**आयकर अपीलीय अधिकरण, दिल्ली न्यायपीठ "डी", नई दिल्ली में**

**IN THE INCOME TAX APPELLATE TRIBUNAL**
**DELHI BENCH 'D', NEW DELHI**

**सुश्री सुषमा चावला, उपाध्यक्ष एवं श्री एन. के. बिल्लैया, लेखा सदस्य के समक्ष**
**BEFORE MS. SUSHMA CHOWLA, VP & SHRI N.K.BILLAIYA, AM**

**[THROUGH VIDEO CONFERENCING]**

**आयकर अपील सं. / ITA Nos.1548/Del/2015 & 286/Del/2016**
**निर्धारण वर्ष /Assessment Years 2011-12 & 2012-13**

Telstra Singapore Pte.Ltd.,
Unit No.518/519/520, 5th Floor,
Tower-B, DLF Towers, Jasola,
New Delhi-110044.
PAN-AADCT5366N .....**अपीलार्थी**/Appellant

vs

The DCIT (International Taxation),
Circle-3(1)(2), New Delhi. ..... **प्रत्यर्थी** / Respondent

**आयकर अपील सं. / ITA No. 6733/Del/2015**
**निर्धारण वर्ष /Assessment Year 2012-13**

The DCIT (International Taxation),
Circle-3(1)(1), Room No.419,
E-2 Block, Dr.S.P.Mukherjee Civic Centre,
J.L.N.Marg,New Delhi. .....**अपीलार्थी**/Appellant

vs

Telstra Singapore Pte.Ltd.,
C/o-M/s. SRBC & Associate LLP,
6th Floor, HT House,
18-20 K.G.Marg, New Delhi-110001.
PAN-AADCT5366N ..... **प्रत्यर्थी** / Respondent

**आयकर अपील सं. / ITA No.3020/Del/2017**

**निर्धारण वर्ष /Assessment Year 2014-15**

Telstra Singapore Pte. Ltd.,
8, Cros Street,
20-00 PWC Building,
Singapore, PIN-048424.
PAN-AADCT5366N .....**अपीलार्थी**/Appellant

vs

The DCIT (International Taxation),
Circle-3(1)(1), New Delhi. ..... **प्रत्यर्थी** / Respondent

**अपीलार्थी की ओर से** / Appellant by : Sh. S.K.Aggarwal, CA &
Sh. Sabhya Gupta, CA
**प्रत्यर्थी की ओर से** / Respondent by : Sh. Satpal Gulati, CIT DR

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| **सुनवाई की तारीख/**<br>**Date of Hearing : 22.07.2020** | | **घोषणा की तारीख /**<br>**Date of Pronouncement: 30 .09.2020** |

**आदेश/ORDER**

**PER SUSHMA CHOWLA,VP**

The present bunch of appeals filed by assessee and the Revenue are against respective orders of Assessing Officer dated 01.01.2015; 16.11.2015 and 30.11.2016 relating to assessment years 2011-12, 2012-13 and 2014-15 respectively against the order/s passed under section 144(3) r.w.s 144C of the Income-tax Act, 1961 (in short 'the Act').

2. This bunch of appeals relating to the same assessee on similar issues are heard together and are being disposed off by this consolidated order for the sake of convenience. It may also be pointed out that the assessee has filed the

appeals for Assessment Years 2011-12, 2012-13 & 2014-15 and Revenue is in cross-appeal for Assessment Year 2012-13.

3. In order to adjudicate the issue raised in the bunch of appeals, we may refer to the facts and issue raised in assessee's appeal in ITA No.1548/Del/2015 relating to Assessment Year 2011-12.

**ITA No.1548/Del/2015 [Assessment Year 2011-12]**

4. The assessee has raised following grounds of appeal:-

*"The Appellant respectfully submits that the present appeal before the Hon'ble Income Tax Appellate Tribunal ('Hon'ble IT AT') is being filed on the following grounds:*

*That the assessment order passed U/S 143(3) read with section 144C of the Income Tax Act, 1961 ('the Act') by the learned Deputy Commissioner of Income Tax, International Taxation- New Delhi ('the learned AO' / 'the ld. AO') in pursuance of the directions of the Hon'ble Dispute Resolution Panel-I ('Hon'ble DRP') is against law, contrary to facts and circumstances of the case and thus erroneous and unsustainable.*

***1. Grounds of Objection***

*1. Based on the facts and circumstances of the case and in law, the ld. AO, has erred in holding that payments amounting to INR 267,515,533 received by the Appellant from Indian customers ('customers' / 'service recipient' / 'payer') for provision of Telecommunication connectivity services (International Private Leased Circuits, Multiprotocol Label Switching ('MPLS'), IPNPN, etc., hereinafter referred to as 'bandwidth services') as consideration for the use of or the right to use of an equipment and/ or use of a process and! or transfer of rights in a process and/ or services in connection with the above process/ equipment, is taxable as a Royalty under section 9(1 )(vi) of the Income Tax Act, 1961 ('the Act') read with Article 12(3) of the India Singapore Tax Treaty ('Tax Treaty') in contravention of the following well-established facts and legal positions:*

*1.1 That the Tax Treaty provisions should apply in the Appellant's case and the learned AO while analyzing the whole transaction failed to*

*appreciate in proper perspective, (a) the applicable Tax Treaty provisions, including the attendant protection and benefits arising there from, (b) the applicable case laws on the subject, and (c) the relevant international commentaries and reports in relation thereto.*

*1.2 That the insertion of Explanations 5 and 6 vide Finance Act 2012 (with retrospective effect from 1 June 1976) to section 9(1 )(vi) of the Act should not apply to and does not alter the tax treatment of a service transaction (as in the Appellant's case). That Explanations 5 and 6 only dispense with the condition of possession or control of the equipment in the hands of the customer and not the condition of use or right to use an equipment and! or process which is codified as a condition under Explanation 2 to section 9(i)(vi) of the Act.*

*1.3 That the finding of the learned AO that the insertion of Explanations 5 and 6 are only clarificatory in nature is incorrect. That these findings are incorrect because the learned AO has failed to appreciate that the tax treaties in case of the United Mexican States and Hungary (including tax treaties entered into by Indian government after insertion of Explanation 5 and 6) specifically include 'transmission by satellite, cable, optic fibre or similar technology' in the definition of Royalty which clause is conspicuous by its absence in the Tax Treaty which is applicable in the Appellant's case.*

*1.4 That the learned AO erred in facts and in law by not following the decision of the Hon'ble Andhra Pradesh High Court in the case of Sanofi Pasteur Holding SA vs Department of Revenue [2013] [354 ITR 316] which correctly holds that the retrospective amendments to the Act cannot be read as an amendment to the tax treaties by virtue of Article 3(2) of the tax treaties. While the judgment of the Hon'ble Andhra Pradesh High Court was in the context of India France tax treaty, the learned AO has failed to appreciate that the rationale of the said judgment is equally applicable to the case of the Appellant in the context of the Tax Treaty.*

*2. Based on the facts and circumstances of the case and in law, the learned AO has erred in holding that the payments received by the Appellant from Indian customers for provision of Bandwidth services to such customers is Royalty for the use of, or the right to use of an equipment and/ or use of a process and! or transfer of rights in a process and/ or services in connection with above process/ equipment, is taxable under section 9(1)(vi) of the Act read with Article 12(3) of the Tax Treaty in contravention of the following well-established facts and legal positions:-*

*2.1 That indisputably the transaction is that of a rendition of bandwidth service by the Appellant, wherein the customer enjoys an uninterrupted 24x7 service to receive and send voice and data at a standard rate of reliability and in consideration of which fees are earned by the Appellant. The failure by the Appellant to render the bandwidth service at such a reliability level resulting in non- payment or loss of consideration for the Appellant (except on agreed upon excusable service outages) further factually substantiates and proves that the transaction under question is a pure service transaction, and is not a transaction in the nature of a rental or one involving a grant of use or right to use any equipment in the entire network to the customer.*

*2.2 That although the rendition of bandwidth service involves a large global network of equipments, which are employed by and under the exclusive dominion and control of the Appellant and other service providers for ultimate delivery of bandwidth services to the service recipients in India, such bandwidth services do not result in the use or right to use any equipment or use of a process by such service recipients.*

*2.3 That the two standard tests to qualify as an Equipment Royalty, as enunciated through various well- established judicial decisions, commentaries, reports and tax treaty interpretations, would fail when applied in the Appellant's case because:*

*i) There is no contract between the Appellant and any service recipient in India that grants such service recipient the use or right to use any equipment, resulting in handing over of physical possession, control or use of the equipment, or any portion of the underlying telecommunications network, by the service recipient/payer for an agreed consideration; and*

*ii) There is no economic exploitation of the global network for the commercial benefit of the service recipient/payer.*

*2.4 That the interpretation to be placed on the expression 'use or right to use' has been considered by Courts, AAR, Commentary on the Model Tax Convention by the Organization for Economic Co-operation and Development ('OECD'), Prof. Klaus Vogel commentary on Double Taxation Conventions, 2001, Report of the Technical Advisory Group ('TAG'), all of which unequivocally and consistently state that rendition of a service by a service provider using equipment or apparatus would not constitute Royalty, in contradistinction to specifically allowing or granting the use or right to use of such equipment or apparatus in the hands of the customer*

*by way of renting or leasing of equipment or allowing the customer to commercially exploit such equipment for the customer's own benefit.*

*2.5. That the ld. AO has erred in holding that provision of bandwidth services involves use/ right to use equipment/ use of process without appreciating that a) no capacity or global network equipment (including cables) are earmarked or dedicated to any service recipient for its exclusive use or economic exploitation to their commercial benefit and further it is a technological impossibility to dedicate any infrastructure or capacity to any particular service recipient! payer; and b) the delivery of bandwidth service is nothing but a contract to transmit voice and data at a particular volume and speed and does not result in dedicating any identified capacity, segment or any portion or allowing any access to such global network of Appellant to the service recipient/ payer.*

*2.6. That the ld. AO has erred in stating that the provision of IPLC/ MPLS connectivity essentially involves access to the equipment and! or process in the network of the Appellant for connectivity and transmission of data.*

*2.7. That the ld. AO has failed to appreciate that the arrangement between the Appellant and the Indian payers is for provision of services and can by no stretch of imagination be construed as providing access over its network and! or processes to the customer.*

*2.8 That the ld. AO erred in not appreciating the following while disregarding the decisions rendered by the AAR in case of Dell International Services Private Limited (2008) (305 ITR 037 AAR) and Cable & Wireless Networks India Pvt. Limited (2009) (315 ITR 72 AAR):*

> *i) The AAR, in both Dell International and Cable & Wireless (supra), after detailed discussions in unequivocal terms, held that payment for bandwidth services (identical to the facts of the Appellant's case) would not constitute a Royalty both under section 9(i)(vi) of the Act and Article 12(3) of the relevant tax treaties;*
>
> *ii) The service providers, in both Dell International and Cable & Wireless (supra) are engaged only in rendering bandwidth services to end customers who enjoy an uninterrupted service of receiving and sending voice and data in exchange for a consideration, which is again identical to the facts of the Appellant in its provision of bandwidth services to customers in India;*

*iii) Both the tests, physical possession and control and! or economic exploitation for commercial benefit would not be satisfied in a pure service transaction because the use or right to use of equipment and! or economic exploitation of the segment remains in the hands of the service provider and not in the hands of the ultimate recipient of the bandwidth service, which is also the fact pattern in the Appellant's case;*

*iv) In order to be consideration for the use or right to use of an equipment, both under section 9(i)(vi) of the Act and Article 12(3) of the applicable tax treaties, the same has to be with respect to specifically identified and contracted for equipment and not, as in the Appellant's case, for the provision and consumption of a service.*

*v) The Hon'ble Supreme Court dismissed the Revenue's Special Leave Petition CC 6392/2010 against the decision ofthe AAR in Cable & Wireless (supra).*

*2.9 That the learned AO erred by contending that various decisions as relied upon by the Appellant do not apply in the case of the Appellant since these involve entirely different fact-situation and were rendered without considered the impact of Explanation 5. The learned AO failed to appreciate that the rationale of the decision of the Hon'ble Delhi High Court in the case of Asia Satellite Telecommunications Co. Ltd v Director of Income Tax (2011) (332 ITR 340)regarding the meaning of the term "use of equipment" in the definition of Royalty (prior to the Explanations 5 and 6 introduced by the Finance Act 2012) would be equally applicable while construing the expression in the Tax Treaty in the absence of any specific amendment to the Tax Treaty definition to the similar effect.*

*2.10 That the learned AO has erred in disregarding the fact that the case of New Skies Satellite NV and others v ADIT (2009) (319 ITR 269) was set aside and referred back by the Hon'ble Delhi High Court (vide order dated 17 February 2011) to the Hon'ble IT AT for fresh adjudication relying on the principles laid down by the Hon'ble Delhi High Court in case of Asia Satellite Telecommunications (supra). It is also pertinent to note that the case of New Skies Satellite (supra) involved the interpretation of the provisions of the Act as well as the India - Netherlands Tax Treaty and that the Hon'ble ITAT in that case, following the directions of the Hon'ble Delhi High Court and in light of the principles laid down in Asia Satellite Telecommunications (supra) has subsequently ruled in favor of New Skies Satellite vide its order dated 11 March 2011.*

*2.11 That the ld AO has erred in relying upon the decision of Hon'ble Madras High Court in case of Verizon Singapore Pte Ltd vs. ITO (2011) 45 SOT 263, without appreciating the fact that the said decision incorrectly treats definition of royalty as per the beneficial provisions of the DT AA as pari materia with the provisions of the Act.*

*2.12 Without prejudice to the above, the ld. AO reliance on the decision of Hon'ble Madras High Court in case of Verizon Singapore Pte Ltd vs. ITO (supra) is misplaced as the judgment by the Hon'ble Madras High Court was in context of the transmission of data through under-sea cables using the Integrated Private Leased Circuit ('IPLC') technology whereas in the case of the Appellant, the transmission of data is based on use of both IPLC and Multi-Protocol Label Switching ('MPLS') technology.*

*2.13 That the learned AO erred in disregarding the principles laid down by Hon'ble Supreme Court in the case of BSNL vs Union of India (2006) (282 ITR 273) which held that a subscriber to a telephone service does not intend to obtain or acquire any right to use any equipment or any portion of the underlying telecommunications network. Similarly, while availing Bandwidth services, the customer also does not intend to obtain or acquire any right to use any equipment or any portion of the underlying telecommunication network.*

*3. Based on the facts and circumstances of the case and in law, the learned AO has erred in considering receipts from certain Indian customers in respect of services utilized in business or profession carried on by such customers outside India! for the purpose of making or earning any income from any source outside India as royalty without appreciating the specific exclusion as contained in section 9(1)(vi)(b) of the Act.*

*4. Without prejudice to the above, on the facts and circumstances of the case and in law, the ld. While holding the entire sums received by the Appellant as taxable in India as per section 9 of the Act read with DT AA between India and Singapore, the ld. AO has erred in not excluding the amount pertaining to use of services provided by Bharti in India.*

*5. Based on the facts and circumstances of the case and in law, the ld.AO has erred in initiating penalty proceedings under section 271(1)(c) of the Act.*

*The grounds are without prejudice to each other."*

5. Briefly in the facts of the case, the assessee company is incorporated in Singapore. It is engaged in the business of providing digital transmission of data through international private line or multi-protocol label switching, etc. to facilitate high speed data connectivity (hereinafter referred to as 'bandwidth services'). The assessee provides bandwidth services outside India to its customers. It has entered into Global Business Service Agreement ('GBSA') with various customers. In case where services are provided by Indian telecom operator like Bharti Airtel in India and the services outside India are provided by the assessee, it enters into One Stop Shopping Services Agreement('OSS') with Bharti Airtel or any other Indian telecom operator, to facilitate single billing facility to the customer. Under the agreement with the customer, uninterrupted 24X7 services are available to it. In case, the services are unavailable or not available at the requisite speed, the customer shall be entitled to rebate as per the rates agreed upon. The assessee for the year under consideration, had filed the return of income at Nil. The Assessing Officer was of the view that the amount received from Indian customers for the provisions of bandwidth services outside India was equipment/process royalty under section 9(1)(vi) of the Act read with Article 12(3) of the India Singapore Tax Treaty. The Assessing Officer in this regard, has placed reliance on Hon'ble Madras High Court in the case of Verizon Singapore Pte Ltd. vs ITO [2013] 39 taxmann.com 70 (Madras) and in Special Bench of Delhi ITAT in the case of New Skies Satellite NV vs ADIT (2009) (126 TTJ 1). The DRP upheld the findings of the Assessing Officer in view of the ratio laid down by the Hon'ble Madras High Court in the case of Verizon Singapore Pte Ltd. vs ITO (supra).

The Assessing Officer passed the final assessment order against which the assessee is in appeal before us.

6. The Ld.AR for the assessee pointed out that the assessee provides data connectivity for high transmission of data. It was clarified by the Ld.AR for the assessee that it was providing services in the field of transmission of data outside India. Even the Indian companies availed such services from India for providing data outside India. Our attention was drawn to the assessment order with special reference to paras 7.3 to 7.5 and it was pointed out that the facts mentioned in the said paras are not that of the assessee. In para 7.6, the Assessing Officer talks of process Royalty and reference to Explanation 2 under section 9(1)(vi) of the Act and not to the provisions of DTAA. The Assessing Officer then referred to the decision of Hon'ble Madras High Court in Verizon Singapore Pte. Ltd. vs ITO (supra) upto page 16 and then reliance was placed on the decision of Special Bench of Tribunal in New Skies Satellite [2016] 68 taxmann.com 8 (Del.). The Assessing Officer at page 18 in para 11.2 wrongly alleges that the assessee is owner of the process. The Ld.AR for the assessee pointed out that Hon'ble Delhi High Court has reversed the decision of Special bench in New Skies Satellite BV which is reported in 68 taxmann.com 8, as the issue stands covered by Asia Satellite Telecommunications Co. Ltd. vs DCIT [2011] 332 ITR 340 (Del.). He also referred to the order of Tribunal where the said issue was allowed on remand. Then the Ld.AR for the assessee referred to para 11.3 onwards of the assessment order wherein reference was made to Explanation 5 under section 9(1)(vi) of the Act i.e. Equipment Royalty. Our

attention was drawn to various paras of the assessment order wherein reference was made to the provision of Act and not to DTAA. The issue stands concluded in para 12 by the Assessing Officer which reads as under:-

> *12. "Therefore, the payments made to the Foreign Telecom Operators/Non-resident companies for international connectivity solutions through IPLC/MPLS/IP/VPN lines and network qualify as Royalty under the DTAAs, and accordingly liable to be taxed under Article 12 of the DTAA as equipment royalty/process royalty."*

7. Referring to the synopsis filed on the issue raised, the Ld.AR for the assessee referred to para 2.2, which reads as under:-

> *"2.2 The Appellant would like to submit that the consideration amount received for providing bandwidth services would not be taxable as equipment royalty or process royalty under the Tax Treaty. The Appellant through its submissions in subsequent paragraphs lays emphasis on the following key arguments:*
>
> *(i) The transaction does not result in equipment royalty under the Tax Treaty as there is no use or right to use any industrial, commercial or scientific equipment by the customer' availing the bandwidth services. Hence, does not fall in the definition of royalty as per Tax Treaty.*
>
> *(ii) The transaction does not result in process royalty under the Tax Treaty as there is no use of any process by the customer availing the bandwidth services. Hence, does not fall in the definition of royalty as per Tax Treaty.*
> *(iii) The Explanations 5 and 6 to section 9(1)(vi) of the Act cannot be read into the Tax Treaty for the definition of equipment and! or process royalty. Further, the Tax Treaty specifically does not include "transmission by satellite, cable, optic fiber or similar technology" in the definition of Royalty under the Tax Treaty, whereas other tax treaties (including treaties entered after insertion of Explanations 5 and 6 vide Finance Act, 2012) do specifically capture such transmissions in the royalty definition."*

8. Then reliance was placed upon the series of cases, which are as under:-

I. Directorate of Income Tax vs New Skies Satellite-BV (Supra)

II. Asia Satellite Telecommunication Co. Ltd. (supra)

III. Verizon communication India Pvt Ltd. (ITA No.2235/Del/2019) dated 30th March 2019

IV. Thaicom Public Co. Ltd. [2018] 96 taxmann.com 577

9. The Ld. AR pointed out that the bandwidth services provided by the assessee company were not equipment/process royalty as per Article 12 under India Singapore Tax Treaty. He stressed that provision of bandwidth services for digital transmission of data by the assessee does not result in use of any equipment or process by the customer. Hence, the consideration received for services does not fall in the definition of 'Royalty' under the Tax Treaty. The Assessing Officer had made passing reference to the definition under Article 12 of the DTAA. Then he took us to the decision of Hon'ble Delhi High Court in New Skies Satellite (supra), wherein it was held that the definition of 'Royalty' will continue to hold the field for the purpose of Double Tax Avoidance Treaty Agreement. He also stressed that the admission of SLP against any High Court decision does not render the same inoperative; decision of the Hon'ble Delhi High Court still remains operative. He then placed strong reliance on the ratio laid down by the Pune Bench of ITAT in John Deere India (P.) Ltd. vs DDIT [2019] 102 taxmann.com 267.

10. It was submitted that the assessee was providing standard services to its customers and similar services were being provided to many customers. It was further stressed by him that the unilateral Act of amendment in the Income Tax Act cannot be read into Tax Treaty, as the definition of Royalty under the India Singapore Treaty has not been amended. The Ld.AR for the assessee

stressed that the reliance on the decision of Hon'ble Madras High Court in M/s Verizon Communications Singapore Pvt. Ltd. (supra) is misplaced as the same was not approved by the Hon'ble Delhi High Court in Asia Satellite Telecommunication Co.Ltd. (supra). He stressed that the issue which needs to be decided is whether the receipts on account of connectivity charges was Royalty or not under Article 12 of DTAA between India and Singapore. The Ld.AR for the assessee further pointed out that Ground of appeal Nos. 1 & 2 were on merits and Ground of appeal Nos. 3 & 4 were alternate issue raised by the assessee. He further pointed out that the issue in Ground of appeal No.5 was pre-mature.

11. The Ld.DR placed reliance on the orders of the authorities below including the Assessing Officer and the DRP.

12. Coming to the appeal of the Revenue, it was pointed out that the only issue was whether the levy of interest u/s 234B of the Act was consequential or not. The Ld.AR for the assessee stated that the DRP had applied the ratio laid down by the Hon'ble Delhi High Court in DIT vs G.E. Packaged Power Inc. [2015] 56 taxmann.com 190 (Del.) and no contrary decision was available.

13. We have heard the rival contentions and perused the record. The issue which arises in the present appeal filed by the assessee for different Assessment Years is against the chargeability of amount received from Indian customers for providing bandwidth services outside India as equipment/process royalty u/s 9(1)(vi) of the Act and/or Article 12(3) of the India Singapore Tax Treaty. The assessee is a tax resident of Singapore and

the bandwidth services are provided as standard services wherein the customer enjoys an uninterrupted 24x7 service to transmit voice and data at standard rate of reliability. Delivery of Bandwidth service at a particular speed (say 2 mbps) is nothing but a contract to deliver voice and data at a particular volume and speed, is the claim of the assessee. In case no service is provided or there is default of regular supply, then there is non-payment of consideration by the payee. The assessee claims that such rendition of service using an equipment/process and the customer being only a recipient of service would not attract equipment/process royalty, as the transaction would not fall within the expression "use or right to use". Mere receipt of service using equipment under the control, possession and operation of service provider would only be transaction of a service and not to "use or right to use" an equipment, and would not attract 'Royalty' under the Act or the Tax Treaty.

14. The Revenue authorities are of the view that the consideration received by the assessee falls within the definition of Royalty both u/s 9(1)(vi) of the Act and also under provisions of Tax Treaty.

15. We find that the similar issue arose before the Hon'ble Delhi High Court in Asia Satellite Telecommunications Co. Ltd. vs. Director of IT (2011) 232 ITR 340 (Del), which in turn has been followed in DIT Vs. (1) New Skies Satellite BV (2) Shin Satellite Public Co. Ltd. (2016) 382 ITR 114 (Del). The assessee therein was engaged in the business of lease of transponder or allocation of transponder capacity on satellite for digital transmission services. The issue before the Hon'ble High Court (supra) was whether the amounts received from

customers for availing the transponder capacity was chargeable to tax in India as 'Royalty'. The Hon'ble Delhi High Court in the case of Asia Satellite Telecommunication Co.Ltd.(supra) held that the transaction does not result in 'Royalty' (equipment or process) under section 9(1)(vi) of the Act (prior to amendment by Finance Act, 2012). It was further held by the Hon'ble Delhi High Court in New Skies Satellite (supra) that the transaction does not result in 'Royalty' (equipment or process) as Section 9(1)(vi) of the Act, prior to amendment by Finance Act, 2012, was *pari-materia* with the definition of 'Royalty' as per the Tax Treaty and hence, the decision in the case of Asia Satellite (supra) was binding and required to be followed.

16. The Hon'ble Delhi High Court in New Skies Satellite (supra) held as under:-

> *"..... the first determinative interpretation given to the word "royalty" in Asia Satellite, when the definitions were in fact pari materia (in the absence of any contouring explanations), will continue to hold the field for the purpose of assessment years preceding the Finance Act, 2012 and in all cases which involve a Double Tax Avoidance Agreement .. .[vide para 60}*
>
> *..... In Asia Satellite Telecommunications Co. Ltd. 's case (supra) this Court held that income from data transmission services would not qualify as royalty in order for it to be taxable under the Act. The Court first recognized that the definition of royalty in the section is with respect to permission granted to use the right in respect of the patent, invention, process, etc., all essentially forms of intellectual property. This permission restricts itself merely to the letting of the licensed asset. The permission does not go so far as to allow alienation of the asset itself. That being said, it is not so restricted as to qualify as a case where the licensor uses the asset himself albeit for the purposes of his customers Essentially therefore, Asia Satellite Telecommunications Co. Ltd. 's case (supra) held that the presence of control was a critical factor in adjudging whether there was "use" of a particular process .... [vide para 28]."*

17. The Special Leave Petition against the decision of Delhi High Court in New Skies Satellite (supra) is pending before the Hon'ble Supreme Court; but that does not render the decision of the Hon'ble Delhi High Court ineffective. Further we find Delhi Benches of the Tribunal is several decisions have followed the decision of Hon'ble Delhi High Court and has held that the receipt from band width services do not qualify as 'Royalty' as per India Singapore Tax Treaty. Reliance is placed on Verizon Communications Singapore Pte Ltd. Vs. DDIT in ITA No.2235/Del/2019 order dated 30.03.2020.

18. Further in Thaicom Public Co.Ltd. [2018] 96 taxmann.com 577, the Delhi Bench of the Tribunal held that despite the amendment in the Act, income from digital broadcast services through transponders is not 'Royalty' as per India Thailand Treaty. Similar propositions have been laid down in various other decisions of Tribunal.

19. The Pune Bench of the Tribunal in John Deere India Pvt. Ltd. vs DDIT in ITA Nos.905 to 908/Pun/2015 reported in [2019] 102 taxmann.com 267, order dated 23.01.2019 vide para 100 relied on decision of Hon'ble Delhi High Court in Asia Satellite Telecommunications Co. Ltd (supra) and held that there was no lease of equipment but only use of broadband facilities. Applying the said ratio to the facts of the present case, we hold that in the case of assessee, there is no question of any equipment royalty where the assessee was only using lease lines for transmitting data and it cannot be said to be a case of equipment Royalty. The Pune Bench of the Tribunal vide para 98 relied to the decision of T-3 Energy Services India Pvt.Ltd. vs JCIT, ITA No.826/PUN/2015,

relating to assessment year 2010-11, order dated 02.02.2018 (supra) which in turn, had relied on the ratio laid down by the Hon'ble Delhi High Court in New Skies Satellite BV (supra) and held that consideration received for lease line charges does not constitute process Royalty. The relevant para 98 reads as under:-

> *98. "We find that objections raised by the learned Departmental Representative for the Revenue are not fully correct. The Assessing Officer had held it to be a case of both equipment and process royalty. As far as the issue of process royalty is concerned, admittedly, the issue stands covered by the ratio laid down by the Tribunal in M/s. T-3 Energy Services India Pvt. Ltd. Vs. JCIT (supra), which in turn, had relied on the ratio laid down in DIT Vs. (1) New Skies Satellite BV (2) Shin Satellite Public Co. Ltd. (supra). The Tribunal after referring to the decision in DIT Vs. (1) New Skies Satellite BV (2) Shin Satellite Public Co. Ltd. (supra) in paras 17 to 20 had further vide paras 21 and 22 held that where the term 'royalty' under DTAA between India and USA was not amended, then the assessee was not liable to withhold tax on payments made to its associated enterprises on account of lease line charges and in turn, relying on the decision of Hon'ble Bombay High Court in the Hon'ble High Court in DIT Vs. WNS UK Ltd. (2013) 214 taxman 317 (Bom), held as under:-*
>
> > *"21. In the present case also, though definition of 'Royalty' under the Act had been amended, but the term 'Royalty' under the DTAA between India and USA is not amended. In the absence of the same, we hold that in view of the definition of 'royalty' under DTAA, the assessee is not liable to withhold tax on the payments made to its associated enterprise on account of lease line charges. We are not going into different decisions of the Tribunal on this aspect, in view of the ratio laid down by the Hon'ble High Court of Delhi, which though is not jurisdictional High Court but the issue raised in the said appeal is similar to the issue raised before us in the present appeal. We may also point out that the Hon'ble High Court of Delhi had also taken note of the ratio laid down by the Hon'ble Bombay High Court in CIT Vs. Seimens Aktiongesellschaft (supra), which in turn, has applied the ratio of the Hon'ble Supreme Court of Canada in R Vs. Melford Developments Inc., 82 DTC 6281 (1982) and observed as under:-*
> >
> > *"The ratio of the judgment, in our opinion, would mean that by a unilateral amendment it is not possible for one nation which is party to an agreement to tax income which otherwise was not subject to*

*tax. Such income would not be subject to tax under the expression 'laws in force'. . .*

*While considering the Double Tax Avoidance Agreement the expression 'laws in force' would not only include a tax already covered by the treaty but would also include any other tax as taxes of a substantially similar character subsequent to the date of the agreement as set out in article I(2). Considering the express language of article I(2) it is not possible to accept the broad proposition urged on behalf of the assessee that the law would be the law as applicable or as define when the double taxation avoidance agreement was entered into."*

*22. In the facts of the case before the Hon'ble Bombay High Court the word 'royalty' was not defined in German Treaty and in that context, the Hon'ble Bombay High Court held that they were unable to accept the assessee's contention that law applicable would be law which existed at the time the DTAA was entered into. In the facts of the case before us, the word 'royalty' is defined in DTAA entered into between USA and India and applying the ratio in CIT Vs. Seimens Aktiongesellschaft (supra), we hold that once a term has been defined in DTAA, then the said term is to be applied unless and until the parties to the DTAA amends the same. The Hon'ble High Court of Delhi in DIT Vs. Nokia Networks OY (supra) had applied the proposition laid down by the Hon'ble Bombay High Court in CIT Vs. Seimens Aktiongesellschaft (supra) and held that the amendments could not be read into the treaty. Unilateral amendment by the Indian Government to the term 'royalty' by way of amendment to section 9(1)(vi) of the Act cannot be extended to the meaning of the term under DTAA. Hence, we hold reliance of learned Departmental Representative for the Revenue on Mumbai Bench of Tribunal in Viacom 18 Media (P.) Ltd. Vs. ACIT (supra) and Bangalore Bench of Tribunal in Vodafone South Ltd. Vs. DDIT (IT) and also Mumbai Bench of Tribunal in C.U. Inspections (I) (P) Ltd. Vs. DCIT (supra) are not to be applied in view of the issue being settled by the Hon'ble High Court of Delhi.*

*23. The assessee on the other hand, has relied on the decision in WNS North America Inc. Vs. ADIT (supra) i.e. decision of Mumbai Bench of Tribunal, which has been approved by the Hon'ble High Court in DIT Vs. WNS UK Ltd. (2013) 214 taxman 317 (Bom). The issue before the Hon'ble High Court of Delhi was in the hands of recipient of lease line charges. The assessee therein had recovered internal telecommunication charges from WNS charges and the Tribunal held the amount in question was received by the said assessee as reimbursement of lease line charges and would not qualify either as 'royalty' or as income attributable to PE in India and hence, it was held that there was no income earned by the*

*assessee. The question before the Hon'ble High Court was whether the amount received on account of reimbursement of lease line charges would qualify as 'royalty' under Article 12 of India – UK Treaty and the second question was in respect of charges being attributable to PE in India. The Hon'ble High Court vide para 5 had noted the decision of Tribunal but had held that since the decision of Tribunal was based on the findings of fact, there was no reason to entertain question Nos.4 and 5.*

*24. Applying the principle laid down by the Hon'ble High Court of Delhi in DIT Vs. New Skies Satellite BV (supra), we hold that where the provisions of DTAA overrides the provisions of Income-tax Act and the definition of 'royalty' having not been undergone any amendment in DTAA, the assessee was not liable to withhold tax on the lease line charges paid by it. The amended provisions of section 9(1)(vi) of the Act brought into force by the Finance Act, 2012 are applicable to domestic laws and the said amended definition cannot be extended to DTAA, where the term has been defined originally and not amended."*

20. Now coming to the next connected plea of the assessee that wherein the definition of 'Royalty' has not been amended in the Tax Treaty, is the receipt taxable as 'Royalty'?

21. We further hold that the amendment, if any to the Income Tax Act cannot be applied to the Tax Treaty. The Hon'ble Delhi High Court in DIT & Others vs Nokia Networks OY & Others [2013] 358 ITR 259 (Del) held as under:-

*"the assessee has opted to be governed by the treaty and the language of the said treaty differs from the amended Section 9 of the Act. It is categorically held in CIT vs Siemens Aktiongesellschaft 310 ITR 320 (Bom) that the amendments cannot be read into the Treaty."*

22. The Hon'ble Bombay High Court in CIT vs Reliance Infocomm Ltd. Income Tax Appeal No.1395 of 2016 dated 05.02.2019 held that *"mere*

*amendments in the Act would not override the provisions of Double tax Avoidance Agreement".*

23. In the above-said facts and circumstances of the case where the Tax Treaty between India Singapore specifically does not include "transmission by satellite, cable, optic fiber or similar technology" in the definition of 'Royalty' under the Tax Treaty and also where the Tax Treaty had not undergone any amendment, the provisions of DTAA being more beneficial to the assessee are attracted and the assessee is not liable to be taxed on the amount received from Indian customers for the provision of bandwidth services outside India.

24. Before parting, we may also refer to the decision of Madras High Court in Verizon Communication India Pvt.Ltd. (supra), which has been relied upon by the Assessing Officer and the Ld. DR for the Revenue. We find that the issue has been addressed by the Pune Bench of the Tribunal in T-3 Energy Services India Pvt.Ltd. (supra) and reliance was placed on decision of Hon'ble Delhi High Court in New Skies Satellite (supra) and it was held as under:-

> *"3.22…….The Hon'ble High Court thereafter took note of various decisions on the issue including that of Hon'ble High Court of Madras in Verizon Communications Singapore Pte. Ltd. (supra) and declined to conclusively determine or record a finding as to whether amendment to section 9(i)(vi) of the Act indeed was clarifactory as the Revenue suggested or prospective, give what its nature may truly be. The Hon'ble High Court further commented that the issue of taxability of income of assessee may be resolved without redressal of above question purely because the assessee did not press the said line of argument and had instead stated that ultimate taxability of income shall rest on the interpretation of terms of DTAA."*

25. Another objection which has been raised by the Assessing Officer in the assessment order is reliance on Special Bench decision of Tribunal in the case of New Skies Satellite (supra). The said reliance is misplaced as the Special Bench decision has been set aside and referred back by Hon'ble Delhi High Court vide order dated 17.02.2011 for fresh adjudication relaying on the principle laid down by the Hon'ble Delhi High Court in Asia Satellite Telecommunication (supra). On remand back, Tribunal following the directions of the Hon'ble Delhi High Court and in light of the principles laid down in Asia Satellite Telecommunications (supra) had also subsequently ruled in favour vide its order dated 11.03.2011.

26. In view of the above said facts, we hold that there is no merit in the orders passed by the authorities below and the same are reversed. The assessee company is a tax resident of Singapore, which is providing band width services to the various Indian Telecom Operators like Bharti Airtel in India and the services are being provided outside India and the consideration received by the assessee company is not taxable as 'Royalty' in view of the beneficial provisions of DTAA between India and Singapore under which the definition of 'Royalty' has not been amended. Thus, Ground of appeal Nos. 1 & 2 raised by the assessee are allowed.

27. Ground of appeal Nos. 3 & 4 raised by the assessee being alternate issue become academic in nature and are dismissed.

28. The issue raised in Ground of appeal No.5 by the assessee is premature, hence dismissed.

29. The facts in ITA No.1548/Del/2015 are identical to the facts and issue in ITA Nos. 286/Del/2016 & 3020/Del/2017 and our decision in ITA No.1548/Del/2015 shall apply *Mutatis Mutandi* to the same.

30. The only issue raised in the Revenue's appeal is against the levy of interest u/s 234B of the Act and whether said levy is consequential or not. The issue stands covered by the decision of Hon'ble Delhi High Court in DIT & Others vs Nokia Networks OY & Others (supra). The assessee is a tax resident of Singapore and provisions of levy of interest u/s 234B of the Act are not attracted. The grounds of appeal raised by Revenue are dismissed.

31. In the result, all appeals filed by the assessee are allowed and appeal filed by the Revenue is dismissed.

Order pronounced in the open court on 30th September, 2020.

**Sd/-** **Sd/-**

**(N.K.BILLAIYA)** **(SUSHMA CHOWLA)**
**लेखासदस्य/ ACCOUNTANT MEMBER** **उपाध्यक्ष / VICE PRESIDENT**

**दिल्ली** / **दिनांक** Dated : 30th September, 2020
**Amit Kumar**
**आदेश की प्रतिलिपि अग्रेषित/**Copy of the Order is forwarded to :

1. **अपीलार्थी** / The Appellant
2. **प्रत्यर्थी** / The Respondent
3. **आयकर आयुक्त(अपील)** / The CIT(A)
4. **मुख्य आयकर आयुक्त** / The Pr. CIT
5. **विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण,दिल्ली**/ DR, ITAT, Delhi
6. **गार्ड फाईल /** Guard file.

**आदेशानुसार**/ BY ORDER,

**सत्यापित प्रति**//True Copy//

**सहायक रजिस्ट्रार, आयकर अपीलीय अधिकरण, दिल्ली**
**Assistant Registrar, ITAT, Delhi**