of Neo-Sports Broadcast Private Limited (ITA number 187 of 2018) wherein it has been held that the transponder charges paid to a non-resident is not taxable as 'royalty' following the decision of the honourable Delhi High Court in case of Asia Satellite Communications Ltd [332 ITR 340] and skies Satellite BV [382 ITR 114] , the learned CIT – A further held that the payment of transponder charges paid by the assessee to the above referred to 3 entities are not taxable in India and therefore assessee cannot be asked to withhold tax on these payments.

06. Learned assessing officer is aggrieved with the above order and therefore has preferred all these appeals.

07. The Ld DR vehemently supported the order of the ld AO and submitted that tax is required to withhold on these payments, as those are chargeable to tax in India. To support his argument, he relied up on the decision of Commissioner of Income-tax Vs Siemens Aktiongesellschaft [2009] 177 Taxman 81 (Bombay)/ [2009] 310 ITR 320 (Bombay). He submitted that based on this decision ITAT in case of the assessee in [2014] 44 taxmann.com 1 (Mumbai)/ [2015] 153 ITD 384 (Mumbai) has decided that Transponder fee is chargeable to tax in India. He referred to

the DTAA of India and Malaysia and referred to Article 12 of that agreement to state that **such** royalties may also be taxed in the Contracting State in which they arise, and according to the laws of that State. He further submitted the word process has been defined in Explanation [6] of section 9 *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;] Inserted by the Finance Act, 2012, w.r.e.f. 1-6-1976 should have been applied. He further submitted that as the word process has not been defined, in terms of article 3 [2] of DTAA definition needs to be incorporated from The Income tax Act as per Explanation [6] of section 9 (1) (vi) of the Act.

08. The learned authorised representative submitted that this issue is squarely covered in favour of the assessee by the decision of the coordinate bench in assessee's own case on identical facts and circumstances in [TS-66-ITAT-2022(Mum)].

09. Countering the arguments of the LD DR, LD AR submitted that New Sky satellites decision. He further submitted that the Royalty has already been defined in Article 12 (3) of the DTAA therefore, there is no reason to look at Article 3 [2} of the DTAA.

010. We have carefully considered rival contention and perused the orders of lower authority. Recently on 20/1/2022 coordinate bench in assessee's own case for AY 2015-16 , 16-17 and 2020-21 in [TS-66-ITAT-2022(Mum)] has considered the order of the ld CIT (A) in that case which is also identically the order in all these appeals passed by the ld CIT (A), the order of the ld CIT (A) held that :-

"5. FINDINGS The assessee is engaged in the business of marketing advertising air time of different television channels, distribution of these channels etc The assessee has made payment for transponder service fees paid to three entities namely: 1) Intelsat Corporation, USA (Intelsat) 2) Intelsat Global Sales and Marketing, UK (IGSM) 3) MEAST Satellite System, Malaysia (MEASAT) The payment to the above three recipients is involved in a number of cases, therefore the same is divided together. The assessee applied for an order u/s 195 (2) for nil withholding tax certificate for payment of transponder service fees to the above service providers. The Assessing Officer rejected the assessee's application observing as under:

"The submission of the applicant have been perused The Finance Act 2012 has inserted a new explanation to section 9(1)(vi) which defines the term 'royalty'. As per the new Explanation 6, the term 'process', as referred to the definition of 'royalty' under the IT Act, includes transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal). The new explanation also states that 'process' (which includes transmission by satellite) shall be 'royalty' under the IT Act whether or not such process in secret. In light of the said explanation, it is held that payment of transponder service fees to Intelsat by Applicant is a 'process' and thus it is in the nature of royalty income taxable in India in terms of the provisions of Section 9(1)(vi) of the IT Act as well as treaty. The definition of Royalties as per Article 12 of the India - USA Tax Treaty includes the payment made for

use of any 'process'. The terms 'process' is not defined in the India-USA Tax Treaty. Therefore, the definition of the term process has to be imposed from the Act. Thus, the payment made for transmission by satellite is a royalty even under the lax treaty. The reference to decision of the Hon'ble Delhi High Court made by the applicant has not been accepted by the department and the SLP has been preferred in this case. Also, the orders passed earlier, in the case of the applicant treating the transponder services fee as ' royalty income' has been upheld by the id. CIT(A) and IT AT. "

Basically, the Assessing Officer held these payments as royalty on the basis of Honourable ITAT order and on the basis of explanation to section 9 (1J(vi) of the IT Act. Hon'ble ITAT in the case of Intelsat initially confirmed the finding of Assessing Officer however subsequently on the basis of Delhi High Court wherein the honourable High Court has held that the income of Intelsat is not taxable in India, held that these payments are not subject to TDS. In the case of IGSM and MEASAT Honourable ITAT held that TDS is deductable in India. Before me, the assessee submitted that subsequent to the above honourable jurisdictional High Court i.e. Bombay High Court in the case of Neo Sports Broadcast Pvt Ltd (ITA no. 1487 of 2018) held that transponder charges paid to non-resident is not taxable as royalty. While doing so the honourable Bombay High Court has relied on Delhi High Court order in the case of Asia Satellite Communication Company Ltd (2011) 332 ITR 340 a nd Skies Satellites BV(2016) 382 ITR 114. It was also submitted that the facts of

assessee's case are similar to the above case and in the view of binding decision of jurisdictional High Court transponder charges cannot be held as royalty and therefore the assessee cannot be asked to deduct TDS on the same. Therefore, to decide the issue in the present case, we have to decide following two points - 1) Weather the issue is covered by the decision of Bombay High Court in the case of Neo Sports. 2.) Weather the honourable High Court has considered explanation to section 9(1)(vi) wherein the royalty is defined. For ready references, the finding in the case of the Neo Sports is reproduced below.

"1. This Appeal is filed by the revenue to challenge the judgment of Income Appellate Tribunal/following questions ore presented for our consideration;

(a) Whether, on the facts and in the circumstances of the case and in law, the Hon'ble ITAT erred in deleting the addition towards Satellite Space Fees/transponder charges relying on the decision of Hon'ble Delhi High Court in the case of Asia Satellite Telecommunication 238 CTR (Del) 233, without considering the amendment in section 9(1)(vi) w.r.e.f. 01.06.1976 [by Finance Act, 2012], wherein the intent of legislature in respect of 'royalty' has been clarified thereby deeming the said charges to be 'royalty' in nature?

(b) Whether, on the facts and in the circumstances of the case and in law, the Hon'ble ITAT erred in deleting the addition of Rs.5l44,17,143/- after

considering the ex-post facto agreement between the assessee and (he Nimbus and not considering the main agreement dtd. 18.03.2006 between the assesses and the Nimbus?

2. in question (a) the revenue contends that the Satellite Space Fees and transponder charges paid by the assessee were in the nature of royalty payments. From the perusal of the impugned judgment of Income Tax Tribunal {'Tribunal' for short) we notice that the revenue's main thrust before the Tribunal was that the charges paid were capital expenditure and not revenue expenditure. However, in this context, the Tribunal did observe fleetingly on the question of charges being royalty payments. We have therefore heard the learned Counsel for the parties on merits on this issue raised by the revenue.

3. We notice that an identical issue came up for consideration before Delhi High Court in case of Asia Satellite Telecommunications Co. Ltd. Vs. DIT, reported in (2011) 332 ITR 340. It was the case in which the assessee a non-resident was engaged in safe/We communication, having control of satellites. The assesses would provide use of transponder facility on satellite to the television companies outside India, which in turn would be routed to the operators in India, who would pass them on to the customers. The question was whether the payments made to the non-resident were in the nature of royalty and therefore come within the scope of section 9(1) of the Income Tax Act, 1961 ('the Act' for short). The Court by a detailed judgment held

that the payments were not in the nature of royalty charges. The Court made a distinction between transfer of rights in respect of property and transfer of rights in the property.

4. Later on similar issue once again came before Delhi High Court in the case of Directorate of Income tax Vs. New Skies Satellite BV, reported in (2016) 382 ITR 114 The Court followed the earlier decision in case of Asia Satellite Telecommunication (supra) and dismissed the revenue's Appeal. It was held that the explanations added below section 9(1) of the Act were not merely clarificatory in nature. Respectfully agreeing with the said decisions of the Delhi High Court, this question is not considered."

While doing so, the honourable Bombay High Court relied on the judgement of honourable Delhi High Court mentioned above. The honourable Delhi High Court has considered the amendment to section 9(1)(vi) and has held that no amendment to the Act, whether retrospective and prospective can be read in a manner so as to extent in operation to the terms of an international treaty- in other words clarificatory or declaratory amendment, much less one which may seek to overcome an unwelcome judicial interpretation of law, cannot be allowed to have same retrospective effect on an international instrument effected between two sovereign states prior to subject amendment - amendment to domestic law cannot be read into treaty provisions without amending the treaty itself. In view of the above, it can be held that honourable High Courts

have decided that the transponder charges cannot be treated as royalty and while doing so they have considered the amendment to section 9(1)(vi). Now, to be on safer side, we have to see whether the term royalty defined in different treaties (USA, UK, Malaysia) have the same/similar words or not For ready reference, the definitions of royalty in these DTAAs are reproduced here under:

Indo-US DTAA

ARTICLE 12 - Royalties and fees for included services –

1. Royalties and fees for included 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 and Fees for included 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 or fees for technical services is a resident of the other Contracting State, the tax so charged shall not exceed: (a) in the case of royalties within paragraph 3(a) of this Articles, and fees for technical services within paragraphs 4(a) and (c) of this Article,— (i) during the first five years for which this Convention has effect; (aa) 15 per cent of the gross amount of such royalties or fees for technical services when the payer of the royalties or fees for technical services is the Government of the first mentioned Contracting State or a political sub-division of that State, and (bb) 20 per cent of the gross amount

of such royalties or fees for technical services in alt other cases; and (ii) during subsequent years, 15 per cent of the gross amount of such royalties or fees for technical services, and (b) in the case of royalties within paragraph 3(b) of this Article and fees for technical services defined in paragraph 4(b) of this Article, 10 per cent of the gross amount of such royalties and fees for technical services.

3. For the purposes of this Article, the term "royalties" means : (a) payments of any kind received as a consideration for the use of, or the right to use, any copyright of a literary, artistic or scientific work, including cinematography films or work on films, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience; and (b) payments of any kind received as consideration for the use of, or the right to use, any industrial, commercial or scientific equipment, other than income derived by an enterprise of a Contracting State from the operation of ships or aircraft in international traffic.

Indo UK DTAA

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 and fees for technical services may also be taxed in the Contracting State in which they arise and according to the law of that State; but if the beneficial owner of the royalties or fees for

technical services is a resident of the other Contracting State, the tax so charged shall not exceed :

(a) in the case of royalties within paragraph 3(a) of this Articles, and fees for technical services within paragraphs 4(a) and (c) of this Article,—

(i) during the first five years for which this Convention has effect ;

(aa) er cent of the gross amount of such royalties or for technical services when the payer of the lties or fees for technical services is the ernment of the first-mentioned Contracting State political sub-division of that State, and

(bb) 20 per cent of the gross amount of such royalties or fees for technical services in all other cases; and

(ii) during subsequent years, 15 per cent of the gross amount of such royalties or fees for technical services; and

(b) in the case of royalties within paragraph 3(b) of this Article and fees for technical services defined in paragraph 4(b) of this Article, 10 per cent of the gross amount of such royalties and fees for technical services.

3. For the purposes of this Article, the term "royalties" means :

(a) payments of any kind received as a consideration for the use of, or the right to use, any copyright of a literary, artistic or scientific work, including cinematography films or work on films, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience; and

(b) payments of any kind received as consideration for the use of, or the right to use, any industrial, commercial or scientific equipment, other than income derived by an enterprise of a Contracting State from the operation of ships or aircraft in international traffic.

Indo-Malaysia DTAA

ARTICLE 12 ROYALTIES

1 Royalties 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 may also be faxed in the Contracting State in which they arise, and according to the laws of that State, but if the recipient is the beneficial owner of the royalties, the tax so charged shall not exceed 10 per cent of the gross amount of the royalties.

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 eluding cinematograph films or films ot tapes used for television or radio broadcasting, any tent, trade mark, design or model, plan, secret formula or process, or for the use of. or the right assessee cannot be asked to withhold tax on the payments of transponder charges paid to these entities.

4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the royalties, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties 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 are paid is effectively connected with such permanent establishment or fixed

base. In such case, the provisions of Article 7 or Article 15, as the case may be, shall apply.

5. Royalties shall be deemed to arise in a Contracting State when the payer is a resident of that State. Where, however, the person paying such royalties, 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 obligation to pay the royalties was incurred, and such royalties are borne by such permanent establishment or fixed base, then such royalties shall be deemed to arise in the State in which the permanent establishment or fixed base is situated.

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

The definition of royalty in all three treaties is similar. In all the three treaties, following words were used:

"secret formula or process'

the assessing officer imported the definition of process from explanation to Section 9 (1) (vi).

The honourable High Court after considering the same in the case of Intelsat and case referred above has held that the income of non-resident from transponder charges is not taxable in India.

In view of the above discussion, I am of the opinion that the payment of transponder charges paid by the

assessee to above referred to 3 entities was not taxable in India and therefore the assessee cannot be asked to withhold tax on the payments of transponder charges paid to these entities."

011. The coordinate bench upheld the decision of the ld CIT (A) holding as Under:-

" 9. We have heard the rival submissions of the parties on the issue in dispute and perused the relevant material on record. In the appeal for assessment year 2015-16, the Ld.CIT(A) has considered the facts of one of the parties in whose case, the assessee sought determination of sum chargeable under the Act and consequential deduction of tax at source u/s 195(2) of the Act. The Ld.CIT (A) referred to master agreement between the assessee and Intelsat Corporation, USA to highlight the services of transponding [sic transponder] facility provided by the party. The Ld. CIT (A) has noted that while passing the order dated 28/03/2014, 04/02/2015 and 10/02/2015 in assessee's own case, the Tribunal was not having any benefit of the decision of the Hon'ble Bombay High Court in the case of New Sports Broadcast Pvt Ltd (ITA 1487 of 2018) and, therefore, transponder payments were held to be royalty, taxable under the Act / Treaty. However, subsequently, in ITA Nos. 599 to 614/Mum/2016 for assessment year 2013-14 to 2015-16 in order dated 09/07/2018 following the decision of GE Technology Centre Pvt Ltd (supra) held that since no income was chargeable in the hands of the recipient, there was no

liability on the part of the assessee to deduct tax at source on the similar payments for transponder facility. Further, the Ld. CIT(A) has followed binding precedents of jurisdictional High Court in the case of New Sports Broadcast Pvt Ltd (supra), wherein it is held that transponder charges are not in the nature of 'Royalty income in the hands of recipients despite amendment to section 9(1)(vi of the Act.

10. In view of binding precedent of the Tribunal and Hon'ble High Court followed by the Ld. CIT (A) in respective impugned orders, we do not find any error or infirmity in the impugned orders passed by the Ld. CIT (A) on the issue in dispute relevant to the orders of Assessing Officer u/s 195(2) of the Act. Accordingly, we uphold the finding of the Ld. CIT (A) in impugned orders. Grounds raised by the Revenue in these appeals are accordingly dismissed.

11. In the result, the appeals filed by the revenue are dismissed."

012. Therefore, respectfully following the decision of the coordinate bench in assessee's own case, which also judicially binds us, we are of the view that there is no infirmity in the order of The ld CIT (A) in holding that payment by assessee to a foreign company for utilization of transponder centered on a satellite is not in the nature of Royalty in terms of various Article of above Three DTAAs.

013. However, coming to the argument of the ld DR that relying on Article 3 (2) of The Treaty, term 'process' as defined in Explanation [6] to section 9 (1) (vi) of The Act, should be read in to the treaty as the term "process' used in the treaty Article 12 (3)

is not defined in Treaty, hence, meaning assigned domestic law should be used. We find that in Article 12 (3) of India Malaysia Treaty it is ' Secret Formula or process' is the term used and not ' process' , therefore meaning of term " process' cannot be incorporated in the treaty, even otherwise, because then, the meaning of word 'secret ' in treaty would become redundant. The ld CIT (A) has also dealt with this argument of ld AO in his order and then order of ld CIT (A) worded identically in the issues decided by coordinate bench has been upheld. Therefore, this argument also deserves to be dismissed.

014. In the result, all these 65 appeal filed by the ld AO are dismissed.

Order pronounced in the open court on 24.02.2022.

Sd/-	Sd/-
(SANDEEP SINGH KARHAIL)	(PRASHANT MAHARISHI)
(JUDICIAL MEMBER)	(ACCOUNTANT MEMBER)

Mumbai, Dated: 24.02.2022
Sudip Sarkar, Sr.PS
Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

True Copy//

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai